



Department of  
**Primary Industries and  
Regional Development**

SHIRE OF NANNUP RECEIVED	
Ref: _____	No: _____
<b>16 SEP 2021</b>	
Officer: _____	

*We're working for  
Western Australia.*

Our reference: DG-2021-1396  
Enquiries: Jaylene Chambers 0447 491 654

Mr David Taylor  
Chief Executive Officer  
Shire of Nannup  
PO Box 11  
NANNUP WA 6275

Dear Mr Taylor,

### **NANNUP TRAIL TOWN PROJECT (NTP) – FINANCIAL ASSISTANCE AGREEMENT**

Regional Recovery Partnership funding of up to \$2.86 million has been approved for the delivery of the Nannup Trail Town Project.

The funding will be transferred under the terms detailed in a Financial Assistance Agreement (FAA) between the Shire of Nannup and the Department of Primary Industries and Regional Development (DPIRD).

Please find attached two copies of the FAA for signature. Please sign and return both copies to Ms. Katelin Fantuz, Agreements Coordination Officer at the address below for execution. I will then return one complete copy of the executed FAA to you for your records.

For further enquiries please contact Jaylene Chambers, Regional Agreements Officer, DPIRD on mobile 0447 491 654 or via email at [jaylene.chambers@dpiird.wa.gov.au](mailto:jaylene.chambers@dpiird.wa.gov.au).

Yours sincerely

Liam O'Connell  
**A/Deputy Director General  
Industry & Economic Development**

13 September 2021

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ABN: 18 951 343 745



Department of  
**Primary Industries and  
Regional Development**

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# **FINANCIAL ASSISTANCE AGREEMENT**

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**STATE OF WESTERN AUSTRALIA**

**AND**

**SHIRE OF NANNUP**

**ABN 43 038 160 786**

Regional Recovery Partnerships Program

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**NANNUP TRAIL TOWN PROJECT (NTTP)**

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THIS Agreement is made on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

**BETWEEN:**

**THE STATE OF WESTERN AUSTRALIA (State) acting through the Department of Primary Industries and Regional Development, (ABN 18 951 343 745) of 1 Nash Street, Perth WA 6000.**

**AND**

**Shire of Nannup (Recipient), of 15 Adam Street, Nannup WA 6275**

**RECITALS**

- (a) The Recipient has applied to the State for financial assistance to undertake the Project and the State has agreed to provide the Funding to the Recipient on the terms and conditions set out in this Agreement.

## OPERATIVE PART

THE PARTIES AGREE as follows:

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions

In this Agreement, unless repugnant to the context:

**Additional/New Milestones** has the meaning given to it in clause 4.1(c).

**Agreement** means this Financial Assistance Agreement, including its recitals, schedules and annexures (if any).

**ASX** means Australian Securities Exchange.

**Associates** means any officer, employee, agent, consultant, contractor, nominee, licensee or adviser of the State, including any other Government Party.

**Auditor** means the Auditor General or a person who is independent of, and not related in any way to, the Recipient and is a member of CPA Australia, the Institute of Public Accountants in Australia or the Institute of Chartered Accountants in Australia.

**Auditor General** means the Auditor General for the State.

**Authorisation** means any consent, authorisation, registration, filing, agreement, notarisation, clearance, certificate, permission, licence, permit, waiver, approval, authority or exemption from, by or within a Government Agency required under any Laws, and includes any renewal of, or variation to, any of them.

BCI Code means the Western Australian Building and Construction Industry Code of Conduct 2016 which is applicable to all state funded building work.

**Best Industry Practice** means:

- (a) the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a reputable and prudent person in providing works and services similar to the Works and under conditions comparable with those applicable to the Works;
- (b) compliance with applicable standards and codes, being the standards and codes specified in this Agreement or, if this Agreement does not specify the applicable standards and codes, those standards and codes as would ordinarily be applied in the circumstances; and
- (c) compliance with all applicable Laws.

**Business Day** means a day which is not a Saturday, Sunday or public holiday in the State.

**Calendar Day** means all days in a month, including weekends and holidays.

**Claim** means any claim, proceeding, cause of action, action, demand or suit (including by way of a claim for contribution or an indemnity).

**Commencement Date** means the execution date of this Agreement.

**Commonwealth** means the Commonwealth of Australia.

**Construct** means one or more of construct, build, erect, assemble, renovate, refurbish and any similar or incidental activity or thing.

**Construction** means one or more of construction, building, erection, assembling, renovation, refurbishment and any similar or incidental activity or thing.

**Contact Officer** has the meaning given in clause 6 of this Agreement.

**Date for Project Completion** means the date by which the Recipient must complete the Project set out in item 3.2 of Schedule 4.

**Defect** means:

- a. any error, deficiency, omission, non-conformity, fault, failure, malfunction, irregularity or other defect in the Works;
- b. any aspect of the Works which is not in accordance with the requirements of this Agreement; or
- c. any failure of the Works to perform at its expected range of capacity and operation in accordance with the relevant technical specifications for the Works and any other the requirements in this Agreement.

**Defects Liability Period** means, where the Recipient has obligations in this Agreement to Construct any Structure and therefore to perform Works, the defects liability period in relation to all or part of those Works contained in an agreement between the Recipient and any other party it engages to carry out all or part of those Works and, if the Recipient engages more than one party to carry out those Works, meaning a defects liability period is contained in more than one agreement, **Defects Liability Period** in this Agreement means the defects liability period in those agreements that finishes on the latest date.

**Deliverables** means the expected activities and outputs from the Project.

**Department** means the Department of Primary Industries and Regional Development which is a department of the State.

**Evaluation or Audit** means one or more of an audit, examination, investigation, inspection, review, evaluation, or a similar activity.

**Event of Default** has the meaning given in clause 11.1.

**Final Report** has the meaning given in Schedule 5 to this Agreement.

**Funding** means the amount specified in item 2 of Schedule 4.

**Government Agency** means any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency or entity in any part of the world.

**Government Party** means any governmental, semi-governmental or local government authority, minister, department, statutory corporation, instrumentality or government owned corporation.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes all associated legislation and regulations.

**Insolvency Event** means the happening of any of these events:

- a. an order is made, or an application is made to a court for an order, that a body corporate be wound up; or
- b. except to reconstruct or amalgamate while solvent, a body corporate:
  - (i) is wound up or dissolved; or
  - (ii) resolves to wind itself up or otherwise dissolve itself, or gives notice of intention to do so; or
  - (iii) enters into, or resolves to enter into, any form of formal or informal arrangement for the benefit of all or any class of its creditors, including a scheme of arrangement,

deed of company arrangement, compromise or composition with, or assignment for the benefit of, all or any class of its creditors; or

- c. a liquidator or provisional liquidator is appointed (whether or not under an order), or an application is made to a court for an order, or a meeting is convened or a resolution is passed, to make such an appointment, in respect of a body corporate; or
- d. a receiver, manager, receiver and manager, trustee, administrator, controller (as defined in section 9 of the *Corporations Act 2001* (Cth)) or similar officer is appointed, or an application is made to a court for an order, or a meeting is convened, or a resolution is passed, to make such an appointment, in respect of a body corporate; or
- e. any step is taken to enforce security over, or a distress, attachment, execution or other similar process is levied, enforced or served out against, any asset or undertaking of a body corporate; or
- f. the process of any court or authority is invoked against a body corporate, or any asset or undertaking of a body corporate, to enforce any judgment or order for the payment or money or the recovery of any property; or
- g. a body corporate:
  - (i) takes any step to obtain protection, or is granted protection, from its creditors under any applicable legislation; or
  - (ii) stops or suspends payment of all, or a class of, its debts; or
  - (iii) is, or is taken by any applicable legislation to be, or states that it is, or makes a statement from which it may be reasonably deduced that it is:
    - (a) insolvent or unable to pay its debts when they fall due; or
    - (b) the subject of an event described in section 459C(2)(b) or section 585 of the *Corporations Act 2001* (Cth); or
  - (iv) is taken to have failed to comply with a statutory demand as a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth); or
  - (v) ceases, or threatens to cease, to carry on all or a material part of its business; or
- h. a person becomes an insolvent under administration as defined in section 9 of the *Corporations Act 2001* (Cth) or action is taken that could result in that event; or
- i. anything analogous or having a similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

**Law** means all applicable present and future laws including:

- (a) all acts, ordinances, regulations by-laws, orders, awards and proclamations of the State of Western Australia or the Commonwealth;
- (b) Authorisations;
- (c) principles of law or equity;
- (d) standards, codes, policies and guidelines; and
- (e) the ASX listing rules.

**Leveraged Funding** has the meaning given to it in item 4.1 of Schedule 4.

**LGISWA** means LGISWA, ABN 59 780 338 975, established by WALGA under a trust deed made by WALGA on 19 September 1996.



**Liability** means any debt, obligation, Loss, compensation or charge of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

**Loss** means any loss, cost (including legal costs), expense, liability (whether arising in negligence or otherwise) or damage whether direct, indirect or consequential (including pure economic loss), present or future, ascertained, unascertained, actual, prospective or contingent or any fine or penalty.

