



# Commercial Broker Agreement

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**Agreement number:** TBA



**Between**

Western Australia Land Information Authority (Landgate)

**And**

NAME

**(Broker)**

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SAMPLE

## PARTIES

This Agreement is made on the date shown in **item 1 of the Schedule** between Landgate and the Broker as specified in **item 2 of the Schedule**.

## BACKGROUND

- A. Landgate is the owner of the Intellectual Property in the Location Information Products.
- B. The Broker has responded to Landgate's Expression of Interest to become a Broker of the Location Information Products.
- C. The Broker has successfully met Landgate's Qualitative Criteria for appointment, subject to the terms of this Agreement.
- D. Landgate has agreed to provide the Broker with a Web Service to access the Location Information Products using a unique Broker ID, to facilitate the supply of Location Information Products to End Users on behalf of Landgate.

## AGREED TERMS

### 1. Definitions

The following words and expressions are capitalised in this Agreement and have the meanings assigned to them as shown below, except where the context implies otherwise:

**Agreement** means this document, the Commercial Broker Licence, including any Schedule, Annexure or other document incorporated by reference into this document.

**Auditor General** means the Auditor General for Western Australia.

**Bank Guarantee** means the amount specified in **item 15 of the Schedule**.

**Broker ID** means the client identification code issued by Landgate to the Broker, to assist with identification of the Broker and access to the Web Service.

**Broker's Outputs** means the Broker's own products and services which:

- (a) are produced independently by the Broker;
- (b) are not part of Landgate's business or operations;
- (c) do not resemble and are not similar to the Location Information Products;
- (d) supplement but cannot replace the Location Information Products and do not alter the inherent nature or integrity and accuracy of the Location Information Products;
- (e) will be supplied at a price determined entirely by the Broker, and may include the following products and services:
  - (f) bundling or packaging together of several Location Information Products;
  - (g) bundling or packaging of the Location Information Products with other products from the Broker's business;
  - (h) provision of integrated web portals or web services;
  - (i) provision of advanced account management functions; and
  - (j) any other Broker products which incorporates a Location Information Product.

**Broker's System** means the computer system comprising the operating, application and database systems of the Broker as specified in **item 7 of the Schedule**.

**Business Day** means any day other than a Saturday, Sunday or public holiday in Western Australia.

**Business Hours** mean 08:30am to 17:00pm Western Standard Time or Western Daylight Time on Business Days.

**Commencement Date** means the date this Agreement takes effect as specified in **item 4 of the Schedule**.

**Confidential Information** means information that:

- (a) is by its nature confidential;
- (b) is designated in writing by Landgate as confidential;
- (c) the Broker knows or reasonably ought to know is confidential and includes:
  - (i) information comprised in or relating to any Intellectual Property Rights of Landgate or the State of Western Australia;
  - (ii) Landgate information to which the Broker has access, other than information referred to in (i), which has actual or potential commercial value to Landgate;
  - (iii) information relating to internal management, computing operations, personnel, policies, strategies, practices and procedures of Landgate and/or the Government of the State of Western Australia and any information in the Broker's possession relating to the Western Australian Public Sector;
  - (iv) information in the Broker's possession relating to Landgate's customers, clients or suppliers;
  - (v) any information shared between the parties to this Agreement, pursuant to this Agreement, including the final terms of this Agreement; and
  - (vi) the contents of any documentation supplied by Landgate to the Broker, except for the Location Information Products providing the Location Information Products have been dealt with in accordance with this Agreement.

**Consultant** means any person (including the employees of that person) who is engaged by the Broker for a specific project within the Broker's own business, which requires that person to access or use the Location Information Product.

**CPI** means the CPI All Groups Index Numbers for Perth as provided by the Australian Bureau of Statistics or if the basis upon which it is determined is substantially altered, then such basis as Landgate may reasonably determine to be as near to the CPI previously referred to as possible.

**CPI Review Date** means the annual date(s) on which payments made under this Agreement may be reviewed, as specified in **item 12 of the Schedule**.

**Date of Agreement** means the date specified in **item 1 of the Schedule** or if blank, the date that the last party signed this Agreement.

**Direct Marketing** means any activity which makes it possible to offer goods or services or to transmit other messages to a person, organisation or segment of the population by post, telephone or other direct means (electronic or otherwise) aimed at informing or soliciting a response from the person, organisation or segment of the population as well as any service ancillary to the same.

**End User** means the Broker's (and any Sub-Broker's) customers, members or subscribers, who have entered into an agreement to purchase the Location Information Product. The Broker is not the End User and must not use the Location Information Product except for supply to the End User.

**Expression of Interest** means the document issued by Landgate and responded to by the Broker, outlining any relevant information or requirements that must be met before

becoming a Broker of the Location Information Products, as varied, updated and amended from time to time.

**Further Term** means the period specified in **item 13 of the Schedule** or any period of extension of the Agreement granted by Landgate under **clause 33** of this Agreement.

**GST** means the goods and services tax payable under the GST Act.

**GST Act** means the *New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Holding Over Period** means the time period after the Termination Date of this Agreement during which the parties continue the operation of this Agreement in accordance with **clause 33.3** of this Agreement.

**Intellectual Property Rights** means all rights in and to any copyright, trade mark, trading name, design, patent, know how (trade secrets) and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic field and any application or right to apply for registration of any of these rights and any right to protect or enforce any of these rights, as specified in **clause 24**.

**Internal Use or Purpose** means use of the Location Information Product for the internal personal or internal business use of the End User only.

**Landgate Software** means the computer programs, code, algorithms (if any) incorporated or provided to access the Web Service or contained within any Location Information Products and which may be necessary to use the Location Information Products.

**Location Information Product** means a collection or compilation of Location Information as specified in **item 6 of the Schedule**.

**Notice** means a written note or e-mail, given and effective in accordance with **clause 38.1**.

**Privacy Legislation** means the *Privacy Act 1988* (Cth) and any Western Australian privacy legislation which may be enacted during the Term.

**Qualitative Criteria** means Landgate's requirements that must be met before a potential broker can become an authorised Broker of Landgate's Location Information Products, including as may be detailed in any Expression of Interest.

**Register** means the document or information that must be maintained by the Broker in accordance with **item 9 of the Schedule**.

**Site** means the Broker's business premises or locations as specified in **item 8 of the Schedule**.

**Special Conditions** means additional conditions of this Agreement set out in **item 16 of the Schedule**.

**Sub-Broker** means an agent of the Broker appointed in accordance with **clause 37**.

**Term** means the period of time specified in **Item 5 of the Schedule**, unless this Agreement is terminated earlier or extended..

**Termination Date** means:

- (a) the date or latest date specified in **item 5 of the Schedule**; or
- (b) if the Agreement is terminated earlier, that date; or
- (c) if the parties enter into a Further Term or Holding Over Period, the expiry dates of the same.

**Web Service** means a customised internet system to access the Location Information Products provided under this Agreement, including an online ordering service which will be provided by Landgate to the Broker and may include Landgate Software.

## 2. Interpretation

In this Agreement, unless the contrary intention appears:

- (a) words importing the singular include the plural and vice versa and words denoting a given gender include all other genders;
- (b) reference to a person or third party includes an individual, the estate of an individual, a partnership, a body politic, a corporation and a statutory or other authority or association (incorporated or unincorporated);
- (c) references to any person or to any party to this Agreement will include that person's or party's personal representatives, executors, administrators, predecessors, successors and permitted assigns;
- (d) reference to a party includes that party's board members, officers, employees, Consultants, agents and invitees;
- (e) where any word or phrase is given a defined meaning, any other part of speech or grammatical form of such word or phrase has a corresponding meaning;
- (f) headings and bold print are for convenience only and do not affect interpretation;
- (g) a reference to a statute, ordinance, code or other law includes regulations, by-laws, rules and other statutory instruments for the time being in force and consolidations, amendments, re-enactments or replacements of any of them;
- (h) a reference to any agreement or document is a reference to that agreement or document as amended, supplemented or replaced from time to time;
- (i) where a party to this Agreement is more than one person, they are jointly and severally liable under the terms of this Agreement;
- (j) if a word or phrase is defined, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (k) references to time are to Western Standard Time or Western Daylight Time in Perth, Western Australia;
- (l) where time is to be reckoned from a day or event, that day or the day of that event is to be included;
- (m) references to currency are to Australian currency unless otherwise stated;
- (n) when the day or last day for doing an act is not a Business Day in the place where that act is to be done, then the day or last day for doing the act will be the directly preceding Business Day in the place where that act is to be done;
- (o) any Schedule, Annexure or document entered into pursuant to this Agreement whether executed at the time of entering into this Agreement or later during the Term of this Agreement, is incorporated into and forms part of this Agreement; and
- (p) no decision, exercise of discretion, judgment or opinion or approval of any matter mentioned in this Agreement or arising from it will be deemed to have been made by Landgate, unless in writing and at its sole discretion, except where otherwise expressly provided in this Agreement.

