

FACS Funding Deed

Legal information for Specialist Homelessness Services in NSW

This fact sheet covers:

- what the FACS Funding Deed is
 - important terms in the FACS Funding Deed
 - when written notifications and approvals are required
 - record and reporting requirements, and
 - action list to assist funded organisations to comply.
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The FACS Funding Deed is a document setting out the standard terms and conditions that apply to organisations that supply services, including homelessness services, funded by the NSW Family & Community Services (FACS) in exchange for a fee.

The contracts for Specialist Homelessness Services (SHS) are made up of the following standard component documents:

- Funding Deed
- Program Level Agreement (PLA)
- SHS Program Level Agreement Special Conditions, and
- Service Description and Service Delivery Schedule (if agreed to by FACS and the organisation).

Organisations must ensure they are aware of the terms of all the documents as together they all make up the contract with FACS. In this fact sheet we will refer to all of the above component documents as the **Funding Documents**. Clauses referred to in this fact sheet will be clauses in the Funding Deed unless otherwise stated.

Importantly, if there are inconsistencies between the Funding Documents, organisations should look to the list set out in clause 26.3 of the Funding Deed. The Funding Documents are listed in order of priority and the inconsistent term in the document listed higher will apply.

The Funding Deed was first introduced on 1 July 2014. A Funding Deed signed with an organisation typically applies for an initial period of three years with an extension period of two years. The Funding Deed is a 'standing offer' which sets out terms that will apply if an organisation is contracted to provide services. The allocation of work or and funding occurs through a PLA, which usually sets out the services and the time period covered by the PLA.

FACS is currently considering whether it is appropriate to use the NSW Human Services Agreement (currently in draft form, but expected to be finalised soon) instead of the FACS Funding Deed in the future. However, a final decision has not been made.

NOTE

If your organisation receives a number of grants from FACS then you will have different Program Level Agreements which apply to each particular grant. The terms of each Program Level Agreement may be different so it is important to read through each document carefully.



In addition to requiring organisations to comply with the Funding Documents, your organisation may be required to comply with:

- FACS departmental policies in place from time to time, and
- other specified policies, guidelines and compliance requirements such as:
 - SHS Program Guidelines
 - SHS Practice Guidelines
 - Contract Governance Guidelines

! CAUTION

Your organisation must familiarise itself with policies, guidelines and frameworks specified in the Funding Documents which are referred to on the FACS website at www.community.nsw.gov.au.

NOTE

A deed is a special type of contract. A deed does not require consideration (an exchange or benefit – each party gives something in return) to be valid and enforceable. This means that the Funding Deed is the contractual relationship between FACS and the organisation but can exist without any funding being provided. Funding is instead associated with the Program Level Agreements.



1. Important Terms in the Funding Deed

Every written contract has terms that should be clearly understood by all parties to the contract.

Some important terms in the Funding Deed are summarised below. This fact sheet is not an exhaustive summary of the Funding Deed, and funded organisations should carefully read all the Funding Documents, and may need to seek legal advice if aspects are unclear or raise particular concerns.



TIP

Remember, this fact sheet may make more sense if it is read with the Funding Documents at hand for reference.

1.1 Funding (clause 6.2 and PLA clause 4.1)

Funding can only be used for the purposes of the Program Level Agreement and will be paid by FACS based on services actually provided.

This means that funding from FACS can generally be used to cover employee entitlements (such as annual leave or long service leave) for employees providing the funded services but funding could generally not be used to cover costs associated with winding-up your organisation or to pay WorkCover claims, for example.

If there are any unspent or uncommitted funds at any time, FACS may provide written notice to the organisation requiring repayment of the unspent or uncommitted funds (clause 8.2). We note that FACS does exercise its rights under this clause but that it might be open to organisations to negotiate with FACS for a re-allocation of funds back to the organisation.

1.2 Performance Audits and Review (clause 5)

FACS can conduct an audit of the organisation to monitor compliance with the Funding Deed or PLA at any time during the term and for seven years after as long as if practicable it has provided the following notice conditions:

- 10 business days notice of an audit
- 48 hours notice of a visit to a service to inspect operation of a program
- 14 days notice to attend a client or carer's private home but can only visit with the client's or carer's permission, and
- no prior notice to attend the premises and inspect records where FACS has serious concerns regarding the operation of a program.

