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James Cook University

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[name of Recipient]

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# Material Transfer Agreement

Biological Material

**[Note to user:** This template is for the transfer of biological material. If any of the Material is non-biological material, please use the template Material Transfer Agreement for non-biological material.]

## Reference Schedule

Item	Description	Detail	
1.	Notice details for Recipient <b>(clause 14)</b>	Postal address:	
		Representative:	
		Representative's position:	
		Email:	
2.	Notice details for JCU <b>(clause 14)</b>	Postal address:	1 James Cook Drive, Douglas, Queensland 4811
		Representative:	
		Representative's position:	Director, JCU Connect
		Email:	directorjcuconnect@jcu.edu.au
3.	Commencement Date <b>(clause 13.1)</b>	[insert date] or [The date that this Agreement has been executed by both parties, as determined by the dates applied to the execution clauses.]	
4.	Expiry Date <b>(clause 13.1)</b>	[insert date that Permitted Use is to end]	
5.	Material <b>(clause 5)</b>	Type	[insert name of type of non-biological material e.g.: formulations, non-living specimens and cultures etc.]
		Name	[insert material's identification code or name. Attach list if necessary]
		Quantity	[specify quantity of material to be transferred to the Transferee]

Item	Description	Detail	
6.	<p>Permitted Use <b>(clause 5.1)</b></p> <p><b>[Drafting note:</b> These permitted use options can be customised to suit the range of permitted uses commonly agreed to by JCU (these are examples only).]</p>	<input type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>  <input type="checkbox"/>	<p><b>Permitted Use 1</b> – breeding: as parent material for crossing with genetic material only.</p> <p><b>Permitted Use 2</b> – reselection: as reselection material only.</p> <p><b>Permitted Use 3</b> – research: as research, testing or evaluation material only (excludes genetic manipulation).</p> <p><b>Permitted Use 4</b> – biotechnology: as genetic manipulation material only.</p> <p><b>Permitted Use 5</b> – other: for any other use or uses – [insert description of other use or uses].</p>
7.	<p>Party responsible for delivery costs (if any) <b>(clause 5.2)</b></p>		
8.	<p>Fees payable for provision of Material (if any) <b>(clause 5.2)</b></p>	<p>Fee:</p>	
		<p>When Fee is payable:</p>	<p>[Within 30 days of the date of the invoice issued by JCU for the Fee]</p>
9.	<p>Premises of Recipient where Material must be stored and used <b>(clause 5.2)</b></p>		
10.	<p>Requirements for return or destruction of Material <b>(clause 6.7)</b></p>		
11.	<p>Publication requirements <b>(clause 9)</b></p>	<p><b>[Drafting note:</b> Please include detailed requirements and/or procedures about how any publication is to be reviewed by JCU, including:</p> <ul style="list-style-type: none"> <li>timeframes, such as how far in advance JCU would require a draft for review and how long it would take to perform a review;</li> </ul>	

Item	Description	Detail
		<ul style="list-style-type: none"> <li>• whether JCU's prior consent is required; and</li> <li>• whether JCU is to have a right to make any amendments to the publication to remove JCU's Confidential Information or any other confidential information about the Material.]</li> </ul>
12.	Special Conditions <b>(clauses 4)</b>	<p><b>[Drafting note:</b> Special Conditions take precedence over the terms of the Agreement. If no Special Conditions insert "Nil".]</p>

## Parties

**James Cook University** ABN 46 253 211 955, a body corporate established pursuant to the *James Cook University Act 1997* (Qld) of 1 James Cook Drive, Townsville in the State of Queensland, Australia (**JCU**)

**[Insert name of recipient of Material]** ACN [insert] of [address] (**Recipient**)

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## Background

- A JCU possesses the Material.
  - B The Recipient wishes to use the Material for the Permitted Use.
  - C JCU agrees to supply the Material to the Recipient and the Recipient agrees to receive and use the Material on the terms and conditions of this Agreement.
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## Agreed terms

### 1 Definitions and interpretation

#### 1.1 Definitions

In this document, these terms have the following meanings:

<b>Agreement</b>	this agreement, including the Reference Schedule.
<b>Business Day</b>	a day that is not a Saturday, Sunday or a public holiday in Townsville, Queensland.
<b>Commencement Date</b>	the date specified in <b>item 3</b> of the Reference Schedule.
<b>Confidential Information</b>	all information that: <ul style="list-style-type: none"><li>(a) is by its nature confidential;</li><li>(b) is designated by a party as being confidential;</li><li>(c) a party knows or ought to know is confidential; or</li><li>(d) where JCU is the Discloser, confidential information about the Material,</li></ul> but does not include information that:

	<ul style="list-style-type: none"> <li>(e) is or becomes public knowledge, other than by breach of this Agreement or by any other unlawful means;</li> <li>(f) is in the possession of a party without restriction in relation to disclosure before the information is received from the other party; or</li> <li>(g) has been independently developed or acquired by a party.</li> </ul>
<b>Discloser</b>	<ul style="list-style-type: none"> <li>(a) JCU, in respect of a disclosure by or on behalf of JCU of its Confidential Information; and</li> <li>(b) the Recipient, in respect of a disclosure by or on behalf of the Recipient of its Confidential Information.</li> </ul>
<b>Expiry Date</b>	the date specified in <b>item 4</b> of the Reference Schedule.
<b>Fee</b>	the fee specified in <b>item 8</b> of the Reference Schedule.
<b>Intellectual Property Rights</b>	all copyright (including future copyright) and all other intellectual property rights anywhere in the world, including, but not limited to, trade marks, logos, domain names, patents, designs, trade secrets, eligible layout rights, processes, inventions, specifications, databases, confidential information, know how, research data, discoveries and similar rights and any other intangible proprietary rights whether registered or unregistered whether created before or after the date of this Agreement both in Australia and throughout the world.
<b>Legislative Requirement</b>	<p>any:</p> <ul style="list-style-type: none"> <li>(a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory applicable to the use of the Material;</li> <li>(b) certificates, licences, consents, permits, approvals, codes, standards and requirements of organisations having jurisdiction in connection with the use of the Material; and</li> <li>(c) Australian Standards and any other relevant standards applicable to the use of the Material.</li> </ul>
<b>Material</b>	the biological material described in <b>item 5</b> of the Reference Schedule.

<b>Modified Derivatives</b>	<p><b>[Drafting note:</b> Please consider whether this definition is appropriate for your proposed transfer of Material. It is intended to cover derivatives that are <u>not</u> copies of the original Material (i.e. which are modified). Depending on the nature of the Material (e.g cell lines, viruses etc) and how it will be modified through the Permitted Use the definition could be customised and use more relevant scientific terminology.]</p> <p>Material or substances created by the Recipient through the Permitted Use of the Material which are not Unmodified Derivatives.</p>
<b>Moral Rights</b>	the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship, as defined by and granted under the <i>Copyright Act 1968</i> (Cth), and any similar rights existing under foreign laws.
<b>Moral Rights Consent</b>	a written consent to any act or omission of the Recipient or its Personnel which would otherwise constitute an infringement of that person's Moral Rights.
<b>MSDS</b>	material safety data sheet (if any) that provides information about the safe handling, use and/or storage of the Material.
<b>New Material</b>	<p>any material or substances created or derived from the Recipient engaging in a Permitted Use of the Material, including:</p> <ul style="list-style-type: none"> <li>(a) Unmodified Derivatives; and</li> <li>(b) Modified Derivatives.</li> </ul>
<b>Permitted Use</b>	the permitted use specified in <b>item 6</b> of the Reference Schedule.
<b>Permitted Use Results</b>	all information (including data and results) generated from the Recipient engaging in the Permitted Use of the Material, but does not include any Unmodified Derivatives or Modified Derivatives.
<b>Personnel</b>	of a party, means that party's directors, officers, employees and agents, and in the case of JCU, includes Students.
<b>Premises</b>	the premises specified in <b>item 9</b> of the Reference Schedule.
<b>Progeny</b>	<b>[Drafting note:</b> Please consider whether this definition is appropriate for your proposed transfer of

Material. It is intended to cover progeny that are exact copies of the original Material. Depending on the nature of the Material (e.g. cell lines, viruses etc) the definition could be customised and use more relevant scientific terminology.]

Descendants replicated from the Material, such as viruses which are copies of the viruses comprising the part or all of the Material or copies or descendants of cells comprising part or all of the Material.

<b>Publish</b>	to publish by way of a paper, thesis, article, manuscript, report, poster, internet posting, presentation, abstract, outline, video, instruction material or other disclosure, in printed, electronic, oral or other form.
<b>Reference Schedule</b>	the schedule titled 'Reference Schedule' at the start of this Agreement.
<b>Representative</b>	an employee, agent, officer, director, contractor, subcontractor or other authorised representative of a party, and if the Recipient is a University, includes a Student enrolled at that University.
<b>Special Conditions</b>	the special conditions (if any) specified in <b>item 12</b> of the Reference Schedule.
<b>Student</b>	a student enrolled with the Recipient whose Thesis, or a part of it, relates to the Material.
<b>Term</b>	the term of this Agreement determined by <b>clause 3</b> .
<b>Thesis</b>	the postgraduate research paper, dissertation and/or thesis submitted by a Student in connection with the Student's higher research degree at the Recipient.
<b>Unmodified Derivatives</b>	<p><b>[Drafting note:</b> Please consider whether this definition is appropriate for your proposed transfer of Material. It is intended to cover progeny that are exact copies of the original Material as well as substances expressed by the original Material. Depending on the nature of the Material (e.g. cell lines, viruses etc) the definition could be customised and use more relevant scientific terminology.]</p> <ul style="list-style-type: none"> <li>(a) Progeny; and</li> <li>(b) substances created by the Recipient through the Permitted Use which constitute a subunit or product expressed or produced by the Material or its Progeny.</li> </ul>



