

# Funding Deed

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**Muswellbrook Shire Council ABN 86 864 180 944**

**AND**

**Arts-Upper Hunter ABN 70 987 561 644**

# Funding Deed

Date	
Parties Details	<p><b>MUSWELLBROOK SHIRE COUNCIL ABN 86 864 180 944</b> of Campbell's Corner, 60-82 Bridge Street, Muswellbrook, NSW 2333</p> <p>Telephone: (02) 6549 3700 Email: records@muswellbrook.nsw.gov.au Attention: The General Manager</p> <p style="text-align: right;">("MSC")</p> <p><b>AND</b></p> <p><b>ARTS-UPPER HUNTER ABN 70 987 561 644</b> of 142 Bridge Street Muswellbrook NSW 2333</p> <p>Telephone: 0409 382 509 Email: rado@artsupperhunter.com.au Attention: Executive Director</p> <p style="text-align: right;">("AUH")</p> <p>("Parties")</p>
Recitals	<p>A. AUH is a community organisation which supports and promotes opportunities for people and organisations involved in the creative industries across the local government areas of Dungog, Muswellbrook, Singleton and Upper Hunter.</p> <p>B. MSC has agreed to provide funding to AUH to support AUH in achieving its Objectives in accordance with the AUH Constitution.</p> <p>C. AUH has agreed to, among other things:</p> <ul style="list-style-type: none"><li>(a) accept the funding from MSC;</li><li>(b) allow a representative of MSC to be a member of The Board; and</li><li>(c) use best endeavours to achieve the Objectives in accordance with the AUH Constitution.</li></ul> <p>D. This Deed sets out the terms on which the funding will be provided.</p>

## IT IS AGREED:

### 1 Definitions and interpretations

#### 1.1 Definitions

In this document:

**AUH Constitution** means the Arts-Upper Hunter Constitution adopted 30 September 2021, a copy of which is annexed to this Deed as Annexure "A".

**Authorised Representative** means:

- (a) in respect of a Party which is a corporation:
  - (i) a company secretary or director or any officer of the corporation whose title or office includes the words “manager” or “director”; or
  - (ii) a person acting with the title or in the office of manager or director; and
- (b) in respect of each Party, a solicitor of that Party or a person nominated by Notice to the other Party as an authorised representative;
- (c) in respect of a Party which is a local council in NSW, that Party’s General Manager.

**Business Day** means a day other than Saturday, Sunday, a public holiday or bank holiday in New South Wales.

**Claim** means in relation to a person, any loss, cost or damage and includes, without limitation, a claim, demand, remedy, suit, injury, damage, loss, cost, liability, action, proceeding, right of action, chose in action, claim for compensation or reimbursement or liability incurred by or to be made or recovered by or against the person, howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at Law, in equity, under statute or otherwise.

**Commencement Date** means the date of this Deed.

**Confidential Information** in relation to this Deed means Information relating to or in connection with the contents of this Deed and which, either orally or in writing:

- (a) is designated or indicated as being the proprietary or confidential information of the discloser, or a third party to whom the discloser owes an obligation of confidentiality; or
- (b) by its nature or the circumstances surrounding its disclosure, could reasonably be expected to be confidential to the discloser or a third party to whom the discloser owes an obligation of confidentiality, but does not include Information which is or becomes public knowledge other than by breach of this Deed or by unlawful means.

**Consideration** has the same meaning as in the GST Act.

**Funding Amount** means the amount of \$11 743.87 plus GST paid annually to AUH (2023 figure invoiced July 2023).

**CPI** means the Consumer Price Index (All Groups) for Sydney, published by the Australian Bureau of Statistics or any similar published index which replaces it.

**Current CPI** means the CPI for the quarter last published at 31 March each year.

**GST** has the same meaning as in the GST Act.

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

**Information:**

- (a) means information, correspondence, data, reports, interpretations, forecasts, processes, formulae, procedures, techniques, computer programs, records, analysis, compilation, business plans, studies, models, drawings, designs, inventions, discoveries and know-how, algorithms and structures, product information, research and development information, financial data and information, marketing materials and

strategies, customer information, and any other documents or material of whatever nature and embodied, contained, exhibited, displayed or conveyed in any form or manner (including in writing, or in machine readable form (whether visible or not) recorded or stored by or in any computer or information retrieval system, or recorded or stored by any electronic magnetic, electromagnetic or other means); and

- (b) includes information that is derived or produced partly or wholly from other Information, including any calculation, conclusion, summary or computer modelling;

**Insolvency Event** means the occurrence of any of the following events in relation to a Party:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the *Corporations Act 2001* (Cth));
- (b) it has a receiver, receiver and manager or similar person appointed to all or any part of its assets; or
- (c) it is in liquidation, in provisional liquidation, under administration or wound up or any action is commenced seeking the liquidation or provisional liquidation of the person and those proceedings are not dismissed or withdrawn within 14 days after the proceedings are commenced.