### **3. Appointment of Broker**

- 3.1 The Broker is appointed as a non-exclusive broker of the Location Information Products, for the Term and in accordance with the terms of this Agreement.
- 3.2 The Broker is appointed to use its best endeavours to undertake the Brokers role to:
  - (a) market, promote and supply the Location Information Product to End Users; and
  - (b) develop and grow the market to maximise the supply of the Location Information Product to End Users.
- 3.3 Notwithstanding appointment as a Broker, Landgate reserves its rights to:
  - (a) continue to supply the Location Information Products direct to any customer or third party;

- (b) appoint other entities as brokers;
- (c) withdraw any Location Information Products and offer new Location Information Products to the Broker;
- (d) vary any or all of the Web Service, Landgate Software or the information content and format of the Location Information Products; and
- (e) vary any or all fees and charges that must be paid.

#### **4. Broker's Establishment Conditions**

- 4.1 As soon as practicable and no later than 90 days after the Commencement Date, the Broker must effect and maintain for the Term:
- (a) the Broker's System in accordance with any system requirements to link to Landgate's Web Service, including any IT system requirements as specified in **clause 12**;
  - (b) the payment of any fees and charges through a Landgate account; and
  - (c) an ability for Landgate to access the Broker's System at no charge in order to access, review and track any usage or orders of Location Information Products.
- 4.2 Landgate, its officers, employees, contractors and agents may verify and review the use and delivery of Location Information Products and compliance by the Broker, in accordance with this Agreement.
- 4.3 A first time Broker must provide a certificate of readiness within 90 days of the Commencement Date to certify that it is operational as a Broker and in a position to fulfil all of its obligations and responsibilities under this Agreement.
- 4.4 The Broker must provide sample copies of the Broker's Outputs and the Location Information Products, as offered by the Broker to End Users, within 14 days of a request from Landgate.
- 4.5 The Broker warrants that it is not at the time of entering into this Agreement insolvent and knows of no circumstances which would entitle any creditor to appoint a receiver or to petition for winding up, or to exercise any other rights over or against the Broker's assets.

#### **5. Landgate Establishment Procedures**

- 5.1 As soon as practicable after the Broker has complied with **clause 4**, Landgate will:
- (a) record the Broker as an authorised broker entitled to access the Location Information Products;
  - (b) establish a link to Landgate's Web Service to the Broker's System;
  - (c) supply the Broker with a Broker ID and such other user names and passwords as Landgate may determine are required from time to time; and
  - (d) establish an account for the Broker.
- 5.2 Landgate may, if requested by the Broker, provide assistance to the Broker in the development and testing of the Broker's System to ensure it complies with any IT system requirements.

#### **6. Access to Location Information Products**

Once the parties have complied with **clauses 4 and 5** of the Agreement, Landgate will provide the Broker with access to the Location Information Products through the Web Service.



## 7. Storage and Location Information Product Safeguards

7.1 The Broker may:

- (a) store Location Information Products received for End Users on the server supporting the Broker's System for a maximum of 30 days after the relevant transaction, provided those Location Information Products are:
  - (i) solely for the purpose of providing backup copies for the relevant End Users; and
  - (ii) secured so as not to be accessible or used by any unauthorised persons or for any other purpose.
- (b) attach the Location Information Products (as a whole) with the Broker's Output, provided that by doing so nothing will:
  - (i) alter the format, meaning or substance of any of the Location Information Products supplied by Landgate;
  - (ii) derogate or detract from the legal rights of Landgate or the State of Western Australia in the Location Information Products or any data derived from the Location Information Products; and
  - (iii) subject to **clause 7.1(a)**, entitle the Broker to keep a copy of any portion of the Location Information Products or any data derived from the Location Information Products, on the expiration or termination of this Agreement, for any reason.

7.2 The Broker must:

- (a) supply the Location Information Products to End Users in the same condition as it is received by the Broker and in accordance with this Agreement;
- (b) do all things within its power to prevent the unauthorised use or disclosure of the Location Information Products and any related information;
- (c) ensure that the Location Information Products are only used for lawful purposes and in ways that are consistent with this Agreement and the *Land Information Authority Act 2006*; and
- (d) not alter, remove or in any way tamper with Landgate's trade mark or disclaimer on the Location Information Product.

7.3 The Broker must not:

- (a) store any Location Information Products (or any part of any Location Information Products) on the Broker's System or any other database, except for the purposes of **clauses 7.1(a) and 7.1(b)**;
- (b) alter or omit the meaning, substance, content, coordinates or spatial integrity of any Location Information Products;
- (c) introduce any virus, error or defect into, or otherwise contaminate or corrupt, or cause any instances of system downtime for Landgate;
- (d) itself, or permit any third party to, (except as permitted by law) create data or other products which are the same as, or substantially similar to the Location Information Products, or reverse engineer or rework the Location Information Products or by any means use any:
  - (i) outputs, whether or not from the Location Information Products; or
  - (ii) combination of data which includes the Location Information Products; and
- (e) make Location Information Products available to Consultants under this Agreement unless they are engaged solely for the internal purposes of the Broker.

## 8. Usage Requirements

- 8.1 The Broker and its Sub-Brokers and Consultants must not access Location Information Products for their own internal business purposes unless:
- (a) required for the performance of their obligations under this Agreement in which case both parties must ensure there is no charge, fee or commission payable for any related usage or orders of Location Information Products (except where acquired for End Users); or
  - (b) an appropriate End User agreement (apart from this Agreement) has been entered into with Landgate.
- 8.2 The Broker and its Sub-Brokers and Consultants must:
- (a) clearly and prominently display the Landgate name and logo on the Broker's website and state that it is a Landgate Authorised Broker of Location Information Products;
  - (b) not use or permit to be used, other than in accordance with this clause, the Landgate name and/or logo or any modification thereof, without the prior written consent of Landgate.
- 8.3 The Broker acknowledges that Landgate is not liable to the Broker, or any of its End Users or Sub-Brokers for any loss or damage (including loss of profits, business, revenue or data) whether in contract, tort (including negligence) or otherwise, for:
- (a) the Brokers' Outputs; or
  - (b) where the Broker combines information such that the output derogates or deviates from that obtained from the Web Service.

## 9. Register

- 9.1 The Broker must establish, maintain and implement procedures for recording and monitoring Location Information Product transactions in the Register as outlined in **item 9 of the Schedule**.
- 9.2 Landgate will provide 30 days Notice to the Broker of any intention to vary the requirements for the Register.
- 9.3 The Broker must ensure that any End User, Sub-Broker and Consultant information collected in accordance with **clauses 9.1 and 9.2** is stored securely for a minimum of 5 years from collection and provided to Landgate on request.

