

# HERC IP Framework – Mutual Confidentiality Agreement

## Details Schedule

Item	Parties			
1.	Party 1	Party 1 name: <i>[insert]</i> ABN: <i>[insert]</i> Address: <i>[insert]</i> Email: <i>[insert]</i> Notices for attention of: <i>[insert]</i>		
2.	Party 2	Party 2 name: <i>[insert]</i> ABN: <i>[insert]</i> Address: <i>[insert]</i> Email: <i>[insert]</i> Notices for attention of: <i>[insert]</i>		
<b>Nature of obligations</b>				
3.	Commencement	This Agreement commences on <i>[insert date]</i> .		
<b>Confidential Information details</b>				
4.	Confidential Information	Party 1		
		<table border="1"> <thead> <tr> <th>Description of Confidential Information</th> <th>Period of confidentiality</th> </tr> </thead> <tbody> <tr> <td> <i>Description: [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> </td> <td> <i>Period: [insert the period it is required to remain confidential (eg 'perpetually' or '7 years from the date of disclosure').]</i> </td> </tr> </tbody> </table>	Description of Confidential Information	Period of confidentiality
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**Guidance Note for items 1 and 2:** These items set out the parties' representatives for the receipt of notices under the Agreement and can only be changed in writing.

The location of Party 1 is also the governing law and jurisdiction of the Agreement (see clause 7.2).

**Guidance Note for item 3:** The date the Agreement commences should be specified here. This would normally be on or after signing of the Agreement, but can be earlier if both parties agree. The date should always be before Confidential Information is provided to a party.

Either party may terminate their engagement at any time and require return or destruction of Confidential Information in accordance with clause 4, but the obligations in this Agreement continue beyond the return or destruction of Confidential Information in accordance with clause 4(c), for the period specified in item 4.

**Guidance Note for item 4:** Information of a confidential nature will be protected as Confidential Information if it is **either** described here, **or** where a party knows or ought to know it is confidential.

If the parties agree to limit Confidential Information to only the specific information described here, this item needs to clearly state that **only** the information listed here is Confidential Information.

The parties may wish to list all information exchanged in relation to a particular project as Confidential Information, or they may wish to limit it to specific information, meetings or documents. Parties should be careful to consider the implications of this.

Unless there is a good reason to specify otherwise, the period of confidentiality will ordinarily be the same for each party's Confidential Information.

		<b>Party 2</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>5.</b>	<b>Permitted Purpose</b>	<i>[insert detailed description of the purpose – e.g. to enable the parties to discuss a potential collaborative project regarding...]</i>  <i>[Identify here if there are additional restrictions on disclosure of Confidential Information with respect to any Affiliate or contractor personnel]</i>	

**Guidance Note for item 5:** The parties must identify the purpose for which Confidential Information can be used. The description should be as specific as possible.

This Agreement permits disclosure of Confidential Information to *Personnel* for the Permitted Purpose in accordance with clause 3(b). It does not cover disclosure of Confidential Information to third parties.

Disclosure to Personnel of Affiliates and contractors is permitted under the Agreement unless expressly restricted as part of this item.

If a party wants to disclose Confidential Information to another third party, the parties should consider if a separate confidentiality agreement is required with that third party, so that the third party is subject to legally binding obligations with respect to the disclosed Confidential Information.

## Operative provisions

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### 1. Definitions

**Affiliate** means any corporation, partnership, or other entity Controlling, Controlled by or under common Control with a party to this Agreement.

**Agreement** means these terms together with the Details Schedule and any attachments.

**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 4 of the Details Schedule; or
- (b) a party knows or ought to know is confidential, unless the parties have specified otherwise in item 4 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.

**Control** of a corporation, partnership or other entity means:

- (a) direct or indirect beneficial ownership of more than 50% of its voting power, or 50% of the interest in its income;
- (b) the power to appoint the majority of its directors; or
- (c) the power otherwise to direct its business activities.

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

**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.

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

**Guidance Note to the definition of Confidential Information:** A party's Confidential Information includes information identified as being confidential in the Details Schedule and - unless clearly stated otherwise in the Details Schedule - any other information a party knows or ought to know is confidential.

