

# NATIONAL PARK TOURISM EXPERIENCES DEVELOPMENT PROGRAM

TERMS AND CONDITIONS FOR  
ACCOMMODATION PROPOSALS



WESTERN  
AUSTRALIA  
WALKING ON A DREAM

## 1. APPLICATION TO PROCESS

- a) These Terms and Conditions apply to the Process, for the duration of the Process.
- b) The State reserves the right to impose additional or amended terms and conditions throughout the Process.
- c) The State's rights under these Terms and Conditions are in addition to and without limitation of the State's rights set out in the Guidelines.
- d) The Guidelines and any supporting documents do not limit these Terms and Conditions.
- e) Without limiting the State's rights under these Terms and Conditions, if these Terms and Conditions appear to be breached in connection with a Proposal or a Proponent, the State may pause evaluation of the Proposal whilst it considers the breach and potential actions.

## 2. GENERAL

- a) Capitalised terms used in these Terms and Conditions are defined in the Glossary of these Terms and Conditions.
- b) Unless otherwise directed or agreed by the State, all communications by or on behalf of the Proponent with the State, including any notices required to be provided by the Proponent under these Terms and Conditions, must be provided by the Lead Proponent Member.
- c) No entity may participate in the Process unless that entity is a Proponent Member or an Associate of a Proponent Member.
- d) Where a Proponent consists of more than one Proponent Member, the obligations and liabilities of those Proponent Members under these Terms and Conditions apply to each of those Proponent Members jointly and severally.
- e) Following receipt of a written notice from the Proponent that there is a material error or discrepancy in any Disclosed Information, or if the State otherwise discovers an ambiguity, discrepancy or inconsistency in any Disclosed Information, the State in its sole and absolute discretion will direct the Proponent in writing as to how to resolve the ambiguity, discrepancy, or inconsistency.
- f) No rule of interpretation applies to the disadvantage of the State on the basis that the State put forward these Terms and Conditions.
- g) Unless the context indicates a contrary intention, in these Terms and Conditions:
  - 1) "includes" in any form is not a word of limitation;
  - 2) the meaning of "or" will be that of the inclusive "or", meaning one, some or all of a number of possibilities;
  - 3) if any of these Terms and Conditions purport to exclude liability for a particular matter, such exclusion only operates to the extent permitted by law;
  - 4) references to the singular include the plural and vice versa;
  - 5) a reference to a "clause" is to a clause of these Terms and Conditions; and
  - 6) references to State's Representative means Western Australian Tourism Commission trading as Tourism Western Australia (Tourism WA).

## 3. APPLICATION OF TERMS AND CONDITIONS

### 3.1 Proponent Members

- a) By submitting a Proposal, each Proponent Member agrees to comply with:
  - 1) the relevant Guidelines; and
  - 2) these Terms and Conditions and any additional terms and conditions imposed by the State during the Process, for the duration of the Process.
- b) In consideration of the Proponent Members agreeing to be bound by these Terms and Conditions the State will, subject to the rights set out in clause 4, receive and consider the Proposal.

### 3.2 Proponent Members' Associates

- a) In these Terms and Conditions, references to a Proponent Member include each of its Associates.
- b) Each Proponent Member must endeavor to ensure that each of its Associates complies with these Terms and Conditions as if it was a Proponent Member.

## 4. RIGHTS

### 4.1 Directions

Each Proponent Member acknowledges that the State may give a direction or requirement under these Terms and Conditions.

### 4.2 Discretions

By submitting a Proposal, each Proponent Member acknowledges and agrees that the State reserves the right in its absolute discretion and at any time to:

- a) cancel, terminate, suspend or change the Process, or any aspect of the Process or to take such other action as the State considers, in its absolute discretion, appropriate, necessary, or convenient in relation to the Process;
- b) require additional information from any Proponent Member, in which case the Proponent Member must provide such information within a reasonable time of the State's request;
- c) provide details of the Proposal to its officers, consultants, advisers and other State government agencies;
- d) refuse to consider or evaluate the Proposal, cease negotiations with the Proponent or terminate the Proponent's participation in the Process at any time, including if:
  - 1) any Proponent Member or Associate breaches the Guidelines or these Terms and Conditions, including if the breach occurred prior to the lodgment of its Proposal;
  - 2) any Proponent Member fails to meet a direction or requirement of the State under the Guidelines or these Terms and Conditions; and
  - 3) the Proposal is materially incomplete or fails to satisfactorily address the requirements of the Guidelines;
- e) where the Proponent consists of more than one Proponent Member, hold meetings or workshops or discussions with, or seek information from, one or more Proponent Members at any time during the Process with or without notifying the other Proponent Members;
- f) not proceed with a Proposal or not accept:
  - 1) the best priced Proposal;
  - 2) the highest scoring Proposal; or
  - 3) any Proposal;
- g) reject the Proposal outright or accept or continue to evaluate (as the case may be) only part of a Proposal and reject the remaining parts;
- h) elect not to further re-evaluate the Proposal if it fails to satisfy any evaluation criteria set out in the Guidelines or other relevant evaluation criteria;
- i) evaluate and accept the Proposal regardless of whether the Proponent has complied with the Guidelines or these Terms and Conditions;
- j) consider and accept any Proposal that does not comply with the requirements of the Guidelines;
- k) not select any Preferred Proponent, select a single Preferred Proponent or select multiple Preferred Proponents and negotiate with multiple Preferred Proponents either simultaneously or separately;
- l) change any evaluation criteria in the Guidelines or upon giving reasonable notice to the Proponent;

- m) in evaluating the Proposal and during the Process, have regard to:
  - 1) the State's knowledge and previous experience and dealings with any of the Proponent Members;
  - 2) without limiting clause 4.2(m)(1), information about the past or current performance of the Proponent or any Proponent Member under any other contract, arrangement or dealing between the Proponent or Proponent Member and a Government Party;
  - 3) information concerning any Proponent Member which is in the public domain or which is obtained by the State through investigations; and
  - 4) additional information provided by the Proponent in response to a request by the State;
- n) change the identity of the entity or person executing any final contract on behalf of the State;
- o) remove and add a Proponent, or change a Preferred Proponent;
- p) allow any Proponent to add or remove a member with or without notifying Concurrent Proponents;
- q) discuss and negotiate with the Proponent any matter arising out of their Proposal, and take such discussions and negotiations into account in its evaluation;
- r) discuss and negotiate with any Concurrent Proponent any matter arising out of their Proposal and take such discussions and negotiations into account in its evaluation;
- s) provide additional information to one or more Proponents at its sole discretion;
- t) defer evaluation of a Proposal or place a Proponent in reserve while considering the Proposal of a Concurrent Proponent;
- u) publish the names of the Proponent Members;
- v) enter into one or more final binding contractual documents in relation to a Proposal with a Proponent, without prior notice to any Concurrent Proponent;
- w) waive any requirement or obligation under the Guidelines;
- x) The State is not required to give notice or reasons for the exercise of any of its rights in accordance with this clause 4.2.

### 4.3 Consent

Whenever the consent of the State is required under the Guidelines or these Terms and Conditions, that consent may be given or withheld by the State in the State's absolute discretion and may be given subject to such conditions as the State may determine.

### 4.4 No Claim

Each Proponent Member releases the State and its Associates from all Liability in relation to the Process and no Proponent Member will make a Claim against the State or any of its Associates arising out of the exercise or performance of or any failure of the State to exercise or perform any rights, obligations or duties under the Guidelines or these Terms and Conditions or otherwise in connection with the Process. This clause 4.4 may be pleaded by the State and its Associates as a bar to any proceedings commenced by a Proponent Member against the State or the relevant Associate in relation to the Process.

## 5. NO LEGAL RELATIONSHIP

Each Proponent Member acknowledges and agrees that:

- a) consideration of the Proposal does not constitute any representation that the State will enter into any final contract;
- b) other than the contract that arises as a consequence of clause 3.1, or any final contract that may be entered into by the State and a Proponent:
  - 1) no contract exists or will arise between the State and the Proponent in respect of the Process; and
  - 2) neither the State nor any Proponent Member intend to create a legal relationship; and

- c) these Terms and Conditions set out the entire agreement between the parties for the Process.

## 6. INFORMATION FROM THE STATE

### 6.1 No details

The State is not required, and does not intend, to release any details regarding the evaluation process outlined by the relevant Guidelines.