## 2 Interpretation and priority

### 2.1 Construction

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of the Agreement;
- (b) words in the singular include the plural and vice versa;
- (c) any gender includes the other genders;
- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (e) 'includes' means includes without limitation;
- (f) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (g) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
  - (iv) a right includes a benefit, remedy, discretion or power;
  - (v) time is to local time in Townsville, Queensland;
  - (vi) '\$' or 'dollars' is a reference to Australian currency;
  - (vii) this or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties; and
  - (viii) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions;
- (h) if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day; and
- (i) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

### 2.2 Priority

Where any inconsistency exists between:

- (a) the Special Conditions;
  - (b) the agreed terms of the Agreement (including the Reference Schedule);  
or
  - (c) any other schedules or annexures of this Agreement,
- the provisions will take precedence in that order to the extent necessary to resolve the inconsistency.

### 3 Term

This Agreement commences on the Commencement Date and ends on the Expiry Date, unless terminated earlier in accordance with **clause 13**.

### 4 Special Conditions

The parties agree to be bound by any Special Conditions.

### 5 Material

#### 5.1 Permission to use the Material

JCU grants the Recipient a non-exclusive, non-transferable right to use the Material for the Permitted Use during the Term. This right does not include any right for the Recipient to supply the Material to any third party other than with the prior written consent of JCU.

#### 5.2 Delivery of the Material

- (a) Unless otherwise agreed in writing between the parties, JCU will deliver the Material to the Premises.
- (b) The party specified in **item 7** of the Reference Schedule will pay the cost of delivering the Material to the Premises.

### 6 Recipient's obligations

#### 6.1 Payment of Fee

In consideration for JCU making the Material available to the Recipient and allowing the Recipient to use the Material for the Permitted Use, the Recipient must pay JCU the Fee on the terms specified in **item 8** of the Reference Schedule.

#### 6.2 Use of the Material

**[Drafting note: Please review the list of requirements and obligations below to determine if each of them is applicable to the Permitted Use. Delete any that are not applicable to the Permitted Use.]**

The Recipient must:

- (a) use the Material only for the Permitted Use and not for any other purpose or use;
- (b) use and keep the Material only at the Premises and, unless the Premises are located outside Australia, not export any of the Material or New Material outside Australia;
- (c) ensure that the Material is at all times kept secure and is handled, stored and transported in accordance with any written or verbal instructions or directions of JCU, including any MSDS or other regulations, guidance or instructions provided to the Recipient by JCU (whether provided before, on or after the Commencement Date);
- (d) ensure that the Material is only handled by those with sufficient skill, knowledge, experience and ability applicable to the Material;
- (e) not transfer or permit the transfer of the Material to any third party that is not authorised in writing by JCU to receive the Material;
- (f) comply with all applicable laws in relation to the use and handling of the Material and any New Material and this Agreement, including those under the *Biodiscovery Act 2004* (Qld);
- (g) cooperate with and assist JCU in connection with any obligations that JCU may have under the *Biodiscovery Act 2004* (Qld), including the provision to JCU upon request by JCU of any information, data or records produced by the Recipient in connection with the Permitted Use;
- (h) not apply for any registration of Intellectual Property Rights or other statutory protection in relation to the Material, New Material, Permitted Use Results or any Confidential Information of JCU;
- (i) other than as expressly permitted by the Permitted Use, not analyse, break-down, decompile, attempt to manufacture, reproduce or reverse-engineer the Material;
- (j) not engage in any conduct having the purpose or effect of developing a work-around or other means of avoiding infringement of any Intellectual Property Rights of JCU relating to the Material;
- (k) take out and maintain at its cost all necessary or appropriate insurances in relation to its use of the Material and the Permitted Use;
- (l) cooperate with and act reasonably toward JCU in relation to this Agreement and the handling and use of Material; and
- (m) not use or permit the Material to be administered to any human or used in any human clinical trials.

### **6.3 Nagoya Protocol**

JCU does not represent or warrant that:

- (a) the Material has been collected, produced, obtained or maintained in accordance with; or

- (b) that the Recipient's access to, receipt or use of the Material under this Agreement is or will be compliant with,

any domestic or international laws regulating the access to, collection of, supply of, storage or utilisation of genetic resources, including any under the 1993 Convention on Biological Diversity or the Nagoya Protocol made under that convention. It is the responsibility of the Recipient to ensure its compliance with any such laws, at the Recipient's cost.

