

# Members' Agreement

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BETWEEN

**Water Research Australia Limited (Company)**

And

**The parties listed in Schedule 3 (Current Members)**

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**THIS AGREEMENT** is made the 20th day of January 2017

BETWEEN

Water Research Australia Limited (ABN 32 127 974 261) of Level 3, 250 Victoria Square,  
Adelaide SA 5000 (**Company**).

AND

The parties listed in Schedule 3 (**Current Members**)

## BACKGROUND

- A. The Members wish for the Activities of the independent research centre to be managed and operated within the Company, a company limited by guarantee, and any such subsidiaries as the Company may determine to create for the purposes of the Activities.
- B. The Members have also agreed that the Company is to operate as a not-for-profit, scientific research institution.
- C. The Members have agreed that the day to day functions of the Company need to be regulated through the formulation of some common principles and an understanding of how Members will deal with each other and the Company.
- D. It has been agreed that a Members' Agreement is an appropriate way to document their understanding of certain key matters relating to understanding the role of the Company and the roles and obligations of each Member that are not otherwise covered in the Constitution of the Company.
- E. This agreement is intended to supersede the previous Members' Agreement (dated 12 October 2007), with effect on and from the date of this agreement.

## AGREED TERMS

### PART A: INTRODUCTION

#### 1. DEFINITIONS AND INTERPRETATION

- 1.1 In this agreement (the "Members' Agreement"), unless a contrary intention appears from the context or is otherwise defined in the Constitution of the Company, the following definitions will apply:

"**Activities**" means those activities undertaken by or for the Company in fulfilment of Rule 4.1 of the Constitution, including such activities as are undertaken as part of a Project;

"**Annual Budget**" means the annual budget for the Company prepared and approved pursuant to clause 10;

"**Annual Contribution**", in relation to a Member, means all of the monies, Assets, services of Contributed Personnel, use of facilities, and services to be contributed by the Member in a particular Financial Year, as required by this agreement;

"**Asset**" means an item of real or personal property but does not include Intellectual Property;

"**Associate Member**" means a person admitted as an Associate Member of the Company from time to time.

"**Background Intellectual Property**" or "**BIP**" means that Intellectual Property owned or otherwise developed by a Project Party which is made available for the Activities;

"**Board**" means the board of directors of the Company;

"**CIP**" means the whole of the Company Intellectual Property developed pursuant to the Activities, but in all cases will exclude Background Intellectual Property;

"**Commercialise**" or "**Commercialisation**" in relation to Intellectual Property means to develop, manufacture, use, sell, offer to sell, hire or license the Intellectual Property or, in respect of a product resulting from that Commercialisation, to use, manufacture, hire, sell or otherwise dispose of the product, or keep it for the purpose of doing any of these things or permit or license any other person to do any of these things;

"**Committees**" means committees established pursuant to the Constitution, and whose role(s) is set out in clause 7.

"**Company Funds**" means the monies comprised in the Company account available to carry out the Activities, including cash Annual Contributions and other monies raised or received by the Company;

"**Company Resources**" means the resources made available to the Company, including the Annual Contributions and any resources provided by third parties;

"**Commencement Date**" means the date the Members' Agreement is signed by the last of the parties;

"**Commercial Terms**" means the normal terms and conditions which would be contained in a contract or transaction entered into by persons dealing with each other at arm's length and from positions of comparable bargaining power;

"**Confidential Information**" means all trade secrets and know-how, financial information and other proprietary information of whatever description and in whatever form (whether written or oral, visible or invisible) of a Member that is:

- (a) treated by that Member as confidential; and
- (b) disclosed by that Member to another Member, or of which another Member becomes aware directly or indirectly through their membership in the Company, whether before or after the date of this agreement, and which is

either marked or stated to be propriety and / or confidential or is by it's nature or method of disclosure is intended to be confidential

and includes the details of the Activities, CIP and other results and outcomes arising from the Activities but does not include information contained in this agreement ;

**“Conflict”** means a situation where there is a divergence between the interests of a Member and their obligations to the other Members and/or the Company such that an independent observer might reasonably question whether the actions of that Member are influenced by the interests of that Member to the detriment of some or all of the other Members and/or the Company;

**“Constitution”** means the constitution of the Company;

**“Contributed Personnel”** means the personnel of a Member to be contributed by it pursuant to clause 23;

**“Corporations Act”** means the *Corporations Act 2001* (Cth);

**“Deliverables”** means the deliverables for a Project identified in the Project Details;

**“Executive Team”** means the senior management that assists the CEO in managing the activities.

**“Financial Year”** means a period of twelve (12) months ending on 30 June in any year or where the context necessitates, a part of such period;

**“Intellectual Property”** or **“IP”** includes all copyright, patents, and industrial and intellectual property rights of whatever nature, including without limitation all rights in relation to inventions, registered and unregistered trade marks (including service marks), registered designs, confidential information, circuit layouts, and all other rights resulting from intellectual activity whether or not such rights are registered or prove capable of being registered but excludes Moral Rights;

**“Member”** means the Current Members, and any person admitted as a New Member from time to time;

**“Milestones”** means the milestones for a Project identified in the Project Details;

**“Moral Rights”** has the same meaning as in the *Copyright Act 1968* (Cth);

**“New Member”** means a person admitted as a Member of the Company after the date of execution of this agreement;

**“Non-Commercial Research”** means research that is internally funded by a Member or funded by the Commonwealth or a State or Territory Government or by a

philanthropic or charitable organisation under a funding agreement that does not transfer intellectual property rights in the results of that research to the funding party;

**“party”** means a person or a Member or the Company as the context requires;

**“Program”** means a research, educational or Commercialisation program to be carried out as part of the Activities

**“Program Manager”** means a person appointed by the CEO to act as co-ordinator of a Program.

**“Project”** means a discrete, time-bounded research, educational or Commercialisation activity to be carried out under clause 17 within the ambit of a Program;

**“Project Agreement”** means an agreement between the Company and one or more Project Parties (which may include one or more Members) setting out the terms upon which a Project will be funded and conducted;

**“Project Budget”** means the budget for a Project as set out in the Project Plan, including any variations to that budget as agreed by the Project Parties in writing;

**“Project Commencement Date”** means the date on which a Project is to commence as set out in the Project Plan;

**“Project Completion Date”** means the date on which a Project is to be completed as set out in the Project Plan;

**“Project Contribution”** means a contribution to a Project to be contributed by a Project Party;

**“Project Details”** means the details applicable to a Project as set out in the relevant Project Agreement.

**“Project Funds”** means the money to be paid to a Project Party for conducting a Project;

**“Project Leader”** means a person appointed under clause 17 to act as a leader of a Project;

**“Project Parties”** means those Members and non-members involved in a Project and specified in the Project Details (and may or may not include the Company) and a reference to a Project Party is one of the Members;

**“Project Objectives”** means the objectives for a Project as set out in the Project Plan;

**“Project Plan”** means the plan for carrying out a Project as set out in the Project Details including any variations to that plan as agreed by the Project Parties in writing;

**“Quarter”** means a three month period ending on 31 March, 30 June, 30 September or 31 December during the term of this agreement.

