

FUNDING AGREEMENT

DEFINITIONS

In this “**Funding Agreement**”, unless expressed or implied to the contrary,:

Application means the application submitted to Council detailing the Project for which the Funding Amount is required, to be assessed by Council against a set of criteria.

Council means Mackay Regional Council.

Project means the project described in the Funding Recipient’s Application submitted to Council.

Force Majeure means an event or circumstance which:

- (a) is beyond the reasonable control of either party;
- (b) is not caused by either party;
- (c) can occur with or without human intervention; and
- (d) was not reasonably foreseeable by the parties at the time the Application was made;

the consequences of which could not have been reasonably prevented by the party affected.

Funding Amount means the funding amount payable to the Funding Recipient pursuant to Council’s funding program under which the Application was made.

Funding Recipient means the person/entity making the Application for the funding, and that the Funding Amount is to be paid to.

Funding Guidelines means any Council guidelines and the like published by Council that provide specific detail about the funding program, to be read in conjunction with this Agreement.

Intellectual Property Rights means all industrial and intellectual property rights, both in Australia and throughout the world, and includes any copyright, moral right, patent, registered or unregistered trade mark, registered or unregistered design, trade secret, knowhow, trade or business or company name, indication or source or appellation of origin or other proprietary right, or right of registration of such rights.

Insolvent means, in respect of a party, the occurrence of any of the following events:

- (a) a party ceases to, or takes any steps to cease to, conduct its business in the normal manner;
- (b) a controller, receiver, receiver and manager, official manager, administrator, provisional liquidator, liquidator, trustee or similar official is appointed to a party or over any of the assets or undertakings of that party;
- (c) a party enters into or resolves to enter into any arrangement, composition or compromise with or assignment for the benefit of its creditors or any class of them;
- (d) an application or order is made or a resolution is passed for the winding up of a party; or
- (e) a party is unable to pay debts as and when they fall due or is deemed under the *Corporations Act 2001* (Cth) to be insolvent.

Loss means any loss, damage, liability, compensation, fine, penalty, charge, payment, cost or expense (including reasonable legal costs and expenses on a full indemnity basis)

Material means material in any form (whether visible or not), including logos, trademarks, documents, advertisements (in print, electronic or recorded format), recordings on disc or any other form of storage, reports, products, equipment, information, data, software, software tools and software development methodologies, and includes all releases, updates and amendments to the original material.

Project means the project proposed to be undertaken by the Funding Recipient utilising the Funding Amount, as specified in the Application and approved by Council.

1 CONDITIONS OF OFFER

- 1.1 If the Application submitted to Council by the Funding Recipient is successful after being assessed against the set criteria for the relevant funding program, in consideration of Council agreeing to pay the Funding Recipient the Funding Amount, the Funding Recipient agrees to provide the Project specified in the

	Application and to comply with the Funding Agreement and the Funding Guidelines.	release or public announcement relating to the Project or the Funding Agreement unless the press release or public announcement is first approved by the Council and the Council may impose such conditions upon any press release or public announcement as it sees fit.
1.2	The Funding Recipient will use the funding solely for the purposes described in the Application and the Funding Guidelines, or as otherwise approved in writing by Council.	
1.3	Approval must be obtained from Council (in writing) for any changes to the Project as described in the Application submitted to Council. Changes can only occur once written approval has been granted by the Council.	1.5 The Funding Recipient is required to submit an outcome report no more than four (4) weeks after the conclusion of the Project (the 'Outcome Report'), which must include the following:
1.4	The Funding Recipient must:	(a) a financial acquittal of the Funding Amount;
	(a) work in collaboration with the Council to announce the Project;	(b) details of the economic, social and community benefits generated by the Project;
	(b) acknowledge the Council as a funding contributor of the Project in all publicity relating to the Project and funded activities (including in all promotional materials, advertisements, social media and events);	(c) copies of promotional materials and media monitoring;
	(c) subject to the restrictions in clause 5.3 include the Council's Marks in a prominent position on all advertising and marketing materials associated with the Project. Use of Council's Marks must adhere to its specific style guidelines as advised from time to time.	(d) number of people involved in the Project; and
	(d) provide the Council with promotional Material which can be used on Council's social media pages to help promote the Project;	(e) photographs from of the Project supplied electronically (with authority to be used in Council reporting, publications and electronic media).
	(e) arrange photography prior, during and after Project has been completed and share images with Council;	1.6 The Funding Recipient agrees that any unexpended funds must be immediately returned to Council.
	(f) procure and maintain, at its own cost, relevant licenses and approvals (such as traffic management, temporary entertainment event permit, footpath trading permit, property owner approval etc – if applicable) as necessary to organise the Project and all rights, licences and consents to enable Council to do all things contemplated by the Funding Agreement, and exercise Council's rights under the Funding Agreement, without infringing any laws or the rights (including Intellectual Property Rights or moral rights) of any person;	1.7 The Funding Recipient acknowledges that if the Funding Recipient does not provide the Outcome Report as required under clause 1.5, or the Funding Amount remains unacquitted, then the Funding Recipient and any of their related bodies corporate will be ineligible to apply for future Council support for a period to be determined at Council's discretion (but no less than three years).
	(g) have appropriate risk management plan in place for the Project; and	
	(h) not, and must ensure that its directors, employees and agents do not, make or authorise a press	