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in clauses (a) and (b) of this definition.

**Notice** means a written notice, consent, approval, direction, order or other communication.

**Notice Address** means the address specified in the above "Parties Details" which describes that Party.

**Objectives** means the objectives of AUH identified in clause 6 of the AUH Constitution.

**Party** means a party to this Deed and **Parties** has a corresponding meaning.

**Personal Information** has the same meaning as in the *Privacy and Personal Information Protection Act 1998* (NSW).

**Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth).

**Taxable Supply** has the same meaning as in the GST Act.

**Tax Invoice** has the same meaning as in the GST Act.

**Terminating Date** means the date that is three (3) years after the Commencement Date.

**The Board** has the same meaning as in the AUH Constitution.

## 1.2 Interpretation

In this document:

- (a) words importing the singular include the plural and vice versa;

- (b) any gender includes every gender;
- (c) a reference to a person includes corporations, trusts, associations, firms, partnerships, joint ventures, Authorities, and other legal entities, and where necessary, includes successor bodies;
- (d) a reference to legislation or to a legislative provision includes all regulations, orders, proclamations, notices or other requirements under that legislation or legislative provision. It also includes any amendments, modification or re-enactments of that legislation or legislative provision and any legislation or legislative provision substituted for, and any statutory instrument issued under, that legislation or legislative provision;
- (e) a reference to a Party to a document includes the Party's executors, administrators, successors and permitted assigns and substitutes;
- (f) another grammatical form of a defined word or expression has a corresponding meaning;
- (g) unless the context requires otherwise, a reference to a thing (including a chose in action or other right) includes a part of that thing;
- (h) a reference to a clause or annexure is a reference to a clause or annexure in or to this Deed all of which are deemed part of this Deed;
- (i) the clause headings in this Deed are for reference purposes only and do not in any way influence or affect the meaning of this Deed;
- (j) where under or pursuant to this Deed or anything done under this Deed the day on or by which any act, matter or thing is to be done is not a Business Day such act, matter or thing must be done on the immediately preceding Business Day;
- (k) a reference to an agreement or document is to that agreement or document as amended, novated, supplemented or replaced from time to time, regardless of any change in the identity of the Parties; and
- (l) a reference to \$ or dollars is a reference to the lawful currency of the Commonwealth of Australia;
- (m) the words 'such as', 'including', 'particularly' and similar expressions are not used as nor are intended to be interpreted as words of limitation; and
- (n) a reference to "month" means calendar month.

## **2 Term**

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This Deed will commence on the Commencement Date and remain in force until the earlier of:

- (a) the Termination Date;
- (b) it is terminated by operation of Law;
- (c) it is terminated in accordance with clause 7; or
- (d) such other time as agreed between the Parties in writing.

## **3 Funding**

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### **3.1. Funding Amount**

- (a) On 1 August of each calendar year, MSC will pay the Funding Amount to AUH as one annual lump sum payment for the following financial year of the Term.
- (b) On 1 August of each year, the Funding Amount paid will be the Funding Amount of the previous year increased by the Current CPI as at the date of payment.
- (c) In addition to the CPI increase every year, the Funding Amount will be reviewed on 1 August of each year during which the Australian Bureau of Statistics conducts an Australian Census, being not less than every 5 years. The Funding Amount will be reviewed in accordance with the following formulas:

$$\text{Muswellbrook Population \%} = \left( \frac{B - A}{A} \right) \times 100$$

Where:

A = The total number of people in the Muswellbrook local government area according to the previous Australian Census. For the avoidance of doubt, the 2021 Australian Census data will be used for the first review under this clause, being 16,357.

B = The total number of people in the Muswellbrook local government area according to the most recent Australian Census. For the avoidance of doubt, the 2026 Australian Census data will be used for the first review under this clause.

$$\text{New Funding Amount} = \text{Funding Amount} + (\text{Funding Amount} \times \text{Muswellbrook Population \%})$$

Where:

Funding Amount = the Funding Amount immediately prior to the relevant review.

Muswellbrook Population % = the percentage calculated in accordance with the formula above.