**“Strategic Plan”** means the strategic plan of the Company developed and approved in accordance with clause 3.4.

**“Valuation Principles”** means the principles approved by the Board for the valuation of non-cash Contributions.

1.2 In this agreement, unless the context indicates to the contrary:

- (a) the expression "person" includes an individual, a body corporate, or other body;
- (b) references to any Member to this agreement will include the Member's legal successor (including executors and administrators) and permitted assigns;
- (c) words importing the singular will include the plural (and vice versa) and words denoting a given gender will include both genders;
- (d) clause headings and notes in parentheses are inserted for convenience only, and have no effect in limiting or extending the language of provisions, except for the purpose of rectifying any erroneous cross reference;
- (e) references to any document or agreement will be deemed to include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (f) references to any legislation or to any provision of any legislation will include any modification or re-enactment of such legislation or any legislative provision substituted for, and all legislation and statutory instruments issued under such legislation;
- (g) all attachments referred to in and appended to this agreement will form part of this agreement;
- (h) all monetary amounts referred to in this agreement will be deemed to be in Australian currency;
- (i) all references to clauses and Schedules are references to clauses in, and schedules of, this agreement unless otherwise specified.

## **2. RELATION TO THE OTHER AGREEMENTS**

- 2.1 In the event of any inconsistency between this agreement and the Constitution the parties agree that, subject to the Corporations Act and the requirements of Rule 78 of the Constitution, it is their intention that this agreement will prevail and the parties will use their reasonable efforts to remove the inconsistency from the Constitution including initiating and voting for amendments to the Constitution.
- 2.2 In the event of any inconsistency between this agreement and the Project Details, this agreement will prevail and the parties will use their reasonable efforts to remove the inconsistency from the Project Details.

## **PART B: GENERAL PRINCIPLES**

### **3. MAJOR COVENANTS**

- 3.1 Each Member covenants and agrees with each other Member:
- (a) to diligently observe and perform its obligations and commitments set out in this agreement;
  - (b) to use reasonable endeavours to make the Company and its role widely known within each Member's organisation, with the aim of encouraging relevant Activities to be undertaken collaboratively through the Company;
  - (c) to carry out any activities that it agrees to conduct as part of a Project to a high standard;
  - (d) to provide its Annual Contribution to the Company in accordance with the terms of this agreement;
  - (e) to make available BIP in accordance with the terms of this agreement;
  - (f) not to knowingly do or cause or permit to be done any act, omission, matter or thing whereby any Member's rights to Intellectual Property could be in any way jeopardised;
  - (g) not to use any of the annual contributions for any purpose other than to carry out the activities;
  - (h) that it may validly enter into and perform this agreement pursuant to its rules;
  - (i) that it will operate within any governing laws or legal requirements applicable to a Member when participating in the Activities, and that it will not impose an obligation on another Member to carry out activities which may be contrary to that Member's governing law or legal requirements; and

(j) that except where expressly provided otherwise in this agreement, all decisions of the Board relating to participation of the Members in the Activities will be final and binding on the Members.

3.2 Each Member covenants with the other Members that it will do all things necessary and will use its best endeavours to procure that its Contributed Personnel do all things necessary to ensure that the Company Resources are applied solely towards the objectives of the Company and the performance of the Activities in accordance with this agreement.

3.3 Notwithstanding the above, each Member reserves to itself the unrestricted right to continue with or engage in research, training or Commercialisation independent of the Activities and to retain all benefits arising from such research, training or Commercialisation that is continued or engaged in independent of the Activities.

3.4 The Strategic Plan of the Company will be the plan of the Activities approved by the Board prior to the commencement of each Financial Year. The Board will prepare any updates to the Strategic Plan during the course of each Financial Year, including consideration of deferring, adding or deleting Projects from the Activities in that year.

3.5 The annual Strategic Plan must be consistent with this agreement. The CEO will make such changes to the annual Strategic Plan as approved by the Board, after consultation with the Members. A copy of the approved Strategic Plan will be made available to each Member.

3.6 The annual Strategic Plan can be amended where circumstances exist or may exist that mean the current Activities need to be deferred, new Activities are able to be commenced or some Activities discontinued. Any amendment to the annual Strategic Plan must be approved by the Board.

#### **4. TERM OF THE AGREEMENT**

4.1 This agreement will commence on the Commencement Date and the Activities will, from the Commencement Date, be conducted on the terms and conditions of this agreement and will continue, subject to earlier termination in accordance with this agreement.

#### **5. LOCATION OF ACTIVITIES AND ACCESS**

5.1 The Activities will be conducted at the locations determined by the Board in accordance with this agreement as agreed by the Member (where on premises controlled by the Member).

- 5.2 Each Member ("the Host") will at all reasonable times give to any other Member, the Company, the Contributed Personnel or other officers, employees, agents or contractors of a Member or the Company ("the Visitor") access to premises occupied by the Host for purposes related to the Activities, including where the Activities or any part of them are to be carried out for the purpose of conducting the Activities.
- 5.3 Notwithstanding clause 5.2, the Host may impose as a condition of such access that the Visitor execute an agreement, in a form acceptable to the Host, which:
- (a) sets out the terms of the visit and any obligations on the Visitor, provided that the obligations are not inconsistent with the ability of the Visitor to conduct the Activities;
  - (b) contains obligations of confidentiality and non-disclosure that protect the interests of the Host; and
  - (c) addresses the liability of the Member in the event of injury to the Visitor while visiting the premises,
- provided that the terms of the agreement provided by the Host are necessary to comply with its own practices and policies.

