

HERC IP Framework – Material Transfer Agreement

Details Schedule

Item	Agreement Details	
1.	Transferor	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.	Recipient	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.	Details of related agreement (if any)	<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.	Commencement	This Agreement commences on <i>[insert date]</i> .
Details of Material		
5.	Material (clause 3)	<i>[insert description of the Material.]</i>
6.	Permitted Use (clause 3(b))	<i>[insert detailed description of the permitted use(s) – e.g. For use within the Recipient operations to...]</i>
7.	Delivery Instructions (clause 3(a))	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.	Handling Instructions (clause 3(d))	<i>[Insert any handling instructions]</i>
9.	Reporting/Review Requirements (clause 3(e))	<i>[Insert any reporting requirements and/or requirements to provide Transferor an opportunity to review any draft publications.]</i>

Guidance Note for items 1 and 2: These items set out the parties' representatives for disputes and receipt of notices under the Agreement and can only be changed in writing.

The location of the Transferor is also the governing law and jurisdiction of the Agreement (see clause 13.2).

Guidance Note for item 4: 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 the Material is provided to a party.

This Agreement may be terminated in accordance with clause 12, but certain obligations in this Agreement continue beyond the termination such as the obligations in relation to Confidential Information, in accordance with clause 9.1, for the period specified in item 17.

Guidance Note for item 5: The Material that is being provided should be described fully in this item, including whether it is in existence or is being newly produced. If new Material is being produced to particular specifications, this should be detailed here (a separate attachment may be included if required). Parties should also specify any associated documentation (e.g. user manuals) that also need to be transferred.

Guidance Note for item 6: This item should specify all of the purposes for which the Transferor permits the Recipient to use the Material. For example, if the Recipient is permitted to use the Material in humans or animals, this should be expressly stated.

Any use not expressly permitted use is prohibited under the Agreement. However, parties may also expressly specify prohibited uses in this item if they wish.

Guidance Note for item 7: This item should specify the date when the Transferor will deliver the Material to the Recipient and any requirements for such delivery (for example, the Material must be delivered during business hours).

Guidance Note for item 8: Any specific requirements for the handling of the Material should be included in this item, including those relating to storage, safe handling, environmental and operation of the Material.

Guidance Note for item 9: Any specific requirements for the Recipient to provide to the Transferor reports in relation to the Material should be specified in this item. This may include, for example, a periodic written report about how the Material has been used, and/or any data generated or publications issued in relation to that use. If the Transferor requires an opportunity to review any types of publications in draft, before they are published, this should be specified in this item.

10.	Return Instructions and Return Date (clause 3(e))	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.
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Guidance Note for item 10: If no Return Instructions are specified (i.e. where the Material will not be returned), the Recipient takes ownership upon delivery. If Return Instructions are specified (i.e. where the Material will be returned), the Transferor retains ownership of the physical Material. Any instructions in respect of the destruction or disposal of the Material that is not to be returned to Transferor should also be specified in this item 10.

Guidance Note for item 11: If the Transferor would like to be acknowledged in any publication that relates to the outcomes of the use of the Transferor's Material (for example, journal papers or articles), the details of the form of acknowledgment should be specified in item 11. For example, the Transferor may specify that its contribution be acknowledged in any abstract of a journal paper.

11.	Acknowledgement (clause 6)	<i>[Insert any requirement for the Recipient to acknowledge in publications (including the form of acknowledgement) its use of the Transferor's Material.]</i>
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Guidance Note for item 12: The parties may specify who will own any Modifications to the Material. If no party is specified here, the Recipient will own any Modifications by default. Modifications encompasses physical modifications or improvements to the Material. This item does not address ownership of any new IPR that may be discovered or created in connection with research involving the Material.

Title and risk		
12.	Ownership of Modifications (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.	Insurance Requirements (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>

Guidance Note for item 13: Any specific requirements for either party to obtain or maintain insurance in relation to the Material should be specified in this item.

Guidance Note for item 14: This item should set out any Fees (exclusive of GST) payable by the Recipient.