2 INDEMNITY

The Funding Recipient agrees to release and indemnify the Council, its employees, officers, servants and agents against all Loss arising out of or in connection with a breach of this Funding Agreement or any wilful misconduct or a negligent act or omission by the Funding Recipient or its authorised personnel or any other person for whose acts or omissions the Funding Recipient are vicariously liable, and any injury to or death of a natural person, and any loss of or damage to the real or personal property of Council or a third party in connection with the Project, except to the extent that the loss or damage is caused or contributed to as a result of the wilful or negligent acts of Council, its servants or agents.

3 **LIMITATION OF LIABILITY**

- 3.1 The Funding Recipient agrees that it is undertaking the Project at its own risk and that it is solely responsible for the Project it is providing.
- 3.2 To the greatest extent permissible by law, and irrespective of any other provision in this Funding Agreement, the Council is not liable to the Funding Recipient in contract, in tort, in equity, by operation of statute or otherwise for any type of damage or loss whatsoever, and howsoever arising out of this Funding Agreement, including without limitation any loss of opportunity, consequential loss, business or injury and damages of any kind whatsoever arising under this Funding Agreement.

The exclusion of liability provisions under the Funding Agreement may be pleaded as a bar to any proceedings.

4 **INSURANCE**

- 4.1 Funding Recipient must:
- (a) have public liability insurance for:
 - (i) not less than 20 million dollars per occurrence for the duration of the Project for any legal liability with respect to personal injury or property damage arising directly or indirectly from the Project or the funded activities related to the Project; or
 - (ii) an amount as approved by Council in writing prior to the payment of the Funding Amount; and
 - (b) ensure that the Funding Recipient's employees, agents or contractors are covered by an appropriate level of worker's compensation insurance, public liability insurance and professional indemnity insurance in relation to their respective profession and risk; and
 - (c) notify the Council immediately if an insurance policy required under this clause is cancelled.
 - (d) On request, produce to Council evidence of its compliance with clause 4.1(a) and (b).

5 **INTELLECTUAL PROPERTY**

- 5.1 Each party (or its licensors, as applicable) retains ownership of all Intellectual Property Rights subsisting in any Material it provides or makes available to the other party under or in connection with the Funding Agreement (including, in the case of Council, all Council's Marks) **(Background Materials)**. Any modification or enhancement to any Background Material of a party is deemed to form part of the Background Materials of that party and all Intellectual Property Rights in such modification or enhancement vest in that party immediately from creation. If a party's Background Material is modified or enhanced by or on behalf of the other party, then the other party assigns to the first party all Intellectual Property Rights it may have in such modification or enhancement immediately from creation.
- 5.2 Each party grants the other party a non-exclusive licence to use its Background Materials provided or made available to the other party, solely as provided for in the Funding Agreement.
- 5.3 The Funding Recipient must not use, reproduce, modify, or distribute any of the Council's Marks or Materials:
 - (a) without the Council's prior written approval; and
 - (b) other than in accordance with this the Funding Agreement and any directions or guidelines given by the Council from time to time.
- 5.4 At Council's request, the Funding Recipient must immediately amend or withdraw any Material bearing the Council's Marks or Council's Materials if they are not being used in accordance with the Funding Agreement.

6 **REPUTATION**

The Funding Recipient must ensure that it and its employees, agents or contractors are not involved in any activity or situation that is likely to materially harm or diminish the name or reputation of the Council or of the Project or bring the Council's name into disrepute, scandal or ridicule.

7 **CONFIDENTIAL INFORMATION**

Each party must treat as confidential information the provisions of the Funding Agreement and all information provided by the other party under the Funding Agreement, including Council's technical, operational, billing, and commercial information in relation to the supply of Funding Amount. Such information shall not be disclosed to a third party without the consent of the other party, unless that

information is in the public domain, or disclosed for the purpose of receiving professional advice, or unless the disclosure is required by law.

8 PAYMENT PROCESS

Council will contact the Funding Recipient to complete the payment process after the Funding Recipient has been notified that they have been successful in their application for funding.

9 PROJECT CANCELLATION

9.1 If the Funding Recipient is made aware that the Project (or part of the Project) will not be progressing, the Funding Recipient agrees to notify Council immediately.

9.2 If:

- (a) the Project is cancelled in its entirety before it commences and the Funding Recipient has received the Funding Amount, the Funding Recipient must refund Council the full Funding Amount, within 30 days of cancellation;
- (b) the Project is cancelled in part only and the Funding Recipient has received the Funding Amount, the Funding Recipient will refund Council a pro-rata amount of the Funding Amount corresponding to the Funding Amount for which Council has not received value, within 30 days of cancellation; or
- (c) the Project is cancelled in its entirety or in part only and the Funding Recipient has not received the Funding Amount, Council will not be required to pay the Funding Amount to the Funding Recipient.