## **PART C: GOVERNANCE AND COMMITTEES**

### **6. EXECUTIVE TEAM**

- 6.1 The Board is responsible to appoint the Chief Executive Officer and the CEO approves the appointment of other persons to executive positions in the Company.
- 6.2 The CEO is responsible to identify and recommend persons that will make up the executive team ("**the Executive Team**") following a transparent and rigorous process.
- 6.3 The Board may fill any vacancy in the Executive Team by further appointment or by the secondment of personnel from a Member on terms as agreed between the Board and the Member.
- 6.4 The CEO will be responsible to the Board and not the Members.
- 6.5 The CEO will be responsible for the supervision and management of the Executive Team and any support staff.
- 6.6 The Executive Team will assist the CEO in managing the Activities according to the principles and guidelines approved by the Board. To the extent that a person is acting

in their capacity as a member of the Executive Team they shall not be responsible to any Member regardless of the terms of their appointment or secondment.

- 6.7 The Executive Team will be located in accordance with the direction of the Board and the Board will be responsible to ensure that the conditions where the Executive Team are located are appropriate and adequate for the role and function they are expected to undertake. The Board may accept an offer from a Member to provide a location for the Executive Team to function and operate from on such terms as are appropriate.
- 6.8 The Board shall periodically review the location of the Executive Team to ensure the national profile of the Company is maintained.

## **7. COMMITTEES**

- 7.1 The Board will establish such Committees to assist the Board, the CEO, the Executive Team and the Program Managers as it thinks fit from time to time.
- 7.2 Such Committees will be bound by their terms of reference, as amended and approved by the Board from time to time.
- 7.3 Unless otherwise provided in this agreement or agreed with the Board, the committees established under this clause 7 will be advisory only and resolutions of those committees will not bind the Board.

## **PART D: RULES REGARDING MEMBERSHIP**

### **8. ADMISSION OF A NEW MEMBER**

- 8.1 A New Member may only be admitted as a Member to a relevant category of membership in accordance with the procedure set out in the Constitution.
- 8.2 Each New Member must execute a deed of accession, a pro-forma copy of which is attached as Schedule 1 to this agreement.
- 8.3 Each application to become a New Member must be made in writing using the form of application in Schedule 2.

### **9. ANNUAL CONTRIBUTIONS**

- 9.1 The Activities will be supported by the levying of Annual Contributions at rates set by the Board from time to time. Members will be consulted prior to making changes in annual contributions (except annual CPI adjustments).

9.2 Each Member agrees:

- (a) to pay or contribute to the Company in accordance with the category and level of membership that the Member satisfies which is attached as Schedule 3 to this agreement;
- (b) that the cash component of Annual Contributions is due and payable on the first day of each Financial Year or upon acceptance of them as a Member (or at such other time or times as the Company may agree with that Member).

9.3 The valuation of non-cash Annual Contributions for the purposes of this agreement must be in accordance with the Valuation Principles.

## **PART E: ACCOUNTING AND REPORTING**

### **10. COMPANY ACCOUNTING AND REPORTING**

10.1 Prior to the commencement of each Financial Year the CEO will submit, for consideration by the Board, a draft Annual Budget which will set out:

- (a) the Annual Contributions from Members and other anticipated income;
- (b) the proposed allocation of the Company Resources to Programs;
- (c) the allocation of the Company Resources to the Company for the purposes of carrying out the Projects and to meet its operating costs;
- (d) the Company Resources to be made available to the Members for the purpose of carrying out the Projects; and
- (e) any allocation as is required to satisfy any reporting obligation arising out of any external funding agreement or any Project Agreement.

10.2 The expenditure as set out in the draft Annual Budget submitted by the CEO may be amended or varied by the Board prior to being approved as the Annual Budget.

### **11. FUNDING OF THE ACTIVITIES**

11.1 The Activities will be funded by:

- (a) the levying of Annual Contributions under clause 9.1;
- (b) Project Contributions;
- (c) funding grants applied for and obtained by the Company pursuant to any external funding agreement or pursuant to funding received from any Project Agreement;

- (d) money provided to the Company by third parties for the purposes of the Activities; and
- (e) other money acquired through the Activities.

## **12. FINANCIAL MANAGEMENT**

### **12.1 The Company's obligations**

The Company will:

- (a) establish and oversee the operation of the Company Account;
- (b) liaise with, report to and meet any other accounting and financial requirements of any external funding agreement or any Project Agreement, in order to secure instalments of such funding in a timely fashion;
- (c) seek and accept the Annual Contribution required of a Member pursuant to the Strategic Plan;
- (d) seek and accept any money to be procured from third parties contributing to the Activities;
- (e) credit all such amounts received into the Company Account;
- (f) draw on the Company Account to make payments for the Activities; and
- (g) draw on the Company Account to make payments to the Company to allow it to meet its operating costs in accordance with the Annual Budget.

### **12.2 Company is not the agent for the Members**

The Company will not be taken to be an agent for any of the Members except to the extent necessary for the purposes of clause 12.1 or as is necessary for the purpose of the admission of a New Member.

### **12.3 No authority**

Nothing in this agreement will be taken to in any way authorise or permit the Company to incur any liabilities or undertake any obligations on behalf of, or in the names of, any of the Members except as specifically authorised in this agreement or Project Details (including any Project Agreement).

## **13. ACCOUNTING**

### **13.1 Member accounts**

Each Member will be responsible for keeping separate financial records which will record:

- (a) the payment of the cash component of its Annual Contributions (if any);
- (b) the in-kind component of its Annual Contributions (if any);
- (c) receipt of any external grant moneys paid to the Member under the terms of any external funding agreement to which the Company is treated as a partner organisation to that agreement;
- (d) any expenditure incurred by the Member in carrying out the Activities; and
- (e) any monies received by it from the Commercialisation of CIP.

### 13.2 **The Company accounts**

The Company will keep separate financial accounts in relation to:

- (a) receipt of any external funding payments paid to the Company;
- (b) the cash component of Annual Contributions received from Members;
- (c) the non-cash component of Annual Contributions from Members;
- (d) the Project Contributions received from Project Parties;
- (e) the Company's payments of the Company Funds to the Members and third parties;
- (f) withdrawals from the Company account under clause 12.1(g);
- (g) expenditure of funds paid to it from the Company account under clause 12.1(g); and
- (h) any other income of or expenditure of the Company;

### 13.3 **Accounting for In-Kind Contributions**

Each Member is responsible for keeping separate documentation that records each non-cash contribution, including records of the time spent by each of its personnel on the Activities, and it must provide such documentation, in a format required by the Company, to the Company if reasonably requested to do so by the Company.