**Milestones** means the milestones set out in item 3.2 of Schedule 4, with each milestone in relation to a Deliverable being the date by which that Deliverable must be completed, and includes the Date for Project Completion.

**Notification** means a notice by the State given in accordance with this Agreement that in the State's opinion the Recipient has properly complied with and fulfilled all of its Obligations, including that the Final Report provided by the Recipient in accordance with Schedule 5 is satisfactory.

**Obligation** means an obligation in this Agreement.

**Party** means each of the State or the Recipient as the context requires, and **Parties** means both of them.

**Project** means the initiative or activities described in item 3 of Schedule 4.

**Project Budget** means the budget set out in item 3.3 of Schedule 4.

**Provision** means any term, condition, undertaking, promise, obligation or warranty of, made or given under this Agreement.

**RCTI** means a recipient-created tax invoice, which term has the same meaning as in the GST Act.

**Related Body Corporate** has the meaning given to it in the *Corporations Act 2001* (Cth).

**Schedule** means any schedule to, and forming part of, this Agreement.

**Senior Staff Member** means a staff member of the Recipient who performs or holds any executive or managerial role including the role of chief executive officer, chief financial officer or an equivalent or similar role, or the role of head of a department or division, manager, senior project officer, or any other senior role.

**Shortfall** has the meaning given to it in item 4.1 of Schedule 4.

**Site** means the site where the Works will be carried out.

**Special Conditions** means the conditions in item 4 of Schedule 4.

**Structure** means any building, structure, construction, infrastructure, facility, form or mode of transport or similar or other thing.

**WALGA** means the Western Australian Local Government Association constituted under section 9.58(1) of the *Local Government Act 1995* as a body corporate with perpetual succession and a common seal.

**Works** has the meaning given in item 4.2 of Schedule 4.

**Third Party Agreement** has the meaning given to it in Clause 12.

## 1.2 Interpretation

In this Agreement unless the context otherwise requires:

(a) words importing the singular include the plural and vice versa;

- (b) words importing any gender include the other genders;
- (c) references to a person include an individual, the estate of an individual and any type of entity or body of persons, including a corporation, an incorporated or unincorporated association or parties in a joint venture, a partnership or a trust and the legal personal representatives, successors and assigns of that person;
- (d) a reference to the State includes each and every agency department, instrumentality and emanation of the State;
- (e) a reference to a statute, ordinance, code, or other law includes regulations, by-laws, rules and other statutory instruments under it for the time being in force and consolidations, amendments, re-enactments, or replacements of any of them (whether of the same or any other legislative authority having jurisdiction);
- (f) references to this Agreement or any other instrument include this Agreement or other instrument as varied or replaced, and notwithstanding any change in the identity of the Parties;
- (g) references to writing include any mode of representing or reproducing words in tangible and permanently visible form, and include e-mail and facsimile transmission;
- (h) an Obligation incurred in favour of two or more persons is enforceable by them jointly and severally;
- (i) if a word or a phrase is defined, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (j) references to this Agreement include its recitals, schedules and annexures;
- (k) headings are inserted for ease of reference only and are to be ignored in construing this Agreement;
- (l) references to time are local time in Perth, Western Australia;
- (m) where time is to be reckoned from a day or event, that day or the day of that event is to be included;
- (n) references to currency are to Australian currency unless otherwise stated;
- (o) no rule of construction applies to the disadvantage of a Party on the basis that the Party put forward this Agreement or any part thereof;
- (p) a reference to any thing is a reference to the whole and each part of it, and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (q) when the day or last day for doing an act is not a Business Day, then the day or last day for doing the act will be the directly preceding Business Day;
- (r) if the word "including" or "includes" is used, the words "without limitation" are taken to immediately follow;
- (s) the phrases "described in", "set out" and "specified in" shall all read as if the words "expressly or impliedly" appeared immediately before them; and
- (t) reference to a contractor or sub-contractor means a contractor or sub-contractor at any tier.

## **2. DEPARTMENT**

- (a) The Department acts for and on behalf of the State and may at any time perform any of the State's Obligations and exercise the State's rights and powers in and under this Agreement, including taking any actions, making any requests and giving or

withholding any consents or approvals which the State has the right or obligation to take, make, give or withhold under this Agreement or at Law.

- (b) The Recipient agrees to treat any notices or other communications (including any requests) from the Department as being from and on behalf of the State.
- (c) Where the Recipient has any Obligation to remit or pay monies to the State, the Recipient must make payment to the State in the manner requested by the State, including making payment into a bank account nominated by the State if so requested, which may be a bank account held in the name of the Department.

### **3. SCOPE OF THIS AGREEMENT**

- (a) The Recipient must:
  - (i) carry out all aspects of the Project and fulfil its Obligations in a competent, diligent, satisfactory and professional manner, and to a high standard;
  - (ii) comply with this Agreement; and
  - (iii) provide funding and other resources, including human resources, adequate to properly meet its Obligations.
- (b) Subject to sub item 4.2.2(b) of Schedule 4 to this Agreement, the State must pay to the Recipient the Funding in the manner set out in Schedule 4 which must be used by the Recipient to carry out the Project and for no other purpose. For the avoidance of doubt, and without in any way limiting the State's rights under sub item 4.2.2(b) of Schedule 4, the State has no obligation to pay any part of the Funding to the Recipient until the Recipient has complied with its obligations in item 4.2 of Schedule 4.
- (c) The Recipient must:
  - (i) notify the Department of any actual, pending or threatened Claim, against one or more of the Recipient, a Related Body Corporate or a Senior Staff Member as soon as practicable after the Recipient first becomes aware of that Claim;
  - (ii) notify the Department immediately if the Recipient is in breach of any Law, receives an audit qualification, or breaches, fails to obtain or is under scrutiny through an inquiry or decree in respect to (as applicable) any consent, registration, approval, licence or permit or agreement, order or award binding on the Recipient or which the Recipient requires in order to carry out one or both of the Project or its business; and
  - (iii) notify the Department immediately if the Recipient becomes aware of any fraud or corruption in relation to the Project, the Funding, any interest which accrues on the Funding, or this Agreement.
- (d) The Recipient must:
  - (i) keep and maintain accurate, complete, up-to-date and properly detailed written records of income, expenditure, work, activities, progress, setbacks, problems and business and commercial arrangements and dealings in relation to either or both of this Agreement and the Project, and promptly provide the Department with information or documentation (relating in any way to the Project or this Agreement) requested by the State. The Recipient must ensure that all such information or documentation (as the case may be) is accurate, complete, up-to-date, properly detailed and not in any way misleading or deceptive;
  - (ii) provide the Department within five (5) Business Days of any request with written evidence (to the satisfaction of the State in its absolute discretion) that the

Recipient is solvent and financially viable and secure and has the expertise and operational capability and capacity to carry out the Project; and

- (iii) establish a separate interest bearing bank account solely for the Funding and any interest which accrues on the Funding.

#### **4. OBLIGATIONS OF RECIPIENT**

##### **4.1 Use of Funding**

- (a) The Recipient must use the Funding for the carrying out of the Project in accordance with this Agreement and the Project Budget. All of this expenditure must be effected in a commercially prudent, sensible and reasonable manner.
- (b) In carrying out the Project, the Recipient must comply with and meet all Milestones including completing the Project by the Date for Project Completion.
- (c) Without in any way limiting the State's rights under this Agreement, including under clause 11, or under Law, if the Recipient fails to comply with or meet a Milestone, the State may at any time impose additional milestones in relation to any aspect of the Project or replace any Milestones with new milestones (**Additional/New Milestones**). The State has absolute discretion as to whether to impose additional milestones, or replace existing Milestones, and as to what those new or replacement milestones will be and what aspects of the Project or Agreement they will relate to. In carrying out the Project, the Recipient must comply with and meet all Additional/New Milestones. If the Recipient fails to comply with or meet an Additional/New Milestone or any further milestones set by the State, the State has the same rights as set out above to at any time impose new or replacement milestones in its absolute discretion without in any way limiting the State's rights under this Agreement, including under clause 11, or under Law.

##### **4.2 No Changes**

The Recipient must not make any changes to the Project or any agreed budget (including the Project Budget) without the prior written consent of the State, which consent may be withheld in the State's absolute discretion.

##### **4.3 No Endorsement**

The Recipient agrees that nothing in this Agreement constitutes an endorsement by the State of any goods or services provided by the Recipient.

##### **4.4 Acknowledgement of the Department**

- (a) Any communications in relation to the Project and this Agreement including presentations, publications, signage, articles, newsletters, or other literary works relating to the Project must:
  - (i) equally represent the Parties when Project logos are displayed, including containing the Department's and Recipient's logos and names in an equally prominent position; and
  - (ii) be consistent with the Department's Marketing, Communications and Acknowledgements Policy.
- (b) The respective roles of the State, Department and the Recipient must be acknowledged at relevant fora, conferences, and project launches where the Project is promoted.
- (c) The Parties shall:

- (i) work cooperatively at the senior management and officer levels;
  - (ii) maintain open communication, both formal and informal, to progress the objectives of this Agreement;
  - (iii) share information and knowledge as practicable; and
  - (iv) advise any stakeholders in the Project about arrangements between the Parties.
- (d) The Parties must coordinate joint communications when dealing with the media and stakeholders in the Project in relation to the Project on issues of significance or mutual concern, including circulating draft media statements, advertising proposals and advertisements between the Parties for comment prior to publication.
- (e) The Recipient must liaise with the Department prior to releasing, and gain the prior written approval of the State to the release of, any media statement, advertising proposal or advertisement by the Recipient in relation to the Project.