**Permitted Purpose** means the purpose identified in item 5 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 or Affiliate of the party.

**Guidance Note on definition of Personnel:**

Personnel is defined broadly to ensure a party is responsible for its Affiliates and contractors. However, disclosure of Confidential Information to Affiliates or contractors may be restricted via the definition of Permitted Purpose in item 5 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 7;
- (b) the Details Schedule;
- (c) any annexures or attachments to this Agreement; and
- (d) any documents incorporated by reference in this Agreement.

**Guidance Note to clause 2:** This clause assists the parties in interpreting this Agreement. If inconsistency arises between Agreement documents (i.e. the Details Schedule and an attachment), the interpretation of the higher priority document is to be applied.

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## 3. Use of Confidential Information

- (a) Except as set out in this clause 3, for the period that Confidential Information is to remain confidential as set out in item 4 of the Details Schedule, each party when receiving Confidential Information of the other party must:
  - (i) only use the Confidential Information for the Permitted Purpose; and
  - (ii) keep confidential and not further disclose the Confidential Information.
- (b) A party may disclose Confidential Information to its Personnel for the Permitted Purpose, subject to any restrictions agreed in item 5 of the Details Schedule. Where Confidential Information of the other party is disclosed to a party's Personnel for use in accordance with the Permitted Purpose, 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, that party must promptly notify the other party (to the extent notification is permitted by law).

**Guidance Note to clause 3(a):** This clause restricts further disclosure of Confidential Information and requires that any use of the Confidential Information be only for the Permitted Purpose.

Exceptions (where disclosure or other uses are permitted) are set out in the remainder of clause 3.

**Guidance Note to clause 3(b):** Any Personnel that the Confidential Information is disclosed to are also subject to the obligations set out in this Agreement. These Personnel are not required to enter into a separate confidentiality agreement, but the recipient party must ensure that the Personnel are legally bound to comply with equivalent obligations (for example, pursuant to their employment agreement).

Personnel is defined to include Personnel of a party's Affiliates and contractors. Confidential Information can be disclosed to such Personnel, unless the parties agree otherwise in item 5 of the Details Schedule.

- (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 3 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.

**Guidance Note to clause 3(d):** The party receiving the Confidential Information is required to implement appropriate security practices and promptly notify the disclosing party of any actual or suspected unauthorised use or disclosure.

**Guidance Note to clause 3(e):** Government entities may be required, for public accountability reasons, to disclose Confidential Information in specific circumstances as set out in this clause.

## 4. Termination

- (a) 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.
- (b) Notwithstanding clause 4(a), 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.
- (c) The obligations under this Agreement survive the return or destruction of any Confidential Information for the period of confidentiality specified in respect of that Confidential Information in item 4 of the Details Schedule.

**Guidance Note to clause 4:** If the parties decide to not continue engaging, either party may, at any time, request return or destruction of all copies of their Confidential Information. The other party cannot then continue to use or retain the Confidential Information unless required by law, to manage legal obligations, or where stored in a back-up of an IT system.

The return or destruction of Confidential Information does not affect the parties' obligations under this Agreement, which continue for the period specified in item 4 of the Details Schedule.

## 5. No warranty

Neither party or their respective Personnel:

- (a) make any express or implied representation or warranty as to the accuracy or completeness of the Confidential Information disclosed by that party to the other party; or
- (b) are liable for direct or indirect damage arising in any way out of the use by the other party of, or termination of the right to use, any Confidential Information disclosed by that party to the other party.

**Guidance Note to clause 5:** Neither party makes any warranties as to the accuracy of the Confidential Information disclosed. Further, neither party is liable for any damage arising out of use of the Confidential Information.

However, in some circumstances the law may imply obligations - for example in relation to safety of information provided - that cannot be excluded. It is also possible that a party could still be liable to a third party, for example if they breach a licence agreement or other confidentiality agreement.

## 6. 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 6. This clause does not prevent either party from seeking urgent injunctive or similar interim relief from a court of competent jurisdiction.
- (b) The party claiming that there is a Dispute must notify the other party in writing and give details of that Dispute.