The organisation is required to cooperate with and provide assistance to the auditor at no cost or expense to FACS.

1.3 Termination (clause 19)

The Funding Deed can be brought to an end in two main ways:

1.3.1 By FACS immediately with written notice (clause 19.1)

This is called 'Termination for cause' and can mean a number of things. In the Funding Deed termination for cause can occur if:

- FACS believes that an organisation has breached the Funding Deed and it is not possible to fix the breach
- FACS believes the organisation has breached the Funding Deed and FACS has notified the organisation to fix the breach within 10 days (eg by lodging late reporting) and this has not occurred
- FACS believes that a conflict of interest exists for the organisation *which prevents the performance* of the Funding Deed or a PLA
- the organisation becomes insolvent (insolvent is defined in the Funding Deed to include being made bankrupt, for individual persons or partnerships who are service providers)
- the organisation breaches any confidentiality or privacy obligation under the Funding Deed or PLA
- the organisation passes on any of its rights to another party except as allowed in the Funding Deed or a PLA, or
- the organisation is found to have engaged in corruption.

Organisations are required to notify FACS if some of the situations above occur – see section 2. below for further discussion.

NOTE

If an organisation receives written notice it must immediately do what the written notice says, which may be to stop providing or reduce services. The organisation must also take steps to minimise any loss from the point in time that it receives the notice.

An organisation that receives written notice of termination may need to notify parties such as its insurers (depending on its policy) and may consider getting legal advice on the consequences of the termination.

If there is a dispute about a decision to terminate by FACS, the organisation can utilise the dispute resolution procedure set out in clause 20.



1.3.2 If either party decides to do so (clause 19.2)

This is called 'Termination for Convenience'. Both FACS and the organisation have the option to terminate the Funding Deed or any PLA without giving any reasons by a written notice given to the other party at least 90 days before the effective date of termination.

TIP

Your organisation should add clauses into its contracts with others (such as suppliers) that allow your organisation to end these contracts if FACS terminates the Funding Deed or PLA under clause 19. This can help manage the costs associated with a termination of FACS funding.



CAUTION: REPAYMENT OF FUNDING

If at any time, any of the funding money is unspent or uncommitted, including at the date of expiry or early termination, then the unspent amount must be repaid to FACS. Organisations' budgets should provide for this possibility (ie FACS funds should not be applied to other activities) (clause 8.2).



1.4 Intellectual Property (clause 11.2)

Intellectual property is a legal term which refers to property created through intellectual effort including copyright, designs, trade marks, and patents. Intellectual property will exist in materials created under the Funding Deed including in any written materials such as reports.

Program Material is all material brought into existence for the purpose of a PLA or the Funding Deed and the material incorporated in or supplied with this material (clause 11.2 and 26.1). The organisation owns the Program Material (clause 11.2a) and gives FACS a broad licence to use the Program Material indefinitely (clause 11.2b). This means that FACS has the right to use, including for commercial purposes, any material that has been created or developed utilising FACS funding.

TIP

If your organisation has existing material that was created by your organisation other than in performing the funded activities, your organisation owns its existing material and would only be giving FACS a licence to use existing material if this material is *incorporated* or *supplied with* Program Material.



CAUTION: SUBCONTRACTORS AND VOLUNTEERS

Organisations must ensure that they legally own all intellectual property in the Program Material (or have an appropriate intellectual property licence) enabling intellectual property to be shared with FACS in the ways required under the Funding Deed. Organisations should make sure they obtain an assignment (or licence) of intellectual property from volunteers and sub-contractors that contribute to the creation of Program Material or reports since the law applies differently for employees, volunteers and sub-contractors.

For more information go to the Information Hub page on Intellectual Property at www.nfplaw.org.au/IP. For more information on whether a worker is an employee, subcontractor or volunteer, go to www.nfplaw.org.au/people.

1.5 Insurance and Indemnity (clauses 17 and 18)

Organisations are responsible for all of their actions in performing the funded activities (including those of its officers, employees and contractors). Organisations should be mindful that they are required to indemnify (essentially repay) FACS or the State of NSW for any loss suffered due to certain wrongful actions of the organisation set out in clause 18.