#### **4.5 Accounts and Reporting**

- (a) The Recipient must provide the Department with annual and financial reports containing the information and within the timeframes set out in Schedules 2, 3 and 5 of this Agreement.
- (b) The Recipient must provide the Department with a Final Report within three (3) months after receipt by the Recipient of any written request from the State to do so or of any earlier termination of this Agreement.
- (c) This clause 4.5 survives termination of this Agreement.

#### **4.6 General Undertakings of the Recipient**

The Recipient must:

- (a) at all times duly perform and observe its Obligations and must promptly inform the Department of any occurrence that might adversely affect its ability to do so in a material way;
- (b) undertake its Obligations with integrity, good faith and probity in accordance with good corporate governance practices;
- (c) not, nor attempt to, sell, transfer, assign, mortgage, charge or otherwise dispose of or deal with any of its rights, entitlements and powers or Obligations under this Agreement;
- (d) comply with all Laws; and
- (e) cooperate fully with the Department in the administration of this Agreement.

#### **4.7 Negation of Employment, Partnership and Agency**

- (a) The Recipient must not represent itself, and must ensure that its employees, contractors, sub-contractors or agents do not represent themselves, as being an employee, partner or agent of the State or the Department or as otherwise able to bind or represent the State or Department.
- (b) The Recipient will not, by virtue of this Agreement, be or for any purpose be deemed to be, an employee, partner, or agent of the State or the Department, or have any power or authority to bind or represent the State or the Department.

#### **4.8 Notification**

- (a) The State intends to provide the Recipient with the Notification once it considers that the Recipient has properly complied with and fulfilled all of its Obligations including that the Final Report provided by the Recipient in accordance with Schedule 5 is satisfactory.
- (b) The Recipient acknowledges and agrees that:
  - (i) the State has absolute discretion in:
    - (A) determining whether and when it considers that the Recipient has properly complied with and fulfilled all of its Obligations including that the Final Report provided by the Recipient in accordance with Schedule 5 is satisfactory; and
    - (B) determining whether and when to provide the Notification to the Recipient; and
  - (ii) receipt of the Notification does not in any way preclude, or operate as a waiver of, the exercise or enforcement of any right power or remedy of the State under this Agreement or under any Law in relation to any Obligation of the Recipient which the State subsequently discovers has not been properly complied with by the Recipient.

## 5. EVALUATION OR AUDIT RIGHTS

At any time until Five (5) years after receipt of the Notification by the Recipient or any earlier termination of this Agreement, the State may arrange for an Evaluation or Audit to be carried out in relation to either or both of the Project and this Agreement by either the Department, an Auditor or any other person that the State in its absolute discretion wishes to carry out the Evaluation or Audit. If the State arranges for an Evaluation or Audit:

- (a) the State must notify the Recipient that the State has arranged for an Evaluation or Audit to be carried out; and
- (b) the Recipient must allow all persons appointed by the State to carry out the Evaluation or Audit to:
  - (i) have full access to all documents, records and premises in the control or possession of the Recipient for the purpose of carrying out the Evaluation or Audit; and
  - (ii) make and take copies of any and all documents and records in the control or possession of the Recipient relating in any way to either or both of the Project and this Agreement.

This clause 5 survives the termination of this Agreement.

## 6. CONTACT OFFICERS

- (a) Each Party must appoint a staff member to be a contact officer in relation to the Project and this Agreement (this staff member and any replacement staff member performing the same role are referred to in this Agreement as the **Contact Officer**). The Contact Officer for each Party is authorised to act for that Party in relation to this Agreement and is the first point of contact for the other Party in relation to any disputes arising under this Agreement.
- (b) The details of each Party's Contact Officer as at the Commencement Date are set out in Schedule 1.
- (c) If a Party changes its Contact Officer that Party must notify the other Party in writing of the details (being the same categories of information set out in Schedule 1 for each Contact Officer) of the new Contact Officer within five (5) Business Days after the change.

## **7. REPAYMENT AND RETENTION OF THE FUNDING**

Within twenty (20) Business Days from receipt by the Recipient of any written request from the State to provide a Final Report or any earlier termination of this Agreement, the Recipient must remit to the State

- (a) any Funding that the State has paid to the Recipient; and
- (b) any interest that accrued on that Funding

that has not been spent or committed in accordance with this Agreement. This clause 7 does not limit clause 11.3 in any way.

## **8. LIMITATION OF LIABILITY**

- (a) The State is not responsible or liable in any way for the success or otherwise of the Project or for any Losses suffered or incurred by the Recipient in undertaking the Project. The Recipient releases the State from all Liability suffered or incurred by the Recipient in relation to one or more of the Project, this Agreement and any related matter and agrees that neither it nor any Related Body Corporate will make a Claim against the State or any of the State's Associates arising directly or indirectly in relation to one or more of the Project, this Agreement and any related matter. This clause 8 may be pleaded by the State or its Associates as a bar to any proceedings commenced by the Recipient against the State or its Associates in relation to one or more of the Project, this Agreement and any related matter.
- (b) If the Funding is insufficient for the Recipient to properly fulfil all of its Obligations, then the Recipient must still fulfil its Obligations at its own cost.
- (c) The Recipient must indemnify the State and must keep it indemnified and hold it and its officers, employees and agents harmless from and against all Claims or Liability, suffered or incurred by or brought against the State or any of its respective officers, employees and agents caused by, arising out of or relating directly or indirectly to any:
  - (i) breach of any Provision by the Recipient;
  - (ii) act or omission of the Recipient or its employees, contractors, officers or agents which relates directly or indirectly to one or more of the Project, this Agreement and any related matter; or
  - (iii) breach of a Law by the Recipient or any of its employees, contractors, officers or agents which relates directly or indirectly to one or more of the Project, this Agreement and any related matter.
- (d) The Recipient must comply with the insurance requirements set out in item 4.2 of Schedule 4.
- (e) This clause 8 survives the termination of this Agreement.

## **9. FREEDOM OF INFORMATION ACT 1992, FINANCIAL MANAGEMENT ACT 2006 AND AUDITOR GENERAL ACT 2006**

- (a) This Agreement and information regarding it is subject to the *Freedom of Information Act 1992*. The State may publicly disclose information in relation to this Agreement, including its terms and the details of the Recipient.
- (b) Despite any express or implied provision of this Agreement to the contrary, nothing in this Agreement in any way alters, limits or affects the operation of the *Auditor General Act 2006*, the *Financial Management Act 2006* or the Recipient's obligations (if any) in relation to these Acts. To the extent permitted by law, the Recipient must allow the Auditor General, or an authorised representative, to have access to and audit (or

otherwise review, examine or evaluate) the Recipient's records and information concerning either or both of this Agreement and the Project.

## 10. NOTICES

- (a) Any notice consent, request, notification, approval or other communication (a "Notice") given or made under this Agreement must be in writing and signed by the sender or a person duly authorised by the sender.
- (b) A Notice given or made under this Agreement must be delivered to the intended recipient by:
  - (i) prepaid post (if posted to an address in another country by registered airmail);
  - (ii) hand; or
  - (iii) email, provided:
    - (A) the Notice is sent as a pdf attachment to the email and is not sent as a temporary file or link; and
    - (B) the size of the email is less than 10MB,to the address or email address specified in Schedule 1 or the address or email address last notified by the intended recipient to the sender.
- (c) A Notice will be conclusively taken to be duly given or made:
  - (i) in the case of delivery in person, when delivered;
  - (ii) in the case of delivery by post, two Business Days after the date of posting (if posted to an address in Australia) or seven Business Days after the date of posting (if posted to an address in another country); and
  - (iii) in the case of email, the earlier of:
    - (A) the time the sender receives an automated message from the intended recipient's information system confirming delivery of the email;
    - (B) the time the email is first opened or read by the intended recipient, or an employee or officer of the intended recipient; and
    - (C) 24 hours after the time the email is sent (as recorded on the device from which the sender sent the email), unless the sender receives, within that 24 hour period, an automated message that the email has not been received,but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day or is later than 5pm (local time) it will be conclusively taken to have been duly given or made at the start of business on the next Business Day.
- (d) Each Party must:
  - (i) monitor the information system on which the mailbox for its email address resides on a frequent and regular basis;



- (ii) immediately notify the other party if it discontinues the use of, or changes, its email address, or if it is unable to access its email address for a period longer than 24 hours;
  - (iii) ensure it is able to receive Notices to its email address, including by ensuring that sufficient storage capacity is available at all times;
  - (iv) ensure its firewall and/or mail server (as applicable):
    - (A) allows messages of up to 10MB to be received; and
    - (B) does not trap any messages in the spam filter that have been sent from the State's or the Recipient's domain (as relevant); and
  - (v) ensure its system automatically sends a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.
- (e) A Notice sent to a Party's Contact Officer or any replacement thereof advised beforehand will be deemed to be received by that Party.