Charges (optional)		
14.	Fee (AUD) (clause 8.1)	\$ <i>[insert, if applicable]</i> (excluding GST)
15.	Additional Expenses (clause 8.1)	<i>[insert if applicable]</i>
16.	Payment terms (clause 8.1)	<i>[insert if applicable – e.g. The Fee and the Additional Expenses will be payable prior to the Delivery Date.]</i>

If Material contains or consists of human tissues, parties should exercise caution in relation to any Charges, in the light of general prohibitions on the sale of human tissues. Any Charges in relation to Material that is not human tissues should be clearly identified as such.

Guidance Note for item 15: If the Recipient is required to pay any Additional Expenses to the Transferor (in addition to the Fees) these should be specified in this item 15. For example, support and maintenance of the Material during the Recipient's possession.

General			
17.	Confidential Information (clause 9)	Transferor	
		Description of Confidential Information	Period of confidentiality
		Description: <i>[Insert description of Confidential Information. If the parties agree to limit Confidential Information to the specific information]</i>	Period: <i>[Insert the period it is required to remain confidential (eg 'perpetually' or '7 years from the date of disclosure').]</i>

Guidance Note for item 16: The manner and timing of payment of the Fee and any Additional Expenses by the Recipient to the Transferor should be specified in this item 16. For example, any delivery costs should be specified as an Additional Expense.

Guidance Note for item 17: 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.

		described here, clearly state that only the information listed here is Confidential Information. If more space is required an attachment can be added.]	
		Recipient	
		Description of Confidential Information	Period of confidentiality
		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.]	Period: [Insert the period it is required to remain confidential (eg 'perpetually' or '7 years from the date of disclosure').]
18.	Liability cap (clause 10(a)(i))	[insert liability cap amount.]	

Guidance Note for item 18: This item sets out the agreed maximum liability of a party for loss suffered by the other party.

The liability cap should be based on a risk assessment (refer to the HERC IP Practical Guide) and can be expressed as a monetary value, or linked to the Fees paid under this Agreement.

This liability cap does not apply to losses arising from the acts set out in clause 10(b).

Operative provisions

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.

Guidance Note for 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.

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.

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.

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.

Guidance Note for 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.

Guidance Note for clause 3(a): This clause requires the Transferor to deliver the Material to the Recipient by the Delivery Date. If required, Additional Expenses for the delivery of the Material can be specified in item 15 of the Details Schedule.

Guidance Note for clause 3(b): This clause restricts the use of the Material to the Permitted Purpose only. Unless expressly set out in item 6 of the Details Schedule, the Recipient cannot use the Material for direct commercial gain or provide the Material to third parties (other than contracted providers working at the Recipient's direction and control).

Guidance Note for clause 3(c): This clause restricts who may use the Material to those Personnel of the Recipient that are required to do so for the Permitted Use.

- (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.

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.

Guidance Note for clause 4: This clause provides that the transfer of Material under this Agreement does not include the transfer of any Intellectual Property Rights in that Material. The Transferor retains full ownership of all IPR in the Material. The Recipient must promptly disclose all information relating to any modifications or improvements that it makes to the Material in using it for the Permitted Use.

If the parties wish for the Transferor to grant to the Recipient any IPR in relation to the Material, the parties may enter into an Assignment Agreement for that purpose.

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.

Guidance Note for 5(a): This clause provides that the Recipient uses the Materials at their own risk. The Transferor gives no assurances that the Material is suitable for the Permitted Use. The Recipient must inspect the Materials and should not accept delivery of newly made Material if it does not meet the specific product specifications.

Guidance Note for clause 5(b): This clause provides that the Transferor is responsible for ensuring Material that is newly made to specific specifications meets those specifications.

Guidance Note for clause 5(c): Other than new Material made to specific product specifications, Material is supplied in whatever condition it is at the time of delivery.

Guidance Note for clause 5(d): The Transferor provides a limited promise that, as far as it is aware, the Material (in the state delivered and at the time it was delivered) does not infringe any IPR of a third party.

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.