- (d) The Parties agree that if the New Funding Amount under clause 3.1(c) will not be determined until after 1 August of the relevant year, then:
  - (i) MSC will pay the Funding Amount immediately prior to the relevant review date; and
  - (ii) within 30 days of the New Funding Amount being determined under clause 3.1(c), MSC will pay the difference (if any) between the previous Funding Amount and the New Funding Amount.
- (e) The Parties agree that MSC and AUH may enter into negotiations to increase or decrease the Funding Amount.

### **3.2. Provision of Funding**

- (a) MSC will provide the Funding Amount to AUH in accordance with and subject to the terms of this Deed; and
- (b) the Funding Amount will be paid by way of an annual lump sum instalment on 1 August each calendar year for the following financial year during the life of this Deed.

### **3.3. Use of Funding Amount**

AUH must only use the Funding Amount for the purposes of achieving the Objectives outlined in the AUH Constitution and in accordance with:

- (a) the requirements of this Deed;
- (b) the AUH Constitution;
- (c) all applicable Laws; and
- (d) all applicable professional ethics, principles and standards.

#### **3.4. No right to assets**

MSC has no rights with respect to the assets purchased by AUH with the Funding Amount.

#### **3.5. No other funding or support**

MSC has no obligation to provide AUH with:

- (a) any funding in addition to the Funding Amount; or
- (b) any other support or services of any kind.

## **4 AUH's Obligations**

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#### **4.1. Obligations**

AUH must:

- (a) comply with all terms and conditions in this Deed;
- (b) only expend the Funding Amount for the purpose identified in clause 3.3;
- (c) comply with the reporting requirements set out in clause 4.3;
- (d) comply with all Laws, AUH policy, standards and procedures that are relevant to the use of the Funding Amount;
- (e) maintain sufficient capability and resources to meet all of its obligations under this Deed;
- (f) perform all of its obligations under this Deed in a cost effective manner consistent with any required levels of quality and performance; and
- (g) comply with all policies, guidelines and reasonable directions MSC provides.

#### **4.2. AUH Constitution**

- (a) AUH must provide MSC with written notification of any proposed changes to the AUH Constitution which may be relevant to this Deed prior to the changes being approved by an annual general meeting or other legal process.
- (b) Within 7 days of receipt of notification of any proposed changes to the AUH Constitution, MSC may object, on reasonable grounds, to the proposed changes.

#### **4.3. Reporting**

- (a) On or before 1 July of each year of the Term, AUH will provide MSC with a written report identifying the activities undertaken by AUH, in the Muswellbrook Shire local government area, during the preceding 12 months and the activities proposed to be

undertaken by AUH, in the Muswellbrook Shire local government area, for the subsequent 12 months, which accord with the AUH Constitution.

#### **4.4. Account and records**

AUH must keep and maintain

- (a) full and accurate accounting and financial transactions, including receipts and payments, relating to the Funding Amount;
- (b) financial statements prepared in accordance with Australian Accounting Standards; and
- (c) records that are able to substantiate AUH carrying out, or performance of, its obligations under this Deed.

#### **4.5. Access and audit rights**

Within 10 Business Days of receipt of such reports, AUH will provide MSC with a copy of any audited annual financial reports.

#### **4.6. Repayment of Funding Amount**

AUH must immediately (or within such time as may be otherwise agreed) repay to MSC any part of the Funding Amount spent on purposes not authorised by this Deed, unless otherwise agreed by the Parties in writing.

#### **4.7. AUH Board**

- (d) Every year during the term of this Deed:
  - (i) MSC will nominate a representative to be a member of The Board; and
  - (ii) AUH will allow the representative nominated by MSC to be a member of The Board.
- (e) Should MSC's representative on The Board vacate their seat, MSC will appoint another representative to be a member of The Board.

#### **4.8. Compliance with Law and policies**

- (a) AUH must comply with and ensure that all employees, volunteers and representatives comply with, all applicable Laws and all policies and procedures of AUH.

#### **4.9. Privacy**

- (a) AUH must not disclose to MSC any Personal Information without the written consent of the individual to whom the Personal Information relates or unless otherwise required or authorised by Law.
- (b) AUH must comply with, including when dealing with the Personal Information, all applicable Laws.