## **11. DEFAULT AND TERMINATION**

### **11.1. Event of Default by the Recipient**

An **Event of Default** occurs if:

- (a) the Recipient breaches any Provision, which (if remediable) continues without remedy for five (5) Business Days after notice in writing has been served on the Recipient by the State. This subclause does not limit any other part of this clause 11.1 in any way; or
- (b) the Recipient breaches any Provision of this Agreement and such breach cannot be remedied. This subclause does not limit any other part of this clause 11.1 in any way; or
- (c) the Recipient fails to comply with or meet a Milestone, an Additional/New Milestone or any other milestone set by the Department in accordance with this Agreement; or
- (d) the Recipient suffers, or is or becomes subject to, an Insolvency Event; or
- (e) the State believes, in its absolute discretion, that the Recipient is unwilling or unable to comply with any one or more of the Provisions; or
- (f) the Recipient repudiates the Agreement; or
- (g) a material warranty given by or representation made by the Recipient is or becomes untrue; or
- (h) the Recipient makes a notification to the Department of the type set out in clause 3(c); or
- (i) the Recipient fails to comply with item 4.2 of Schedule 4; or
- (j) any aspect of this Agreement is or is held to be void, unenforceable, or invalid for whatever reason; or
- (k) the Recipient persistently, regularly, consistently or continually breaches the Provisions. This subclause does not limit any other part of this clause 11.1 in any way; or

- (l) where this Agreement provides for or contemplates the Parties reaching further agreement in relation to anything the subject of, or related to, either or both of this Agreement and the Project, this further agreement is not reached and recorded in writing within a reasonable time.

## **11.2. Effect of Event of Default**

- (a) If an Event of Default occurs, the State may terminate the Agreement by providing notice in writing to the Recipient and the Agreement is then terminated from the date specified in that notice.
- (b) Without limiting the State's rights under clause 11.2(a), if the Recipient is in breach of this Agreement, the State may suspend the performance of its Obligations until such time as it is satisfied in its absolute discretion that the Recipient has remedied that breach.
- (c) The State may terminate the Agreement by providing notice in writing to the Recipient if, in the opinion of the State exercisable in its absolute discretion, the Project is no longer necessary for any reason and the Agreement is then terminated from the date specified in that notice, although in this instance only, clause 11.3(c) of this Agreement does not apply.
- (d) If the State terminates this Agreement in accordance with this clause 11.2 or otherwise, or this Agreement otherwise comes to an end:
  - (i) clauses 2, 3(c), 4.4, 4.5, 4.7, 5, 7, 8, 9, 10, 11.3, 12 and 14 will survive termination of this Agreement; and
  - (ii) in respect of item 4.2 of Schedule 4:
    - (A) where the Recipient has an obligation in subitem 4.2.1 of Schedule 4 to effect, maintain and keep in force any policy of insurance set out in subitem 4.2.1 for a period referable to "the date the Recipient receives the Notification", that policy of insurance must now be effected, maintained and kept in force as if the words "the date the Recipient receives the Notification" are replaced with the words "the date the Recipient receives notice in writing from the State that the State is terminating this Agreement, or the date this Agreement otherwise comes to an end";
    - (B) where the Recipient has an obligation in subitem 4.2.1 of Schedule 4 to effect, maintain and keep in force any policy of insurance set out in subitem 4.2.1 until the end of any Defects Liability Period, it must continue to effect, maintain and keep in force that policy of insurance until the end of any Defects Liability Period; and
    - (C) subitems 4.2.2, 4.2.3, 4.2.4, 4.2.5 and 4.2.6 of Schedule 4 survive until the Recipient no longer has any Obligation to effect, maintain and keep in force any policy of insurance set out in subitem 4.2.1 of Schedule 4.

For the avoidance of doubt, this sub-clause 11.2(d) does not set out an exhaustive list of clauses, rights and obligations that will survive termination and any other clauses, rights and obligations that survive at common law are also intended by the parties to, and do, survive the termination of this Agreement.

## **11.3. No Further Funding and Recovery of Funding**

If the Agreement is terminated under clause 11.2, or terminated unlawfully by the Recipient:

- (a) the State has no further obligation to pay the Recipient any part of the Funding which has not yet been paid to the Recipient;

- (b) the Recipient must remit to the State within twenty (20) Business Days from the termination date specified by the State all Funding paid to the Recipient under the Agreement that has not been spent or committed in accordance with this Agreement by the termination date specified by the State and any interest which has accrued on that Funding; and
- (c) subject to clause 11.2(c), if requested by the State in writing, the Recipient must remit to the State within twenty (20) Business Days from the date of the State's request all Funding paid to the Recipient under the Agreement that has been spent or committed and any interest which has accrued on that Funding. If the State only requests the Recipient to remit part of those monies, then the Recipient must remit that part of those monies within twenty (20) Business Days from the date of the State's request.

## 12. AGREEMENT BETWEEN THE RECIPIENT AND A THIRD PARTY

If the Recipient enters into an agreement with any other party relating in any way to either or both of this Agreement and the Funding (**Third Party Agreement**), including a Third Party Agreement with a party to deliver or fulfil any of the Recipient's Obligations or to provide services to the Recipient to assist or enable it to fulfil its Obligations, the Recipient must ensure that the other party:

- (a) has obligations in the Third Party Agreement which, if properly fulfilled, will ensure that the Recipient properly fulfils its corresponding Obligations and to the extent necessary to ensure that the other party has these obligations, the Recipient must ensure that the Third Party Agreement mirrors the terms of this Agreement; and
- (b) agrees to the Recipient providing the State with any documents that the other party provides to the Recipient and to the State attending any meetings it has with the Recipient if the State wishes to obtain copies of such documents or attend such meetings.

## 13. GOODS AND SERVICES TAX (GST)

- (a) For the purposes of this Agreement, including this clause 13, the terms "GST", "recipient-created tax invoice", "registered", "supply", "tax invoice", and "taxable supply" have the same meanings as in the GST Act.
- (b) Subject to clause 13(c) below, If GST is or becomes payable by a party (**Supplier**) in relation to any supply that it makes under, in connection with, or resulting from, this Agreement, then (unless the consideration for that supply is expressly stated to include GST) in addition to any consideration provided by a party (**Supplied Party**) for that supply, the Supplied Party must pay to the Supplier the amount of any GST for which the Supplier is liable in relation to that supply (**Additional Amount**) at the same time as the relevant consideration or any part of it is provided.
- (c) Subject to clause 13(e) below, the obligation in clause 13(b) above to pay the Additional Amount only arises once the Supplier has issued a tax invoice to the Supplied Party in respect of the Additional Amount.
- (d) If the Funding is consideration for the supply of anything under, in connection with, or resulting from, this Agreement which is a taxable supply under the GST Act, the Funding is exclusive of GST.
- (e) If the Funding is consideration for the supply of anything under, in connection with, or resulting from, this Agreement which is a taxable supply under the GST Act, the State may choose (in its absolute discretion) by notice to the Recipient to have the Department issue a RCTI in respect of the Additional Amount and if the State so chooses:

- (i) the Department will issue a RCTI in respect of the Additional Amount and the Recipient will not issue a tax invoice in respect of that Additional Amount;
- (ii) the Recipient warrants that it is registered for GST and will notify the Department as soon as practicable of any change to the Recipient's registration;
- (iii) the State warrants that the Department is registered for GST and will notify the Recipient as soon as practicable of any change to the Department's registration; and
- (iv) the State will indemnify and keep indemnified the Recipient for any liability for GST and any related penalty or interest charge that may arise from a statement of GST payable on the supply for which the Department issues a RCTI under this Agreement.

#### **14. WAIVER**

- (a) No right under this Agreement shall be deemed to be waived except by notice in writing signed by both Parties.
- (b) A waiver by either Party will not prejudice that Party's rights in relation to any further breach of this Agreement by the other Party.
- (c) Any failure to enforce any part of this Agreement, or any forbearance, delay or indulgence granted by one Party to the other Party, will not be construed as a waiver of any rights under this Agreement or under any Law.

#### **15. ENTIRE AGREEMENT**

This Agreement constitutes the entire, full and complete understanding and agreement between the Parties in relation to its subject matter and supersedes all prior communications, negotiations, arrangements and agreements between the Parties (or between the State and any party negotiating on behalf of the Recipient, including LGISWA) with respect to the subject matter of this Agreement.

#### **16. ASSIGNMENT**

- (a) This Agreement is personal to the Recipient and may not be assigned by the Recipient without the State's consent, which may be withheld in the State's absolute discretion. The State may at any time, in its absolute discretion, assign or transfer its rights and Obligations under this Agreement as it sees fit.
- (b) For the purposes of this clause 16, the Recipient shall be deemed to have assigned this Agreement if any act, matter or thing is done or occurs, the effect of which is, in the opinion of the State, to transfer, directly or indirectly, the management or control of the Recipient.