## 10. Related Contracts

- 10.1 Where the Broker intends to provide or supply Location Information Products to Consultants and/or End Users the Broker must:
- (a) not allow those End Users and Consultants access to any Location Information Products, unless they have entered into an appropriate agreement ("**Related Contract**"), the terms and conditions of which have first been approved in writing by Landgate;
  - (b) ensure the Related Contract reflects the access and security requirements of this Broker Agreement including:
    - (i) agreeing to be bound by and complying with the Broker's obligations under this Agreement in relation to the ownership of, access to, use of and dealing with the Location Information Products; and
    - (ii) permitting Landgate to inspect and audit the security and access procedures of End Users and/or Consultants, after Landgate gives them reasonable notice;

- (c) take all steps necessary to enforce the Related Contract with the Consultant and/or End User (including executing documents and bringing legal proceedings); and
  - (d) ensure any variation in the terms and conditions of the Related Contract are approved in writing by Landgate (except for price changes or any other clauses that may be excluded in writing by Landgate) before the variations take effect.
- 10.2 Where the Broker provides or supplies Location Information Products to Consultants and/or End Users, the Broker must ensure that the Related Contract includes terms and conditions prohibiting the:
- (a) use of the Location Information Products unless for:
    - (i) the Consultant's engagement for the Broker's internal purposes; and
    - (ii) the End User's Internal Use;
  - (b) reproducing, supplying, on-supplying, sub-licensing, disclosing or otherwise providing Location Information Products in any form to any other person;
  - (c) altering the format, meaning or substance of any Location Information Products supplied;
  - (d) displaying, distributing, supplying, licensing, hiring, letting, trading or exposing the Location Information Products for sale.

## 11. Retention of Title

- 11.1 The Location Information Products remain the sole and absolute property of Landgate as legal and equitable owner until all money due to Landgate has been paid.
- 11.2 Location Information Products will be at the End User's, Consultant's or Sub-Broker's risk from the time of delivery to them.
- 11.3 The Broker acknowledges that where it takes possession of any Location Information Products for delivery to End Users, Consultants or the Sub-Brokers or for the Broker's own use in accordance with **clause 6**:
- (a) it does so as bailee for Landgate; and
  - (b) the Broker accepts the risk for those Location Information Products until the time they are delivered to the relevant End User, Consultant or Sub-Broker.
- 11.4 The Broker must ensure that the Location Information Products are readily identifiable as Landgate's, when stored on the Broker's System.
- 11.5 The Broker's right to possession of the Location Information Products will cease if it does anything or fails to do anything which would entitle a receiver to take possession of any assets or which would entitle any person to present a petition for the winding up of the Broker.
- 11.6 Subject to Landgate providing 14 days prior Notice, it may enter on any Site where its Location Information Products are stored or where they are reasonably thought to be stored, for the purpose of examining or recovering them pursuant to this clause.

## 12. IT System Requirements and Maintenance

- 12.1 The Broker must:
- (a) undertake sufficient maintenance of the Broker's System such that its levels of service are compliant with this Agreement;
  - (b) undertake necessary improvements to the Broker's System in accordance with Landgate's reasonable requirements, including improvements recommended by any audit conducted under **clause 23.2**.

- 12.2 The Broker must comply with Landgate's IT system requirements detailing the specifications and standards required of the Broker's System.
- 12.3 The Broker will be advised by Landgate of any changes to the IT system requirements and be provided with not less than 30 days Notice of proposed changes or additions.
- 12.4 The Broker must immediately implement changes to its Broker's System in accordance with the amended IT system requirements.
- 12.5 Landgate may withdraw support of obsolete or decommissioned versions of the IT system requirements by giving the Broker 30 days Notice.
- 12.6 Landgate may modify the Web Service and where it does:
- (a) will endeavour to provide at least 30 days Notice to the Broker of such modifications that may adversely affect Location Information Product availability or access;
  - (b) make a test version available (in a suitable environment) of the modifications referred to in **clause 12.6(a)** at least 30 days prior to the proposed implementation.

### **13. Broker's Help Desk and Landgate's Customer Service**

- 13.1 The Broker must at its own expense:
- (a) make available to its End Users and Consultants a customer service help desk; and
  - (b) not refer any End User enquiries to Landgate's Customer Service, without first making available the Broker's customer service help desk in accordance with this **clause 13.1** and, where necessary, making enquiries to Landgate's Customer Service directly on behalf of such End Users.
- 13.2 Subject to **clause 13.1**, Landgate will, at its own expense, make Customer Service available to the Broker during Business Hours, solely to assist the Broker with enquiries in relation to access to the Web Service.
- 13.3 Landgate will provide 30 days Notice of any permanent change in the hours of operation of its Customer Service or the availability of particular Location Information Products.

### **14. Hours of Operation**

- 14.1 Landgate will provide the Broker access to the Web Service 24 hours per day, seven days per week, subject to any system downtime, scheduled maintenance or emergency maintenance required for any reason.
- 14.2 Notwithstanding **clause 14.1**, Landgate may temporarily modify the hours of operation of the Web Service (during which time the Location Information Products may be inaccessible), providing the Broker is given reasonable notice of the same.

### **15. Security**

- 15.1 The Broker must effect and maintain adequate security measures to ensure compliance with this Agreement and any inspection that may be undertaken by Landgate demonstrates compliance to Landgate's reasonable satisfaction, particularly in relation to **clauses 7 to 10**.
- 15.2 The Broker may only acquire and or distribute any Location Information Products in accordance with the security requirements specified in **clause 15.3**.
- 15.3 The Broker must:

- (a) take all reasonable steps that a prudent operator in a similar situation would take to prevent unauthorised access, damage and interference to the Site and the Broker's System;
  - (b) have formal procedures in place to:
    - (i) provide protection (eg Firewall) against intrusion and uncontrolled access to any Location Information Product through the Internet;
    - (ii) prevent unauthorised downloading of Location Information Products before payment has been secured; and
    - (iii) ensure any Location Information Products are properly secured from interference when they are being transferred across the Internet.
- 15.4 The Broker must immediately notify Landgate of any activity that may breach the security measures referred to in **clauses 15.1, 15.2 and 15.3**.
- 15.5 Where the Broker notifies Landgate or Landgate otherwise becomes aware, that the Broker has not complied with **clauses 7 to 10 and 12 to 16**, Landgate must notify the Broker of the non-compliance and provide the Broker 14 days to correct that non-compliance.
- 15.6 If the Broker fails to correct the non-compliance specified in **clause 15.5**, Landgate may immediately terminate, give notice of termination, suspend access to, add, alter, withdraw, redefine or otherwise amend the contents of, and/or terms of access to the Web Service.
- 15.7 The Broker must ensure that its employees, contractors, agents, Sub-Brokers, Consultants and End Users are made personally aware of and agree to comply with the Broker's security obligations contained in this Agreement, before providing them with access to any Location Information Product.
- 15.8 The Broker agrees to only use Location Information Products on the Broker's System and at the Site.
- 15.9 Landgate reserves the right to periodically test the security of any Site and the Broker's System to ensure compliance with this **clause 15** to Landgate's reasonable satisfaction.

## **16. Business Continuity**

- 16.1 Landgate may develop and implement planning and procedures to meet its obligations under this Agreement and to minimise system downtime arising from the occurrence of any event which may disrupt or otherwise materially adversely affect the continuity of the Web Service ("**Landgate Business Continuity Plan**").
- 16.2 The Broker must:
- (a) document and implement business continuity planning and procedures that are reasonably satisfactory to Landgate and appropriate to the Broker's, including the appropriate priority of electronic information security programs ("**Broker Business Continuity Plan**");
  - (b) regularly review the Broker Business Continuity Plan to ensure it remains current and relevant to the Broker;
  - (c) provide Landgate a current version of the Broker Business Continuity Plan, or allow Landgate to review the Broker Business Continuity Plan, on 30 days written request from Landgate; and
  - (d) comply with any reasonable request from Landgate for the Broker to amend the Broker Business Continuity Plan.

