

# HERC IP Framework – Material Transfer Agreement

## Details Schedule

Item Agreement Details		
1.	<b>Transferor</b>	Party name: <i>[insert]</i> ABN: <i>[insert]</i> Address: <i>[insert]</i> Email: <i>[insert]</i> Notices for attention of: <i>[insert]</i>
2.	<b>Recipient</b>	Party name: <i>[insert]</i> ABN: <i>[insert]</i> Address: <i>[insert]</i> Email: <i>[insert]</i> Notices for attention of: <i>[insert]</i>
3.	<b>Details of related agreement (if any)</b>	<i>[If the Material is being provided for use as part of a particular project, insert the details (e.g. title, date) of the relevant agreement for that project.]</i>
4.	<b>Commencement</b>	This Agreement commences on <i>[insert date]</i> .
Details of Material		
5.	<b>Material (clause 3)</b>	<i>[insert description of the Material.]</i>
6.	<b>Permitted Use (clause 3(b))</b>	<i>[insert detailed description of the permitted use(s) – e.g. For use within the Recipient operations to...]</i>
7.	<b>Delivery Instructions (clause 3(a))</b>	Delivery Date: <i>[insert date]</i> Delivery Instructions: <i>[insert details]</i> The <i>[specify party]</i> is responsible for all costs associated with the delivery of Material to the Recipient.
8.	<b>Handling Instructions (clause 3(d))</b>	<i>[Insert any handling instructions]</i>
9.	<b>Reporting/Review Requirements (clause 3(e))</b>	<i>[Insert any reporting requirements and/or requirements to provide Transferor an opportunity to review any draft publications.]</i>
10.	<b>Return Instructions and Return Date (clause 3(e))</b>	Return Instructions: <i>[insert details, or N/A if Materials will not be returned to Transferor. If N/A, ownership of the Material transfers to the Recipient on delivery.]</i> Return Date: <i>[insert or N/A if not applicable]</i> The <i>[specify party]</i> is responsible for all costs associated with the return of Material to the Transferor.
11.	<b>Acknowledgement (clause 6)</b>	<i>[Insert any requirement for the Recipient to acknowledge in publications (including the form of acknowledgement) its use of the Transferor's Material.]</i>

Title and risk			
12.	<b>Ownership of Modifications</b> (clause 7(c))	<i>[Tick which applies.]</i> Recipient <input type="checkbox"/> Transferor <input type="checkbox"/> Other person <i>[insert details]</i> <input type="checkbox"/>	
13.	<b>Insurance Requirements</b> (clause 7(e))	<i>[insert if applicable - e.g. the Party that has Title to the Material under this Agreement must obtain and maintain adequate insurance in respect of the possession, handling, storage, use and disposal of the Material.]</i>	
Charges (optional)			
14.	<b>Fee (AUD)</b> (clause 8.1)	<i>[\$[insert, if applicable] (excluding GST)</i>	
15.	<b>Additional Expenses</b> (clause 8.1)	<i>[insert if applicable]</i>	
16.	<b>Payment terms</b> (clause 8.1)	<i>[insert if applicable – e.g. The Fee and the Additional Expenses will be payable prior to the Delivery Date.]</i>	
General			
17.	<b>Confidential Information</b> (clause 9)	<b>Transferor</b>	
		<b>Description of Confidential Information</b>	<b>Period of confidentiality</b>
		Description: <i>[Insert description of Confidential Information. If the parties agree to limit Confidential Information to the specific information described here, clearly state that only the information listed here is Confidential Information. If more space is required an attachment can be added.]</i>	Period: <i>[Insert the period it is required to remain confidential (eg 'perpetually' or '7 years from the date of disclosure').]</i>
		<b>Recipient</b>	
		<b>Description of Confidential Information</b>	<b>Period of confidentiality</b>
		Description: <i>[Insert description of Confidential Information. If the parties agree to limit Confidential Information to the specific information described here, clearly state that only the information listed here is Confidential Information. If more space is required an attachment can be added.]</i>	Period: <i>[Insert the period it is required to remain confidential (eg 'perpetually' or '7 years from the date of disclosure').]</i>
18.	<b>Liability cap</b> (clause 10(a)(i))	<i>[insert liability cap amount.]</i>	

## Operative provisions

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### 1. Definitions

**Additional Expenses** mean the expenses (if any) identified in item 15 of the Details Schedule.

**Agreement** means this material transfer agreement, and any schedules, annexures and attachments to it.

**Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the act is to be performed or where the notice is received.

**Commonwealth Entity** means any government body which is subject to the *Public Governance, Performance and Accountability Act 2013* (Cth).

