

Model clauses on the ownership of intellectual property rights in developed software for use by Commonwealth agencies subject to the *Financial Management and Accountability Act 1997* in information and communication technology contract negotiations starting from 1 October 2010

Agreed Terms

1. In this Contract, except where the contrary intention is expressed, the following definitions are used:

Agency A Commonwealth Government agency subject to the *Financial Management and Accountability Act 1997* (Cth).

Associated Documentation Documentation which is owned by the Contractor or in which the Contractor has rights to sub-licence and is associated with the Developed Software as it describes the characteristics of the Developed Software (including but not limited to technical, functional and performance characteristics) and/or it allows the Customer and the Commonwealth to make full use of the Developed Software.

Associated Tools Tools, object libraries and methodologies owned by the Contractor or in which the Contractor has rights to sub-licence that relate to the Developed Software.

Commercial Exploitation Any commercial exploitation, but does not include any use, support, maintenance, modification, enhancement or other activity conducted in relation to the Developed Software, Associated Documentation, Associated Tools, Software or Tools, where such activities are conducted by a service provider engaged by the Commonwealth to provide services to the Commonwealth on commercial terms.

Commonwealth The Commonwealth of Australia.

Contract This agreement between the Customer and the Contractor.

Contractor	The party specified in item [insert clause number] of the Contract Details and includes its subcontractors and Personnel.
Customer	The party specified in item [insert clause number] of the Contract Details.
Developed Software	The software (including the source code) created by the Contractor under this Contract.
Harmful Code	Any virus, disabling or malicious device or code, worm, Trojan, time bomb or other harmful or destructive code, but does not include any software lock or other technical mechanism that is included to manage the proper use of any software.
Open Source Licence	The open source licence agreement set out in Schedule [insert number].
Software	Software (including the source code) which is owned by the Contractor or in which the Contractor has rights to sub-license.
Tools	Tools, object libraries, methodologies owned by the Contractor or in which the Contractor has rights to sub-license.

.....

Ownership of the intellectual property rights in the Developed Software

2. All relevant intellectual property rights in the Developed Software, Associated Documentation and Associated Tools will, upon their creation, vest in the Contractor.
3. For the avoidance of doubt, unless expressly stated to the contrary, ownership of relevant intellectual property rights in Software, Tools or other materials that existed at the commencement of the Contract is not affected.
4. The Contractor must provide the Customer with a copy of the Developed Software, Associated Documentation and Associated Tools at the acceptance testing stage or within 14 days of a written request from the Customer to the Contractor.

Provision of Associated Documentation

5. The Contractor must provide the Customer with up to date technical and operator Associated Documentation containing sufficient information to enable the Customer to make full use of the Developed Software at all times.

Documentation requirements [*Optional clause – may already be in contract*]

6. The Associated Documentation must, at the time of delivery,:
 - (a) be current and accurate and consistent with the specifications;
 - (b) adequately explain key terms and symbols; and
 - (c) unless specified otherwise in item [insert number] of the contract details, be in English.

Licence to the Commonwealth

7. The Contractor will provide the Commonwealth with a perpetual, irrevocable, non-exclusive, [world-wide (*optional additional term*)], royalty free, fully paid up licence to all relevant intellectual property rights, except a right of Commercial Exploitation, in the Developed Software, Associated Documentation and Associated Tools for any use for government activities.
8. This licence includes a right to the Commonwealth to sub-license. For the avoidance of doubt, this right to sub-license includes the right to engage third parties, contractors, or outsource suppliers of information technology services, to do anything with the Developed Software, Associated Documentation and Associated Tools that the Commonwealth is entitled to do under clause 7, on behalf of the Commonwealth.
9. For the avoidance of doubt, the right to sub-license that is granted to the Commonwealth does not include a right to sub-license third parties, contractors, or outsource suppliers of information technology services to engage in Commercial Exploitation of the Developed Software, Associated Documentation or Associated Tools.
10. Where the Commonwealth relies on its right to sub-license, it may do so without the Contractor's consent and without any financial consequences for the Customer, the Commonwealth, the sub-licensee or any other third party, contractor, or outsource supplier of information technology services.
11. For the avoidance of doubt, the Commonwealth is entitled to use the source code in the Developed Software for any use for government activities except Commercial Exploitation of the Developed Software.
12. The licence to the Commonwealth is not to be subject to any obligation on the Customer, an Agency or the Commonwealth to receive support, maintenance, upgrades or other services from the Contractor only.
13. For the avoidance of doubt, an Agency that is not party to this Contract is entitled to the benefit of and may enforce the licence rights in clauses 7 to 12 as if it were a party to this Contract.

Software and Tools

14. Where any Software is required to allow for the proper functioning and performance of the Developed Software, the Contractor grants to the Customer and the Commonwealth a non-exclusive, perpetual and irrevocable licence:

- (a) at the one-time charge, if any specified in [insert schedule or clause]
- (b) to use, support, maintain, modify and enhance the Software or to engage other contractors to use, support, maintain, modify and enhance the Software on its behalf
- (c) to use, reproduce, revise, adapt and modify the technical or user documentation about the Software or to engage other contractors to do any of these on its behalf.
- (d) The rights in (b) and (c) do not include a right of Commercial Exploitation.

15. Where exercise of the licence or sub-licence granted under clauses 7 and 8 or the licence granted under clause 14 necessitates use of any Tools, the relevant licence is deemed to include an entitlement to use the necessary Tools. The Contractor will provide those Tools to the Customer when it provides the Software or the Developed Software to which they relate.

Developments made by the Customer

16. All developments made by the Customer to the Developed Software remain the property of the Commonwealth or, where relevant, the property of the service provider who made the developments where so provided in an agreement with the Customer.

Developments made by the Contractor

17. [DRAFTING NOTE: Agencies should consider whether to include a clause about the rights of the Customer — or possibly the broader Commonwealth — to any of the Contractor’s developments to the Developed Software. This is an issue for each Agency to consider, negotiate and draft as need be].

Open source software *[Optional - may be in contract already]*

18. To the extent that the Software, or any part of the Software, is licensed under an open source software arrangement,

- (a) the terms of the Open Source Licence will apply to that Software; and
- (b) the provisions of the Open Source Licence will prevail over the agreed terms in the event and to the extent of any inconsistency.

Software warranties *[Optional - may be in contract already]*

19. The Contractor represents and warrants that:

- (a) during the warranty period:

- (i) the Developed Software will comply with the specifications and documentation;
 - (ii) the Developed Software will be fit for the purpose as set out in the specifications; and
 - (iii) the Developed Software and Associated Documentation will be complete, accurate and free from material faults in design;
- (b) the Customer's use of the deliverables will not infringe the intellectual property rights of any person;
- (c) the media on which the Developed Software is furnished will be, under normal use, free from Harmful Code; and
- (d) if any Harmful Code is introduced into the Customer's systems or any deliverables, the Contractor will use all reasonable efforts promptly to report that introduction to the Customer and, where that Harmful Code is introduced as a result of a breach of clause (c), it will:
- (i) take all necessary action to eliminate the Harmful Code; and
 - (ii) promptly, at its own cost, repair any harm or destruction caused by that Harmful Code.

Contractor warranty [Optional]

20. Where the Contractor has provided software to another Agency and agreed to provide a licence to the Commonwealth to use that software, the Contractor warrants it will not charge the Customer for that software.