

Dated

SPEAR Customer Access Agreement

This Agreement is made between the **Department of Environment, Land, Water and Planning (Department)** on behalf of the **State of Victoria** of 2 Lonsdale Street, Melbourne and the **Customer** identified in the Reference Schedule.

Introduction

- A. The Customer is granted access to the SPEAR system on the conditions set out below and in the SPEAR Common Rules.
- B. The Parties agree that in consideration of the access granted to SPEAR by the Department, the Customer is bound by the following conditions and the Common Rules.

It is agreed

1. SPEAR Access

The Department grants to the Customer a right of access to SPEAR for the purpose of the Customer lodging and tracking Relevant Applications and communicating with other Customers.

2. Parties Bound

The Customer and the Department agree to be bound by these conditions and the Common Rules.

3. Web Interface

- 3.1 The Customer must only gain access to SPEAR via the SPEAR Internet Site using the Web Interface and must not use any program other than a standard internet browser to connect to SPEAR. The access granted is subject to compliance by the Customer and all of its employees and agents with this Agreement, the Common Rules, all User Manuals issued by the Department under clause 9 and all relevant Statutory Provisions.
- 3.2 Without limiting clause 3.1, the Customer must not connect to SPEAR directly using any software application other than a standard internet browser unless such form of connection (commonly known as an application to application environment) is approved in writing by the Department which approval may be withheld subject to the satisfaction of appropriate standards.
- 3.3 The Department reserves the right to change the Web Interface or other aspects of SPEAR (including software required for access) from time to time.

4. Access to SPEAR

- 4.1 Subject to availability, the Customer may gain access to SPEAR 24 hours a day for every day of the year but the Department does not warrant that access to SPEAR will be uninterrupted or available when required, at all times, on all days.
- 4.2 The Department accepts no liability which may arise as a result of any unavailability of, or any interruption of access to, SPEAR and does not guarantee that SPEAR is or will remain error or virus free.

5. Email Notification

The Customer agrees that email notification of the lodgement of any document or information in SPEAR is sufficient and the Customer must check any documents or information notified by SPEAR in a timely and diligent manner.

6. Customer Users

- 6.1 The Customer must appoint at least one Administrator who shall have the authority to appoint and remove Customer Users for the purposes of access to SPEAR. An Administrator must be appointed and may be removed by the Customer by notice to the Department in accordance with the User Manual. If an Administrator is not appointed, the Chief Executive of the Customer (by whatever title that position is known) shall be the Administrator. The actions of the Administrator are binding upon the Customer.
- 6.2 The Customer through the Administrator may appoint Customer Users in accordance with the User Manual. The Customer through the Administrator is fully and solely responsible for validating the identity of Customer Users. It is the sole responsibility of the Customer (and not of the Department) to monitor the use of any Access Method used to access SPEAR and to grant or deny access to SPEAR for Customer Users.
- 6.3 The Administrator or the Department (as appropriate) will issue each Customer User with an appropriate Access Method which will be unique to that Customer User. The Customer and Customer User must keep all components of all Access Methods secure and not more than one person may use an allocated Access Method. If the security of the Access Method is compromised in any way, or is suspected of having been compromised, the Customer must immediately stop the use of such Access Method and must immediately notify the Department.
- 6.4 The Department may take any action including cancelling or suspending an Access Method at any time without notice if the Department believes, on reasonable grounds, that the Access Method is being misused or has been compromised. The Customer may cancel any Access Method by requesting the Department, in writing, to cancel it.
- 6.5 The Department is authorised by the Customer to act upon all instructions communicated through SPEAR by a Customer User or the Administrator.
- 6.6 The Customer User shall have authority to sign documents, to enter data and to have access to SPEAR on behalf of the Customer and the actions of the Customer User and the Administrator shall be binding actions of the Customer. The

Customer must use its reasonable endeavours to ensure that each Customer User provides complete and accurate responses to all requests for information made during an application process including with respect to the identity of the Customer User.

7. Responsibility of the Customer

- 7.1 The Customer accepts liability for all instructions and Communications sent through SPEAR by a Customer User, other than where the relevant Access Method has been suspended or terminated by the Department.
- 7.2 All actions and transactions will be deemed to have been communicated by the Customer if the correct Access Method is used and even if the Customer User is not appointed or actions or transactions are communicated by a person acting fraudulently or by fraudulent or unauthorised use of the Access Method.
- 7.3 Without limiting the foregoing, any use of SPEAR by any person using an Access Method issued to a Customer User is deemed to be use by that Customer User. The Customer indemnifies the Department against any Loss arising from any use or misuse of SPEAR by any person using the Access Method of a Customer User.