## **17. Other Broker Obligations**

- 17.1 The Broker must:

- (a) perform the Broker's duties strictly in accordance with this Agreement;
- (b) comply throughout the Term with any and all warranties and representations made in its Expression of Interest;
- (c) always act ethically in connection with this Agreement and in accordance with good corporate governance practices;
- (d) act in good faith at all times towards Landgate and provide assistance and co-operation as practicable, on request by Landgate;
- (e) not demean, defame or otherwise denigrate Landgate;
- (f) comply with all State and Commonwealth laws relevant to this Agreement;
- (g) use its best endeavours to ensure that none of its employees, Consultants, Sub-Brokers or End Users cause the Broker to breach this Agreement;
- (h) not order or use any Location Information Products obtained under this Agreement for anything other than the performance of the Broker's role;
- (i) at its own cost, comply with all regulations, restrictions and conditions imposed by any legislation for the use of, access to, storage of and/or dealing with the Location Information Products, including but not limited to, Privacy Legislation.

## **18. Best Efforts**

18.1 The Broker must:

- (a) use its best endeavours to promote and maximise supply of the Location Information Products and work diligently to obtain more of the same;
- (b) share any information with Landgate which is likely to benefit Landgate in the marketing, development or use of the Location Information Product ; and
- (c) ensure that any notices relating to Intellectual Property Rights appearing in or on the Location Information Products or literature relating to them are not altered or removed.

## **19. Broker Acknowledgements**

19.1 The Broker agrees and acknowledges that:

- (a) Landgate is not required to install the Location Information Products on the Broker's System or to test whether the Location Information Products are capable of being processed on the Broker's System;
- (b) it may receive introductory training from Landgate for new Location Information Product launches and that training will be free of charge if conducted at Landgate's business premises. Otherwise Landgate is not required to provide any training in the use of the Location Information Products but may do so at its absolute discretion at a cost which provides a fair commercial return to Landgate in accordance with section 16 of the *Land Information Authority Act 2006*;
- (c) full responsibility for obtaining and for the consequences of using hardware, Landgate Software, computer programs and any other thing necessary to make use of the Location Information Products, remains with the Broker;
- (d) Landgate does not represent or warrant to the Broker that:
  - (i) the Location Information Products are error free or virus free; or
  - (ii) the supply of the Location Information Products will be uninterrupted;
- (e) Landgate gives no assurance or guarantee of the volume of supplies or orders for the Location Information Products which the Broker may receive or expect to receive under this Agreement; and

- (f) the Broker is responsible for:
  - (i) making its own assessment of the potential market for the Location Information Products; and
  - (ii) carrying out any marketing and promotional activities needed to stimulate and increase supply volumes during the Term.

## **20. Bank Guarantee**

- 20.1 The Broker must effect a Bank Guarantee before the Commencement Date in accordance with this **clause 20** in the amount specified in **item 15 of the Schedule**.
- 20.2 The Broker's Bank Guarantee must:
  - (a) be maintained for the Term; and
  - (b) be provided in favour of Landgate from a financial institution approved by Landgate.
- 20.3 Subject to 30 days written Notice, Landgate may review the amount secured by the Bank Guarantee and request the Broker to immediately provide a revised Bank Guarantee in accordance with the reviewed amount.
- 20.4 The Broker's credit limit in relation to Location Information Products supplied under this Agreement will be restricted to the amount of the Bank Guarantee. The Broker must also ensure that the amount owing on its account does not exceed that credit limit.

## **21. Payments and GST**

- 21.1 The Broker must pay Landgate:
  - (a) the charges per product for the Location Information Products purchased by the Broker or any Sub-Broker as specified in **item 10 of the Schedule**;
  - (b) any fees and charges specified in **item 11 of the Schedule**; and
  - (c) all taxes, duties or charges arising out of, incidental to or levied in respect of this Agreement, the Location Information Products or any goods or services supplied pursuant to this Agreement.
- 21.2 The Broker must pay for any fees or charges within 30 days of receipt of any invoice from Landgate.
- 21.3 If the Broker breaches this **clause 21** then Landgate may, without limitation, in its absolute discretion, invoke the processes specified in **clause 31.2**.
- 21.4 The Broker must immediately advise Landgate in writing of any changes to their details as shown in **item 2 of the Schedule**.
- 21.5 All payments made by the Broker are calculated without regard to GST. The Broker must pay Landgate (at the same time and in the same manner as the Broker is obliged to pay for the supply) the amount of any GST which Landgate pays or is liable to pay on a supply (as that term is defined in the GST Act), in addition to the consideration payable for that supply. Where GST is payable, Landgate will provide to the Broker, if required by the Broker, a Tax Invoice in the format and form required by the GST Act.

## **22. Increase in Prices, Fees and Charges**

- 22.1 Landgate may vary any of the fees and charges specified in this Agreement, including the fees and charges specified in **items 10 and 11 of the Schedule**.
- 22.2 All fees and charges will increase on the CPI Review Date provided the new fees and charges:

- (a) will be increased by a factor equal to the percentage increase in the annual CPI in the 12 month period preceding the CPI Review Date; and
- (b) will not be less than the fees and charges payable immediately prior to the CPI Review Date,

subject to any variation made pursuant to **clause 22.1**.

- 22.3 Landgate must, without time being of the essence and as soon as reasonably practicable, give to the Broker a notice specifying any new fees and charges.
- 22.4 Landgate reserves the right to vary any charge per product as specified in **item 10 of the Schedule** and offered from time to time. Any changes will be immediate and implemented independent of any CPI Review Date. Landgate will use its best endeavours to provide at least 30 days Notice of any such variation.

### **23. Reporting and Auditing**

- 23.1 Landgate, including its officers, employees and agents may:
  - (a) subject to providing 14 days prior written Notice, enter the Broker's premises and Sites during Business Hours to verify the use of the Location Information Products and the payments made by the Broker in accordance with this Agreement, including inspecting any facilities, records, books of account, hardware and software for such purposes;
  - (b) at any time monitor the Broker's use of the Location Information Products without notice to the Broker; and
  - (c) subject to the provision of 14 days prior written Notice, require the Broker to provide it with:
    - (i) such information notified by Landgate exclusively for the purpose of confirming the Broker's compliance with this Agreement including any IT system requirements, provision of Bank Guarantee and payments; and
    - (ii) the Register to be maintained in accordance with **clause 9**.
- 23.2 Landgate may audit the Broker, including the Broker's operations, governance, risk management and internal controls in relation to this Agreement at any time provided:
  - (a) Landgate and its Auditor do not divulge any Confidential Information gathered as a result of the audit, except to the extent required by law;
  - (b) Landgate gives the Broker 30 days notice of its intention to conduct an audit;
  - (c) Landgate will pay for the costs of any audit but the Broker must pay any costs associated with providing the Auditor with access to the Site, the Broker's accounts and records and with answering the Auditor's questions;
  - (d) Landgate will provide the Broker a copy of the final draft Audit Report for the Broker to offer explanations and comments and any such explanations and comments may result in amendment to the final Audit Report; and
  - (e) the Auditor will provide the final written Audit Report to the Broker and the manager of Landgate's internal audit function.
- 23.3 The Broker must at all reasonable times and after reasonable notice:
  - (a) provide Landgate and the Auditor will full and free access to the Broker's Sites and records (including electronic records) and provide full answers to questions asked by the Auditor;
  - (b) undertake, at its own expense, the corrective actions required under the audit report; and
  - (c) keep Landgate informed of its progress and corrective actions by dates agreed with Landgate.



- 23.4 The Broker must do all things reasonably requested, to ensure Landgate's has an ability to verify, measure, monitor and/or report on the:
- (a) Broker's compliance with the terms of the Agreement;
  - (b) Broker's Outputs;
  - (c) Broker's access, use and delivery of Location Information Products; and
  - (d) End User's satisfaction.
- 23.5 The powers and duties of the Auditor General, including those under s17 of the *Auditor General Act 2006*, are not limited or otherwise affected by the terms and conditions of this Agreement. The Broker must allow the Auditor General, or an authorised representative of the Auditor General, to have access to and examine the same items and materials as those referred to elsewhere in this **clause 23**.