#### **6.4 Responsibility for Personnel**

The Recipient will ensure that its Personnel and other persons under its control or supervision who have any access to the Material:

- (a) comply with the obligations imposed by this Agreement as if they were personally bound by such obligations;
- (b) assign any Intellectual Property in Permitted Use Results and New Material (other than copyright in a Student's Thesis) which they generate in accordance with this Agreement;
- (c) grant a Moral Rights Consent with respect to any publication of Permitted Use Results (provided that the parties acknowledge authorship of a Student's Thesis); and
- (d) if the Representative or person is a Student, that they grant to JCU a royalty free and irrevocable licence to use the Student's Thesis for non-commercial JCU purposes, where requested by JCU.

#### **6.5 Evidence of compliance**

Upon reasonable request of JCU during the Term, the Recipient must provide JCU with evidence, in a form reasonably satisfactory to JCU, of its compliance with **clauses 6.2(a) to 6.2(m), clause 6.3 and 6.4(b) to 6.4(d)**.

#### **6.6 Access and reporting**

- (a) The Recipient must, during the Term, provide JCU with access to the Premises, and access to all information and data relating to and including the Material, New Material and the Permitted Use Results.
- (b) The Recipient must deliver to JCU a report on the performance of the Material (including any information or data resulting from use of the Material, including Permitted Use Results) within 30 days after:
  - (i) each anniversary of the Commencement Date during the Term; and
  - (ii) the Expiry Date or date of termination of this Agreement.
- (c) The Recipient acknowledges that JCU may use the results, information and data provided under **clauses 6.6(a) or 6.6(b)** for its own research purposes.

#### **6.7 Return of the Material**

Within 5 Business Days of the earlier of:

- (a) the completion of the Permitted Use;
- (b) the Expiry Date;
- (c) the date this Agreement is terminated; or
- (d) JCU making a written request to the Recipient to return the Material to JCU or destroy the Material,

the Recipient must either return or destroy the Material (or what is left of the Material) in accordance with **item 10** of the Reference Schedule or as otherwise requested by JCU in the notice it provides under **clause 6.7(d)**.

## 7 Ownership of the Material

The Recipient acknowledges and agrees that:

- (a) JCU owns and retains title to the Material and all Intellectual Property Rights in and relating to the Material, and nothing in this Agreement assigns or transfers those rights to the Recipient; and
- (b) except as expressly provided in this Agreement, the Recipient has no right to supply the Material (or license any Intellectual Property Rights in or relating to the Material) to any third party or otherwise encumber the Material without the prior written consent of JCU, which consent may be given or withheld and made subject to conditions at JCU's absolute discretion.

## 8 Ownership of results and materials

**[Option #1:** This clause causes the Permitted Use Results and any New Material (i.e. essentially, anything the Recipient creates) created by the Recipient to be owned by JCU, including any Intellectual Property Rights in those results and materials. This clause is designed to protect JCU's interests in the Material and potential commercialisation of the Material in the future.

Recipients will often request to own the Permitted Use Results they create or claim them as their confidential information. There are risks in allowing this to happen because that may inhibit JCU's ability to use or commercialise the Material in the future (JCU may need to ask the Recipient for a licence, which it may not be willing to grant).

If JCU is willing to agree to such a change, please consider Options #2 or # 3 below. Please contact the JCU legal team for advice on whether using Option #2 is appropriate for your transaction, including as to whether the licence back under **clause 8(g)** is sufficient for JCU's purposes.]

- (a) In consideration for the rights granted to the Recipient under this Agreement, all rights in and title to any New Material and Permitted Use Results (including all Intellectual Property rights subsisting in such

materials and results) vest in JCU (and will be JCU's Confidential Information) as such rights are created or developed.

- (b) If requested by JCU, the Recipient will provide all New Material and Permitted Use Results to JCU within 3 Business Days of the request, or such longer period specified by JCU in its request.

**[Option #2 - Use this option where JCU wishes to own the New Material and intellectual property rights subsisting in the New Material however is willing for the Recipient to own intellectual property rights in the Permitted Use Results that they generate through use of the Material.]**

- (c) All rights in and title to any New Material (including all Intellectual Property rights subsisting in the New Material) vest in JCU (and will be JCU's Confidential Information) as such rights are created or developed.
- (d) All Intellectual Property Rights in any Permitted Use Results vest in the Recipient as such Intellectual Property Rights are created or developed.
- (e) The Recipient grants a non-exclusive, royalty and fee-free, irrevocable and perpetual licence to JCU to use the Intellectual Property Rights in the Permitted Use Results for research and development by JCU both internally and with any third party. This licence includes a right for JCU to sub-license to third parties without the consent of the Recipient.