Organisations should ensure that they have appropriate insurance policies to mitigate this risk. Certain insurances are required under the Funding Deed (clause 17.1) but it may be that an organisation needs extra insurance for the activities carried out.

For more information on insurance, go the Information Hub page on Risk and Insurance at www.nfplaw.org.au/riskinsurance.

1.6 Privacy and GIPA Act (clauses 15 and 22)

An organisation deals with personal information (being any information about a person from which that person can be reasonably identifiable) and it must ensure that it complies with the *Privacy and Personal Information Protection Act 1998* (NSW) as if it was a public sector agency and also the *Health Records and Information Privacy Act 2002* (NSW).

FACS, as a NSW government agency, must comply with the *Government Information (Public Access) Act 2009* (GIPA). An organisation may be required to provide FACS with information FACS requests within seven days, in accordance with clause 22.2. This does not include information that the funded organisation is prohibited from disclosing to FACS under law (which may include some information regulated by privacy laws or prohibited under Schedule 1 GIPA) although it may include information an individual should be likely to be aware would be disclosed or has been made aware will be disclosed to FACS. It may be good practice to inform individuals when collecting information that it may be passed to FACS in limited circumstances.

CAUTION: PRIVACY PRINCIPLES

Depending on the size and nature of your organisation it might not have previously been required to comply with privacy laws. Despite this, the Funding Deed requires your organisation to ensure privacy obligations are complied with at all times when dealing with personal information in performing the funded activities. If an organisation is unsure of the systems it will need to put in place, it may need to seek advice from a privacy law specialist. For more information on privacy laws go the Information Hub Privacy page, at www.nfplaw.org.au/privacy.

1.7 Warranties (clause 23)

The warranties in the Funding Deed are a type of 'promise' and organisations should make sure they:

- comply with reporting and other requirements of their regulators to remain incorporated as a separate legal entity
- have the authority of their board and members as required to provide the funded services
- disclose any investigations and litigation that may impact on performance of the Funding Deed, and
- ensure suitable, qualified and skilled people are undertaking the services at all times.

1.8 Conflict of Interest (clause 13)

Organisations must also warrant or 'promise' to FACS that no conflict of interest exists or is likely to arise. FACS understands that there may be conflicts of interest from time-to-time, particularly in smaller communities or remote areas. Conflicts of interest should be managed in accordance with the organisation's conflict of interest policy.

EXAMPLES OF CONFLICTS OF INTEREST



Examples of a conflict of interest might be:

- the CEO's family member is employed to deliver a funded service without the job being appropriately advertised or a formal selection process undertaken (actual), or
- a board member's own business has applied for a contract to provide a service related to the funded program (potential).

TIP



Conflicts of interest should be recorded on a conflict of interest register and managed appropriately (for example, any staff/board member with a personal interest should not be present in a meeting where the matter is being discussed or voted on). For more information on conflicts of interest go the Information Hub governance page at www.nfplaw.org.au/governance.

2. Written Notifications and Approvals

It is very important that organisations provide notices where required, because failing to provide a notice can be a breach (and certain breaches allow FACS to terminate the Funding Deed or PLA). A notification made under the Funding Deed needs to be in writing and signed by a person with authority to sign on behalf of the organisation (clause 24.1). Most organisations will have delegation policies covering who is authorised in particular circumstances.

NOTE: Notices can also be served by email if the conditions in clause 24.2 are followed.

The table below lists the circumstances where organisations and FACS must provide notification, and also the circumstances where organisations need to seek prior written approval from FACS.