## **24. Intellectual Property**

- 24.1 The parties acknowledge and agree that all Intellectual Property Rights in:
- (a) the Location Information Products;
  - (b) any data derived from the Location Information Products; and
  - (c) any documentation provided by Landgate to the Broker for the purposes of this Agreement,
- are the property of and are vested in Landgate.
- 24.2 The Broker only acquires the right to use the Location Information Products in accordance with this Agreement during the Term. The Broker does not acquire any rights of ownership in the Location Information Products.
- 24.3 The Broker recognises and agrees that the Location Information Products:
- (a) are and shall remain the property of Landgate and the State of Western Australia;
  - (b) contain proprietary information; and
  - (c) are provided on a confidential basis and must not be disclosed except in accordance with this Agreement.
- 24.4 Landgate retains the right to distribute, market and supply the Location Information Products to any other person on such terms and conditions as Landgate deems fit.
- 24.5 To the extent permitted by law, the Broker will promptly report to Landgate any known infringement by any End User, Sub-Broker, Consultant or third party, of the Intellectual Property Rights referred to in **clause 24.1**.
- 24.6 Landgate agrees that this Agreement does not transfer any Intellectual Property Rights in any computer software, the Broker's Outputs or other material created by the Broker, which forms any part of the Broker's System.
- 24.7 The Broker must not alter or remove any copyright or other proprietary notice displayed on the Location Information Products.
- 24.8 The Broker must not grant or create a security interest over this Agreement and/or the Location Information Products.

## **25. Confidentiality**

- 25.1 The parties must not disclose Confidential Information except in the circumstances of **clause 25.4**.
- 25.2 Neither party may use or make available in any form to any third party the other party's Confidential Information unless in accordance with this Agreement.

- 25.3 A Broker may only provide the Location Information Products to a Consultant, provided:
- (a) the Consultant is engaged by the Broker for a specific project requiring use of the Location Information Product;
  - (b) the Consultant receives no benefit from use of the Location Information Product except the fee paid by the Broker; and
  - (c) if required by Landgate, the Consultant has first completed, lodged with and had approved by Landgate a Consultant's Confidentiality Deed in the form prescribed by Landgate.
- 25.4 Each party must hold the other party's Confidential Information secure and in confidence, except for such Confidential Information which the first party can demonstrate:
- (a) is required to be disclosed according to the requirements of any law, stock exchange, judicial or parliamentary body or government agency;
  - (b) is or has generally become available to the public without breach of this Agreement;
  - (c) was approved for release in writing by the other party, but only to the extent of and subject to such conditions as may be imposed in such written authorisation; and
  - (d) is required to be disclosed to a Western Australian government Minister, the Western Australian Parliament or any committee or sub-committee of the Western Australian Parliament (where Landgate is the first party).
- 25.5 This **clause 25** will survive termination of this Agreement.

## **26. Privacy**

- 26.1 The Broker agrees to:
- (a) comply with the requirements of the Privacy Legislation, particularly in relation to its handling of personal information, as defined in the same, including the collection, use, disclosure and security of such information, whether or not the Broker is required by law to comply with the Privacy Legislation;
  - (b) comply with any other reasonable direction relating to privacy given by Landgate, including those relating to Landgate's own privacy policies and procedures; and
  - (c) not do anything which if done by Landgate would be a breach of the Privacy Legislation.
- 26.2 Landgate, its board members, officers, employees and contractors will not be responsible for any actions, claims, cost, proceedings, suits or demands whatsoever arising out of any breach of the Privacy Legislation by the Broker, or any Sub-Broker, End User, Consultant or third person, in relation to any Location Information Product obtained under this Agreement, or in relation to the Broker's Outputs.
- 26.3 The Broker must not use any Location Information Product for the purpose of Direct Marketing of goods or services.
- 26.4 The Broker must not release the Location Information Products to any third party where that party intends to use those Location Information Products for the purpose of Direct Marketing of goods or services.
- 26.5 The Broker will provide any assistance requested by Landgate in relation to an investigation of an allegation of misuse of any Location Information Product or contravention of the Privacy Legislation.
- 26.6 This **clause 26** will survive termination of this Agreement.

## 27. Publicity

The Broker agrees to:

- (a) only release publicity statements or any other form of advertisement or promotion that specifically refers to Landgate or Landgate's Location Information Products where:
  - (i) they have first been approved by Landgate's authorised delegate in writing (including by email); and
  - (ii) at least 24 hours written Notice has been provided to Landgate prior to any such release;
- (b) advise Landgate of any media report in relation to the Location Information Products of which the Broker is aware, at least 24 hours prior to the report being published;
- (c) not permit commercial filming or recording in relation to Landgate, without the prior written approval of Landgate's authorised delegate.

## 28. Disclaimers and Limitations on Liability

28.1 The Broker acknowledges and agrees that, other than as expressly provided for in this Agreement and to the extent permitted by law:

- (a) no warranty, condition, description or representation is given by Landgate in relation to any documentation, services and/or software provided in conjunction with this Agreement;
- (b) all representations, warranties, terms and conditions whether express or implied by use, statute or otherwise, in relation to the state, quality or fitness for purpose of any documentation, services and/or software provided in conjunction with this Agreement are excluded; and
- (c) except as provided in **clauses 28.2 and 28.3**, Landgate will not be liable to the Broker, its Sub-Brokers, End Users, Consultants, agents or third parties for any loss or damage (including loss of profits, business, revenue or data) arising from or in connection with this Agreement, whether in contract, tort, negligence or otherwise, or in relation to:
  - (i) the performance of the Web Service and Landgate Software;
  - (ii) any variation to all or part of the Web Service, Landgate Software or the information content and format of the Location Information Product;
  - (iii) any inaccuracy, omission, defect or error in the Broker's System or the Broker failing to comply with the IT System Requirements;
  - (iv) any claim for infringement of Intellectual Property Rights based on the modification, combination, operation or use of the Location Information Products with any computer programs, systems or data not furnished by Landgate; and
  - (v) the Broker's Output.

28.2 Pursuant to section 64A of the Australian Consumer Law, this **clause 28.2** applies in respect of any of the goods or services supplied under this Agreement which are not of a kind ordinarily acquired for personal, domestic or household use or consumption. To the extent permitted by law, Landgate's liability for failure to comply with a guarantee that applies under Division 1 of Part 3-2 of the Australian Consumer Law, other than a guarantee under section 51, 52 or 53 of the Australian Consumer Law, is hereby limited to:

- (a) in the case of goods, at Landgate's option, any one or more of the following:
  - (i) the replacement of the goods or the supply of an equivalent product;

- (ii) the repair of the goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring an equivalent product; or
  - (iv) the payment of the cost of having the goods repaired; or
- (b) in the case of services, at Landgate's option;
- (i) the supply of the services again; or
  - (ii) the payment of the cost of having the services supplied again.
- 28.3 This **clause 28.3** applies where any act, statute, rule or regulation (other than Division 1 of Part 3-2 of the Australian Consumer Law and regulations made in relation thereto) ("**other law**") implies in this Agreement any term, condition, warranty, right or obligation ("**implied term**"), and the other law avoids or prohibits a provision in a contract excluding or modifying the application of, exercise of or liability under such implied term. To the extent permitted by law, the liability of Landgate for any breach by it of such implied term is limited, at Landgate's option, to any one or more of the remedies referred to in **clauses 28.2(a) or 28.2(b)**.
- 28.4 To the full extent permitted by law, Landgate's total liability and the sole and exclusive remedy of the Broker for:
- (a) any system downtime which adversely affects the Broker's System or the ability of the Broker to perform the Broker's role and which is caused by Landgate, will at the option of Landgate, be either:
    - (i) the refund of Fees for any Location Information Products lost or destroyed in transit; or
    - (ii) the re-supply of the Location Information Products lost or destroyed in transit at no additional charge to the Broker; and
  - (b) any loss or damage incurred by the Broker as a result of Landgate's breach of contract, tort, negligence or otherwise, will be a maximum of half any Annual Licence Fee paid by the Broker in the year immediately preceding the event causing the loss or damage.
- 28.5 Notwithstanding anything else in this Agreement, the Broker must ensure that Landgate will not be held liable for any loss or damages claimed by End Users, Consultants, Sub-Brokers or third parties arising from or in connection with:
- (a) the modification, combination, operation or use of any Location Information Products with computer programs or other data not provided by Landgate; and
  - (b) the Broker's Outputs.
- 28.6 **Clause 28.4(a)** of this Agreement may be a "warranty against defects" for the purposes of the Australian Consumer Law. Accordingly, **clauses 28.6 to 28.11** set out the information prescribed by the Australian Consumer Law. In particular, the following statement is included as required by Regulation 90 of the *Competition and Consumer Regulations 2010*: "Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure".
- 28.7 If the Broker is a "consumer" within the meaning of section 3 of the Australian Consumer Law, the benefits to the Broker of **clause 28.4(a)** are in addition to other rights and remedies under a law in relation to the goods or services to which **clause 28.4(a)** relates.
- 28.8 In order to be entitled to claim under **clause 28.4(a)**, notice to Landgate must be given within 30 days of the date on which the alleged system downtime occurred.