#### **17. VARIATION**

Any modification, amendment or other variation to this Agreement must be made in writing, and must, unless the State in its absolute discretion directs in writing otherwise, be duly executed by both Parties.

#### **18. RIGHTS, POWERS AND REMEDIES**

The rights, powers and remedies in this Agreement are in addition to, and not exclusive of, the rights, powers and remedies existing at law or in equity.

#### **19. GOVERNING LAW**

This Agreement is governed by the laws in force in the State. Each Party irrevocably submits unconditionally to the non-exclusive jurisdiction of the Courts of Western Australia and of all Courts competent to hear appeals therefrom in relation to any legal action, suit or proceeding arising out of or with respect to the Agreement.

## 20. ACCESS TO LAND

If the Project is being undertaken on land (whether freehold or Crown land) that is not owned, leased or managed by the Recipient, the Recipient must obtain before it enters or occupies that land & keep in place whilst the Recipient is on or occupying that land the written consent of the person owning or leasing that land to such entry or occupation by the Recipient. A copy of this consent to be provided to the Department.

## 21. SCHEDULES

- (a) Any express or implied provision of any Schedule to this Agreement is hereby deemed to be a provision of this Agreement and therefore must be complied with (by the relevant Party) in accordance with its terms.
- (b) In clause 21(a), "provision" includes term, condition, warranty, stipulation, right, Obligation, representation and the like.
- (c) Without limiting the preceding provisions of this clause 21, the Recipient agrees to comply with the Special Conditions, if any.

## 22. TRUSTS

If the Grantee is a trustee of a trust (**Trust**):

- (a) the Grantee enters into and is bound by this Agreement both in its personal capacity and in its capacity as trustee of the Trust; and
- (b) the Grantee represents and warrants to the State that, in respect of the Trust:
  - (i) it is the sole trustee of the Trust;
  - (ii) it is a validly appointed trustee of the trust and no action is proposed to remove it as trustee of the Trust;
  - (iii) there has not been any contravention of or non-compliance with any of the terms of the trust deed constituting the Trust;
  - (iv) it has a right of indemnity out of the assets of the Trust for all liabilities incurred by it under this Agreement and the assets of the Trust are sufficient to satisfy that right; and
  - (v) this Agreement does not conflict with the operation or terms of the Trust or the trust deed;
  - (vi) it has full and valid power and authority under the Trust to enter into this Agreement and to carry out the transactions contemplated by this Agreement (including all proper authorisations and consents);
  - (vii) it enters into this Agreement and the transactions evidenced by it for the proper administration of the Trust and for the benefit of all of the beneficiaries of the Trust; and

- (viii) it will not, without the State's consent (not to be unreasonably withheld or delayed), resign, allow the appointment of a substitute or additional trustee, terminate the trust or vary the terms of the Trust or resettle the Trust.

## SCHEDULE 1 – CONTACT OFFICERS

### 1 Notice Addresses

#### 1.1 State and Department

Registered Mail:	PO Box 2000 Bunbury, WA, 6231
Email:	<a href="mailto:Jaylene.chambers@dpird.wa.gov.au">Jaylene.chambers@dpird.wa.gov.au</a> <a href="mailto:Amanda.taylor@dpird.wa.gov.au">Amanda.taylor@dpird.wa.gov.au</a>

#### 1.2 Recipient

Registered Mail:	PO Box 11, Nannup WA 6275
Email:	Nicole Botica - <a href="mailto:ecdo@nannup.wa.gov.au">ecdo@nannup.wa.gov.au</a>

### 2. Contact Officers

#### 2.1 State

<b>Name:</b>	Jaylene Chambers
<b>Job Title:</b>	Regional Agreements Officer
<b>Phone:</b>	0447 491 654
<b>Email:</b>	<a href="mailto:Jaylene.chambers@dpird.wa.gov.au">Jaylene.chambers@dpird.wa.gov.au</a>
<b>Postal Address:</b>	PO Box 2000 Bunbury WA 6231
<b>Street Address:</b>	Level 9, 61 Victoria Street Bunbury WA 6230
<b>Supervisor:</b>	Audrey Martin – Principal Agreements Officer

#### 2.2 Recipient

<b>Name:</b>	Nicole Botica
<b>Job Title:</b>	Economic and Community Development Officer
<b>Phone:</b>	08 9756 1018
<b>Email:</b>	<a href="mailto:ecdo@nannup.wa.gov.au">ecdo@nannup.wa.gov.au</a>
<b>Postal Address:</b>	PO Box 11 Nannup WA 6275
<b>Street Address:</b>	15 Adam Street
<b>Supervisor:</b>	David Taylor – Chief Executive Officer

#### 2.3 Recipient financial contact

<b>Name:</b>	Nicole Botica
<b>Job Title:</b>	Economic and Community Development Officer
<b>Phone:</b>	08 9756 1018
<b>Email:</b>	<a href="mailto:ecdo@nannup.wa.gov.au">ecdo@nannup.wa.gov.au</a>

## **SCHEDULE 2 – FINANCIAL REPORT**

*The State intends to provide relevant templates to assist the Recipient in completing its reporting Obligations.*

*The information listed below is indicative of the information requested by the State and may be varied by the State from time to time in its absolute discretion.*

1. Total approved budget for the current financial year.
2. Balance brought forward from previous reporting period.
3. Funding received from the State to date.
4. Total monies committed in the current period from Funding and other funds received (if any), including Leveraged Funds.
5. Actual payments to date.
6. Initial estimated cost of the Project.
7. Amount of interest earned on the Funding and on any income generated by the Project.
8. Amount of Leveraged Funding from other sources.
9. Forecast cost to complete the Project.
10. Use of funds: Infrastructure/Services/Administration.



### **SCHEDULE 3 – PROJECT REPORT**

*The State will provide relevant templates to assist the Recipient in completing its reporting Obligations.*

*The information listed below, is indicative of the information requested by the State and may be varied by the State from time to time in its absolute discretion.*

1. Fulfilment of Recipient's Deliverables (activities and outputs).
2. Project indicators.
3. Milestones/achievements target for the reporting period.
4. Milestones/actual achievements for the reporting period.
5. Explanation of variances between target and actual achievements, including reasons why milestones were not achieved, impediments encountered, action taken to overcome these and potential future impediments if any.
6. Risks in relation to the Project, including in relation to completing the Recipient's Obligations and solutions proposed by the Recipient in relation to these risks.
7. Funding allocation by project category.
8. What the Funding received has been spent on.
9. Provide copies of contracts entered into between the Recipient and any other party in relation to the Project, including Third Party Agreements.

## **SCHEDULE 4 –PROJECT DETAILS**

### **1. Use of Funding by the Recipient**

Without limiting clause 8(b) or clause 11.3 in any way, the Recipient must use the Funding to carry out the Project in accordance with this Agreement and for no other purpose.

### **2. Funding Amount**

Funding of \$2,860,000 (excluding GST) will be provided by the State to the Recipient in the manner and within the timeframes outlined in item 3.2 of this Schedule 4 and in Schedule 6.

Disbursal of Funding will be subject to availability of funds through the State budget and mid-year review of the State budget each financial year.

### **3. Detailed Description of Project**

#### *3.1. Project Description*

In 2020 the South West region in Western Australia was one of 10 regions Australia-wide that was selected to receive up to \$10 million in funding under the Federal Government's Regional Recovery Partnership Program (RRP). The RRP aims to support existing State and regional recovery plans with targeted initiatives to deliver jobs, economic recovery and economic diversification post Covid-19.

The Nannup Trail Town Project (NTTP) will aim to attract visitors, trail users and businesses through the investment of trail infrastructure including mountain bike trails, a freestyle jump park, car parking, traffic bridge, toilets, and directional signage in and around Nannup. The project goes beyond just mountain biking/cycling and caters to a wide range of trail users including mountain bikers, road cyclists, gravel cyclists, equestrian riders, canoe/kayak users and others.

Specifically, the project will deliver:

- Stage 1: Completion of Tank 7 & 8 Mountain Bike Park. This will encompass a trail network made up of 37km of trail.
- Stage 2: Southern traffic bridge, freestyle jump park, signage, branding and mapping for gravel and road cycling routes and link to Donnelly River Village. This will encompass infrastructure to link pathways with the southern end of town to facilitate access to the Nannup town centre, and marketing collateral for the NTTP.
- Stage 3: Native Forest Mountain Bike Park. This will encompass approximately 40km of new trails and includes a primary trail head, end of trip user facilities, directional signage and trail network entry.

The three stages have been designed to link into Nannup's town centre and make up the NTTP product offering, with Stage 1 currently under construction.