### 13.4 **Provision of information by Members**

Each Member shall provide to the Company within fourteen (14) days of a written request from the Company Secretary:

- (a) all necessary information from the accounts referred to in clause 13.1 for the Company to:
  - (i) comply with the financial reporting requirements contained in any external funding agreement or any Project Agreement;

- (ii) report to the Members as required under this agreement; or
  - (iii) conduct its operations in accordance with best practice principles of not-for-profit governance; and
- (b) any other information reasonably requested by the Company relating to the Projects and Activities including that required to meet the reporting and monitoring requirements in any external funding agreement or any Project Agreement.

## **14. REPORTING OBLIGATIONS**

### **14.1 Reporting on Activities**

The Company must, within three (3) months of the end of each Financial Year, provide a written report to each Member on the Activities conducted in that Financial Year, including information regarding:

- (a) progress in relation to the Strategic Plan;
- (b) progress on research and development activities, including Projects; and
- (c) likely or actual achievement of any Milestones and Deliverables that are material to the fulfilment of the objectives of the Company;
- (d) progress on Commercialisation of CIP.

### **14.2 Reporting on financial position**

Without limitation to its obligations under the Corporations Act, the Company must, within three (3) months of the end of each Financial Year provide to each Member:

- (a) an annual statement of financial position;
- (b) an annual statement of financial performance;
- (c) an annual cashflow statement; and
- (d) income projections for the next Financial Year as contained in the Annual Budget.

### **14.3 Notification of critical events**

The Company must, within fourteen (14) days of becoming aware, give written notice to each Member should any of the following occur:

- (a) any litigation threatened or commenced against the Company;
- (b) any notification from any government agency of breach or alleged breach of any legal obligation; or

- (c) anything that may cause or has caused the Company to be insolvent or unable to pay its debts as and when they fall due.

#### 14.4 **Audit by Members**

Each Member and its nominated servants, agents and auditors will be entitled at all reasonable times to inspect and have provided to them copies of all documents, records and accounts under the control of the Company relating to the Activities at the expense of the Member and will also be supplied at the expense of the Member with copies of all reports, statements and certificates material to the Activities, in each case together with such explanation as the Member may reasonably require.

### 15. **ASSETS**

15.1 This clause applies to any Asset:

- (a) provided by a Member as a part of its Annual Contribution to the Company;
- (b) acquired by a Member in whole or in part from any Company Funds paid to that Member; or
- (c) provided to a Member as part of the non-cash Company Resources made available to that Member for the purpose of carrying out the Activities.

15.2 An Asset to which this clause 15 applies will at all times be or remain vested in the Member acquiring or providing the Asset.

15.3 During the term of this agreement the Member having title to an Asset to which this clause 15 applies will:

- (a) not charge, mortgage, pledge or otherwise encumber the Asset;
- (b) be responsible for insurance, maintenance and any other costs and liabilities associated with the Asset;
- (c) make the Asset available for the Activities; and
- (d) shall be entitled to retain use of the Asset for other purposes.

15.4 The Board may treat the costs described in clause 15.3(b) or part of them, as part of the Annual Contributions of the Member.

## **PART F: RESEARCH AND TRAINING**

### 16. **PROGRAMS**

16.1 The Activities of the Company will be co-ordinated through Programs and Projects with particular reference given to the priorities identified by the Members.

- 16.2 The process of planning and reviewing the Programs will be developed by the CEO, the Executive Team and the Program Managers.
- 16.3 The Programs and their component Projects must be approved by and may be varied from time to time by the Board.
- 16.4 Each Program will be carried out in accordance with, and directed towards the achievement of, the objectives of the Company.
- 16.5 Each Program will be coordinated by a Program Manager.
- 16.6 In relation to each Program, it will be the responsibility of the Program Manager to monitor the Activities within his/her Program, and to coordinate the reporting of Activities to the CEO and Board as required on all aspects of the Program including progress of individual Projects against Milestones and budget.
- 16.7 The Member employing any Contributed Personnel who are Program Managers authorises the said person to perform the functions set out in clause 16.6.
- 16.8 The Projects within Programs must, where required, have ethics approval from an ethics committee as required by law. Each Member must ensure that the CEO is provided with written confirmation of any required ethics committee approval for the Projects in which it is a participant.

## **17. EXTERNAL FUNDED PROJECTS**

- 17.1 The Activities within Programs will be carried out primarily through discrete Projects, each of which contributes to predominantly one, but sometimes more than one, Program.

### **17.2 Research Activities**

All Activities involving research will be carried out through Projects. A research Project must not commence unless the Project Details have been agreed in writing by all Project Parties, it has all relevant approvals from the Board and, where necessary, ethics approval from an ethics committee in accordance with clause 16.8.

**17.3 Non-members contributing to Projects**

Non-members may make cash or in-kind contributions to a Project, subject to the approval of the Board with the relevant management fee above and beyond members rate.

**17.4 Project Details**

In relation to every proposed Project, the Company will prepare, or will arrange for the preparation of, a draft Project Plan and Project Details, with such details to specify details as the Board may require.

**17.5 Project Documents**

The Members acknowledge that a Project will be established for the purposes of this agreement when the Project Plan and Project Details have been agreed in writing by all Project Parties.

**17.6 Appointment of Project Leaders**

As part of the development of a Project Plan, the Project Parties may appoint a Member to be the leader of that Project and they shall be known as the Project Leader. If a leader is not appointed by the Project Parties, then the CEO shall appoint the Project Leader.

**17.7 Project Contributions**

- (a) The Project Contributions to be made by the Project Parties must be specified in the respective Project Details.
- (b) Each Project Party must provide its Project Contributions at the times and in the manner specified in the Project Details.

**18. COMPANY FUNDED PROJECTS**

18.1 The Company may fund all or part of a Project using Company Resources (**Company Funded Projects**).

18.2 The priorities concerning Company Funded Projects may be determined by way of vote organised by the CEO as required from time to time, with the following votes given to each Member for this purpose:

<b>Member</b>	<b>Number of votes per Member for specific Company Funded Projects</b>
Industry (Tier 1)	3 votes in total

Industry (Tier 2)	2 votes in total
Industry (Tier 3)	1 vote in total
Industry (Tier 4)	1 vote in total
Research Member	1 vote in total
General member	None
Associate Member	None

- 18.3 Voting entitlements that are exercised by a Member in excess of that allowed per voting instance/event shall be void and of no effect. The CEO is entitled to regard the votes received from a Member as allocated in accordance with the order they are received by the CEO if voting entitlements are purportedly exercised by a Member in excess of their allowed number of votes.

