
Legal Guide to Model Funding Agreement (Community Grants Programs)
Version July 2006

Purpose of the Model Funding Agreement and this Guide

The model funding agreement has been prepared as a template document, intended to cover a range of possible funding arrangements in the area of community funding. As a template, it is expected that it will need modification to a greater or lesser extent to suit the particular funding arrangement. It is recommended that you obtain legal assistance in the use and adaptation of the agreement for particular projects.

The agreement assumes that funding will be provided for a single project, subject to satisfactory performance. If funding is to be provided to a single agency for multiple projects either a separate agreement should be concluded for each project or this agreement should be modified. Be aware that changes to clause numbering may affect internal cross-referencing of clauses.

A separate model funding agreement for services is currently under development.

This Guide has been prepared to assist agencies use the funding agreement (community funding programs). It is not intended as legal advice.

The NSW Government cannot accept responsibility or liability for any loss, damage, cost or expense you might incur as a result of the application of the funding agreement or this Guide to a particular project.

GUIDE NOTE 1

Legal status of donor agency. If the donor agency is incorporated (a statutory corporation, statutory body corporate or company incorporated by registration under the Corporations Act) then delete text “Crown in right of the State of New South Wales represented by the” and insert only the name of the agency.

Some Departments are incorporated but most are not. If the Department or agency is unincorporated and therefore has no separate legal status from the Crown, add the Department or agency’s name after the text “Crown in right of the State of New South Wales represented by the”.

Insert Department or agency ABN in all cases.

GUIDE NOTE 2

Legal status of funding recipient. Funding recipients should be incorporated. If the End Recipient of the Funding is not incorporated, funding may be given to an incorporated recipient for transfer to the End Recipient on the basis that the incorporated recipient will, by being named as party to the agreement, assume responsibility for its performance and for compliance by the End Recipient with its terms.

Where the funding recipient is a company, the full name of the company should be used. A free company search is available at www.search.asic.gov.au/gns001.html. Where appropriate, a company search should be undertaken before entering the agreement. A free Australian Business Number search is available at www.abr.business.gov.au.

Care should be taken where it is proposed that there be more than one recipient of the funding. If there is a consortium of recipients, consider entering the agreement with one, “lead” entity, which is prepared to assume responsibility for performance of the agreement. The other entities may be identified as End Recipients.

GUIDE NOTE 3

Background clauses. Background clauses are used as an aid to interpreting the operative provisions. They can be modified for the particular agreement if necessary.

GUIDE NOTE 4

Funding period. The agreement provides for a funding period, during which funding must be spent and the funded project performed, rather than a term. The agreement will only terminate if the donor agency takes steps to do so under clause 20. There may remain some outstanding obligations after the end of the funding period, for example if the donor agency requires audited financial statements for the financial year in which the funding period concludes.

If a term is to be included, the agreement will need to be modified. Consider if, in these circumstances, it is necessary to separately provide for a funding period.

GUIDE NOTE 5

Funding in instalments. Funding can be payable in any number of instalments, in advance or in arrears. The initial instalment will be payable in advance, and generally future progress payments will be too. Progress payments are paid upon receipt of satisfactory progress reports. Adjust the payment schedule as necessary.

GUIDE NOTE 6

Commonwealth funding. The agreement does not provide for a situation where there may be back-to-back funding, eg where the donor agency is providing funding from, or in conjunction with, funds granted to it by a third party, eg the Commonwealth. In these situations the third party may attach conditions to its funding which also need to be replicated in the donor agency's funding agreement with the recipient.

If this is the case for a project, the agreement should be modified to ensure that third party funding conditions are imposed on the recipient and to add additional protections for the donor agency, eg to ensure that availability of third party funding is a pre-condition to payment of the funding by the donor agency and to give the donor agency the right to terminate where third party funding is withdrawn.

GUIDE NOTE 7

Specified Personnel. If certain individuals are critical to the success of a project, they may be named as specified personnel of the funding recipient. Minimum hours during which they must work on the project may also be specified. The recipient retains the right to substitute equivalent personnel as replacements but these must be approved by the donor agency.

GUIDE NOTE 8

Insurance. If appropriate, a specific level of public liability insurance may be substituted, eg "broad form public liability insurance in the amount of not less than \$10 million in respect of each occurrence and unlimited in the aggregate". The amount of insurance chosen would reflect the size of the funding, the risk attached to the project and the recipient's ability to obtain the required level of insurance. If the donor agency self-insures through the Treasury Managed Fund, the donor agency may be able to obtain advice from the TMF as to an appropriate level of cover.