#### *3.2. Recipient's Deliverables and Payment Funding*

Deliverables	Performance Measures	Performance method Measure	Milestone	Payment details and timing	Payment Amount \$
Execution of Agreement between state and recipient.	Signed Agreement by both parties.	Signed agreement by both parties.	30 August 2021	Payment will be authorised within 20 business days upon acceptance that the deliverable has been met.	\$860,000
<u>Stage 1</u> – Tank 7 & 8 open to the public.	Completion of Tank 7 & 8 Mountain Bike Park: -loop trail network, -parking, -shelters, -signage and -bituminising Town to Tank link	Provide evidence of Stage 1 trail completion to DPIRD (photos, media coverage, trail usage data).	31 December 2021		
Implemented Monitoring and Evaluation (M&E) Plan	Development of M&E Plan.	M&E Plan developed and lodged with DPIRD.	28 February 2022		
<u>Stage 2</u> - Infrastructure works open to the public.  Signage Branding and mapping complete.	Completion of Stage 2 works: - New trail (bridge works and pathways), and - freestyle jump park.  Signage implemented, branding and mapping launched via Nannup tool (app).	Provide evidence of Stage 2 infrastructure works completed to DPIRD (media coverage, usage data and photos).  Evidence of signage branding and mapping deliverables provided to DPIRD (as appropriate).	31 August 2022	Payment will be authorised within 20 business days upon acceptance that this and the above deliverables have been met.	\$1,000,000
<u>Commence Stage 3</u> - Native Forest Mountain Bike Park works.	Stage 3 works commenced.	Provide evidence of Stage 3 works commenced by an endorsed works plan to DPIRD.	31 August 2023	Payment will be authorised within 20 business days upon acceptance that the deliverable has been met.	\$1,000,000
<u>Stage 3</u> – Native Forest Mountain Bike Park open to the public.	Completion of Stage 3 works: -New trail, - parking and shelters - amenities, and signage.	Provide evidence of Stage 3 works completed to DPIRD, including opening to the public (photos, usage data, media coverage, and launch event).	1 June 2024		
Project Complete.	Completion of the project.	Project completion	30 June 2024		

Acquittal.	Acquittal documentation provided, to the satisfaction of DPIRD.	Acquittal documentation provided, to the satisfaction of DPIRD	30 September 2024		
Completion of the Project including all of the Recipient's Obligations			30 September 2024	Total Payment Amount	\$2,860,000

The Recipient agrees to commence the Project within six (6) months after execution of the Agreement.

### 3.3. Project Budget

Item of Expenditure	Budget (\$)	Source of Funds
Trail infrastructure and development	\$2,774,590	Regional Recovery Partnership Program (RRP). Drought Funding Program. Regional Economic Development Grant Round 3. Local Roads and Community Infrastructure. Shire of Nannup. Regional Bike Network Grants.
Trail head	\$194,313	RRP.
Installation of two bridges	\$472,830	RRP. Regional Bike Network Grants. Shire of Nannup.
Car parking construction incl bituminising	\$369,305	RRP.
Signage and marketing	\$207,221	RRP.
Detailed design and project management	\$296,555	RRP.
<b>Total Budget</b>	<b>\$4,314,814</b>	

## 4. Special Conditions

### 4.1. Leveraged Funding

(a) The Recipient must obtain the funding from the sources set out in the table immediately below (**Leveraged Funding**), which the Recipient must use to carry out the Project in accordance with this Agreement and for no other purpose:

Source of Leveraged Funding	Amount (\$)
Drought Funding Program (confirmed)	\$675,000
Regional Economic Development Grant, Round 3 (confirmed)	\$100,000

Source of Leveraged Funding	Amount (\$)
Local Roads and Community Infrastructure (confirmed)	\$325,000
Regional Bike Network Grants (confirmed)	\$236,415
Shire of Nannup (confirmed)	\$118,208

- (b) Despite anything express or implied to the contrary in this Agreement, before the Recipient is entitled to any payment under this Agreement, it has to provide evidence to the Department which proves to the satisfaction of the State, in its absolute discretion, that the Recipient has obtained the Leveraged Funding. If the Recipient does not obtain any part of the Leveraged Funding (that part being the **Shortfall**), the State may reduce the amount it is to pay the Recipient under this Agreement by the amount of the Shortfall.

## 4.2. Insurance

### 4.2.1 Policies of insurance

#### 4.2.1.1 Effecting, maintaining and keeping in force policies of insurance

Subject to sub-item 4.2.1.3 below, the Recipient must effect, maintain and keep in force, or cause to be effected, maintained and kept in force, from the Commencement Date until it receives the Notification (or for a longer period where it is required to keep any insurance current for a longer period as set out in this sub item below) adequate insurance cover in its name for its rights and interests in relation to the Project:

- (a) with a reputable and solvent insurer (with a Standard and Poor's rating of not less than A minus) which carries on insurance business in Australia and is authorised in Australia to operate as an insurance company; or
- (b) only for insurance policies which the Recipient effects, maintains and keeps in force, with LGISWA instead of an insurer of the type set out in sub item 4.2.1.1(a) immediately above,

including effecting, maintaining and keeping in force, or causing to be effected, maintained and kept in force, the following policies of insurance for the Project:

- (c) a public liability policy for an amount of indemnity of not less than 100 MILLION DOLLARS (\$100 000 000) (or any higher sum as is determined by the State from time to time (acting reasonably)) for any one occurrence and unlimited as to the number of occurrences which must:
  - (i) be effected, maintained and kept in force from the Commencement Date until the later of one year from the date the Recipient receives the Notification and the end of any Defects Liability Period;
  - (ii) must contain or be endorsed to contain an indemnity extension in favour of the State to the extent of its vicarious liability caused, contributed to, or arising directly or indirectly out of the negligent acts or omissions of the Recipient, its employees, contractors or agents in their performance or non-performance of the Project;
  - (iii) cover liability resulting from loss of or damage to property and the death or illness of, or injury to, any person (other than liability which is required by Law to be insured

under a workers compensation policy of insurance) arising out of or in connection with the Project, this Agreement or both;

(iv) be endorsed to cover;

(A) the use of unregistered motor vehicles, plant and equipment; and

(B) sudden and accidental pollution.

(d) where the Recipient has obligations in this Agreement to Construct any Structure, a policy of insurance in relation to all work required for and incidental to the Construction of that Structure and rectifying Defects (**Works**) which must:

(i) be in the joint names of the Recipient and all agents and contractors employed from time to time in relation to the Works and:

(A) note the State as a person to whom the benefit of the insurance cover provided by that insurance policy extends; and

(B) expressly provide that to the extent (if any) that noting the State in the manner set out in subitem 4.2.1.1(d)(i)(A) above does not have the effect that the State's interests and rights, and liabilities of, and owed to, the State (howsoever these interests, rights and liabilities arise, including if they arise under clause 8(c) of this Agreement) are noted on that insurance policy, that insurance policy also notes those interests, rights and liabilities;

(ii) cover against any and all physical loss or damage to the Works including covering the:

(A) full replacement value of that Structure, including any extension of or addition to that Structure;

(B) the cost of removal of materials and debris from the Site;

(C) any loss or damage to any equipment used in relation to the Works;

(iii) covering the cost of making good resultant damage arising in connection with faulty design;

(iv) provide that any breach of the conditions of this policy of insurance by an insured under the policy will not in any way prejudice or diminish any rights which any other person has under the policy;

(v) provide that the insurance provided under this policy is primary with respect to the interest of the State and any other insurance or self-insurance arrangements maintained by the State is excess to and not contributory with this policy; and

(vi) be effected, maintained and kept in force from the Commencement Date until the end of any Defects Liability Period, or if there is no Defects Liability Period, then until one year from the date the Recipient receives the Notification;

(e) where the Recipient has obligations in this Agreement to Construct any Structure, a vehicle and equipment policy of insurance for the Recipient's vehicles, registered plant and equipment brought on to the Site or used in connection with the Project whether owned, hired or leased (**Recipient's Vehicles**) in addition to any compulsory motor vehicle third party insurance required to be taken out by the Recipient under any Law. This vehicle and equipment insurance policy must;

(i) cover third party liability for personal injury or death (other than compulsory third party motor vehicle insurance) and property loss or damage involving the Recipient's Vehicles;