**Confidential Information** means information that is by its nature confidential and:

- (a) is designated by a party as confidential in item 17 of the Details Schedule; or
- (b) a party knows or ought to know is confidential, unless the parties have specified otherwise in item 17 of the Details Schedule,

but does not include information that is:

- (c) publicly available other than as a result of unauthorised disclosure by a party;
- (d) independently known by or lawfully in the possession of the receiving party; or
- (e) independently created by the receiving party without access to the other party's Confidential Information.

**Delivery Date** means the date identified in item 7 of the Details Schedule.

**Delivery Instructions** mean the requirements for delivery of the Material identified in item 7 of the Details Schedule.

**Details Schedule** means the schedule of details particular to this Agreement set out at the start of this Agreement.

**Fee** means the fee identified in item 14 of the Details Schedule.

**Handling Instructions** mean the requirements (if any) for handling of the Material identified in item 8 of the Details Schedule.

**Insurance Requirements** mean the requirements (if any) in relation to insurance identified in item 13 of the Details Schedule.

**Intellectual Property Rights** or **IPR** means patents, rights to exploit inventions, trade marks, service marks, registered designs, plant breeder's rights, copyrights and related rights, database rights, design rights, circuit layout rights, in each case whether registered or unregistered, including rights to apply for and be granted and applications for any of the above and any continuations, continuations-in-part, divisional applications, renewals or extensions of, and rights to claim priority from, those rights, and any similar right recognised from time to time in any jurisdiction, together with all rights of action in relation to the infringement of any of the above, but does not include Moral Rights and similar personal rights, which by law are non-assignable.

**Material** is identified in item 5 of the Details Schedule.

**Modifications** means any modifications or improvements made by the Recipient to the Material or its features or specifications, but does not include the Material itself.

**Moral Rights** has the same meaning in Part IX of the *Copyright Act 1968* (Cth) or any similar foreign legislation as applicable.

**Permitted Use** means the use(s) identified in as a permitted use in item 6 of the Details Schedule, but excludes any use(s) expressly identified as a prohibited use in that item of the Details Schedule.

**Personnel** means a party's officers, employees and contractors and in the case of a university, includes students. Personnel includes the Personnel of a contractor.

**Recipient** means the party to this Agreement as identified in item 2 of the Details Schedule.

**Reporting/Review Requirements** mean the requirements (if any) for reporting to the Transferor and/or providing the Transferor an opportunity to review draft publications, as identified in item 9 of the Details Schedule.

**Return Date** means (where applicable) the date identified in item 10 of the Details Schedule.

**Return Instructions** mean the requirements for return or disposal of the Materials (where applicable) identified in item 10 of the Details Schedule.

**Transferor** means the party to this Agreement identified in item 1 of the Details Schedule.

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## **2. Precedence of documents**

To the extent of any inconsistency between any of the documents forming part of this Agreement, those documents will be interpreted in the following order of priority:

- (a) clauses 1 to 13;
  - (b) the Details Schedule;
  - (c) any annexures or attachments to this Agreement; and
  - (d) any documents incorporated by reference in this Agreement.
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## **3. Recipient's Use of the Material**