Notifications to be made by the organisation

Circumstance requiring notification	Potential action following notification
<p>If the organisation (clause 3.1g):</p> <ul style="list-style-type: none"> • will not be ready to start services for a program within 60 days of start date; • has not been operating or accessible to clients for five consecutive business days when required to; or • has ceased services for a particular program 	Clause doesn't specify but these could become a breach for which FACS terminates
If the organisation has changed its constitution, it must notify FACS within 28 days (clause 3.3) (See note below about changing your constitution)	FACS can object to changes <i>on reasonable grounds</i>
If the organisation changes its address or bank account details (clause 3.4c)	Clause doesn't specify but might be a risk of delays in payment or difficulty receiving notices and other communications from FACS
If the organisation intends to sell or dispose of an asset valued over \$5,000 purchased using FACS funds (clause 9.1b)	FACS must provide prior written approval
If the organisation receives financial assistance from any other agency or authority in relation to a program (clause 3.4e)	Clause doesn't specify but ensure there has not been any breach of the Funding Deed in relation to this such as confidentiality or privacy
If the organisation or any third party intends to conduct research into funded activities (clause 4.1d)	Any research must comply with FACS guidelines
If there is any actual, perceived or potential conflicts of interest (clause 13.1)	If FACS believes there is a conflict of interest <i>which prevents the performance</i> of the Funding Deed or a PLA, they can terminate immediately
If the organisation wants to use FACS' logo (clause 12.1b)	FACS must provide prior written approval
If the organisation wants to disclose confidential information other than to FACS or when required by legislation (clause 14.1)	FACS must provide prior written approval
If the organisation decides to terminate the Funding Deed for convenience, they need to give 90 days notice (clause 19.2c)	If the Funding Deed is terminated, the PLA and any Service Delivery Schedule will also terminate

Notifications to be made by FACS

Circumstance requiring notification	Potential action following notification
If FACS is withholding funds because it is not satisfied with the services delivered or financial reporting (clause 8.1a)	Organisation must continue to deliver services and fulfil obligations under PLA while addressing concerns
If FACS want to end the Funding Deed after the initial three year term, then they need to give 60 days notice (clause 1.2b)	PLA also automatically ends if Funding Deed ends
If FACS believes there is a basis for termination by default (eg if organisation has breached the Funding Deed) (clause 19.1ai)	Organisation has to take the specified action to rectify the breach (if it can). If the organisation fails to take such action, after 10 days FACS can immediately terminate the Funding Deed or PLA by written notice
If FACS decides to terminate the Funding Deed or PLA for convenience (in situations where there is no cause such as a breach of the Funding Deed), then they need to give 90 days notice (clause 19.2)	PLA also automatically ends if Funding Deed is terminated however if a PLA or Service Delivery Schedule is terminated, any remaining PLAs and the Funding Deed continue to apply
If FACS considers that a sub-contractor is not complying with the requirements of the Funding Deed or PLA, then they can notify the organisation to immediately terminate its sub-contract (clause 21.1f)	Organisation must immediately terminate arrangement with sub-contractor

3. Records and Access

The Funding Deed imposes a number of recordkeeping and access obligations as set out below:

Recordkeeping	Brief description
Records	Records of the receipt and expenditure of the funds must be made and kept for at least 7 years from the expiration of the Funding Deed and remain accessible to FACS for 7 years, even if the organisation ceases to operate (clause 11.1c) (NOTE - it is good practice to keep records regardless of a contractual obligation to do so)
Asset Register	Any asset purchased with the fund money for over \$5,000 is held by the organisation on trust for FACS. The organisation must have an asset register for these assets (clause 9.1)
Providing access to materials	Organisations need to provide access to records (including making copies) and access to the premises where the funded activity is taking place (clause 5.1).

NOTE: OWNERSHIP OF RECORDS

The organisation owns the records created relating to the funding, the services or any obligations under the Funding Deed however FACS has an indefinite, fee-free licence to use, copy, modify and commercialise the program material which includes documents, records, information and data.



4. Reporting

The Funding Deed imposes a number of reporting obligations on your organisation which must be undertaken by the particular dates specified in the Funding Deed. There may be reporting requirements in several of the Funding Documents, for example, the Service Delivery Schedule (if there is one) may have a specific reporting timeline and particular performance reports related to the funded activity. Clause 7 relates to financial reporting.

FACS require sufficient financial information to ensure that funds are only used for the purposes of the PLA (clause 6.2).