**Interpretation Note:**

It is intended that each Member be able to cast their vote(s) to nominate Projects for prioritisation by allocating the number of votes they are entitled to cast towards one or more Projects. For example a Band 2 Industry Member could cast their voting entitlement by nominating one Project twice or by nominating two separate Projects once only. Once a Member has exhausted their voting entitlement, then they are not able to nominate further projects.

**19. PROJECT MANAGEMENT AND REPORTING**

**19.1 Carrying out the Project**

The Project Parties for a Project must carry out the Project:

- (a) in accordance with the Project Details, including the Project Budget;
- (b) to a professional standard;
- (c) so as to do all things necessary or desirable to achieve the Project Objectives;
- (d) so as to achieve the Milestones by their required dates;
- (e) so as to provide the Deliverables by their required dates; and
- (f) in accordance with the Project Leader's reasonable directions.

**Project Leader**

19.2 The Project Leader will be responsible for the day-to-day management of the Project and for the required reporting on the progress of the Project.

19.3 In relation to each Project, the Project Leader will for each Financial Year specify a Project Plan which, subject to the CEO's approval, will include the Project Details and management of the Project, and will specify the Project Contributions of all Project Parties. The Project Leader is responsible for the delivery of each report on the progress of a Project in accordance with the reporting terms and reporting timeframes as specified in the Project Plan.

**19.4 Project reporting**

A Project Party that employs or engages the Project Leader must:

(a) ensure that the Project Leader does anything required of a Project Leader under this agreement;

(b) ensure that:

(i) any substantial deviation from the Project Plan; and

(ii) any matter which the Project Leader considers will, or may, affect the ability of the Project to meet the Project Objectives, satisfy any Milestones, provide any Deliverables or be completed within the Project Budget, including any failure to provide Project Contributions;

are immediately reported to the Company by the Project Leader;

(c) ensure that Milestone reports are provided in accordance with the Project Details to the Company by the Project Leader on:

(i) progress with the Project and its scientific advances, outcomes, key achievements, Deliverables and Milestones;

(ii) any matter which the Project Leader considers will, or may, affect the ability of the Project to meet the Project Objectives, satisfy any Milestones, provide any Deliverables or be completed within the Project Budget, including any failure to provide Project Contributions;

(iii) any significant difficulties encountered during the Project and measures taken or plans to resolve them;

(iv) any CIP created (including a description of the CIP, when it was created and by whom); and

- (v) the BIP used in the Project.

## 19.5 **Separate Project financial records**

Each Project Party must keep separate financial records which must record:

- (a) any Project Contributions it makes under clause 17.7;
- (b) any payments of Project Funds made to it by the Company;
- (c) all expenditure incurred by the Project Party from Project Funds in carrying out the Project; and
- (d) any other expenditure associated with its carrying out the Project.

## 20. **WITHDRAWAL AND EXPULSION FROM PROJECTS**

### 20.1 **Withdrawal from Projects**

- (a) Subject to a Project Party being solvent and to clause 20.1(c), a Project Party may only withdraw from a Project by giving three (3) months written notice to each other Project Party.
- (b) If a Project Party becomes insolvent or withdraws from a Project the remaining Project Parties must agree on whether or not to continue the Project or a variation of the Project and the terms to which that continuation would be subject. A decision by the remaining Project Parties not to continue the Project after a Project Party has withdrawn will not constitute a breach of this agreement or the Project Details.
- (c) A Project Party that is solvent may not withdraw from a Project without the agreement of the other Project Parties, such agreement not to be unreasonably withheld. In the event that clause 39 applies to a Party, and the circumstances are unlikely to change such that clause 39 continues to apply and/or a mutually satisfactory resolution to the event(s) cannot be achieved, then the agreement of the other Project Parties is deemed to have been received by the affected Project Parties.

### 20.2 **Expulsion from Projects**

- (a) A Project Party may be expelled from a Project by notice from the Company if Due Cause exists in relation to that Project Party and remains unremedied after twenty one (21) days following written notice to that Project Party.
- (b) For the purposes of clause 20.2(a), **Due Cause** means:

- (i) failure to make Project Contributions when required by the Project Details;
- (ii) unauthorised use or Commercialisation of Intellectual Property;
- (iii) any other material breach of this agreement in relation to the Project or of the Project Details, including failure to meet Milestones;
- (iv) change or proposed change to Contributed Personnel that is likely to adversely affect the Project and where the replacement of Contributed Personnel under clause 23.3 is not acceptable to the Board.
- (v) failure to remedy a conflict of interest in relation to the Project under clause 34 to the reasonable satisfaction of the Company;
- (vi) change in the direct or indirect ownership or control of the Project Party in question that would, in the assessment of the Board, affect its ability to comply with its obligations under this agreement;
- (vii) disposal of the whole or any part of the Project Party's assets, operations or business other than in the ordinary course of business;
- (viii) ceasing to carry on business;
- (ix) insolvency;
- (x) steps taken by a mortgagee to take possession or dispose of the whole or any part of the Project Party's assets, operations or business;
- (xi) steps taken to enter into any arrangement between the Project Party and its creditors other than in the ordinary course of business;
- (xii) steps taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a liquidator, a provisional liquidator, an administrator or other like person, concerning the whole or any part of the Project Party's assets, operations or business; or
- (xiii) assignment of its rights or obligations under a Project (where the Project Parties have not consented) or this agreement.