- (ii) be for not less than \$[100] million third party liability insurance for any one occurrence and unlimited as to the number of occurrences;
  - (iii) to the extent available at the times of placement and each renewal, be endorsed to cover the State to the extent of its vicarious liability caused, contributed to, or arising directly or indirectly out of the use of the Recipient's vehicles; and
  - (iv) be effected, maintained and kept in force from the Commencement Date until the later of one year from the date the Recipient receives the Notification and the end of any Defects Liability Period;
- (f) where the Recipient has obligations in this Agreement to Construct any Structure, in addition to the insurance cover set out in sub items 4.2.1.1(d) and 4.2.1.1(e) of this Schedule 4, it must take out, or cause to be taken out, any other policies of insurance consistent with Best Industry Practice for the engineering, design, procurement, supply, Construction, testing and commissioning of the Project, which must be effected, maintained and kept in force from the Commencement Date until the end of any Defects Liability Period, or if there is no Defects Liability Period, then until one year from the date the Recipient receives the Notification;
- (g) where the Recipient is in the business of providing professional services, has Obligations to provide professional services, or both, a professional indemnity policy of insurance, which must:
- (i) to the extent available at the times of placement and each renewal, be endorsed to contain an indemnity extension in favour of the State if the Recipient has Obligations to provide professional services;
  - (ii) include one full automatic reinstatement of the limit of liability;
  - (iii) cover liability arising from any negligent act or omission in connection with or arising out of the professional activities and duties under this Agreement;
  - (iv) cover claims in respect of this Agreement or otherwise under the *Competition and Consumer Act 2010 (Cth)*, *Fair Trading Act 2010 (WA)*, *Fair Trading Act 1987 (WA)*, and any similar legislation in any other state or territory insofar as they relate to the provision of professional advice; and
  - (v) be effected, maintained and kept in force from the Commencement Date until seven (7) years from the date the Recipient receives the Notification for not less than \$[100] million for each and every claim and in the aggregate annually; and
- (h) a policy of insurance which:
- (i) insures against liability under any applicable statute relating to workers or accident compensation for death of, or illness or injury to, natural persons employed or engaged by the Recipient which are required to be insured under the *Workers' Compensation and Injury Management Act 1981 (WA)* or equivalent legislation in other Australian jurisdictions in work under this Agreement including liability by statute and, where available, at common law; and
  - (ii) which must be effected, maintained and kept in force from the Commencement Date until the date the Recipient receives the Notification. Where common law claims are not fully covered under this policy of insurance, the Recipient must effect, maintain and keep in force, or cause to be effected, maintained and kept in force, from the Commencement Date until the date the Recipient receives the Notification a policy of insurance which insures against employer's liability at common law for not less than fifty million dollars (\$50,000,000.00) for any one event.

#### 4.2.1.2 Noting the State

In accordance with sub item 4.2.1.1(d), where the Recipient has obligations in this Agreement to Construct any Structure, it must effect, maintain and keep in force, or cause to be effected, maintained and kept in force, a policy of insurance in relation to the Works in the terms set out in that sub item, including noting the State in the manner set out in sub item 4.2.1.1(d)(i). Each other policy of insurance which the Recipient effects, maintains and keeps in force (or causes to be effected, maintained and kept in force) in relation to the Project, must note the interests of the State.

#### *4.2.1.3 State may extend time by which Recipient has to procure certain policies of insurance*

The Recipient must comply in full with sub item 4.2.1.1 of this Schedule 4 except that, with respect to the policies of insurance required to be effected, maintained and kept in force (or caused to be effected, maintained and kept in force) set out in sub items 4.2.1.1(d), 4.2.1.1(e) and 4.2.1.1(f), if the State has provided written notice to the Recipient prior to the Commencement Date (which notice, notwithstanding that this Agreement had not been executed at the time the notice was given, must comply with clause 10 of this Agreement as if both parties were bound by clause 10 at the time the notice was given) which:

- (a) provides that the Recipient may effect (or cause to be effected) one or more of those policies of insurance from a later date than the Commencement Date; and
- (b) specifies the date from which the Recipient must effect, maintain and keep in force (or cause to be effected, maintained and kept in force) that policy of insurance or those policies of insurance (as the case may be),

then the Recipient may effect (or cause to be effected) that policy of insurance or those policies of insurance (as the case may be) from the date specified in that written notice. For the avoidance of doubt, if the State provides written notice of the type outlined in this sub item 4.2.1.3:

- (c) the policy of insurance or policies of insurance (as the case may be) to be effected, maintained and kept in force by the Recipient (or which it causes to be effected maintained and kept in force) specified in that written notice must comply in all other respects with the relevant Provisions in sub item 4.2.1.1 (and comply with sub item 4.2.1.2) and only the time by which the Recipient must effect that policy of insurance or those policies of insurance (as the case may be) is altered; and
- (d) if that notice only alters the time by which one or some of the policies of insurance set out in sub items 4.2.1.1(d), 4.2.1.1(e) and 4.2.1.1(f) must be effected, the Recipient must still effect the other policy of insurance or policies of insurance (as the case may be) by the Commencement Date.

#### *4.2.2 Proof of insurance*

(a) Within ten (10) Business Days from:

- (i) the Commencement Date;
- (ii) the date the Recipient receives the Notification (except in relation to insurance cover which is only required under this Agreement to be maintained until receipt by the Recipient of the Notification);
- (iii) the date any insurance policy is renewed or varied; and
- (iv) any other request by the State,

the Recipient must provide the Department with the following information in relation to all insurance cover for the Project (regardless of whether the Recipient or another party effected the policies or whether one or more of the policies are in the joint names of the Recipient and one or more other parties):



- (v) certificates of currency from the insurer which provided the insurance. These certificates of currency must be accurate as at the time of issue, must not contain a general disclaimer to the effect that they cannot be relied upon and must contain sufficient information to enable the Recipient to demonstrate to the satisfaction of the State in its absolute discretion that the Recipient has complied with its Obligations under item 4.2 of Schedule 4. Where, in the opinion of the State in its absolute discretion, these certificates of currency do not provide this information, then the Recipient must provide such further information as the State may require to demonstrate compliance with the Recipient's Obligations under item 4.2 of Schedule 4. The Recipient is entitled to redact commercially sensitive information in any insurance policies which relates to other projects; and
  - (vi) receipts for premiums paid for each policy of insurance.
- (b) If, after being requested in writing by the State to do so, the Recipient fails to produce evidence (to the satisfaction of the State in its absolute discretion) of compliance with its Obligations under Item 4.2 of Schedule 4, the State may do one or more of the following:
- (i) effect and maintain the required insurance and pay the premiums. The amount paid by the State in effecting and maintaining the required insurance is a debt due and payable on demand from the Recipient to the State;
  - (ii) exercise its rights under clause 11 of this Agreement; or
  - (iii) suspend one or both of the performance of the Recipient's Obligations and the provision of Funding to the Recipient until evidence that the Recipient has complied with its Obligations under item 5.2 of Schedule 4 is provided to the Department and is satisfactory to the State in its absolute discretion.

The rights given to the State by this sub item 4.2.2(b) of Schedule 4 are in addition to any other rights the State may have.

#### 4.2.3 *Recipient's Obligations and Recipient's further obligations*

- (a) Unless the Recipient first obtains the State's prior written consent, which consent can be given or withheld by the State in its absolute discretion, the Recipient must not:
- (i) do, allow to be done by another person (except the State), or suffer the doing of, anything which adversely affects any insurance cover taken out by, or on behalf of, the Recipient or the State in relation to the Project or this Agreement or both, or which may increase the premium on that insurance;
  - (ii) store or use inflammable, volatile or explosive substances on the site or premises on which the Project is being carried out except those normally used in the Recipient's business; or
  - (iii) settle or compromise, or allow any other person (except an insurer who is legally entitled to, and does, take over conduct of the matter) to settle or compromise, any claim under any policy of insurance relating to the Project or this Agreement, or both.
- (b) The Recipient must give notice to the Department immediately if:
- (i) an event occurs which may give rise to a claim under any of the policies of insurance in relation to the Project (including under any of the policies of insurance held by a sub-contractor or sub-grantee in relation to the Project) and must keep the Department informed of subsequent developments concerning the claim. This requirement does not apply to those occurrences that may give rise to a motor vehicle or worker's compensation claim;

- (ii) an event occurs which could adversely affect any of the policies of insurance in relation to the Project (including under any of the policies of insurance held by a sub-contractor or sub-grantee in relation to the Project); or
  - (iii) any of the policies of insurance in relation to the Project (including under any of the policies of insurance held by a sub-contractor or sub-grantee in relation to the Project) are cancelled.
- (c) The Recipient must pay (or procure the payment of) all premiums and all deductibles applicable to the policies of insurance effected by it, or which it causes to be effected, in relation to the Project and promptly reinstate any of these policies which lapse or under which cover is exhausted.
- (d) Each policy of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project must:
- (i) provide that where the number of persons (in each case, an "insured") who are either:
    - (1) named on that policy of insurance; or
    - (2) otherwise entitled to insurance cover under that policy of insurance, exceeds one person, that policy of insurance must include a cross liability clause in which the insurer agrees to waive all express and implied rights of subrogation against any insured under that policy and agrees that the term "insured" applies to each insured under that policy as if a separate policy of insurance has been issued to each of them in the same terms as that policy of insurance but not so as to increase the limit of liability or sum insured under that policy;
  - (ii) state that they are governed by the laws of Western Australia and that each insurer irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Western Australia; and
  - (iii) provide that the excess in any of these policies must not exceed 1% of the insurance amount.
- (e) The Recipient must not do or omit to do, and must ensure that the Recipient's personnel (including its agents and contractors) not do or omit to do, any act or thing that would be grounds for an insurer to refuse to pay the whole of or any part of a claim made under any of the insurance policies effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project.
- (f) The Recipient must give the Department prior notice of at least one (1) month of the cancellation, non-renewal, or a material alteration to the detriment of cover of any of the insurance policies effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project or in accordance with the *Insurance Contracts Act 1984 (Cth)*.