**Guidance Note to clause 6(a):** A party may go to court and urgently seek an order preventing disclosure or use of Confidential Information (an injunction), including prior to following the Dispute process. This is permitted because the value of the Confidential Information is lost once it is disclosed.

- (c) On receipt of a notification under clause 6(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 will 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.
- (f) The parties acknowledge that damages may not be a sufficient remedy for any breach of this Agreement and that the party disclosing the Confidential Information is entitled to seek injunctive relief as a remedy for any breach or threatened breach by the receiving party of its obligations under this Agreement, in addition to any other remedies available.

## 7. General

### 7.1 Notices

- (a) The parties' 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.

### 7.2 Applicable 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 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.

### 7.3 Variation

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

### 7.4 Assignment and novation

A party may only assign rights or novate rights and obligations under this Agreement with the prior written consent of the other party.

**Guidance Note to clause 7.1:** For any formal notices and communications, the parties should follow the requirements of clause 7.1 to ensure it is valid.

A notice will be deemed to be received upon delivery, as set out in clause 7.1(b).

While there are several ways to send notices, the most common approach (and the fastest) is via email. An email sent before 5pm on a Business Day in the place of receipt is deemed delivered at the time sent, unless an automated message is received that an email has not been delivered. There is no requirement to also post or hand deliver a copy of a notice once sent via email.

**Guidance Note to clause 7.2:** The location of the party specified as Party 1 in the Details Schedule determines the applicable law and jurisdiction of the Agreement.

**Guidance Note to clause 7.3:** Despite the requirement for changes to be agreed and in writing, if the parties or their Personnel verbally agree changes or act as if the Agreement has been varied, this can become legally binding on them. The parties need to manage their conduct to ensure it is consistent with the agreed terms.

**Guidance Note to clause 7.4:** Assigning any rights will need written consent of the other party. Novation replaces a party with a new party and requires a deed to be **agreed** by all parties.



## 7.5 Entire agreement

Without limiting clause 3(f) 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.

**Guidance Note to clause 7.5:** The purpose of this clause is to make clear that this Agreement is the entire agreement between the parties with respect to the use of the Confidential Information.

## 7.6 Intellectual Property Rights

This Agreement does not transfer any interest in any IPR embodied in the Confidential Information.

**Guidance Note to clause 7.6:** This Agreement does not affect the IPRs within the Confidential Information.

If the parties require further IP rights or will be testing materials before entering into the main **transaction**, these rights should be granted under a separate agreement - such as a material transfer agreement or technical services agreement.

## 7.7 No obligation

This Agreement does not oblige either party to enter into any further agreements.

**Guidance Note for clause 7.8:** The purpose of this clause is to make it clear that the parties can sign separate copies of this Agreement (called 'counterparts') and the Agreement will be binding. The parties should ensure that the counterpart documents are exactly the same.

## 7.8 Counterparts

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

## 7.9 Affiliates and contractors

Notwithstanding any clause of this Agreement, in relation to the Confidential Information of the other party, a party will be responsible for the actions of its Affiliates and any contractors, and their Personnel, as if they were the actions of the party.

**Guidance Note for clause 7.9:** The purpose of this clause is to clarify that where Affiliates or contractors, and their Personnel, are permitted to access Confidential Information, the relevant party will be responsible for their actions.

Affiliate and contractor Personnel are subject to the same restrictions as set out in clause 3. If there are further restrictions on access, these can be agreed by the parties as part of the Permitted Purpose for the Agreement.

# Signing page

Executed as an agreement.

Signed for and on behalf of the  
**[Insert Party 1 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 Party 2 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

**Guidance Note for execution:**

The parties should adjust their respective execution blocks to reflect the nature of the entity signing.

The Agreement is not a deed and only needs to be signed by an authorised representative of each party to be binding. Each party is responsible for satisfying itself that the other party has validly signed the Agreement.

The template requires both parties to arrange for an authorised representative and witness to sign the Agreement.

The parties may also agree alternative signing methods as required, including under section 127 of the *Corporations Act 2001* (Cth) either by wet ink or electronically.

Once signed, there is no requirement to exchange physical versions of the Agreement with the other party and a PDF (of the whole signed document) could be exchanged if agreed by the parties.