### 20.3 Consequences of withdrawal from Project

- (a) If a Project Party withdraws or is expelled from a Project, the Project Party will, from the date of effect of the withdrawal or expulsion:
  - (i) cease to be a Project Party;

- (ii) relinquish all rights with respect to the Project other than the right to an indemnity under clause 29; and
  - (iii) subject to it either meeting its obligations to make its Project Contributions by other means or obtaining the approval of the Board to reduce its Project Contributions, be relieved of its obligations to make Project Contributions to that Project or to carry out, report on or manage the Project, or otherwise participate in the Project.
- (b) The withdrawal or expulsion of any Project Party from a Project:
- (i) will not affect the enforceability of any obligations of that Project Party or rights against that Project Party accrued at that time;
  - (ii) will not relieve that Project Party of the obligations imposed upon it under this agreement other than as specified in clause 20.3(a)(iii);
  - (iii) will not affect any licences to its BIP provided to the Project under clauses 25 or 26 which will operate according to the provisions of those licences; and
  - (iv) subject to clause 20.1(b), will not relieve the remaining Project Parties of their obligations under this agreement with respect to the Project and they will continue to carry out the Project and perform the terms of this agreement with respect to the Project.

## **21. VARIATION TO PROJECTS**

Any variation, other than a trivial or minor variation, to a Project, except a withdrawal or expulsion of a Project Party in accordance with clause 20, must be approved by the CEO.

## **22. TERMINATION OF PROJECTS**

### **22.1 Termination of Projects by the Company**

The Company may terminate a Project by giving thirty (30) days written notice to the Project Parties if:

- (a) a Milestone is not achieved by the date by which it was required to be achieved and is not achieved after thirty (30) days following a notice from the Company to the Project Parties (or such longer period of time agreed by the Company and the Project Parties following the issue of the notice);
- (b) a Deliverable has not been provided by the date by which it was required to be provided and is not provided after thirty (30) days following a notice from

the Company to the Project Parties (or such longer period of time agreed by the Company and the Project Parties following the issue of the notice);

- (c) in the reasonable opinion of the Company, the Project Objectives are unlikely to be achieved and are unlikely to be achieved after thirty (30) days following a notice from the Company to the Project Parties of such opinion; or
- (d) in the reasonable opinion of the Company the Project is no longer consistent with or likely to contribute to the achievement of the objectives of the Company,

provided that if required by any external funding agreement, the external funding body has been informed of the proposed termination and does not object to the termination of the Project.

## 22.2 Consequences of termination

- (a) If the project is terminated pursuant to clause 22.1 (a) or (b), then the Project Party or Project Parties responsible for the non – achievement of a Milestone. or a Deliverable will reimburse the other Project Parties for unavoidable costs incurred as a result of the early termination (if any), up to a total amount for each Project Party not to exceed the balance of the Project Funds that would have been paid to that Project Party if there had been no early termination.
- (b) If the Project is terminated pursuant to clause 22.1(c) or (d), then the Company must, subject to having sufficient Company Funds, reimburse each Project Party for committed funds and unavoidable costs incurred as a result of the early termination (if any), up to a total amount for each Project Party not to exceed the balance of the Project Funds that would have been paid to that Project Party if there had been no early termination.
- (c) The Company must keep all of the Members informed of the termination of any Project.

## 23. CONTRIBUTED PERSONNEL

- 23.1 Each Member agrees to provide to the Company its personnel for the time and purposes set out in Strategic Plan or as agreed between the Member and the Board from time to time. Such persons shall be regarded as “Contributed Personnel”.
- 23.2 Contributed Personnel of each Member will remain subject to the terms and conditions of employment of that Member.
- 23.3 A Member may withdraw any of its Contributed Personnel from the Company upon ninety (90) days' notice to the Board, provided the Member replaces such personnel

with a person or persons (as the case may be) acceptable to the Board prior to the expiry of the notice period. The requirement of ninety (90) days notice in this clause 23.3 will not apply where a withdrawal of Contributed Personnel arises by termination of the employment of the Contributed Personnel, and in that event the Member will be required to notify the Board as soon as practicable and replace that person within ninety (90) days of the termination of the Contributed Personnel's employment with the Member.

23.4 The Board may request a Member to replace any of its Contributed Personnel by written notice to the Member setting out the reasons why their replacement is required. The Member must replace the specified personnel with an alternative person that is appropriately qualified and acceptable to the Board and will do so within ninety (90) days of being requested to do so by the Board.

23.5 Notwithstanding clause 23.3, the Members agree that replacement of Contributed Personnel of any Members who are listed in the Strategic Plan will be in accordance with the provisions of any external funding agreement or any Project Agreement.

23.6 Should the Company require the services of persons not presently employed by any of the Members, such persons will be engaged or retained by the Company or a Member pursuant to arrangements determined by the CEO and agreed to by the Board or Member as is appropriate.

23.7 Each Member covenants and undertakes to procure that CIP created by any of its Contributed Personnel as part of their involvement in Activities will be owned and dealt with according to the provisions of this agreement.

## **24. STUDENT INVOLVEMENT**

The Members agree that:

- (a) Members who have enrolled students or who have students under their supervision who are involved in the Activities:
  - (i) must ensure that those students comply with clauses 27 and 28;
  - (ii) must ensure that, unless otherwise agreed by the Board, CIP developed by the student through their involvement in a Project is owned in accordance with clause 26, provided that the student will own the copyright in his or her thesis;
- (b) the Member enrolling the student must ensure the student complies with clause 28 regarding publications provided that the only restrictions on

- publishing a student's thesis will be those reasonably necessary to protect BIP, Confidential Information or CIP;
- (c) the Company will not inhibit the right of a student to have his or her thesis that contains CIP examined, but the Company may require an examiner to sign a confidentiality agreement to protect Confidential Information;
  - (d) before a student becomes involved in any Activities, the Company may require that the student and/or the enrolling Member (as agreed with that Member) enter into a written agreement with the Company setting out the terms on which the student is involved in the Activities, which will be consistent with the principles in this clause 24; and
  - (e) the student will continue to have a licence to use BIP and CIP for the purposes of completing and publishing his or her thesis notwithstanding the withdrawal of any Member or the termination of a Project.

## **PART G: OUTCOMES, RESULTS AND TRANSITIONAL PROVISIONS**

### **25. BACKGROUND INTELLECTUAL PROPERTY**

- 25.1 From time to time during the term of this agreement, a Member may in its absolute discretion make Intellectual Property, of which it is the owner or for which it enjoys rights of user available for use in a Project by providing to the Project Leader concerned and the CEO particulars sufficient to enable that Intellectual Property to be adequately identified and entered into the confidential register for that Project, and such Intellectual Property will thereafter be BIP, provided that:
- (a) each Member will retain the sole, absolute and unfettered discretion to decide what Intellectual Property it will make available as BIP for use by a Project in the Company;
  - (b) where a Member agrees to make any Intellectual Property available as BIP for use in a Project, that BIP may only be used in a manner agreed to in writing by the Member making the BIP available;
  - (c) all use of and limitations on those persons who will have access to such Intellectual Property will be as agreed by the Project Leader and the Member making the Intellectual Property available;
  - (d) once Intellectual Property has been made available for use in a Project in the Company, the Member may not withdraw it until the earlier of the end of the

Project to which the Intellectual Property was made available or the termination of this agreement;

- (e) where Commercialisation of CIP is only achievable with a licence of the BIP the Member will take reasonable steps to make such BIP available for the Commercialisation in accordance with clause 25.2.