## **5 Representations and Warranties**

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### **5.1. AUH representations and warranties**

- (a) AUH represents and warrants to MSC that:
  - (i) it is not breaching any Law by signing and performing its obligations this Deed;



- (ii) all information provided to MSC both before and after the date of this Deed is true, correct and complete in all material respects and is not misleading;
  - (iii) it is not the subject to any judicial decision against it in relation to employee entitlements (not including decisions under appeal) where it has not paid the claim;
  - (iv) no Insolvency Event has occurred and there are no reasonable grounds to suspect that an Insolvency Event will occur in respect to AUH; and
  - (v) AUH, its employees, representatives and agents have the necessary experience, skill, knowledge, expertise and competence to undertake the obligations under this Deed and are fit and proper people.
- (b) Unless expressly represented otherwise in writing prior to the date of payment of each annual Funding Amount, AUH warrants that the representations and warranties in this clause are deemed to be repeated on the date of payment of the Funding Amount.
- (c) AUH acknowledges and agrees that MSC has entered into this Deed and performs this Deed in reliance on the representations and warranties in this clause.

## **6 Indemnity**

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The Parties indemnify, and keep indemnified, each other from and against any loss (including legal costs and expenses on a solicitor/own client basis) or liability arising directly or indirectly from any Claim by any person as a result of or in connection with:

- (a) the Funding Amount or the use of the Funding Amount;
- (b) a breach of this Deed; or
- (c) any negligent act or omission by such Party in connection with this Deed.

## **7 Termination**

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### **7.1. Termination for breach**

If AUH is in breach of any of its obligations under this Deed, or is otherwise not undertaking or is unable to carry out its Objectives under the AUH Constitution then MSC may immediately terminate this Deed if:

- (a) AUH fails to remedy any breach of this Deed within a reasonable period, being no less than 5 Business Days, after receiving notice from MSC directing it to do so;
- (b) AUH fails to prevent the recurrence of a breach of any obligation under this Deed which it has breached on 2 or more previous occasions, after receiving notice from MSC directing it to do so;
- (c) MSC is the victim of any fraud or dishonest conduct by AUH in connection with this Deed; or
- (d) an Insolvency Event occurs in respect of AUH.

## **7.2. Repayment of Funding Amount**

- (a) If this Deed is terminated in accordance with clauses 7.1(a), 7.1(b) or 7.1(d), AUH is not obliged to repay any Funding Amounts which were paid to AUH prior to termination.
- (b) If the Deed is terminated due to clause 7.1(c), then AUH must repay to MSC all Funding Amounts paid to AUH prior to termination.

## **7.3. Termination for Convenience**

This Deed may be terminated by either Party for any reason by providing no less than 6 months' notice in writing to the other Party.

# **8 Position of MSC**

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- (a) The Parties acknowledge that MSC is an authority with statutory rights and obligations pursuant to the terms of any relevant Law.
- (b) This Deed is not intended to operate to fetter, in any unlawful manner the:
  - (i) power of MSC to make any Law; or
  - (ii) exercise by MSC of any statutory power or discretion.
- (c) No provision of this Deed is intended to, or does, constitute any unlawful fetter on any discretion of MSC. If, contrary to the operation of this clause, any provision of this Deed is held by a court of competent jurisdiction to constitute an unlawful fetter on any discretion, the Parties agree:
  - (i) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied; and
  - (ii) in the event that clause 8(c)(i) cannot be achieved without giving rise to an unlawful fetter on a discretion, the relevant provision is to be severed and the remainder of this Deed has full force and effect.
- (d) Where the Law permits MSC to contract out of a provision of that Law or gives MSC power to exercise a discretion, and if MSC has in this Deed contracted out of a provision or exercised a discretion under this Deed, then to that extent this Deed is not to be taken to be inconsistent with the Law.

# **9 Assignment**

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- (a) AUH must not transfer, assign, novate or similarly deal with ("Dealing") its rights or obligations under this Deed.
- (b) Any change of ownership or control (as defined in section 50AA of the *Corporations Act 2001* (Cth)) of AUH shall be deemed to be an assignment of this Deed for the purposes of this clause.
- (c) Any purported Dealing in breach of this clause is of no effect.

# **10 Confidentiality**

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## **10.1. Confidentiality of this Deed**

The Parties agree that the terms of this Deed are not confidential and this Deed may be treated as a public document and exhibited without restriction by any Party.

## **10.2. Confidentiality**

The Parties agree, subject to clause 10.1, not to disclose any Confidential Information provided by the other party that is not publicly available except:

- (a) to any person in connection with an exercise of rights or a dealing with rights or obligations under this Deed;
- (b) to officers, employees, legal and other advisers and auditors of any party;
- (c) to any party to this Deed or any Related Body Corporate of any party to this Deed, provided the recipient agrees to act consistently with this clause;
- (d) in the case of MSC, to comply with its obligations as a statutory authority under all relevant Laws;
- (e) with the consent of the party who provided the Confidential Information; or
- (f) as allowed by any Law.

## **11 GST**

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### **11.1 Defined GST terms**

Defined terms used in this clause have the meaning ascribed to them in the GST Act.