- (a) The Transferor will deliver the Material to the Recipient by the Delivery Date in accordance with the Delivery Instructions.
  - (b) The Recipient may only use the Material solely for the Permitted Use. Unless expressly included in this Agreement, the Permitted Use does not allow disclosure of Material to third parties, including by exhibition or use of physical Material in the presence of third parties (other than contracted providers working at the Recipient's direction and control), or use of Material for direct commercial return (including to produce goods or services for sale or hire, or the provision of any reports, test results or findings to any third party).
  - (c) The Recipient may only allow Personnel to use the Material where required for the Permitted Use and the Recipient is responsible for ensuring those Personnel comply with the terms of this Agreement.
  - (d) The Recipient must comply with any Handling Instructions, obtain all relevant approvals, comply with all applicable ethical and research codes of practice, and comply with all applicable law.
  - (e) The Recipient must comply with any Reporting/Review Requirements.
  - (f) Where required in item 10 of the Details Schedule, the Recipient must either return or dispose of any unused portions of the Material in accordance with the Return Instructions and by the Return Date.
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## **4. No IPR granted**

- (a) The Transferor (or the relevant third party) retains full ownership of the IPR in the Material, unless the parties agree otherwise in writing. The Recipient's rights to the Material are limited to those rights expressly set out in this Agreement.
  - (b) The Recipient must promptly disclose to the Transferor all information relating to any Modifications.
  - (c) The Recipient must not (and must ensure that its Personnel do not) attempt to obtain patent coverage on, or assert any other IPR over, the Material or any manner of manufacture involving the Material including processes for the manufacture or use of the Materials or any compositions containing the Materials, unless the parties agree otherwise in writing.
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## **5. Material properties**

- (a) The Recipient must inspect the Material before accepting delivery to ensure that it meets the requirements of this Agreement. The Transferor does not give any assurance that the Material is suitable for the Permitted Use, and any use of the Material will be at the Recipient's own risk.

- (b) Where item 5 of the Details Schedule identifies that the Material has been newly made to specific product specifications, the Transferor will ensure it meets those specifications at the time of delivery.
- (c) Except where clause 5(b) applies, the Material is supplied to the Recipient on an 'as is' basis at the time of delivery, which means it may be experimental in nature, may have inherent defects or deficiencies, and may not be of merchantable quality, fit for any particular purpose, safe, effective, or of a particular quality.
- (d) The Transferor warrants, to the best of its knowledge and belief, that as at the time delivered, and in the state delivered, the Material, does not infringe any IPR of a third party, and would not infringe any IPR of a third party if used for the Permitted Use.

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## **6. Use of the party's name and acknowledgement**

- (a) Except with a party's prior written consent, the other party must not use that party's:
  - (i) name in a manner that suggests that the party endorses or is associated with the other party's business, products or services; or
  - (ii) logo or branding.
- (b) If any acknowledgement requirements are specified in item 11 of the Details Schedule, the Recipient must acknowledge the Transferor's contribution in any publication that refers to the Material, in accordance with those requirements. If no requirements are specified in item 11 of the Details Schedule, the Recipient is not required to acknowledge the Transferor's contribution.

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## **7. Title and risk to Material**

- (a) Except as set out in clause 7(b), title to the Material passes to the Recipient on the later of delivery and final payment of the Fee and any Additional Expenses.
- (b) Where Return Instructions apply in respect of Material, the Transferor retains title to the Material, regardless of whether the Recipient complies with those Return Instructions.
- (c) Unless the parties specify otherwise in item 12 of the Details Schedule, the Recipient owns any Modifications.
- (d) Risk of loss in respect of the Material passes to the Recipient on acceptance of delivery.
- (e) Each party must comply with any Insurance Requirements.

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## **8. Payment**

### **8.1 Fee and payment terms**

- (a) The Recipient must pay the Transferor the Fee (and any Additional Expenses) in full in accordance with item 16 of the Details Schedule.
- (b) The parties each hereby acknowledge and agree that they enter into this agreement voluntarily, and in exchange for valuable consideration, being their respective promises, rights and obligations as set out in this Agreement, and they so acknowledge and agree, even if both the Fee and Additional Expenses are \$0, "N/A" or not specified.
- (c) The Recipient must pay an invoice issued by the Transferor within 20 Business Days after the date of the invoice. For GST purposes all invoices or receipts issued by the Transferor are tax invoices.
- (d) If the Recipient does not pay on time then the Transferor may charge interest on the outstanding amount. Interest is calculated daily from the due date until the date the outstanding amount is paid at:
  - (i) in respect of the period from 1 January to 30 June in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced; and
  - (ii) in respect of the period from 1 July to 31 December in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