25.2 Subject to any terms and conditions or restrictions notified under clause 25.3, where Commercialisation of CIP requires a licence of BIP, the CEO will notify the Member that made such BIP available. That Member will take reasonable steps to make such BIP available to the Company by way of licence (including the right to sub-license) for the Commercialisation of the CIP on Commercial Terms agreed with the Board and the Member. If an agreement on the Commercial Terms has not been agreed within sixty (60) days of the issue of the notification the matter will be referred for expert determination in accordance with clause 36.

25.3 The Member owning BIP will not be obliged to grant a licence under clause 25.2 where the Commercialisation of the CIP is being undertaken by a person considered by the Member as owning that BIP to be a commercial competitor.

25.4 Each Member represents and warrants to each other that:

- (a) it is the owner of or otherwise has the right to make available and is entitled to use the BIP which it makes available for the Activities; and
- (b) except to the extent disclosed to the Company, that BIP is unencumbered.

25.5 The Members acknowledge and agree that the BIP will at all times remain the property of the Member which made the BIP available for use in a Project pursuant to clause 25.1.

25.6 The Company will maintain a confidential register of the BIP and of all written approvals received from the Members in relation to BIP that has been made available by the Members for use in each Project (pursuant to clause 25.1(b) and clause 25.7), or that has been made available by the Members for use in Commercialisation (pursuant to clause 25.1(d)).

25.7 Subject always to the prior written agreement of the Member owning that BIP and strict compliance with this agreement and the terms of clause 25.1(b) and without prejudicing the ability of the owner of BIP to seek appropriate protection for BIP, each Member involved in the Project to which BIP is made available will have a non-assignable, non-exclusive royalty-free right to use the BIP for the purposes of the Project other than Commercialisation.

- 25.8 A Member is free to use its own BIP outside the scope of the Activities provided that such use does not prevent such BIP from continuing to be made available to the Company in accordance with clauses 25.1(b), 25.1(d) and 25.1(e).
- 25.9 Where a Member intends to conduct research, training or Commercialisation outside the Activities, and wishes to use BIP owned by another Member, the Member will only be permitted to do so if it obtains a non-exclusive licence for such use from the Member owning that BIP, and upon terms agreed in writing by the Member owning that BIP.
- 25.10 The Members agree to take all reasonably necessary steps to protect the BIP of any other Member and give each other prompt notice of any infringement of BIP which comes to their attention. Each Member agrees to give all Members who own such BIP all assistance which they may reasonably require in order to protect that Member's BIP, provided that any Member requiring such assistance shall indemnify any Member providing the assistance for all reasonable costs and expenses of so doing.

## **26. COMPANY INTELLECTUAL PROPERTY AND COMMERCIALISATION**

- 26.1 All CIP will be owned by the Company.
- 26.2 Each Member will upon request from either the CEO or from the Board provide to the CEO or the Board information regarding CIP and will give to the CEO and Board access to all records and information in its possession related to the CIP.
- 26.3 By executing this agreement, the Members assign to the Company all of their right, title and interest in all CIP.
- 26.4 The Members must cooperate with each other and promptly do all acts and things and execute all documents which may be necessary for the purpose of vesting ownership of the legal and beneficial interest in the CIP as required under this agreement.
- 26.5 The Members will use their best efforts to ensure that their respective employees (including Contributed Personnel), agents, sub-contractors, postgraduate students under their supervision or other persons participating in the Activities:
- (a) identify CIP generated or developed by them;
  - (b) promptly disclose details of it to the relevant Program Manager; and
  - (c) promptly do all acts and things and execute all documents as requested by the CEO necessary for the purpose of protecting CIP.

- 26.6 (a) Subject to this agreement, each Member has:
- (i) a non-exclusive, royalty-free, world-wide licence to use CIP for the purposes of undertaking the Activities under this agreement;
  - (ii) if the Member is an Industry Member, a non-exclusive, royalty-free, world-wide licence to use CIP in its operations, but not to the extent that the Industry Member transfers, sells or otherwise assigns a product or process that uses the CIP or a part of or the whole of its operations that uses the CIP to a non-Member; and
  - (iii) a non-exclusive, royalty-free, world-wide licence to use CIP for Non-Commercial Research, education and teaching purposes subject to the Member notifying the Board in its Quarterly report under clause 13.4 of the specific use and compliance with any guidelines that the Board may establish from time to time relating to such use;

provided that the Member:

- (iv) will not have a right to grant sub-licences except as provided in clause 26.7;
  - (v) does not use the CIP in such a way that would compete, or would be reasonably likely to compete, with the Commercialisation activities of the Company;
  - (vi) subject to clause 27, complies with clause 28 of this agreement in respect of any publication which contains details or a description of the CIP.
- (b) A Member must not Commercialise or seek any form of IP protection in respect of any outcomes developed or derived by the Member through the use of CIP under the licence granted under clause 26.6(a)(ii) without the prior written approval of the Board, which approval must not be unreasonably withheld.
- (c) Should a Member require a licence of BIP and/or CIP in order for that Member to Commercialise the IP referred to in subclause (b) above, the Member must obtain a licence from the owners of the BIP and/or CIP on Commercial Terms.

26.7 A Member does not have the right to grant sub-licences of the licences granted under clause 26.6 other than in the case where the Member is a university, where the

Member may grant a sub-licence to its enrolled students to access CIP for the purpose of their university studies whilst on university premises, using equipment under the control of the Member.