**[Option #3 – Warning – only use this option following receipt of legal advice. Intellectual Property Rights in Modified Derivatives and Permitted Use Results vests in the Recipient, with Recipient granting a licence-back of those Intellectual Property Rights to JCU. Rights to and title in Unmodified Derivatives vests in JCU.]**

- (f) All Intellectual Property Rights in any:
  - (i) Modified Derivatives; and
  - (ii) Permitted Use Results,vest in the Recipient as such Intellectual Property Rights are created or developed.
- (g) The Recipient grants a non-exclusive, royalty and fee-free, irrevocable and perpetual licence to JCU to use the Intellectual Property Rights in the New Material and Permitted Use Results for research and development by JCU both internally and with any third party. This licence includes a right for JCU to sub-license to third parties without the consent of the Recipient.
- (h) All rights in and title to any Unmodified Derivatives (including all Intellectual Property rights subsisting in the Unmodified Derivatives) vest in JCU (and will be JCU's Confidential Information) as such rights are created or developed.

**[End options]**

## 9 Publication

- (a) The Recipient must not Publish any information relating to the Material, New Material or this Agreement including any Permitted Use Results, other than as specified in **item 11** of the Reference Schedule and subject to the requirements and restrictions (if any) specified in **item 11** of the Reference Schedule and this **clause 9**.
- (b) If any information is Published in accordance with **clause 9(a)**, the Recipient will acknowledge JCU's supply and ownership of the Material in the manner reasonably required by JCU.

## 10 Confidential information

### 10.1 Obligations of confidentiality

Subject to **clause 10.2**, the Recipient must:

- (a) keep confidential and not allow, make or cause any public announcement or other disclosure of any Confidential Information of the Discloser without the prior written consent of the Discloser, which consent may be given or withheld, or given with conditions, in the Discloser's sole discretion;
- (b) use, copy and retain the Confidential Information of the Discloser solely for the purposes of exercising its rights and performing its obligations under this Agreement; and
- (c) on the expiry or termination of this Agreement promptly return to the Discloser or destroy (and certify such destruction) all Confidential Information of the Discloser then in the Recipient's possession or under its control, provided that the Recipient may retain a copy of the Confidential Information of the Discloser:
  - (i) for the Recipient's internal record-keeping purposes;
  - (ii) where the copy of the Confidential Information of the Discloser is contained in the Recipient's computer system back-ups, which are not generally available to employees of the Recipient and which cannot readily be deleted; or
  - (iii) if the Recipient is required to do so by:
    - (A) law or Legislative Requirements;
    - (B) its insurance policies; or
    - (C) any applicable professional standard or government policy.

### 10.2 Exceptions

The obligations of each party (as a Recipient) under **clause 10.1** do not apply to a disclosure or announcement by the Recipient to the extent that the disclosure or announcement is:

- (a) to a related body corporate of the Recipient, including that related body corporate's officer, employees and/or agents on a need to know basis and only if the disclosure is made on a confidential basis;
- (b) to any bona fide proposed assignee of all or part of the rights and obligations of the Recipient under this Agreement subject to the proposed assignee undertaking to treat the information as confidential;
- (c) required by the listing rules of Australian Stock Exchange Limited or any relevant overseas stock exchange;
- (d) reasonably necessary to comply with any request, instruction, direction of any Minister of the Commonwealth or of the Queensland Government;
- (e) required by law, provided that the Recipient notifies the Discloser prior to the disclosure required to enable the Discloser to seek a protective order or other appropriate remedy in respect of the Confidential Information;
- (f) information which is already in the public domain or is obtained without breach of any obligation of confidentiality by the Recipient from a third party;
- (g) to any professional adviser of the Recipient, subject to that adviser agreeing to maintain the confidentiality of the relevant Confidential Information;
- (h) required for the Recipient to perform its obligations under this Agreement, including disclosures to officers, employees, agents and subcontractors; or
- (i) made by the Recipient with the written consent of the Discloser.

### **10.3 Survival**

This **clause 10** survives termination or expiry of this Agreement.

## **11 Risk and liability**

### **11.1 Recipient accepts risk**

The Recipient acknowledges and agrees that:

- (a) it receives and uses the Material at its own risk;
- (b) risk in the Material transfers to the Recipient upon delivery of the Material to the Recipient under **clause 5.2(a)**;
- (c) the Material may have inherent defects;
- (d) JCU has not made and does not make any warranty or representation:
  - (i) as to the suitability of the Material for the Permitted Use; or
  - (ii) that the use of the Material, including for the Permitted Use, will not infringe the Intellectual Property Rights of any third party; and



- (e) to the full extent permitted by law, all conditions and warranties not expressly stated in this Agreement are excluded, or if unable to be excluded then limited to the fullest extent permitted by law.

## **11.2 Release**

To the extent permitted by law and subject to **clause 11.5**, the Recipient releases JCU and its Personnel from all actions, claims, proceedings or demands and in respect of any loss, death, injury, illness or damage (whether personal or property, and whether special, direct, indirect or consequential, including consequential financial loss) that the Recipient has, or may have in the future, against JCU or its Personnel in respect of or in any way arising out of the use of the Material, the Permitted Use Results (including the New Material) or any products derived from the Material, except to the extent that the loss, injury or damage was caused by the negligence of JCU or its Personnel.