8. Common Rules

- 8.1 The Customer agrees that the Common Rules apply to the Customer's use of SPEAR and shall bind the Customer for all dealings between that Customer and any other Customer or User. The Customer agrees that the terms and conditions contained in the Common Rules are for the benefit of and may be enforced by, or relied upon by the Department and any other Customer or User against the Customer. To the extent that there is any inconsistency between the provisions of this Agreement and the Common Rules, the Common Rules shall prevail.
- 8.2 The Department may amend the Common Rules by not less than 60 days notice via email to the Customer (**Rules Change Notice**). The Customer is deemed to accept the amended Common Rules as set out in the Rules Change Notice if it continues to use SPEAR after the expiration of the period of notice. The Customer may by not less than 30 days notice to the Department elect that this Agreement shall terminate at the expiration of the period set out in the Rules Change Notice and this Agreement shall terminate accordingly.

9. User manuals

The Department may, from time to time, issue to the Customer a User Manual relating to the use of SPEAR. The Customer and its Customer Users must strictly comply with the User Manual when using SPEAR.

10. Term, Suspension and Termination

- 10.1 The term of this Agreement shall be from the Commencement Date until termination.

10.2 The Department can immediately suspend the Customer's access to SPEAR and provide notice of termination in the event of:

- (1) Any misuse of SPEAR or any fraud by the Customer or a Customer User.
- (2) Any significant adverse effect on SPEAR or its operation which is, in the reasonable opinion of the Department, due to access to SPEAR by the Customer or any Customer User.

The Department shall reinstate the Customer's access to SPEAR upon being reasonably satisfied that the cause of the suspension has been removed or resolved and that there is no reasonable likelihood of such cause re-occurring.

10.3 The Customer may terminate this Agreement by notice under clause 8.2 if a Rules Change Notice has been given by the Department.

10.4 Either party may terminate this Agreement by giving the other party not less than 6 calendar months notice of such termination.

10.5 Either party may terminate this Agreement effective immediately by written notice to the other party ("**Defaulting Party**") only if any of the following apply:

- (1) the Defaulting Party fails to comply with any material provision of this Agreement and does not remedy that failure to the reasonable satisfaction of the other party within 15 Business Days after notice from the other party requiring it to be remedied;
- (2) the Department has suspended the Customer's use of SPEAR pursuant to clause 10.1 and the Customer has failed to rectify the cause of suspension to the reasonable satisfaction of the Department within 28 days of such suspension; or
- (3) it becomes unlawful for the Defaulting Party to perform its obligations under this Agreement.

10.6 Upon termination of this Agreement for any reason the Customer must immediately cease to use SPEAR.

11. Privacy

11.1 In providing information to the SPEAR system the Customer acknowledges and agrees that the information may be used for the Authorised Purposes.

11.2 The Customer is bound by the information privacy principles and any applicable code of practice under the *Information Privacy Act 2000* (Vic) for the purposes of information provided to it or generated by it as a result of the performance or use of the SPEAR system as if it were the Department. The Customer acknowledges and agrees that the information it derives from the SPEAR system shall only be used for Relevant Purposes.

12. SPEAR Intellectual Property

- 12.1 The Customer acknowledges and agrees that the Department owns all of the Intellectual Property Rights in SPEAR and nothing in this Agreement shall be read so as to transfer any rights, title or interest in SPEAR to the Customer.
- 12.2 The Customer acknowledges and agrees that except as expressly provided in this Agreement, it will not acquire any rights, including Intellectual Property Rights, in SPEAR or any materials supplied by the Department or through SPEAR and that all such rights and goodwill whenever arising immediately vest in, and will remain vested in, the Department.
- 12.3 Subject to this clause 12 and to clause 14 of the Common Rules, nothing in this Agreement affects any pre-existing intellectual property rights in any document or information communicated to SPEAR.