Broad form public liability insurance covers the insured in respect of their liability to the public for personal injury or property damage. It should therefore be available to protect the recipient in the event that they incur such liability in the conduct of the project.

GUIDE NOTE 9

Unexpended funding. Unexpended funding must be returned within 30 days of the happening of specific trigger events, listed in clause 6.4. These include the expiry of the Funding Period. Clause 19.2 allows the recipient to request that they be allowed to retain these funds for a further period. The request will need to be made before expiry of the 30 day period since, if it is not approved within that time, the funds must be returned. Of course, it would always be possible to vary the 30 day period for return of funds to allow more time to consider the request for retention, but the current timeframes should encourage the lodgement of timely requests and their early determination by the donor agency.

GUIDE NOTE 10

Execution as a deed. Funding agreements may not always be enforceable as contracts. In some cases they may be characterised as conditional gifts. Executing the agreement as a deed may support its legal enforceability if it should be classed as a conditional gift.

GUIDE NOTE 11

Execution by recipient. If execution is by a company, the signatories should be two directors or a director and company secretary, unless the company has a sole director and secretary in which case the sole Director and Secretary need only sign once, adding the statement "Sole Director and Company Secretary" as position title.

Unless a company's constitution requires it, it is not necessary for a company to execute a deed using its company seal.

GUIDE NOTE 12

Notices by email. By inserting an email address, a party agrees that notices may be served on that party by email. Delete the reference(s) to the email if you would prefer this not to occur.

GUIDE NOTE 13

Funding. Funding may be paid in one or any other number of instalments, in advance or in arrears. The initial instalment will be payable in advance and generally future instalments will be too although a final instalment may be held back until completion. Unless the amount of Funding is very small, it is generally advisable not to pay all Funding up front. Often the most effective means of ensuring agreed outcomes is to pay in instalments, upon receipt of satisfactory progress reports, coupled with active monitoring of the project over the funding period. Adjust the payment schedule as necessary.

GUIDE NOTE 14

Special conditions. Additional conditions specific to the particular agreement may be inserted here and in other items of Schedule 1. As with all additional conditions added, ensure that they are not inconsistent with the template conditions. Be aware that under Part 2 of Attachment 7, standard conditions will take precedence over special conditions to the extent of inconsistency.

GUIDE NOTE 15

Budget. Before executing the agreement, replace the template with an agreed budget for the project.

GUIDE NOTE 16

Reports. Consider what reports you require for the agreement and adapt accordingly. You may take the view that the Audited Financial Report is only necessary for high value projects, for example involving several hundred thousand dollars. Note that the Final Report also includes a financial acquittal component.

GUIDE NOTE 17

Performance report template. Attach a performance report template to Attachment 3A. You can use or adapt the template available at www.premiers.nsw.gov.au/GrantsAdministration/GoodPractice/MonitorAcquitGrants.htm.

GUIDE NOTE 18

Income and expenditure statement template. Attach an income and expenditure statement template to Attachment 3B. You can use or adapt the template available at www.premiers.nsw.gov.au/GrantsAdministration/GoodPractice/MonitorAcquitGrants.htm.

GUIDE NOTE 19

Asset register template. Attach an asset register template to Attachment 3C. You can use or adapt the template available at www.premiers.nsw.gov.au/GrantsAdministration/GoodPractice/MonitorAcquitGrants.htm.

GUIDE NOTE 20

Acquittal certificate. Attach an acquittal certificate template to Attachment 3D. You can use or adapt the template available at www.premiers.nsw.gov.au/GrantsAdministration/GoodPractice/MonitorAcquitGrants.htm.

GUIDE NOTE 21

Project plan. Before executing the agreement, replace the template with an agreed project plan for the project.

The project plan may be written in any format. It should describe the project and where relevant identify:

1. All project milestones and expected outcomes/outputs and their target dates for completion.
2. All related project tasks and their target dates for commencement and completion.
3. Names and details of roles and responsibilities of personnel involved and their organisations.

Other details may be relevant according to the particular project.

Performance Measures, Outcomes or Outputs identified in the Project Plan may be cross-referenced in the Progress Report(s).

GUIDE NOTE 22

Agreement. The definition of the “Agreement” assumes that all documents that make up the agreement will be attached to it. This has the advantage that all documentation is collated. However, if you wish to incorporate other documents by reference only then amend the definition of “Agreement”, for example to:

“Agreement” means this agreement including:

- (a) the Attachments;
- (b) *[insert sufficient description of document to be taken as part of the agreement, eg by title and date or title, parties and date]* which is incorporated into this Agreement by reference.”