## 8.2 GST

- (a) In this clause 8.2, words and expressions which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) have the same meaning as in the GST Act.
- (b) The Fee (and any Additional Expenses) payable under this Agreement is exclusive of GST.
- (c) If GST is payable by a supplier on any supply made under this Agreement:
  - (i) the recipient, upon receiving a tax invoice from the supplier, will pay to the supplier an amount equal to the GST payable on the supply; and
  - (ii) this amount will be paid in addition to, and at the same time, that the consideration for the supply is to be provided.

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## 9. Information management

### 9.1 Use of Confidential Information

- (a) Except as set out in this clause 9.1, for the period that Confidential Information is to remain confidential as set out in item 17 of the Details Schedule, each party when receiving Confidential Information of the other party must:
  - (i) only use the Confidential Information for the purpose it was disclosed; and
  - (ii) keep confidential and not further disclose the Confidential Information.
- (b) A party may only disclose Confidential Information to its Personnel for the purpose of performing this Agreement. Where Confidential Information of the other party is disclosed to a party's Personnel for the purpose of performing this Agreement, that party must ensure those Personnel are subject to equivalent (legally binding) obligations to those set out in this Agreement.
- (c) Each party may disclose Confidential Information of the other party:
  - (i) with that other party's prior written consent;
  - (ii) to a professional adviser in order to comply with obligations, or to exercise rights, under this Agreement, provided that the adviser is subject to equivalent (legally binding) obligations to those set out in this Agreement; or
  - (iii) if required by law or the rules of a securities exchange, but only to the extent of the legal requirement and after appropriate action is taken to protect the form and content of the disclosure. If a party is required to disclose any Confidential Information of the other party pursuant to this clause 9, that party must promptly notify the other party (to the extent notification is permitted by law).
- (d) Without limiting its obligations, each party:
  - (i) undertakes to implement appropriate security practices to prevent any unauthorised copying, use or disclosure of the other party's Confidential Information; and
  - (ii) must promptly notify the other if the party becomes aware of any actual or suspected unauthorised use or disclosure of the other party's Confidential Information.
- (e) Notwithstanding any other provision of this Agreement, if a party is a Commonwealth Entity, or a State or Territory government entity, that party will not be in breach of this clause 9.1 if it is required to disclose information to a Minister or a House or Committee of Parliament.
- (f) This Agreement does not limit any other agreement between the parties that provides authority for a party to disclose or use Confidential Information, where received or created under that other agreement.
- (g) At any time a party may request return or destruction of any or all copies of its Confidential Information (unless required by law to be retained). The other party must promptly comply with such request. On receipt of any such request the other party's right to use that Confidential Information ceases.
- (h) Notwithstanding clause 9.1(g), a party is entitled to keep a copy of Confidential Information of the other party for the sole purpose of managing legal obligations, or where stored in a back-up of an IT system. A party must continue to treat any such copy as Confidential Information of the other party which is subject to the terms of this Agreement.

- (i) The obligations under this clause 9.1 survive the return or destruction of any Confidential Information for the period of confidentiality specified in respect of that Confidential Information in item 17 of the Details Schedule.

## 9.2 Privacy

In performing this Agreement, both parties agree to comply with their respective obligations under any applicable laws protecting the privacy of individuals. To the extent that the Material includes personal information, the parties will agree and comply with appropriate protocols for handling the Material, consistent with applicable laws and ethics approvals obtained.

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## 10. Limitation of liability

- (a) The aggregate liability of each party for loss suffered or incurred by the other party arising out of or in connection with this Agreement however caused whether in tort (including negligence), contract, statute, equity or otherwise is, subject to clause 10(b), to the full extent permitted by law:
  - (i) subject to clause 10(b), limited to the amount specified in item 18 of the Details Schedule;
  - (ii) excluded for any loss of anticipated profits or savings, business interruption, loss of revenue or loss of goodwill; and
  - (iii) reduced proportionately to the extent that the acts or omissions of the other party have contributed to the loss.
- (b) Any limit on or exclusion of the liability of each party under clause 10(a)(i) does not apply in relation to liability for:
  - (i) personal injury (including sickness and death);
  - (ii) an infringement of third party IPR;
  - (iii) a breach of any obligation of confidentiality; or
  - (iv) wilful default or fraud.