### 6.2 Addendum

At any time during the Process, the State may, for any reason (but without being obliged to do so) amend the relevant Guidelines or any associated documentation (Addendum). The State or its Associates will be liable for any costs, Losses, expenses or damages incurred by a Proponent as a consequence of any such Addendum.

## 7. COMMUNICATION, ENQUIRIES AND CLARIFICATION

### 7.1 Enquiries

- a) The Proponent must submit any enquiries or clarification questions regarding the Process to the State's Representative or any probity adviser (as appropriate) or otherwise in accordance with section of the Guidelines;
- b) Other than in accordance with this clause, a Proponent Member may not directly contact the State to discuss any aspect of the Process (including its Proposal).

### 7.2 State requests for clarification

- a) The State will communicate with the Proponent(s) through the State's Representative.
- b) The State may, through the State's Representative:
  - 1) request written clarification;
  - 2) conduct clarification meetings; or
  - 3) request further information in clarification workshops, with or from the Proponent as part of the evaluation process. The Proponent will be notified if clarification is required, and the nature of the clarification being sought.

### 7.3 Proponent requests for clarification

- a) The decision of whether to respond to any request for clarification from the Proponent and the content of any response is at the absolute discretion of the State.
- b) If there are Concurrent Proponents, the State reserves the right to circulate clarification questions of a general nature asked by a Proponent, together with the response, to the Proponent and to all Concurrent Proponents.
- c) If the Proponent is of the view that a clarification question is not of a general nature, but relates to proprietary aspects of its Proposal, the Proponent must identify that question as such when asking the clarification question. If, in the opinion of the State:
  - 1) the question is not proprietary, the State's Representative will advise the Proponent, who has the option to withdraw the question. If the Proponent continues to request a response to that question, the response will be circulated to the Proponent and all Concurrent Proponents in accordance with clause 7.3(b); or
  - 2) the question does relate to proprietary aspects of the Proposal, the response to the question will be provided to the Proponent only (and will not be circulated to any Concurrent Proponents).

### 7.4 Official channels of communication

- a) For the duration of the Process Proponents must only communicate with the State in connection with the Proposal via the official channels notified by the State's Representative. Official channels are:
  - 1) Email: [invest@westernaustralia.com](mailto:invest@westernaustralia.com) and any other email address notified by the State's Representative for this purpose;

- 2) Phone: 08 9262 1700 and any other email address notified by the State's Representative for this purpose; or
  - 3) At any meeting between the Proponent and any other party which has been coordinated by the State's Representative in connection with the Proposal.
- b) For the duration of the Process Proponents must not directly contact stakeholders in connection with the Proposal without the prior written consent of the State except at a meeting which has been coordinated by the State's Representative in connection with the Proposal.
  - c) The State may notify the Proponent that a particular person, body or group of persons is a 'Restricted Stakeholder'.
  - d) The Proponent must not communicate with a Restricted Stakeholder in connection with the Process or the Proponent's participation in it, except:
    - 1) where expressly authorised to do so by the State; and
    - 2) subject to terms for that communication specified by the State.

## 8. PROPONENT'S ACKNOWLEDGEMENTS, REPRESENTATIONS AND WARRANTIES

### 8.1 Acknowledgements

Each Proponents Member acknowledges and agrees that:

- a) the Process is being conducted for the benefit of the State and Traditional Owners (where applicable);
- b) the State will rely on the representations and warranties given by Proponent Members in clause 8.2 of these Terms and Conditions, in evaluating the Proposal;
- c) it will not rely on any oral advice, representation or information given or furnished by or on behalf of the State or the State's Associates with respect to the Process or any Disclosed Information;
- d) it is making an independent assessment of the Disclosed Information and that:
  - 1) it will carry out, and rely solely on, its own investigation and analyses in relation to the Disclosed Information;
  - 2) it will verify all information on which it intends to rely to its own satisfaction; and
  - 3) it will not rely on any of the Disclosed Information (provided that this does not prevent a party from agreeing to give warranties in any final contract document);
- e) in no circumstances will the State or any of its Associates be liable to a Proponent Member whether in contract, tort (including negligence, misrepresentation or breach of warranty), under statute or otherwise for any costs, Losses, expenses or damages incurred or suffered by the Proponent Member as a result of or arising from:
  - 1) any incompleteness or inadequacy of, or any inaccuracy or error in, or omission from; or
  - 2) any use of, or reliance by, the Proponent Member upon any Disclosed Information.
- f) the Guidelines and the Submission will not form any part of the final contract except to the extent expressly incorporated in any final contract;
- g) the Proponent Member participates in the Process at its own cost and risk; and
- h) except in the State's absolute discretion, no payment will be made by the State or any of its Associates to the Proponent for any costs, losses, expenses or damages incurred by the Proponent in preparing and submitting the Proposal, or otherwise incurred in respect of:
  - 1) preparing for and attending any interview, meeting or workshop conducted pursuant to the Process;
  - 2) otherwise participating in the Process; or
  - 3) as a consequence of the exercise of the State's rights in accordance with clause 4.

### 8.2 Representations and warranties

By submitting a Proposal each Proponent Member represents and warrants that:

- a) it has examined all information and documents which are relevant to the Process;
- b) the Proposal and any subsequent information submitted to the State pursuant to the Guidelines or the Process:
  - 1) are based on its own independent assessment and investigations, interpretations, deductions, information and determinations; and
  - 2) are to the best of its knowledge and belief complete and accurate;
- c) it has examined all information relevant to the risks, contingencies and other circumstances having an effect on the Proposal, which is obtainable by the making of reasonable enquiries, which enquiries the Proponent Member has made;
- d) it has not paid or received and will not pay or receive any secret commission in respect of the Process;
- e) it has not entered and will not enter into any unlawful arrangements with any other person in respect of the Process;
- f) it has not sought and will not seek to influence any decision in respect of the Proposal or the Process by improper means;
- g) any information provided to the State during any interview, meeting or workshop or otherwise submitted to the State pursuant to its Proposal or the Process, is accurate; and
- h) it did not place any reliance upon the completeness, accuracy, adequacy or correctness of any Disclosed Information.

## 9. STATUS OF PROPOSAL AND PROPONENT

### 9.1 Material changes

- a) The Proponent must notify the State promptly, in writing, of any:
  - 1) material change to any:
    - i) of the information contained in its Submission;
    - ii) additional information submitted to the State pursuant to its Proposal or the Process; and
    - iii) information submitted to the State in any interview, meeting or workshop conducted pursuant to the Process;
  - 2) event which may affect or have an impact on the financial position or capacity of any Proponent Member; or
  - 3) circumstances which may affect the truth, completeness or accuracy of any of the information provided in the Submission, or in connection with the Proposal.
- b) On receipt of any written notification pursuant to clause 9.1(a), the State reserves the right to assess the change and to terminate the Proponent's further participation in the Process, or to invite the Proponent to amend its Proposal accordingly.

### 9.2 Status of Proponent Members

- a) If, after lodgement of its Submission:
  - 1) there is a change in the structure of a Proponent Member or there is otherwise a change in Control of a Proponent Member; or
  - 2) the Proponent replaces, adds or removes a Proponent Member, the Proponent must:
    - i) promptly notify the State;
    - ii) provide the State with sufficient details of the change and any additional information reasonably requested by the State; and
    - iii) provide evidence to the State that the new Proponent Member has agreed to be bound by these Terms and Conditions.

- b) On receipt of such notification the State will assess any change and reserves the right to accept the change and impose such conditions as it thinks fit in connection with accepting the change or terminate the Proponent's further participation in the Process.

### 9.3 No amendment

- a) The Proponent may not amend its Submission (unless the Proponent is otherwise invited or requested to do so by the State) after it has been submitted.
- b) Without limiting the State's rights to invite or request a Proponent to amend its Submission, the Proponent acknowledges that the State reserves the right to:
  - 1) require a Proponent to withdraw any part of its Submission which specifies or results in a departure from the requirements at any time (including prior to the appointment of any Preferred Proponent); and
  - 2) allow the Proponent or a Concurrent Proponent to correct patent typographical or arithmetic errors in its Submission at any time (including prior to the appointment of any Preferred Proponent) without allowing or requiring all Proponents to do so.