- 28.9 Notice of a claim under **clause 28.4(a)** must be provided to Landgate in accordance with **item 2 of the Schedule** as soon as practicable after the alleged system downtime becomes apparent and must include:
- (a) details of the order made by the Broker under which the Location Information Products relating to the claim were provided;
  - (b) details of the alleged system downtime; and
  - (c) contact details of the Broker making the claim.
- 28.10 The Broker will bear the expense of any claim made in relation to **clause 28.4(a)**.

## 29. Indemnity

- 29.1 The Broker must indemnify and keep indemnified, hold harmless and defend Landgate, including any board member, officer, employee, contractor or agent of Landgate, from and against any and all actions, proceedings, claims or demands for costs, losses, damages and expenses, which may be brought against or made on Landgate arising from, or incurred by reason of, or in connection with:
- (a) any unlawful or wilfully wrong act or omission of the Broker or Sub-Broker or their respective employees, agents or officers arising in relation to this Agreement;
  - (b) any breach of this Agreement, tort or negligence by the Broker or Sub-Broker or their respective employees, agents, contractors or officers;
  - (c) any unauthorised use of the Broker ID or any other Broker passwords or similar;
  - (d) the Broker's Outputs;
  - (e) the infringement of Intellectual Property Rights based on the modification, combination, operation or use of the Location Information Products with any computer programs, systems or data not furnished by Landgate,
- except to the extent such loss is caused by Landgate's negligence or breach of this Agreement.
- 29.2 The Broker agrees to:
- (a) notify Landgate of and to provide all information in its possession or control in relation to any breach of this Agreement by an End User, Sub-Broker, Consultant or third party;
  - (b) provide all reasonable assistance in any action taken or proposed to be taken by Landgate in enforcing its rights under this Agreement; and
  - (c) promptly advise Landgate in writing of any actions, suits, claims, demands, proceedings, losses, damages, compensation, sums of money, costs, charges and expenses which may be brought, claimed or threatened against the Broker, Sub-Broker or Landgate for or relating to any Location Information Product.
- 29.3 This **clause 29** will survive termination of this Agreement.

## 30. Insurance

- 30.1 The Broker must take out and maintain at its sole expense for the Term:
- (a) all statutory workers' compensation insurance required by law;
  - (b) a valid and enforceable product and public liability insurance policy with an insurer approved by the Australian Prudential Regulation Authority for a sum insured of at least \$10,000,000 for each claim; and
  - (c) a valid and enforceable professional indemnity insurance policy with an insurer approved by Landgate, for the actions or omissions of the Broker, its directors, officers, employees, agents, Sub-Brokers and Consultants for a sum insured of at least \$5,000,000 per occurrence.

- 30.2 The Broker must disclose this Agreement to any insurer from whom such insurance referred to in this **clause 30** and provide proof of this disclosure by a written confirmation from the insurer to Landgate.
- 30.3 The Broker must notify Landgate immediately of any cancellation or non-renewal of any insurance policies required by this Agreement.
- 30.4 Landgate may, in its absolute discretion, subject to the provision of 60 days prior written Notice to the Broker, reasonably require the Broker to increase the level of insurance obtained by the Broker, as referred to in this **clause 30**.
- 30.5 The Broker must purchase a special professional indemnity policy covering a run off period for a minimum of 7 years (continuing) in the event of:
- (a) cessation of the Broker's business;
  - (b) termination of this Agreement resulting from the Broker ceasing to operate, becoming insolvent or a receiver/manager, trustee in bankruptcy, administrator or similar officer being appointed to take charge of all or part of the Broker's property;
  - (c) a petition being presented for the winding up or dissolution of the Broker; or
  - (d) the Broker terminating this Agreement.
- 30.6 The Broker must provide to Landgate:
- (a) a certificate of currency or other policy documentation as deemed reasonably necessary by Landgate, as evidence of the insurance held by the Broker to meet the requirements of this **clause 30**; and
  - (b) a copy of each annual renewal of the Broker's certificate of currency, on receipt from its insurer.

## 31. Default and Termination

- 31.1 Either Party may terminate this Agreement by giving the other Party at least 30 days Notice in writing.
- 31.2 If the Broker fails to perform any of its obligations under this Agreement Landgate may:
- (a) give the Broker a Notice describing the default and requiring the Broker to remedy the default within 7 days;
  - (b) immediately (without notice) suspend part or all of the Broker's access to the Web Service and Location Information Products, until such time as the Broker remedies the default;
  - (c) charge the Broker interest on any overdue amounts at a rate equal to 2% above the applicable base lending rate of the Commonwealth Bank, as determined by Landgate, calculated on a daily and cumulative basis from the payment due date until the date of payment in full;
  - (d) charge the Broker a default fee for all costs reasonably incurred by Landgate in relation to the enforcement and/or collection of any overdue amounts; and
  - (e) immediately draw on or require payment under the Bank Guarantee to an amount equal to the total amount owing to Landgate and any other charges owed by the Broker.
- 31.3 To the extent that Landgate is required to do any matter or thing which the Broker should have done or is required to do under this Agreement, the Broker agrees:
- (a) to pay Landgate, within 7 days of receiving an invoice for such matter from Landgate, the full amount of such invoice without setoff or deduction; and

- (b) that where the Broker does not make payment within 7 days, Landgate may immediately take action to recover any sums due to it as and by way of liquidated debt, in a court of competent jurisdiction.
- 31.4 Landgate may terminate this Agreement immediately by Notice to the Broker if:
- (a) the Broker fails to remedy a default after being given 14 days Notice by Landgate;
  - (b) anything occurs the effect of which is to transfer, directly or indirectly, the management or control of the Broker to another person or third party;
  - (c) there is any change in control of the Broker within the meaning of the *Corporations Act 2001* (Cth);
  - (d) the Broker is wound up, becomes insolvent or has a liquidator, provisional liquidator, administrator, receiver, manager or receiver and manager appointed;
  - (e) the Broker fails to comply with **clauses 4, 6, 7.1, 7.2, 9.1, 9.2, 10, 11, 12, 20, 21, 22, 23, 24.7, 25, 26, 27, 30, 35, and 43.1** of this Agreement.
- 31.5 If Landgate ceases to be a public authority within the meaning of section 3(1) the *State Supply Commission Act 1991*, either Party may terminate the Agreement within 30 days by written Notice.
- 31.6 Any termination of this Agreement will not affect any accrued rights or liabilities of any party, including rights to injunctive relief or any liability to account for profits from any breach of this Agreement.