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## 11. Dispute resolution

- (a) Any dispute, controversy or claim arising out of or in connection with this Agreement, including its existence, breach, validity or termination (**Dispute**) must be dealt with in accordance with this clause 11. This clause does not prevent either party from seeking urgent injunctive or similar interim relief from a Court.
- (b) The party claiming that there is a Dispute must notify the other party in writing and give details of that Dispute.
- (c) On receipt of a notification under clause 11(b) the parties must arrange for their respective representatives to meet within 20 Business Days to attempt to resolve the Dispute in good faith.
- (d) If the Dispute is not resolved within 20 Business Days of receipt of the notification (or longer period agreed by the parties) the parties will endeavour to settle the Dispute by mediation administered by the Australian Disputes Centre (ADC). The mediation must be conducted in accordance with the *ADC Guidelines for Commercial Mediation* operating at the time the matter is referred to ADC.
- (e) If the Dispute is not resolved within 30 Business Days from the date that the written notice of the Dispute is received, then either party may initiate proceedings in a court of competent jurisdiction.

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## 12. Termination

- (a) Either party may terminate this Agreement with immediate effect by giving notice to the other party if the other party is in material breach of any provision of this Agreement and (if it is capable of remedy) the breach has not been remedied within 20 Business Days after receipt of written notice specifying the breach and requiring its remedy.

- (b) If the Transferor terminates this Agreement under clause 12(a), then:
    - (i) ownership of the Material immediately vests in the Transferor; and
    - (ii) the Recipient must cease all use, and return or dispose of the Material (at Transferor's election) immediately and in accordance with the Transferor's instructions,even if no Return Instructions apply to this Agreement.
  - (c) Either party may terminate this Agreement for convenience by giving the other party at least three months' prior written notice.
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## **13. General**

### **13.1 Notices**

- (a) The parties' respective representatives for the receipt of notices are as set out in items 1 and 2 respectively of the Details Schedule, until changed by written notice.
- (b) A notice is deemed to be received:
  - (i) if delivered by hand - upon delivery to the relevant address;
  - (ii) if sent by pre-paid express post - on the second Business Day after the date of posting; or
  - (iii) if transmitted by email - at the time sent (as recorded on the device from which the sender sent the email) unless, within 4 hours of sending the email, the party sending the email receives an automated message that the email has not been delivered.
- (c) A notice received after 5.00 pm, or on a day that is not a Business Day in the place of receipt, is deemed to be effected on the next Business Day in that place.

### **13.2 Governing law**

This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation are governed by, and this Agreement is governed by, the laws of the State or Territory based on the Transferor's location set out in item 1 of the Details Schedule. The parties irrevocably submit to the non-exclusive jurisdiction of the courts of that State or Territory.

### **13.3 Variation**

No variation or amendment of this Agreement will be effective unless it is made in writing by an authorised representative of each party.

### **13.4 Counterparts**

This Agreement may be executed in any number of counterparts. All counterparts will collectively be taken to constitute one instrument.

### **13.5 Assignment and novation**

The Recipient may only assign its rights or novate its rights and obligations under this Agreement with the prior written consent of the Transferor.

### **13.6 Entire agreement**

This Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.



# Signing page

Signed as an agreement.

Signed for and on behalf of the **[Insert Transferor Name and ABN]** by its duly authorised representative:

\_\_\_\_\_  
Signature of authorised representative

\_\_\_\_\_  
Full name of authorised representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Full name of witness

Signed for and on behalf of the **[Insert Recipient Name and ABN]** by its duly authorised representative:

\_\_\_\_\_  
Signature of authorised representative

\_\_\_\_\_  
Full name of authorised representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Full name of witness