#### 4.2.4 Insurance policies primary

- (a) Each policy of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project is primary and not secondary to the indemnity given by the Recipient to the State in clause 8(c) of this Agreement. However, the State is not obliged to make a claim or institute proceedings against any insurer under any of these insurance policies before enforcing any of its rights or remedies under the indemnity given by the Recipient to the State in clause 8(c) of this Agreement, or generally. In addition, the parties acknowledge that if a claim is made under any of these insurance policies by the State, it is their intention that the insurer cannot require the State to exhaust the indemnity given by the Recipient to the State in clause 8(c) of this Agreement before the insurer considers or meets the relevant claim.

- (b) The Recipient acknowledges that regardless of whether any of the policies of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project respond or not, and regardless of the reason why any of these insurance policies respond or fail to respond, the Recipient is not released (in whole or in part), from any of its obligations under the indemnity given by the Recipient to the State in clause 8(c) of this Agreement, or any of its Obligations generally.

#### 4.2.5 *Settlement of claims*

Upon settlement of a claim under any of the policies of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project, to the extent that the work to be reinstated or services to be repeated have been the subject of a payment of Funding by the State to the Recipient, the State may determine in its absolute discretion whether the Recipient must repay that Funding (and any interest accrued on that Funding) to the State out of the proceeds of insurance or use the proceeds of insurance to reinstate the work or repeat the services for which the Funding was provided. If the State requests that the Recipient repay that Funding (and any interest accrued on that Funding), or any part of that Funding (and any interest accrued on that Funding), to the State, the Recipient must do so:

- (a) within ten (10) Business Days of the date of the State's request (if the Recipient has already received the proceeds of insurance); and
- (b) within ten (10) Business Days of receipt of the proceeds of insurance (if the Recipient has not received the proceeds of insurance by the date of the State's request).

In order to ensure that the Recipient can fulfil its obligations under this sub item 4.2.5, the Recipient must ensure that any other party (except the State) named as an insured or otherwise noted or covered under any of the policies of insurance effected by the Recipient in relation to the Project, or which the Recipient causes to be effected in relation to the Project, has a contractual obligation to the Recipient to, if it receives proceeds of insurance under any of those policies, pay on request:

- (a) the Recipient; or
- (b) the State if directed by the Recipient to do so,

within a sufficient timeframe a sufficient part of those proceeds of insurance, to enable the Recipient to fulfil its obligation to the State in this sub item 4.2.5.

#### 4.2.6 *Insurance review*

- (a) The State may, from time to time, review the adequacy and appropriateness of the policies of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project. As part of this review, the State may ascertain whether, in the State's reasonable opinion, any additional insurance policies are required, or whether any insurance policies effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project and maintained at the time of the review are still required or require amendment.
- (b) To allow the State to perform this function, it may make a request for the documents set out in sub item 4.2.2 of this Schedule 4 which the Recipient must comply with.
- (c) The Recipient must commence negotiations to obtain insurances or amend the policies of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project within ten (10) Business Days of receiving notice from the State to do so, and must, as soon as practicable thereafter at the Recipient's own cost, obtain insurances or amend the policies of insurance effected by the Recipient, or which the Recipient causes to be effected, in relation to the Project to reflect the recommendations made by the State following its review.

- (d) The Recipient must promptly notify the Department if it is unable to, or it becomes apparent that it will be unable to, comply with the recommendations arising in connection with the State's review. The parties must determine what action, if any, is to be taken following receipt of this notice.

#### *4.3 Interest Earned*

The Recipient must inform the State on a quarterly basis if any and how much interest has accrued on the Funding paid to the Recipient. The State will decide, in its sole discretion, whether any interest accrued on the Funding must either be used by the Recipient for the Project, or must be paid to the State. The Recipient must comply with any such decision. This item 4.3 applies despite any other expressed or implied provision of this Agreement to the contrary.

#### *4.4. Local Products and Services*

The Recipient, in or in connection with procuring goods and services for or preparatory to the Project shall use all reasonable commercial endeavours to maximise:

- (a) such procurement from providers which have a business address closest to the place where the Project is to be carried out; and
- (b) the employment of persons who live closest to the place where the Project is to be carried out.

For your assistance in regard to the above, DPIRD Local Content Advisers are located in each of the nine Regional Development Commissions across the State.

Local Content Advisers are available to provide high level support to maximise local content outcomes for the Project.

#### *4.5. Aboriginal Participation*

In carrying out the Project, the Recipient must comply with any applicable State policies in relation to creating employment opportunities and engaging and developing relationships with Indigenous peoples.

#### *4.6 Building and Construction Code of Conduct 2016*

For all construction projects, the Recipient must comply with the Western Australian Building and Construction Industry Code of Conduct 2016

The Recipient and any Third Party engaged by the Recipient is subject to the Code, and must comply with each of the obligations described in the Code, for the term of this Agreement

#### *4.7 Project Governance*

The Recipient is to invite DPIRD to participate on the Project Steering Group (PSG).

The PSG is to, at a minimum include a nominated representative from the following:

- Department of Primary Industries and Regional Development (DPIRD).
- South West Development Commission (SWDC).
- The Recipient – Shire of Nannup (Project Facilitator)
- Department of Biodiversity, Conservation and Attractions (DBCA).
- Nannup Mountain Bike Club.
- Forest Products Commission (FPC).
- Water Corporation.

The PSG is required to meet on a minimum bi-monthly basis, with the meeting agenda distributed to members.

The Recipient will provide secretarial services to the PSG and will provide the Department with copies of all meeting minutes. DPIRD to be provided with a copy of the Terms of Reference.

#### *4.8 Land Management*

DPIRD to be provided with a copy of any signed MOUs between the Shire of Nannup and the Department of Biodiversity Conservation and Attractions and the Forest Products Commission, regarding land usage for trails management.

## SCHEDULE 5 – ACCOUNTS AND REPORTING

- (i) (a) The Recipient is to provide to the Department progress reports on a quarterly basis (as at 30 September, 31 December, 31 March and 30 June), or as determined from time to time by the State, until receipt by the Recipient of the Notification. The progress report is to contain information with respect to the Project, which must include the information set out in Schedule 2 and must be certified by the Director General, Chief Financial Officer or other accountable officer of the Recipient.

Note – quarterly reports are to be submitted within 15 calendar days after the end of each quarter.

For the avoidance of doubt the State may:

- (i) request progress reports at more regular intervals than one progress report every quarter but must not request progress reports at more regular intervals than every week; and
  - (ii) determine in its absolute discretion what information the Recipient is required to include in a progress report and requiring less information in a progress report than that prescribed in item (a) of this Schedule 5 in any one instance does not constitute a waiver of the State's right to receive the information prescribed in item (a) of this Schedule 5 in every other progress report.
- (b) The Recipient is to provide to the Department an annual report on the Project based on a financial year ending 30 June until receipt by the Recipient of the Notification. These annual reports must be certified by the Chief Financial Officer or other accountable officer of the Recipient and audited by an Auditor, and include:
- (i) a financial report containing information with respect to the Project which must include the information set out in Schedule 2; and
  - (ii) a project report which must include the information set out in Schedule 3, showing how and to what extent the Funding was spent and the extent to which the Recipient's Deliverables were performed and the Milestones met.

Note – the annual report on the Project is to be submitted within three (3) months after the end of the financial year to which the annual report relates.

- (c) The Recipient must provide the Department with a report (**Final Report**) within three (3) months after receipt by the Recipient of any written request from the State to do so or of any earlier termination of this Agreement, which must be certified by the Chief Financial Officer or other accountable officer of the Recipient and audited by an Auditor, and include:
- (i) a financial report certifying that the Funding was used for the Project, confirming the amount of Funding spent and which must include the information set out in Schedule 2; and
  - (ii) a project report which must include the information set out in Schedule 3, showing how and to what extent the Funding was spent and the extent to which the Recipient's Deliverables were performed and the Milestones met.

**SCHEDULE 6 – PAYMENT OF THE FUNDING**

Funding will be made available subject to, in the manner outlined in, and for the purpose outlined in, this Agreement.

The payment of the Funding or each tranche of the Funding (if applicable) will be processed by the State and by the time required by this Agreement, transferred into the following bank account of the Recipient by electronic funds transfer:

<b>Account name:</b>	Shire of Nannup Municipal Account
<b>BSB:</b>	
<b>Account number:</b>	

**EXECUTED AS AN AGREEMENT**

Signed for and on behalf of the **State of** )  
**Western Australia** by a duly authorised )  
officer of the Department of Primary )  
Industries and Regional Development )  
(ABN 18 951 343 745) in the presence of: )  
)

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Signature of officer

\_\_\_\_\_  
Full name of witness (print)

\_\_\_\_\_  
Full name of officer (print)

\_\_\_\_\_  
Title of officer (print)

\_\_\_\_\_  
Date

Signed for and on behalf of Shire of Nannup

The Common Seal of Shire of Nannup was hereto duly affixed in the presence of:

Signature Director/Board Member/ Office Holder

Print full name of Authorised Person

Print the position of the Authorised Person

Signature Director/Board Member/ Office Holder

Print full name of Authorised Person

Print the position of the Authorised Person