Guidance Note for clause 6(a): This clause prevents either party from using the other party's name or logo without the other party's consent. For example, the Recipient cannot use the Transferor's logo on its website without the Transferor's prior written consent.

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.

Guidance Note for clause 7(a): This clause provides that title to the Material transfers to the Recipient on the later of delivery or payment of all Fees and Additional Expenses, except if Return Instructions are specified in item 10 of the Details Schedule. IPR in the Material does not transfer.

Guidance Note for clause 7(b): If the Transferor wishes to retain ownership of the physical Material, Return Instructions must be specified in item 10 of the Details Schedule.

Guidance Note for clause 7(c): The Recipient assumes responsibility for the Material from delivery. The Recipient should ensure appropriate storage and insurances are in place to protect the Material.

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.

Guidance Note for clause 8.1(d): The cash rate for the calculation of the additional charge is published by the Reserve Bank of Australia and can be found on its website: <https://www.rba.gov.au/statistics/cash-rate/>.

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.

Guidance Note for clause 8.2: This clause provides that if GST is payable by the Transferor, then the Recipient will pay the Transferor the Fee plus any GST payable on that supply.

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.

Guidance Note for clause 9.1(a): This clause requires that the recipient of Confidential Information must ensure that it remains confidential for the period of time specified in item 17 of the Details Schedule. Confidential Information may only be used by the recipient for the purpose of performing this Agreement.

Exceptions (where disclosure or other uses are permitted) are set out in the remainder of clause 9.

Guidance Note for clause 9.1(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).

Guidance Note for clause 9.1(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 for clause 9.1(e): Government entities may be required, for public accountability reasons, to disclose Confidential Information in specific circumstances as set out in this clause.

Guidance Note for clauses 9.1(f) to (h): 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 17 of the Details Schedule.

- (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.

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.

Guidance Note for clause 10(a): This clause limits the amount of financial exposure each party faces in the event a lawsuit is filed or a claim is made by the other party.

The parties can agree to cap the total amount that a party may be liable to pay to the other party for loss suffered in relation to this Agreement. If the parties wish, the liability cap may be specified as "\$0". This cap should be set out in item 18 of the Details Schedule.

Guidance Note for clause 10(b): The liability cap specified in item 18 of the Details Schedule does not apply to the types of liability listed in clause 10(b). This means that the liability of each party for these types of claims is unlimited. These types of liability are typically unlimited in commercial arrangements because it is difficult to quantify (for the purposes of determining a liability cap) the losses that can arise from such claims.

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.

Guidance Note for clause 11(a): A party may go to court and urgently seek an order injunctive or interim relief (for example, to prevent disclosure or use of Confidential Information), including prior to following the Dispute process. This is permitted because the value of the Confidential Information is lost once it is disclosed.

- (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.

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.

Guidance Note for clause 12(a): This Agreement may be terminated where a party has not complied with a material obligation. For example, the Recipient fails to pay the Fee to the Transferor or the Transferor has failed to deliver the required Material.

If the breach of the material obligation can be fixed by the party in breach, the other party must issue a notice requiring the breach to be remedied within 20 Business Days.

If the breach of the material obligation cannot be fixed by the breaching party, the Agreement may be terminated with immediate effect by the other party. The other party should carefully consider whether the breach can be fixed before terminating with immediate effect. Otherwise, the other party may be considered to have itself breached the Agreement and exercised its termination rights wrongfully.

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.

Guidance Note for clause 13.1: For any formal notices and communications, the parties should follow the requirements of clause 13.1 to ensure it is valid.

A notice will be deemed to be received upon delivery, as set out in clause 13.1(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 or hand deliver a copy of a notice once sent via email.

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.

Guidance Note for clause 13.2: The location of the party specified as the Transferor in the Details Schedule determines the applicable law and jurisdiction of the Agreement.

Guidance Note for clause 13.3: 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 for clause 13.4: 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.

Guidance Note for clause 13.5: 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.

Guidance Note for clause 13.6: The purpose of this clause is to make clear that this Agreement is the entire agreement between the parties with respect to the transfer of the relevant Material.

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

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

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.