### 9.4 No requirements to return

Each Proponent Member agrees that the State will not be required to return the Submission or any documents, materials, articles and information lodged by the Proponent as part of, or in support of, the Proposal.

### 9.5 Withdrawal

The Proponent may withdraw from the Process at any time by notifying the State in writing.

## 10. DISCLOSURE BY PROPONENT

### 10.1 Disclosed Information

Each Proponent Member must in relation to Disclosed Information:

- a) Keep the Disclosed Information confidential, save:
  - 1) to the extent it is proven to be necessary to comply with any applicable law, legally binding order of any court or Government Party, or the rules of a stock exchange;
  - 2) where the Proponent Member can demonstrate that the information is already in the public domain (other than due to a breach of its obligations under the Process);
  - 3) to the extent it is required (and only to the extent required) to be disclosed to the Proponent's professional advisers, and the Proponent must ensure that such professional advisers are bound to comply with the obligations in clauses 10.1(a) to (g) of these Terms and Conditions;
  - 4) where agreed to or required by the State, and then only in accordance with clause 10.1(g);
- b) not use, copy, reproduce or distribute any Disclosed Information except as required for the purposes of participating in the Process and then only to the minimum extent reasonably necessary;
- c) immediately notify the State if it becomes aware of a suspected or actual unauthorised disclosure, copying or use of Disclosed Information;
- d) immediately take all reasonable steps to prevent or stop any such suspected or actual unauthorised disclosure, copying or use of Disclosed Information (including complying with directions of the State in this regard);
- e) take all reasonable steps to recover any unauthorised Disclosed Information that has been disclosed, used or copied;
- f) not make a media release or other public announcement or statement in relation to the Process without the prior written consent of the State; and

- g) ensure that each party to whom it discloses Disclosed Information, including any Recipient, complies with the obligations in clauses 10.1(a) to (f) of these Terms and Conditions (Recipient Obligations).

## 10.2 Survives Termination

The obligations in clause 10 continue after termination of the Proponent Member's participation in the Process.

# 11. PUBLIC DISCLOSURE AND FREEDOM OF INFORMATION

## 11.1 State's Public Disclosure Obligations

Each Proponent Member agrees to:

- a) the disclosure by any person to the State or the State's Associates of information concerning the Proposal, the Proponent or a Proponent Member for the purpose of the State exercising its rights set out in the Guidelines or at law;
- b) the State and its Associates disclosing any aspect of the Proposal or any other information provided by the Proponent to the State during the Process, including the terms and conditions of any final contract, to enable the State to meet public disclosure obligations the State may have:
  - 1) under any current or future legislation;
  - 2) under any current or future policy of the State;
  - 3) in the course of official duties of any Minister of the State;
  - 4) to satisfy requirements of parliamentary accountability;
  - 5) in annual reports of any agency of the State; or
  - 6) to satisfy any other recognised public requirement;
- c) the State and its Associates publicly publishing or disclosing (on the Internet or otherwise) information in relation to the Process, the Proposal or the details of the Proponent and Proponent Members, including the terms and conditions of any final contract; and
- d) without limiting clauses 11.1(a), (b) or (c), the State publishing or releasing, as part of a competitive tendering process, details of proposed outcomes or key elements that the State considers the Proposal is seeking to deliver.

## 11.2 State License

Each Proponent Member agrees to grant the State and the State's Associates an irrevocable, perpetual, royalty free, non-exclusive licence to disclose, copy, use, adapt, modify, sublicense or reproduce the whole or any portion of the Proposal for the purposes of evaluation and clarification of the Proposal and for the finalisation of any final contract.

## 11.3 Freedom of Information Act

Each Proponent Member acknowledges that the FOI Act applies to the information provided by the Proponent in its Proposal or as otherwise submitted by the Proponent to the State pursuant to the Process and that:

- a) the FOI Act allows members of the public rights of access to the State's documents and the State's Associates' documents;
- b) all or part of the information provided by the Proponent may be disclosed to third parties if there is a requirement to do so under the provisions of the FOI Act;
- c) any information that the Proponent considers is commercially sensitive or confidential must be marked "commercial and confidential". The Proponent Members acknowledge that this special notation must not be used unless the information is genuinely confidential. Marking information as "commercial and confidential" will not necessarily prevent disclosure of the information in accordance with the FOI Act. Any decision to release information will be determined by the requirements of the FOI Act; and

- d) save to the extent expressly permitted under the FOI Act, no Proponent Member will be able to commence any action or make any claim against the State or the State's Associates for the release of any information by the State under the FOI Act (including any information submitted by any Proponent Members to the State pursuant to the Process).