## 32. Obligations when Agreement Ends

- 32.1 The expiration or termination of the Agreement does not affect any rights, liabilities or obligations of the parties as a result of anything occurring before the expiration or termination.
- 32.2 On termination of this Agreement the Broker must immediately:
- (a) pay Landgate all prices, fees and charges that are owing;
  - (b) cease to use all Location Information Products;
  - (c) delete, expunge, erase or destroy any Location Information Products or copies of the same, in the possession, custody or control of the Broker within 30 days of the Termination Date;
  - (d) maintain the security and confidentiality of all of Landgate's Confidential Information;
  - (e) return to Landgate, or erase or destroy, all of Landgate's Confidential Information which is in the possession, custody or control of the Broker;
  - (f) maintain the security and integrity of the Register in accordance with **clause 9**;
  - (g) co-operate with Landgate in every other respect, as it may reasonably require, to minimise any loss, damage or inconvenience to Landgate and its customers resulting from the expiration or termination of the Agreement.
- 32.3 The Broker must provide Landgate with a Notice certifying that **clause 32.2** has been complied with, within 30 days of the Termination Date.
- 32.4 The Broker must permit Landgate or any person authorised by Landgate to audit the Broker in accordance with **clause 23**.
- 32.5 This **clause 32** survives the termination of this Agreement.

### **33. Further Term or Holding Over Period**

- 33.1 The Broker may exercise an option to extend this Agreement for the Further Term set out in **item 13 of the Schedule**, on the terms and conditions of this Agreement (except for this option to extend) provided:
- (a) the Broker is not in breach of any of the terms and conditions of this Agreement;
  - (b) the Broker makes a written request to Landgate that the Agreement be extended, at least 3 months prior to the expiration of the Term; and
  - (c) Landgate, in its absolute discretion, agrees to that request.
- 33.2 If Landgate consents, the Agreement will be extended for the Further Term, will commence on the day after this Agreement expires and will include any increased fees and charges in accordance with this Agreement.
- 33.3 Subject to Landgate's approval, if the Agreement is not extended but the Broker:
- (a) is not in arrears; and
  - (b) continues to make any payments required under this Agreement,
- this Agreement will continue in operation in all respects during a Holding Over Period, terminable by either party on not less than 30 days written Notice with any payments payable monthly in advance on a pro rata basis.
- 33.4 If this Agreement is not extended for a Further Term or Holding Over Period, this Agreement will cease at the expiration of the Term or sooner if terminated earlier.

### **34. Force Majeure**

- 34.1 A party to this Agreement will not be entitled to exercise its rights and remedies upon the default of the other party if that default:
- (a) is caused by an act or event beyond the reasonable control of that other party;
  - (b) continues for greater than one month; and
  - (c) was not reasonably foreseeable at the time this Agreement was entered into.
- 34.2 Both parties will be released from their respective obligations in the event of national emergency, war, prohibitive governmental legislation or if any other cause beyond the reasonable control of the parties renders performance of this Agreement impossible.
- 34.3 Neither party will be in breach of its obligations which it cannot fulfil as a result of an event contemplated in **clauses 34.1 and 34.2**, provided each party notifies the other as soon as a party believes an occurrence has occurred of the type contemplated in **clauses 34.1 and 34.2**.
- 34.4 If the situation specified in **clauses 34.1 or 34.2** occurs, the Broker must comply with **clause 32**.

### **35. Assignment**

- 35.1 The Broker must not assign, transfer or sub-contract its rights under this Agreement unless it has first obtained the written consent of Landgate, which may be withheld in its absolute discretion.
- 35.2 If the Broker is a corporation (other than a public company as defined in the *Corporations Act 2001 (Cth)*) the Broker is deemed to have assigned the Agreement if:
- (a) anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Broker to another person; or
  - (b) there is any change in control of the Broker within the meaning of the *Corporations Act 2001 (Cth)*.



35.3 The assignee must comply with the Qualitative Criteria, prior to Landgate approving any assignment.

## 36. Dispute Resolution

36.1 Before resorting to external dispute resolution mechanisms, the parties must attempt to settle by negotiation in good faith any dispute in relation to this Agreement and where practicable, each party will refer the matter to personnel who have authority to intervene and direct some form of resolution.

36.2 Either party may give the other party formal Notice in writing of a dispute, and if the dispute is not settled within 10 Business Days, it must be submitted to the dispute resolution process described in **clauses 36.3 and 36.4**.

36.3 It is agreed by both parties that the dispute resolution process will first consist of mediation.

36.4 In the absence of agreement, the mediation will be conducted by a single mediator.

36.5 The mediator is to be appointed by the *President of the Law Society of Western Australia* within 10 Business Days of request for appointment by one party to the other.

36.6 During the mediation:

- (a) the parties may not be represented by legal practitioners;
- (b) the mediator will determine the process for mediation; and
- (c) the costs of the mediation will be shared equally by the parties.

36.7 If the dispute remains unresolved after 30 days and both parties have made genuine attempts to resolve the dispute in accordance with this **clause 36**, either party may then have recourse to the courts.

## 37. Sub-Brokers

37.1 The Broker may appoint a Sub-Broker for the sole purpose of supplying or taking orders for Location Information Products, provided the Broker:

- (a) obtains Landgate's prior written approval of the Sub-Broker and the contractual arrangements for the same;
- (b) provides any supporting information if required by Landgate, including details of the Sub-Broker's company ownership and relationship, corporate governance, principal activities, technical capabilities, commercial capabilities, anticipated markets and contract documentation, or any other requirement specified in the Qualitative Criteria; and
- (c) pays any prices, fees and charges specified in **items 10 and 11 of the Schedule**, including any fees specific to appointment as a Sub-Broker.

37.2 The Broker must:

- (a) only provide access to Location Information Products to any Sub-Broker through the Broker's Systems;
- (b) pay for any Location Information Products supplied to the Sub-Broker, regardless of whether the Sub-Broker pays the Broker for the Location Information Product; and
- (c) ensure that any Location Information Product is only used for the Internal Use of the End User, not the Internal Use of the Broker or Sub-Broker.

37.3 The parties acknowledge and agree that, without limiting **clause 37.1**, any contractual arrangements the Broker enters into with a Sub-Broker must ensure:

- (a) the relevant terms and conditions of this Agreement also apply to any Sub-Broker and include a provision that prohibits the Sub-Broker from appointing sub-agents;

- (b) supply orders for Location Information Products taken by the Sub-Broker are accounted for separately and not accumulated with those of the Broker;
- (c) Landgate will be permitted to inspect any Sub-Broker's contractual arrangements, accounts and records which arise from or relate to any part of the Broker's duties;
- (d) the Broker remains entirely responsible for the Sub-Broker's acts or omissions in carrying on anything that the Sub-Broker may do under or in connection with this Agreement;
- (e) the Broker indemnifies Landgate fully for any loss Landgate suffers or against any third party liability it incurs, that is caused or contributed to by an act or omission of a Sub-Broker carrying on anything that the Sub-Broker does under or in connection with this Agreement;
- (f) the contractual relationship between the Broker and Landgate does not impose any express or implied legal obligation of any nature whatsoever, in contract or by any other means, on the part of Landgate to the Sub-Broker;
- (g) Landgate may withdraw its consent to any or all of the Broker's contractual arrangements with Sub-Brokers at any time by Notice and the Broker must terminate the same, within 7 days of the date of such Notice; and
- (h) the details of any Sub-Broker, as specified in **item 14 of the Schedule**, are advised to Landgate in writing and updated in the same manner, whenever those details change.

37.4 If Landgate withdraws its consent to any Sub-Broker arrangements the Sub-Broker must cease acting as a Sub-Broker and Landgate may also, (acting in its absolute discretion):

- (a) terminate this Agreement;
- (b) terminate any other contracts it has with the Broker; and
- (c) neither Landgate, nor the State of Western Australia will be subject to any claim for damages or any other loss for any contracts terminated under this clause.

## 38. Notices

38.1 Any notice given under this Agreement must:

- (a) be in writing and signed by a person duly authorised by the sender;
- (b) be addressed to the intended recipient at the address, facsimile number or e-mail address specified in **item 2 of the Schedule** (or **item 14 of the Schedule** for any Sub-Broker(s)), or the address, facsimile number or email address last notified by the intended recipient to the sender; and
- (c) be given and will be taken to have been given or made:
  - (i) for delivery in person, when delivered;
  - (ii) for posting, 3 Business Days after posting (or 7 Business Days if to or from a place outside Australia);
  - (iii) for facsimile transmission, at the time of transmission the sender's facsimile machine produces a report confirming successful transmission of the facsimile in its entirety. However, if transmission occurs at a time later than 4:00pm at the recipients location, the Notice will be deemed duly given at 9:00am on the next Business Day; and
  - (iv) for email, when the e-mail enters the recipient's email server.

