

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>												
Nature of obligations														
3.	Commencement	This Agreement commences on <i>[insert date]</i> .												
Confidential Information details														
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5.	Permitted Purpose	<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>												

Operative provisions

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:

- (a) publicly available other than as a result of unauthorised disclosure by a party;
- (b) independently known by or lawfully in the possession of the receiving party; or
- (c) 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.

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.

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.

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).
- (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.

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.

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.

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.
- (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.

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.

7.6 Intellectual Property Rights

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

7.7 No obligation

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

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.

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

Signature of witness

Full name of authorised representative

Full name of witness

Date

Signed for and on behalf of the
[Insert Party 2 Name and ABN]
by its duly authorised
representative:

Signature of authorised representative

Signature of witness

Full name of authorised representative

Full name of witness

Date