## 12. PROBITY

### 12.1 Inducement

- a) A Proponent Member must not offer any incentive to, or otherwise attempt to, influence any of the persons who are either directly or indirectly involved in the Process, or in the entry into any subsequent contract.
- b) Without limiting clause 12.1(a), the Proponent must not:
  - 1) without the prior written consent of the State, directly or indirectly approach or communicate with any officer or employee of the State having any connection or involvement with the Process, with respect to:
    - i) an offer of employment; or
    - ii) availability of employment with the Proponent or any related entity; or
  - 2) directly or indirectly offer a bribe, gift or inducement to any officer or employee of the State in connection with the Process.
- c) The Proponent will not breach clause 12.1(b)(1) where it communicates with an officer or employee of the State who, of their own volition, approaches or communicates with the Proponent in response to a general advertisement by the Proponent for employees, provided that the Proponent notifies the State immediately after such communication first occurs and then complies with clause 12.1(b)(1) of these Terms and Conditions in relation to that officer or employee.

### 12.2 Probity checks

Without limiting the State's rights pursuant to clause 4, each Proponent Member consents to the State undertaking probity checks in respect of the Proponent Member which may include:

- a) investigations into commercial structure, business and credit history;
- b) prior contract compliance in respect of other projects;
- c) police checks or any checks for any criminal records or pending charges; and
- d) research into any relevant activity that is, or might reasonably be expected to be, the subject of regulatory investigation.

### 12.3 Conflict of interest

Each Proponent Member must:

- a) disclose in the Submission or otherwise in writing in connection with the Proposal any circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential conflict of interest with the Proponent Member's obligations under the Process (including in respect to any final contract);
- b) provide details of its proposed strategy for managing any actual or potential conflict of interest disclosed pursuant to clause 12.3(a);
- c) not place itself in a position which may, or will give rise to a conflict of interest, or a potential conflict of interest during the Process; and
- d) otherwise notify the State promptly, in writing, on becoming aware of any actual or perceived circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential conflict of interest with the Proponent Member's obligations under the Process (including in respect to any final contract).

To the extent that the State directs a Proponent Member to take particular action in respect to a conflict of interest, the Proponent Member must comply with such a direction.

If a Proponent Member is unable or unwilling to comply with any such direction, the State may terminate the Proponent's participation in the Process.

### 13. COLLUSION AND RELATED PARTY PARTICIPANTS

- a) A Proponent Member must not engage in any collusive tendering, anti-competitive conduct or any other similar conduct with any person in relation to the Proposal or the Process.
- b) A Proponent Member must not seek to obtain any information from the State or its Associates or any other person in respect of a Concurrent Proponent's Proposal and must maintain the confidentiality of its own Proposal.
- c) The Proponent must identify in a Submission, or otherwise immediately notify the State in writing, if a Proponent Member is also:
  - 1) a member of a Concurrent Proponent;
  - 2) an Associate of a member of a Concurrent Proponent; or
  - 3) a related party to a member of a Concurrent Proponent,  
(each a **Related Party Participant**).
- d) If the State becomes aware of any Related Party Participants, the State may require such Related Party Participants to:
  - 1) execute process and confidentiality acknowledgments;
  - 2) implement internal governance arrangements and procedures as reasonably required by the State to address the probity and competitiveness concerns of the State;
  - 3) provide verification that all the above required procedures are being complied with, as a condition to the Proponent continuing to participate in the Process.
- e) The State reserves its right to disqualify the Proponent from the Process for breach of any process or confidentiality obligations at any time during the Process or otherwise in circumstances where a Related Party Participant issue cannot be resolved to the satisfaction of the State.