Reporting obligation	Brief description
Audited Financial Reports	Independently audited financial reports verifying the proper expenditure of the funds must be provided to FACS (clause 7.1) if the organisation is required by law to prepare audited financial statements. This could include: <ul style="list-style-type: none">• Tier 1 Incorporated Associations who have income of more than \$250,000 or assets of more than \$500,000• Charities who have an income of more than \$1 million• Organisations who have other contractual obligations to have audited financial reports

Reporting obligation	Brief description
Financial statements	If not required to provide audited financial reports, then an organisation must provide FACS with financial statements (clause 7.1c) Local Government, universities or other bodies established under NSW legislation do not need to provide audited financial reports or financial statements (clause 7.1d)
Income and expenditure statement	Required to be provided under each PLA valued at above \$25,000 and include any additional funds
Performance measurement	The organisation must report on their performance against the performance measures in the PLA from time to time when notified by FACS

NOTE

A certificate in relation to expenditure must be provided to FACS to certify that funds have been properly spent under each PLA. Certificates must be signed by two board or committee members from the organisation who have authority to do so.



5. Action List

There are a number of practical steps that organisations can take to ensure compliance with the Funding Deed.

Item	Steps to take
Accessibility	Make sure services are provided in a way that is reasonably accessible to all people in the recognised client group (as set out in the PLA) (clause 3.1 a-d) This might mean considering if your organisation can afford to make modifications if required, the cost of which may not be covered by the funding for service delivery
Personnel	Employ personnel who are “properly authorised, accredited, trained and experienced to provide the Services” (clause 3.2) This will usually include undertaking background checks such as working with children checks, criminal record checks and qualification checks For more information on background checks, go to www.nfplaw.org.au/recruitment Although the Funding Deed does not define personnel to include volunteers, it is also a good idea to ensure all your volunteers are properly authorised, screened and trained. For more information on volunteers, go to www.nfplaw.org.au/volunteers
Records	Keep proper records and registers about how the funds have been spent and comply with all privacy legislation.
Expenditure	Ensure the funds are only spent on the activities to be provided under the Funding Deed and PLA and not on other aspects of your organisation – funds that are improperly spent may need to be repaid (clause 8.2).
Acknowledgement	Acknowledge the funding received from FACS in publications and publicity related to the services including in your annual report.
Conflict of interest	Notify FACS if an actual or potential conflict of interest arises during the term of the Funding Deed and take steps to deal with the conflict. NOTE: Your organisation should

	have its own written conflict of interest policy.
Sub-contractor	<p>An organisation may sub-contract any part of a PLA with prior the written consent of FACS (clause 21). Ensure any sub-contract includes the same terms and conditions as the Funding Deed, including a condition allowing FACS to access the premises of the sub-contractor to conduct a performance review or audit</p> <p>For more information on sub-contracting, see the Not-for-profit Law template sub-contract and checklist on the Information Hub at www.nfplaw.org.au/sub-contracts.</p>

NOTE



There is a dispute resolution procedure set out in the Funding Deed in clause 20. If problems arise during the term of the Funding Deed, then this should be the first step considered by the organisation to resolve the dispute.

Although clause 20 does not specify the use of an independent mediator to assist in resolving disputes, organisations should raise this as an option with FACS as a further alternative before or at what is referred to in the Funding Deed as 'Second Level Discussions' (clause 20e.)

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub (www.nfplaw.org.au) has resources on the following related topics:

- ✔ Conflicts of interest and other duties at www.nfplaw.org.au/governance
- ✔ Intellectual Property at www.nfplaw.org.au/ip
- ✔ Employment at www.nfplaw.org.au/employees
- ✔ Background checks at www.nfplaw.org.au/recruitment
- ✔ Privacy at www.nfplaw.org.au/privacy
- ✔ Risk and Insurance at www.nfplaw.org.au/riskinsurance
- ✔ Documents and Records at www.nfplaw.org.au/recordkeeping
- ✔ Financial Reporting at www.nfplaw.org.au/annual-reporting-government
- ✔ Volunteers at www.nfplaw.org.au/volunteers

NSW Family & Community Services

- ✔ [Policies and guidelines for funded services](#) (includes link to Funding Deed and PLA)
- ✔ [Program guidelines for Specialist Homelessness Services](#)

Legislation

- ✔ [Privacy and Personal Information Protection Act 1998 \(NSW\)](#)
- ✔ [Health Records and Information Privacy Act 2002 \(NSW\)](#)
- ✔ [Government Information \(Public Access\) Act 2009 \(NSW\)](#)



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