13. Department and Council Liability

- 13.1 To the extent permitted by law, the Department excludes all representations or warranties with respect to SPEAR including as to its security or availability or as to any support information or materials. Subject to the following, all statutory or implied conditions and warranties are excluded to the extent permitted by law. The liability of the Department and the Relevant Council under any condition or warranty which cannot be legally excluded is limited to (to the extent permitted by law):
- (1) in the case of goods;
 - (2) the replacement of the goods or the supply of equivalent goods;
 - (3) the repair of the goods;
 - (4) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (5) the payment of the cost of having the goods repaired; and
 - (6) in the case of services;
 - (7) supplying the services again; or
 - (8) paying the cost of having the services supplied again.
- 13.2 To the extent permitted by law, the Department and each Relevant Council exclude liability for any Loss arising from or in connection with:
- (1) any inaccuracy or incompleteness of the information or document contained in or obtained through the use of SPEAR; or
 - (2) use by the Customer or any person of SPEAR and the information that may be derived from SPEAR,

except to the extent caused or contributed by any negligent act or omission of the Department or the Relevant Council or their respective employees or agents.

- 13.3 To the extent permitted by the law, the Department shall under no circumstances be liable for any indirect or consequential Loss incurred or sustained by any person arising out of access to or use of information derived from SPEAR.

14. Release

The Customer hereby releases the Department and any relevant Responsible Authority, their employees and agents from any Loss suffered or incurred by the Customer including but not limited to indirect, special, or consequential damages (and in any event loss of anticipated revenue, business interruption and loss of business) in connection with or arising out of access to SPEAR, the use of SPEAR or the access to or use of information derived from SPEAR (including any lack of access or loss of data) except to the extent that any Loss arises from any wilful or negligent act or omission of the Department or the relevant Responsible Authority, their respective employees or agents.

15. Statutory obligations

For the avoidance of doubt the parties agree that nothing in this Agreement is to be construed as changing the duties or functions of any party under the *Planning Environment Act 1987* or the *Subdivision Act 1988* or any other Statutory Provision. The Customer and the Department must comply with all Statutory Provisions in all matters relating to this Agreement and to any dealing with or use of SPEAR or information derived from it.

16. Survival of obligations

The provisions of clauses 7.3, 10.6, 11, 12, 13 and 14 of this document and clauses 5.2, 5.4, 10, 11, 12, 13, 14 and 17 of the Common Rules survive the termination of this Agreement.

17. Notices

- 17.1 Notices connected with this Agreement may be given in writing by prepaid ordinary post or by electronic mail to the addresses of the party as set out in the Reference Schedule.
- 17.2 A notice sent by post is deemed to have been received on the 2nd Business Day (at the address to which it is posted) after posting. A notice sent by electronic mail before 5pm on a Business Day at the place of receipt, is deemed to have been received on the day it is sent and otherwise on the next Business Day at the place of receipt. An electronic mail message is not treated as given or received if the sender's computer reports that the message has not been delivered.
- 17.3 Notice to the Customer Representative or to the Department Representative as nominated from time to time shall constitute notice to the Customer or the Department respectively.

18. Miscellaneous

18.1 Assignment

The Customer may not assign or otherwise deal with this Agreement without the prior written consent of the Department.

18.2 Further assurance

Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

18.3 Severability

If anything in this Agreement is unenforceable, illegal or void then it is severed and the rest of this Agreement remains in force.

18.4 Entire understanding

This Agreement (including the Common Rules):

- (1) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and
- (2) supersedes any prior agreement or understanding on anything connected with that subject matter.

18.5 Variation

Subject to clause 8.2, an amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

18.6 Waiver

The parties agree that:

- (1) a party's failure or delay to exercise a power or right does not operate as a waiver of that power or right;
- (2) the exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right;
- (3) a waiver is not effective unless it is in writing; and
- (4) a waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

18.7 Governing law and jurisdiction

The law of the State of Victoria governs this Agreement. The parties submit to the non-exclusive jurisdiction of the courts of the State of Victoria and of the Commonwealth of Australia.

18.8 Delegate to execute

If the Customer executes this Agreement by its delegate (**Delegate**), in executing this Agreement, the Delegate warrants that he or she is duly authorised to do so and acts within the scope of his or her appointment in executing this Agreement.

19. Definitions and Interpretation

19.1 The following definitions shall apply in these conditions.

Agreement means this document including any annexures and the Common Rules

Access Method means either a Digital Certificate or username and password or such other method of access to SPEAR as may be approved by the Department from time to time.

Administrator means a person or persons nominated by the Customer to the Department from time to time under clause 6.1.