## 39. Inconsistency and Precedence

- 39.1 If there is any inconsistency between:
- (a) this Agreement; and
  - (b) the Schedule to this Agreement,
- the Schedule prevails to the extent of that inconsistency.
- 39.2 If there is any inconsistency between this Agreement and the terms and conditions for a Landgate Account, this Agreement prevails to the extent of that inconsistency.

#### **40. Conflict of Interest**

- 40.1 The Broker must disclose to Landgate, any information that is or might be relevant to determining whether an actual, potential or perceived conflict of interest exists or might exist in relation to this Agreement or the performance of this Agreement by the Broker.
- 40.2 Landgate may, in its discretion, terminate the Agreement if it considers that the Broker has, or could reasonably be considered to have, an actual, potential or perceived conflict of interest in relation to the performance of the Agreement by the Broker.

#### **41. No Bribe, Inducement or Offer of Employment**

- 41.1 The Broker must not, without the prior written consent of Landgate, directly or indirectly approach or communicate with any officer or employee of Landgate having any connection or involvement with the Agreement for:
- (i) an offer of employment; or
  - (ii) availability of employment,
- with the Broker or any related entity.
- 41.2 The Broker must not directly or indirectly offer a bribe, gift or inducement to any officer or employee of Landgate in connection with the Agreement.

#### **42. Use of Lobbyists**

The Broker warrants and represents to Landgate that any Lobbyist [as that term is defined in *Premier's Circular No 2007/09* (see <http://www.publicsector.wa.gov.au/SiteCollectionDocuments/Module%20%20Communication%20and%20Official%20Information.pdf>)] the Broker has employed, engaged or has otherwise involved, directly or indirectly, in connection with the Agreement, is duly registered as a "Lobbyist" in terms of that Premier's Circular and has fully complied with the obligations under it.

#### **43. General Terms**

- 43.1 The Broker must obtain Landgate's prior written consent and do all things reasonably requested by Landgate before registering the appropriate documentation with Australian Securities and Investment Commission to result in a change of name of the Broker.
- 43.2 If any provision of this Agreement becomes invalid, illegal or unenforceable for any reason, this Agreement will remain otherwise in full force apart from such provision, which will be deemed deleted or read down to the extent reasonable to make it valid and enforceable, at Landgate's election.
- 43.3 The waiver by either party of any default or breach of this Agreement will not constitute a waiver of any other or subsequent default or breach.
- 43.4 This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements, arrangements, understandings and representations whether written or oral, for the subject matter of this Agreement.

- 43.5 The rights, powers and remedies provided under this Agreement are cumulative and not exclusive of any rights, powers or remedies provided by law or any other right or remedy.
- 43.6 The Broker must do all things and sign all documents necessary to give effect to the provisions of this Agreement.
- 43.7 The Agreement may be varied by the parties. Any variation of the terms and conditions of the Agreement will only be binding if in writing and signed by both Parties.
- 43.8 The Parties are not partners or joint venturers and the Broker is not Landgate's agent.
- 43.9 This Agreement will be construed and governed in all respects by the law for the time being in force in Western Australia. The Parties submit to the non-exclusive jurisdiction of the courts of Western Australia.
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SAMPLE

# SCHEDULE

Item 1            **Date of Agreement**

Item 2            **Details of Parties**

Details	Landgate	Broker
<b>Business Name</b>	The Western Australian Land Information Authority, a body corporate established by the <i>Land Information Authority Act 2006</i> and trading as Landgate	
<b>ABN</b>	86 574 793 858	
<b>Contact Person</b>	Pepita Chan, Account Manager, Business & Government Sales	
<b>Address for service of Notices</b>	1 Midland Square, Midland, Western Australia 6056	
<b>Telephone</b>	(08) 9273 7139	
<b>Mobile</b>		
<b>Fax</b>	(08) 9273 7205	
<b>Email Address</b>	<a href="mailto:pepita.chan@landgate.wa.gov.au">pepita.chan@landgate.wa.gov.au</a> <a href="mailto:licensing@landgate.wa.gov.au">licensing@landgate.wa.gov.au</a>	
<b>Web Address</b>	<a href="http://www.landgate.wa.gov.au">www.landgate.wa.gov.au</a>	

Item 3            **Agreement Number**

Item 4            **Commencement Date**

Item 5            **Term and Termination Date**

Item 6            **Description of Location Information Products able to Broker**  
Property Interest Reports

Item 7            **Broker's System**

**Item 8 Sites**

**Item 9 Register (clause 9)**

The Broker must record and monitor Location Information Products transactions in the Register including:

1. date, time and details of orders or requests for Location Information Products by each End User;
2. date and time of delivery of Location Information Products to End Users;
3. the name and contact address of each End User and Consultant;
4. a breakdown of orders or requests for Location Information Products by the Broker and each of its Sub-Brokers; and
5. date, time and details of each access of Location Information Products by a Consultant.

**Item 10 Location Information Product Charges (clauses 21 and 22)**

Commercial Product	Wholesale charge per product	Payment Method
Property Interest Report	\$45.95 (plus GST) per report. The recommended retail price is \$54.95 (inc GST).	Payable monthly in arrears.

**Item 11 Fees and Charges (clauses 21 and 22)**

Charge Description	Amount	Payment Method
Annual Licence Fee	\$2,500 (plus GST) per annum.	Payable annually in advance.
Set-up Charge	\$2,500 (plus GST) one off payment.	Payable on the Commencement Date.
Sub-Broker Access Charge	\$1,000 (plus GST) one off payment per Sub-Broker added.	Payable on the confirmation of every additional Sub-Broker.
Licence Variation or Renewal Fee	\$147 (plus GST) per hour.	Payable on the Variation or Renewal.

**Item 12 CPI Review Date(s) (clause 22)**

Annually on 1 July.

**Item 13 Further Term (clause 33)**

**Item 14 Sub-Broker Details (clause 37)**

<b>Sub-Broker</b>	<b>Details</b>
<b>Business Name</b>	
<b>ABN</b>	
<b>Contact Person</b>	
<b>Address for service of Notices</b>	
<b>Telephone</b>	
<b>Mobile</b>	
<b>Fax</b>	
<b>Email</b>	
<b>Web Address</b>	

**Item 15 Bank Guarantee (clause 20)**

The amount equivalent to Landgate's estimate of the fees and charges payable by the Broker during a 60 day period.

On the Commencement Date the Bank Guarantee amount is approximately \$

**Item 16 Special Conditions (clause 1)**

16.1 Landgate's recommended retail charge per Location Information is a recommendation only, not a requirement. There is no obligation on the Broker to offer the Location Information Product at Landgate's recommended retail price and the Broker has discretion as to the price it offers End Users.

# SIGNING PAGE

## Landgate's Execution

Signed for and on behalf of the Western Australian Land Information Authority in accordance with authorisation under section 87 of the *Land Information Authority Act 2006*, in the presence of:

\_\_\_\_\_

\_\_\_\_\_

Signature of Witness

\_\_\_\_\_

Name of Witness (print)

Date:     /     /

## Broker's Execution

**Executed** by .....(ABN.....) in accordance with section 127 of the *Corporations Act 2001*:

\_\_\_\_\_

Signature of Director

\_\_\_\_\_

Signature of Director / Company Secretary

\_\_\_\_\_

Name of Director (print)

\_\_\_\_\_

Name of Director / Company Secretary (print)

Date:     /     /

Date:     /     /



**OR**

**Executed** by .....(ABN.....) in accordance with section 127 of the *Corporations Act* 2001:

\_\_\_\_\_  
Signature of Sole Director/Sole Secretary

\_\_\_\_\_  
Name of Sole Director/Sole Secretary (print)

Date:    /    /

SAMPLE