## **11.3 No liability for consequential or indirect loss**

To the extent permitted by law and subject to **clause 11.5**, JCU and its Personnel will not in any circumstances (including for negligence) be liable to the Recipient for any loss of revenue, loss of profit, loss of anticipated savings or business, loss of opportunity (including opportunity to enter into or complete arrangements with third parties), loss of data or goodwill, loss of reputation or any indirect or consequential loss, whether arising in contract, tort (including negligence) or otherwise, in connection with this Agreement.

## **11.4 Limitation of liability**

To the extent that the supply of the Material or any other goods or services by JCU under this Agreement to the Recipient is a supply to a 'consumer' (as the term 'consumer' is defined in section 3 of the Australian Consumer Law) (**ACL**), JCU limits its liability to the Recipient for any failure by JCU to comply with a guarantee under the ACL (other than a guarantee under sections 51, 52 or 53 of the ACL) to one or more of the following:

- (a) in the case of a supply of goods by JCU:
  - (i) replacing the goods or supplying equivalent goods;
  - (ii) repairing the goods;
  - (iii) paying the cost of replacing the goods or acquiring equivalent goods;
  - (iv) paying the cost of having the goods repaired; and
- (b) in the case of a supply of services by JCU:
  - (i) supplying the services again; or
  - (ii) paying the cost of having the services supplied again.

## **11.5 Indemnity**

- (a) The Recipient indemnifies JCU and its Personnel against all liability, loss, costs and expenses (including any actions, claims, proceedings or

demand brought by any third party, and any legal fees, costs and disbursements on a solicitor and own client basis) arising from or incurred in connection with:

- (i) any use of the Material by the Recipient or its Personnel;
  - (ii) any default by the Recipient or the Recipient's Personnel under this Agreement;
  - (iii) any unlawful, wilful or negligent act or omission of the Recipient, the Recipient's Personnel or any person for whose conduct the Recipient is liable;
  - (iv) personal injury (including sickness and death) or property damage or loss in connection with the performance (or attempted or purported performance or non-performance) of this Agreement or a breach of this Agreement by the Recipient; or
  - (v) any infringement or alleged infringement of any Intellectual Property Rights or Moral Rights of any person in respect of the conduct of the Permitted Use, the Permitted Use Results or New Material.
- (b) The Recipient's liability to indemnify JCU and its Personnel under **clause 11.5(a)** will be reduced proportionally to the extent that any negligence or breach of this Agreement by JCU caused the relevant loss or damage.
- (c) The indemnity granted in **clause 11.5(a)** is in addition to, and not exclusive of, any other remedies JCU may have against the Recipient at law.
- (d) It is not necessary for JCU to incur expense or to make a payment before enforcing a right of indemnity conferred by this Agreement.

## 11.6 Survival

This **clause 11** survives termination or expiry of this Agreement.

## 12 GST

### 12.1 GST definitions

In this **clause 12.1**:

- (a) unless there is a contrary indication, words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or, if that Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act; and

- (c) references to GST payable and input tax credit entitlements include:
  - (i) notional GST payable by, and notional input tax credit entitlements of the Commonwealth, a State or a Territory (including a government, government body, authority, agency or instrumentality of the Commonwealth, a State or a Territory); and
  - (ii) GST payable by, and the input tax credit entitlements of, the representative member of a GST group of which the entity is a member.

## **12.2 Consideration GST exclusive**

Unless otherwise expressly stated, all consideration, whether monetary or non-monetary, payable or to be provided under or in connection with this Agreement is exclusive of GST (**GST-exclusive consideration**).

## **12.3 Payment of GST**

If GST is payable on any supply made by:

- (a) a party; or
- (b) an entity that is taken under the GST Law to make the supply by reason of the capacity in which a party acts,

(**GST Supplier**) under or in connection with this Agreement, the recipient of the supply, or the party providing the consideration for the supply, must pay to the GST Supplier an amount equal to the GST payable on the supply.

## **12.4 Timing of GST payment**

The amount referred to in **clause 12.3** must be paid in addition to and at the same time and in the same manner (without any set off or deduction) that the GST-exclusive consideration for the supply is payable or to be provided.

## **12.5 Tax invoice**

The GST Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable supply before the GST Supplier is entitled to payment of an amount under **clause 12.3**

## **12.6 Adjustment event**

If an adjustment event arises in respect of a supply made by a GST Supplier under or in connection with this Agreement, any amount that is payable under **clause 12.3** will be calculated or recalculated to reflect the adjustment event and a payment will be made by the recipient to the GST Supplier or by the GST Supplier to the recipient as the case requires.