### **11.2 GST to be added to amounts payable**

If GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST amount as additional Consideration. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this Deed are exclusive of GST.

### **11.3 GST obligations to survive termination**

This clause will continue to apply after expiration or termination of this Deed.

## **12 Notices**

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### **12.1 Form of Notices**

Notices given under this Deed shall be:

- (a) in writing;
- (b) (except where transmitted by email) signed by the Party giving the Notice or its Authorised Representative; and
- (c) addressed to the Notice Address of the person to whom it is to be given.

### **12.2 Method and address for giving Notices**

Notices must be either:

- (a) delivered by hand;
- (b) posted by way of express post; or
- (c) transmitted by email,

to the Notice Address of the person receiving the Notice.

### **12.3 Time of receipt**

A Notice given to a person in accordance with this Deed is deemed to have been given and received if:

- (a) delivered, on the day of delivery if delivered before 5:00pm on a Business Day, otherwise on the next Business Day;
- (b) posted by pre-paid security mail or certified mail, on the second day after the day on which the Notice was accepted by the post office from the Party sending the Notice; or
- (c) transmitted by email, provided the sender receives no failure notice in respect of the email, on the day of transmission if the machine from which the email is sent records the time the email was sent as before 5:00pm on a Business Day, otherwise on the next Business Day.

## **13 General**

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### **13.1 Amendments**

Unless expressly stated otherwise, this Deed may not be modified, amended, added to or otherwise varied except by a document in writing signed by all Parties.

### **13.2 No Merger**

The rights and obligations of the Parties under this Deed do not merge on completion of any transaction contemplated by this Deed.

### **13.3 Entire Agreement**

This Deed constitutes the entire agreement of the Parties in relation to its subject matter and supersedes all prior agreements, understandings and negotiations between the Parties. No other covenants or provisions are implied or arise between the Parties by way of collateral or other agreement. No Party was induced to enter into this Deed by any promise, representation, warranty or undertaking given or made by the other Party (or any of its employees, contractors or agents). The existence of any such implication or collateral or other agreement is expressly negative.

### **13.4 Construction**

No rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of or seeks to rely on this Deed or any part of it.

### **13.5 Governing Law and Jurisdiction**

- (a) The laws applicable in New South Wales govern this Deed.
- (b) Each Party irrevocably submits to the non-exclusive jurisdiction of the New South Wales Courts and Courts competent to hear appeals from those Courts.

### **13.6 Counterparts**

This Deed may be executed in any number of counterparts and all such counterparts taken together will constitute the same instrument. A Party can execute this Deed by signing any counterpart. Counterparts can be exchanged electronically by way of email.

### **13.7 Costs**

Each Party shall bear its own legal costs and disbursements in relation to the negotiation, preparation and execution of this Deed.

### **13.8 Representation and warranties**

The Parties represent and warrant that they have the power and authority to enter into this Deed and comply with their obligations under the Deed and that entry into this Deed will not result in the breach of any Law.

### **13.9 Severability**

This Deed will, so far as possible, be interpreted or construed so as not to be invalid, illegal or unenforceable in any respect but if any provision on its true interpretation or construction is held to be illegal, invalid or unenforceable:

- (a) that provision will, so far as possible, be read down to the extent that it may be necessary to ensure that it is not illegal, invalid or unenforceable and as may be reasonable in all the circumstances so as to give it a valid operation of a partial character; or
- (b) if the provision or part of it cannot effectively be read down, that provision or part of it will be deemed to be void and severable and the remaining provisions of this Deed will not in any way be affected or impaired and will continue notwithstanding that illegality, invalidity or unenforceability.

### **13.10 Relationship of the Parties**

Nothing in this Deed constitutes a joint venture, agency, partnership or other fiduciary relationship between the Parties.

**EXECUTED** as a Deed:

**EXECUTED** by **Muswellbrook Shire Council** )  
**ABN 86 864 180 944** by its authorised delegate )  
pursuant to Section 377 of the *Local* )  
*Government Act 1993 (NSW)*, in the presence  
of:

.....  
Signature of Witness

.....  
Authorised Delegate

.....  
Name of Witness (Print)

.....  
Name of Authorised Delegate

**EXECUTED** by **Arts-Upper Hunter ABN 70** )  
**987 561 644** in accordance with Section 127 of )  
the *Corporations Act 2001 (Cth)*: )

.....  
Signature of Director

.....  
Signature of Director/Secretary

.....  
Name of Director (Print)

.....  
Name of Director/Secretary (Print)

**ANNEXURE “A”**  
**AUH Constitution**