10 TERMINATION

10.1 A party may terminate the Funding Agreement immediately by written notice to the other party if:

- (a) the other party does not carry out its obligations under the Funding Agreement or the Funding Guidelines and fails to rectify the breach within five (5) Business Days after being requested in writing by the first party to do so; or
- (b) the other party becomes Insolvent.

10.2 Council may also terminate the Funding Agreement immediately if the Funding Recipient does not carry out the Project within the timeframes as set out in the

Funding Guidelines, the Funding Recipient's Application or otherwise approved or notified by Council in writing.

10.3 If Council terminates the Funding Agreement under clause 10.1 and:

- (a) the Funding Amount has not been received by the Funding Recipient, then Council will not be required to pay the Funding Amount to the Funding Recipient; or
- (b) the Funding Amount has been received by the Funding Recipient, in whole or in part, then the amount received will be due and repayable to Council by the Funding Recipient within seven (7) days of termination.

10.4 Upon termination or expiry of the Funding Agreement, without limiting any other rights or remedies that each party may have under the Funding Agreement:

- (a) all rights granted under the Funding Agreement (other than rights which have accrued up to and including the date of termination or expiry or are expressed to continue in full force and effect after the Funding Agreement terminates or expires) cease; and
- (b) the Funding Recipient must immediately cease using Council's Marks and amend, withdraw or remove any document or thing bearing Council's Marks.

11 FORCE MAJEURE

11.1 Neither party is responsible for any delay or failure to perform its obligations under the Funding Agreement if the delay or failure is attributable to Force Majeure. Should the performance by either party of its obligations under the Funding Agreement be prevented or adversely affected by Force Majeure, that party must, as soon as possible, give a written notice to the other party of the Force Majeure and the likely impact on the performance of that party's obligations under the Funding Agreement.

11.2 In the event of the happening of Force Majeure which delays the performance by the Funding Recipient of the whole or a substantial part of the Funding Agreement for more than 21 days, Council has the right to terminate the Funding Agreement by giving the Funding Recipient seven (7) days written notice of termination under which circumstance the provisions of 9.2 shall prevail.

12 ASSIGNMENT

The Funding Recipient may not assign the Funding Agreement to a third party without the prior written consent of the Council, which the Council may grant or withhold in its absolute discretion.

13 FUNDING GUIDELINES

To the extent of any inconsistency, the Funding Guidelines shall prevail over the terms of this Funding Agreement.

14 COSTS

Each party shall bear its own costs of the preparation of the Funding Agreement. The Funding Recipient will be liable for any stamp duty on the Funding Agreement (if applicable).

15 GENERAL

15.1 The Funding Agreement may only be amended by written agreement between all parties.

15.2 The Funding Agreement supersede all previous agreements about their subject matter and embodies the entire agreement between the parties.

15.3 If:

(a) A clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way;

(b) Any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this document, but the rest of this document is not affected.

15.4 The laws of Queensland (Australia) govern the Funding Agreement. Each party irrevocably submits to the non-exclusive jurisdiction of the courts of Queensland (Australia) and courts competent to hear appeals from those courts.

15.5 Termination or expiry of the Funding Agreement will not affect any provision of this document which is expressly or by implication intended to come into force or continue on or after the termination or expiry, including clauses 2, 3, 5.1, 5.3, 5.4, 7, 8, 10, 11, 12, 13 or this clause 15.

15.6 All notices to be effective will be in writing and sent by either by email or delivered to the addresses specified below:

(a) For Council:

Mackay Waterfront Team
Sir Albert Abbott Administration Building,
73 Gordon St, Mackay QLD;

E-mail:

mackaywaterfront@mackay.qld.gov.au

(b) For Funding Recipient, the email and address specified in the Application.

15.7 The Funding Agreement do not create a partnership, agency, fiduciary, or any other relationship, except the relationship of contracting parties, between the parties. No party is liable for an act or omission of another party, except to the extent set out in the Funding Agreement. The Funding Recipient will not hold out in any way that he or she is an agent for the Council.

15.8 In the Funding Agreement unless the context otherwise requires:

(a) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation issued under, that legislation or legislative provision;

(b) the singular includes the plural and vice versa;

(c) a reference to an individual or person includes a corporation, partnership, joint venture, association, authority, trust, state or government and vice versa;

(d) a reference to any gender includes all genders;

(e) a reference to a recital, clause, schedule, annexure or exhibit is to a recital, clause, schedule, annexure or exhibit of or to the Funding Agreement;

(f) a recital, schedule, annexure or a description of the parties forms part of the Funding Agreement;

(g) a reference to any deed or document is to that deed or document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;

(h) a reference to any party to the Funding Agreement or any other document or arrangement includes that party's executors, administrators, substitutes, successors and permitted assigns; and

(i) where an expression is defined,
another part of speech or

grammatical form of that expression
has a corresponding meaning.