## **12.7 Reimbursements**

- (a) Where a party is required under or in connection with this Agreement to pay for, reimburse or contribute to any expense, loss, liability or outgoing suffered or incurred by another party or indemnify another party in relation to such an expense, loss, liability or outgoing (**Reimbursable Expense**), the amount required to be paid, reimbursed or contributed by

the first party will be reduced by the amount of any input tax credits to which the other party is entitled in respect of the Reimbursable Expense.

- (b) This **clause 12.7** does not limit the application of **clause 12.3**, if appropriate, to the Reimbursable Expense as reduced in accordance with **clause 12.7(a)**.

### **12.8 No merger**

This **clause 12** does not merge on the completion, rescission or other termination of this Agreement or on the transfer of any property supplied under this Agreement.

## **13 Term and termination**

### **13.1 Term**

This Agreement will remain in force for the Term.

### **13.2 Termination for convenience**

- (a) JCU may, at any time, by reasonable written notice, terminate this Agreement for convenience.
- (b) If this Agreement is terminated by JCU under **clause 13.2(a)**, the Recipient will be entitled to the reasonable costs (if any) that have been or will be incurred by the Recipient as a direct result of the termination of the Agreement and which the Recipient cannot recoup or avoid and which would not otherwise have been incurred by the Recipient if the Agreement had continued until the expiry of the Term.
- (c) For the avoidance of doubt, **clause 11.3** applies to any termination of this Agreement under **clause 13.2(a)**.

### **13.3 Termination for breach**

Either party may terminate this Agreement by written notice with immediate effect if the other party:

- (a) breaches a term of this Agreement which is not capable of being remedied; or
- (b) breaches a term of this Agreement which is capable of being remedied and fails to remedy that breach within 30 days after receiving notice requiring it to do so.

### **13.4 Pre-existing rights and survival**

- (a) Termination in accordance with this **clause 13** is without prejudice to any rights of either party under this Agreement existing at the date of termination.
- (b) **Clauses 6.6, 6.7, 7, 8, 9, 13.4, 13.5** and any other terms of this Agreement that are expressed to or by their nature survive expiration or termination of this Agreement, shall survive such expiry or termination for any reason.

## 13.5 Obligations upon expiry or termination

- (a) Upon expiry or termination of this Agreement, the Recipient must:
  - (i) stop using the Material for any purpose, including the Permitted Use;
  - (ii) return or destroy the Material in accordance with its obligations under **clause 6.7**; and
  - (iii) take all available steps to:
    - (A) minimise any loss resulting from termination of the Agreement; and
    - (B) protect the Material, Permitted Use Results and Intellectual Property Rights.
- (b) Within 30 days of the Expiry Date or date of termination, the Recipient must provide JCU samples and copies of all New Material and Permitted Use Results developed as at the Expiry Date or date of termination.

## 14 Notices

### 14.1 General

Each party must send all notices relating to the Agreement to the other party's nominated representative.

### 14.2 How to give a communication

In addition to any other lawful means, a communication may be given by being:

- (a) delivered by hand at the party's current address for notices;
- (b) sent to the party's current postal address for notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (c) sent by email to party's current email address for notices.

### 14.3 Particulars for delivery of notices

- (a) The particulars for delivery of notices to each party as at the Commencement Date are those set out in **item 1** and **item 2** of the Reference Schedule.
- (b) Each party may change its particulars for delivery of notices by notice to the other party in accordance with this **clause 14**.

### 14.4 Time of delivery

A notice will be deemed to be given:

- (a) if posted:
  - (i) within Australia to an Australian postal address, five Business Days after posting; or

- (ii) outside of Australia to an Australian postal address or within Australia to an address outside of Australia, ten Business Days after posting;
- (b) if delivered by hand during a Business Day – on the date of delivery;
- (c) if emailed – subject to **clause 14.5**, on the date recorded on the device from which the party sent the email, unless the sending party receives an automated message that the email has not been delivered,

except that a delivery by hand or email received after 5:00 pm (local time of the receiving party) will be deemed to be given on the next Business Day.

#### **14.5 Process service**

Any notice under **clause 13** or **15** which is sent via email must also be sent by post, hand delivery or in any other way permitted by law.

## **15 Dispute Resolution**

### **15.1 Dispute**

Subject to **clause 15.5**, the parties agree to follow the procedures in this **clause 15** prior to the commencement of litigation or other external dispute resolution procedure in relation to any dispute between the parties concerning this Agreement.

### **15.2 Procedure**

The parties agree that any dispute concerning this Agreement will be dealt with as follows:

- (a) either party may notify the other in writing of the occurrence of a dispute;
- (b) the parties must meet within five Business Days after receipt of the notice at a mutually convenient time and place, either face to face or by electronic means (**First Meeting**); and
- (c) if the parties fail to hold the First Meeting within the required time, or fail to resolve the dispute as agreed in writing within 14 Business Days after the First Meeting, then the parties must ensure that senior representatives with authority to settle the dispute meet within 14 Business Days at a mutually convenient time and place, either face to face or by electronic means (**Second Meeting**).