### 14. PREFERRED PROPONENT

Each Proponent Member acknowledges and agrees that:

- a) the State may select or appoint, but is not obliged to select or appoint, one or more Proponents as a Preferred Proponent;
- b) the selection or appointment of a Preferred Proponent does not constitute an acceptance of any binding offer submitted by the Preferred Proponent or otherwise confer any rights on a Preferred Proponent and is without prejudice to the right of the State to decline to enter into a final contract, or to enter into a final contract with a Preferred Proponent or a Concurrent Proponent;
- c) the State may:
  - 1) choose to negotiate any aspect of a Preferred Proponent's Proposal; or
  - 2) request a Preferred Proponent to provide a performance guarantee or some other form of security in connection with a final contract on terms and conditions to be agreed by the State with the Preferred Proponent;
  - 3) the State may suspend any negotiations with a Preferred Proponent and commence negotiations with any Concurrent Proponent, or select or appoint any Concurrent Proponent as a Preferred Proponent, if in the opinion of the State;
  - 4) timely execution and completion of a final contract in terms acceptable to the State is unlikely to be achieved with the Preferred Proponent;
  - 5) the Preferred Proponent has breached a term or condition of the Process; or
  - 6) there is any change to the information on which the State has relied in selecting or appointing the Proponent as a Preferred Proponent; or
  - 7) for any other reason;

- d) subject to paragraph (d), only those issues previously identified by a Preferred Proponent in its Submission, in responses to clarification questions (if any) or in writing from the Proponent to the State may be raised by the Preferred Proponent in negotiations in respect of a final contract, unless the State otherwise agrees in writing;
- e) the State may propose, negotiate with a Preferred Proponent and accept, a solution that departs substantially from the Preferred Proponent's Submission and such a negotiated outcome will not breach any obligation owed by the State to any Proponent under or pursuant to the Process; and
- f) if appointed a Preferred Proponent, the Proponent Members must negotiate in good faith with the State to agree and finalise a final contract and any other applicable agreements.

## 15. MISCELLANEOUS

### 15.1 Waiver

Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under the Process by the State or any of its Associates does not preclude, or operate as an estoppel of any form of, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under the Process or provided by law.

### 15.2 No fettering

Each Proponent Member acknowledges and agrees that nothing contained or implied in the Guidelines, the Process or any final contract will be construed or interpreted as unlawfully restricting, or otherwise unlawfully affecting the unfettered discretion of the State to exercise any of its executive or statutory powers or functions under any law.

### 15.3 Severability

If any of these Terms and Conditions or any part of them is inconsistent with any law, it will be severed from the Terms and Conditions to the extent of the inconsistency without invalidating or otherwise affecting the enforceability of the remaining Terms and Conditions.

### 15.4 Representatives

- a) Any matter which may be done by the State may be done by an authorised officer of the State (including the State's Representative).
- b) Any notice to be issued under the Guidelines or the Process may be given by the State's Representative.

### 15.5 Replacement of State's Representative

The State may, at any time, and from time to time, replace the State's Representative. The State will notify the Proponent of the identity and contact details of the replacement State's Representative.

### 15.6 Issues Management

The parties agree that the Proponent may raise any issues or disagreement between it and the State relating to the Process with Tourism WA.

## 16. GLOSSARY

In these Terms and Conditions, unless the context otherwise requires, the following terms have the meaning given to them.

**Addendum** has the meaning given in clause 6.2.

**Associates** means, any officer, employee, agent, consultant, contractor, nominee, licensee or adviser of:

- a) the State; or
- b) a Proponent Member including any Related Body Corporate of a Proponent Member.

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

**Concept Proposal** refers to an accommodation proposal, required by the relevant Guidelines, to be considered by the Evaluation Panel and the State.

**Concurrent Proponent** means any person or group of persons who are participating in the process other than the Proponent and Proponent Members.

**Control** means:

- a) control or influence of, or having the capacity to control or influence the composition of the board (or if the entity is a trust, the appointment of a trustee of that trust), or decision making, directly or indirectly;
- b) being in a position to cast, or control the casting of, 20 per cent or more of the maximum number of votes that may be cast at a general meeting (or if the entity is a trust, a meeting of unit holders);
- c) or having a relevant interest (as defined in section 608 of the Corporations Act) in 20 per cent or more of the securities (as defined in the Corporations Act), of an entity (whether alone or together with any associate (as that term is defined in the Corporations Act)). Corporations Act means the Corporations Act 2001 (Cth).