Authorised Purposes means the recording and the processing of Relevant Applications and includes use for all documentation and associated purposes (including recording for public access) and includes use in records of Responsible Authorities or Referral Authorities, Land Use Victoria, Crown land records and the digital map base as used and distributed by or on behalf of the State.

Business Day means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made.

Commencement Date means the date so described in the Reference Schedule.

Common Rules means the terms and conditions so identified and set out on the SPEAR web site at www.spear.land.vic.gov.au which bind all Customers of SPEAR.

Communication includes any instruction, request, approval, certification, acceptance, confirmation, information, or document.

Council means a Council as defined in the *Local Government Act 1989 (Vic)*.

Customer means the party so identified in the Reference Schedule provided that any reference to another or other Customers shall be a reference to a Customer other than the party to this Agreement which has entered into an agreement for access to SPEAR.

Customer Representative means the person so nominated in the Reference Schedule or such person who shall be subsequently notified in writing by the Customer to the Department.

Customer User means any User appointed to act on behalf of the Customer in accordance with this Agreement.

Department Representative means the person so nominated in the Reference Schedule or such person who shall be subsequently notified in writing by the Department to the Customer.

Digital Certificate means a token based certificate which meets the requirements of the Department as specified in writing by the Department from time to time.

Intellectual Property Rights means any patents, trade marks or service marks, rights in designs, trade or business names, copyrights, domain names and data base rights (whether or not any of these is registered and including applications for registration of any such thing) and all rights or forms of protection of a similar nature having equivalent or similar effect to any of these in any part of the world.

Loss means any loss, damage, cost, interest, expense, fee, penalty, fine, forfeiture, assessment, demand, action, suit, claim, proceeding, cause of action, liability or damages incurred by a person and includes:

- (1) the cost of any action taken by any person to protect itself from any loss or to preserve any right it has under this Agreement;
- (2) any taxes or duties payable by the person in connection with this Agreement (excluding any tax on assessable income); and
- (3) where applicable, all costs actually paid by the person to their own legal representative (whether or not under a costs agreement) and other expenses incurred by the person in connection with a demand, action, arbitration or other proceeding (including mediation, compromise, out of court settlement or appeal).
- (4) **Personal Information** has the same meaning as that provided in Section 3 of the *Information Privacy Act 2000* (Vic).

Referral Authority has the same meaning as in the *Subdivision Act 1988* (Vic).

Relevant Application means an application to a Responsible Authority or other authorised body and relating to:

- (1) subdivision or consolidation of any land under the *Subdivision Act 1988* (Vic);
- (2) approval of the development or use of any land under the *Planning and Environment Act 1987* (Vic);
- (3) the issue of permits under the *Building Act 1993* (Vic); and
- (4) any other activity as notified to Users by the Department from time to time,
- (5) and includes all activities and documentation associated with such applications.

Relevant Council means the Council or other person or body responsible for processing the Relevant Application.

Relevant Purpose means the purpose of making a Relevant Application, or updating, viewing or objecting to a Relevant Application and includes use for all associated activities and documentation.

Responsible Authority has the same meaning as in the *Planning and Environment Act 1987* (Vic) and, where appropriate, includes such other person or body responsible for the processing of the Relevant Application.

Rules Change Notice means a notice given by the Department under clause 8.2.

SPEAR means the computerised system for Surveying and Planning through Electronic Applications and Referrals developed by the Department as modified from time to time.

SPEAR Application means a Relevant Application lodged in SPEAR.

SPEAR Internet Site means the URL specified by the Department from time to time as the online location for accessing SPEAR through the Web Interface, which URL at the Commencement Date is specified in the Reference Schedule.

State means the Crown in right of the State of Victoria.

Statutory Provision means a statute, regulation or provision of a statute or regulation.

User means any person authorised to access and use SPEAR.

User Manual means such instructions and procedures in any form, including any user guide or information available online, provided by the Department for the operation of SPEAR.

Web Interface means the interface to SPEAR (as modified from time to time) which is intended to be accessed by Customers of SPEAR using a standard internet browser over internet based communications.

19.2 Interpretation

- (1) In this Agreement reference to:
 - (a) one gender includes the others;
 - (b) the singular includes the plural and the plural includes the singular;
 - (c) a person includes a body corporate; and
 - (d) a party includes the party's executors, administrators, successors and permitted assigns.
- (2) Including and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

- (4) Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.
- (5) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