### **15.3 Mediation**

- (a) If the dispute is not resolved under **clause 15.2(c)** as agreed in writing within five Business Days after the Second Meeting, then either party may refer the dispute to mediation under **clause 15.3(b)** and the other party must participate in the mediation.
- (b) The mediation will be administered by the Australian Centre for International Commercial Arbitration in Townsville in accordance with the

ACICA Mediation Rules operating at the time the dispute is referred to mediation. The parties:

- (i) will jointly appoint the mediator, or if the parties cannot agree on the mediator within 5 Business Days of referral to mediation, the ACICA will determine the mediator;
  - (ii) may be legally represented at the mediation; and
  - (iii) will each bear their own costs concerning the mediation, and will bear the costs of the mediation venue and the mediator equally.
- (c) If the mediation does not resolve the dispute, either party may commence any other form of action to resolve the dispute, including court proceedings.

#### **15.4 Continuity during dispute**

Unless otherwise specified in this Agreement, notwithstanding the existence of a dispute, each party must continue to perform its obligations under this Agreement.

#### **15.5 Urgent interlocutory relief**

Nothing in this **clause 15** prevents either party from commencing court proceedings in relation to a dispute arising under or in relation to this Agreement at any time, where that party seeks urgent interlocutory relief.

#### **15.6 Survival**

This **clause 15** survives termination or expiry of this Agreement.

### **16 General**

#### **16.1 Legal costs**

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

#### **16.2 Relationship**

Nothing contained in this Agreement will be taken as giving rise to any employment, agency, partnership or joint venture relationship between the parties. A party may not enter into any Agreement or incur any liabilities on behalf of the other party and may not represent to any person that it has authority to do so.

#### **16.3 Amendment**

This Agreement may only be varied or replaced by a document executed by the parties.

#### **16.4 Assignment**

- (a) A party must not assign or deal with any right under this Agreement without the prior written consent of the other party (with such consent not to be unreasonably withheld).
- (b) Any purported dealing in breach of this clause is of no effect.

#### **16.5 Waiver and exercise of rights**

- (a) A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

#### **16.6 Rights cumulative**

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

#### **16.7 Consents**

Except as expressly stated otherwise in this Agreement, a party may conditionally or unconditionally give or withhold any consent to be given under this Agreement and is not obliged to give its reasons for doing so.

#### **16.8 Further steps**

Each party must promptly do whatever any other party reasonably requires of it to give effect to this Agreement and to perform its obligations under it.

#### **16.9 Execution warranty**

If this Agreement is executed by an officer of a party, that party warrants that the execution of the Agreement by that officer has been properly authorised, and is effective and binding on the party.

#### **16.10 Governing law and jurisdiction**

- (a) This Agreement governed by and is to be construed in accordance with the laws applicable in Queensland.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Queensland and any courts which have jurisdiction to hear appeals from any of those courts.

#### **16.11 Severability**

If any part of this Agreement is or becomes illegal, void or unenforceable, that part of the Agreement may be severed from the original, and that severance will not affect the validity or enforceability of the Agreement, and the remainder of the Agreement as the case may be otherwise continues to apply.

#### **16.12 Liability**

An obligation of two or more persons binds them separately and together.



### **16.13 Counterparts**

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

### **16.14 Entire understanding**

- (a) This Agreement contains the entire understanding between the parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and are of no effect. No party is liable to any other party in respect of those matters. No party is liable to any other party in respect of those matters.
- (c) No oral explanation or information provided by any party to another:
  - (i) affects the meaning or interpretation of this Agreement; or
  - (ii) constitutes any collateral Agreement, warranty or understanding between any of the parties.

# Execution

**Executed** as an agreement.

**[OPTION ONE: If Recipient wishes to execute via an authorised officer.]**

**Executed** for and on behalf of **[insert** )  
**name of Recipient]** by its duly appointed )  
officer in the presence of: )

.....  
Witness

.....  
Officer

.....  
Name of Witness (print)

By executing this Agreement the signatory warrants that the signatory is duly authorised to execute this Agreement on behalf of **[name of Recipient]**.

.....  
Name of Officer (print)

.....  
Date

.....  
Position of Officer (print)

**[OPTION TWO: If Recipient is a company]**

**Executed** by **[name of Recipient]** in )  
accordance with section 127(1) of the )  
*Corporations Act 2001* (Cth):

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director (print)

.....  
Date

.....  
Date

**Executed** for and on behalf of **James** )  
**Cook University** by its duly appointed )  
officer in the presence of: )

.....  
Witness

.....  
Officer

.....  
Name of Witness (print)

By executing this Agreement the signatory warrants that the signatory is duly authorised to execute this Agreement on behalf of James Cook University.

.....  
Name of Officer (print)

.....  
Date

.....  
Position of Officer (print)