**Disclosed Information** means the following information (of whatever nature, including written, graphical, electronic, oral, or in any other form) which is either directly or indirectly disclosed to, or otherwise obtained by or on behalf of, a Proponent in respect of or in connection with the Process:

- a) any oral advice, representations or information given or furnished by or on behalf of the State or the State's Associates during the Process;
- b) all information in any written material given or furnished by or on behalf of the State or the State's Associates during the Process;
- c) all material disclosed in presentations or briefings by or on behalf of the State or an Associate of the State in connection with the Process;
- d) all discussions, correspondence and negotiations between the State and any Associate of the State (on the one hand) and any Proponent Member or any Associate of the Proponent Member (on the other hand) relating to the Process; and
- e) any other information which a Proponent Member or an Associate of a Proponent Member knows or ought reasonably to know is confidential to the State or an Associate of the State or should be treated as such.

**Final Offer** means a final offer as referred to in the Guidelines.

**FOI Act** means the *Freedom of Information Act 1992* (WA).

**Government** means the Western Australian Government.

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

**Lead Proponent Member** means the Proponent Member identified as the Lead Proponent Member in the Submission.

**Liability** means any debt, obligation, cost (including legal costs), expense, loss, damage, compensation, charge or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

**Loss** includes any cost, expense, damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, ascertained, unascertained, actual, prospective or contingent or any fine or penalty.

**Guidelines** means a document prepared by Tourism WA that sets the criteria and standards for evaluating a specific tourism accommodation opportunity.

**Evaluation Panel** means the body of that name referred to in the relevant Guidelines document.

**Preferred Proponent** means a Proponent (if any) which is selected or appointed by the State as a preferred Proponent.

**Process** means the receipt and review or evaluation (as the case may be) by the State of one or more Proposals in accordance with the relevant Guidelines, and as may be amended by the State in accordance with clause 4.2(a).

**Proponent** refers to a Proponent in the Process and for any Proponent includes all of the Proponent Members acting as a group in participating in the Process.

**Proponent Member** means each of the following, in their individual capacity:

- a) the Proponent or Lead Proponent Member (as the case may be) identified in the Submission;
- b) each person identified as a Proponent Member in the Submission; and
- c) any other person that is added as a Proponent Member from time to time.

**Proposal** means a proposal lodged by a Proponent in accordance with the relevant Guidelines. A reference to “the Proposal” is to the Proponent’s Proposal and a reference to “a Proposal” is a reference to the Proposal of a Proponent.

**Recipient** means:

- a) the Lead Proponent Member;
- b) each other Proponent Member; and
- c) any other person to whom a Proponent Member discloses the Disclosed Information

**Recipient Obligations** has the meaning given in clause 10.1.

**Related Body Corporate** has the meaning given to it in the Corporations Act.

**Restricted Stakeholder** means a person, group of persons or body notified by the State to the Proponent under clause 7.4.

**State** means the Crown in the right of the State of Western Australia and includes a department established under the Public Sector Management Act 1994 (WA), a Minister of the Crown, whether body corporate or otherwise, and any agency, authority or instrumentality of the State.

References to the State include references to the **Lead Agency** (within the meaning given to that term in the Guidelines) in respect of the Proposal.

**State’s Representative** means the Lead Agency proposal manager for the Process as contemplated by clause 2(g)(6) or any replacement person notified by the State under clause 15.5.

**Submission** means any and all of a Concept Proposal, a Final Offer and any interim submission lodged by the Proponent with the State for evaluation.

**Terms and Conditions** or **these Terms and Conditions** means the terms and conditions of the Process (this document) and includes any additional terms and conditions imposed by the State in writing during the Process.

**Tourism Western Australia**

Level 10, 1 William Street, PERTH WA 6000

GPO Box X2261 PERTH WA 6847

T. 08 9262 1700 F. 08 9262 1787

[invest@westernaustralia.com](mailto:invest@westernaustralia.com)

[westernaustralia.com](http://westernaustralia.com)

[tourism.wa.gov.au](http://tourism.wa.gov.au)

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