- 26.8 Where a Member wishes to use CIP for any purpose, whether for conducting research, training or otherwise, not authorised under clause 26.6, that Member must obtain a licence from the Company covering such use. The grant of any such licence will be at the Company's absolute discretion and will be on the Commercial Terms agreed between the Member and the Company. If the proposed use of CIP relates to the Activities then the Company will not unreasonably withhold consent to such use.
- 26.9 The Company may at all times:
- (a) Commercialise the CIP in accordance with this clause 26;
  - (b) use the CIP for the Activities;
  - (c) license any Member or other person to use the CIP for the Activities.
- 26.10 The Members will give the Board prompt notice of any infringement of CIP which comes to their attention and each Member agrees to give the Company all assistance which it may reasonably require in order to protect that CIP, provided that the Company indemnifies the Member providing the assistance for all reasonable costs and expenses of so doing.
- 26.11 If a Project Leader considers that a particular development arising from Activities within that Program may be patentable or the subject of another form of Intellectual Property protection, the Project Leader must promptly disclose details of that development to the CEO and the Board.
- 26.12 The Company must maintain an IP register recording CIP notified to the Company, containing at least the following details:
- (a) date of entry on register;
  - (b) description of CIP;
  - (c) description of the inventor or author and the party that developed the CIP; and
  - (d) details of any agreements made by the Company with the Members or with third parties in relation to disclosure or use of CIP.
- 26.13 The Board will decide all general matters of patent or other Intellectual Property protection policy for the CIP.
- 26.14 Unless otherwise agreed by the Company, the Company is to apply for, maintain and prosecute any form of IP protection decided under clause 26.13.

- 26.15 All costs associated with applying for, maintaining and prosecuting patent or any other form of IP protection associated with the CIP (including any action for infringement of the CIP) and the costs associated with the application, maintenance and prosecution of any actions which may be associated with any such CIP will be drawn from the Company account provided that where the Board determines that there is insufficient funds in the Company account to enable such costs to be debited, the Board may resolve to fund these costs by seeking additional cash Annual Contributions from the Members or particular Members in accordance with clause 9.1.
- 26.16 The Company will be responsible for facilitating, managing and overseeing the Commercialisation of CIP. In doing so, the Company may determine that the Commercialisation of CIP will be undertaken by the Company itself, a Member, a related party of the Company (as defined in the Corporations Act), a third party or any combination of them.
- 26.17 The Company is entitled to retain all proceeds from Commercialisation with respect to CIP to be expended on promotion of its objects in accordance with the Constitution.
- 26.18 After Commercialisation of any CIP is commenced, the Company must provide a progress report to the Members every twelve (12) months with respect to Commercialisation of CIP.
- 26.19 No Member has the power to veto a decision by the Board regarding Commercialisation of CIP.
- 26.20 The Company must keep written records of:
- (a) all proceeds of Commercialisation received into the Company account; and
  - (b) all Commercialisation expenses incurred,
- and will on the reasonable request of a Member provide that Member with a copy of or access to those records within twenty-eight (28) days of the request.

## **PART H: PROTECTING THE RESEARCH**

### **27. CONFIDENTIALITY**

- 27.1 Other than as contemplated in this Agreement, each party agrees that it will keep secret and confidential and not disclose or make unauthorised use of:
- (a) any Confidential Information or any part of it relating to the Activities without the prior written consent of the Board;

- (b) Confidential Information provided by any of the parties without the prior written consent of that party providing the Confidential Information;
- (c) any CIP (including any Commercialisation of it) without the prior written consent of the Board, or,
- (d) any BIP without the prior written consent of the owner of such BIP and the Board.

27.2 The obligations imposed on a party by this clause will not apply to data or Confidential Information which:

- (a) prior to disclosure is in the public domain or in published literature or subsequent to disclosure to the party becomes part of the public domain or is published other than as a result of an unauthorised act or failure to act by that party;
- (b) is received by a party from a third party without any obligation to hold in confidence and which has not been obtained by that third party directly or indirectly from a disclosing party;
- (c) is independently developed by an employee or officer engaged by the party owing the obligation of confidentiality whilst having no knowledge of the other party's Confidential Information;
- (d) the party claiming confidentiality has identified in writing the information as being released from the obligation of confidentiality;
- (e) is required to be disclosed by law (but only to the extent of the required disclosure); or
- (f) is disclosed to a party's legal, accounting, financial or other professional advisers provided that such disclosure is necessary and is subject to an obligation of confidentiality.

27.3 Any combination of Confidential Information will not be deemed to be in the public domain merely because the Confidential Information is in a party's possession or contains information in the public domain.

27.4 Confidential Information will not be deemed to be in the public domain merely because it is embraced by a general disclosure in the public domain.

27.5 The onus of showing that any of the above exceptions apply will rest upon the receiving party.

- 27.6 Each party will ensure that:
- (a) its respective employees (including Contributed Personnel) who participate in the Activities and acquire access to Confidential Information, will comply with the obligations of confidentiality as though parties to this agreement; and
  - (b) any of the above-mentioned employees who cease to be employed by the party will continue to be bound by such obligations of confidentiality.
- 27.7 The obligations of confidentiality imposed on a party will survive termination of this agreement or the party's expulsion or retirement from the Company until the relevant Confidential Information lawfully enters the public domain.
- 27.8 Notwithstanding any obligation, duty or requirement imposed by this clause, a Member will not be in breach of this agreement if disclosure of Confidential Information is legally required, by convention or by law, to be made to Parliament, the Governor, Cabinet or a Parliamentary or Cabinet committee or subcommittee or to any agency, authority instrumentality, Minister or Officer of a State or the Commonwealth to whom it is required to be disclosed.

## **28. PUBLICATIONS & PUBLIC ANNOUNCEMENTS**

- 28.1 The Members acknowledge that the dissemination of knowledge is an important function of the Company and that publication of books, papers, theses and other forms of dissemination of information is encouraged.
- 28.2 Subject to clause 27 and this clause 28, a Member has the right to publish the results of its own work arising from the Member's involvement in the Activities (publications to include institutional affiliations of authors as well as their affiliation with the Company).
- 28.3 The Members will use their best endeavours to ensure nothing is done which might prejudice the subsistence or Commercialisation of BIP or CIP, and in particular the Members will not publish or disclose any such Intellectual Property to any third person so as to preclude the granting of a patent or cause the loss of Intellectual Property protection in any CIP.
- 28.4 Prior to any publication the Member wishing to publish material relating to the Activities ("the Requesting Member") will forward a request in writing to the CEO seeking permission to publish such material.
- 28.5 The CEO will within thirty (30) days of receipt of any such request notify the Requesting Member whether permission has been granted, delayed or denied. A failure by the CEO to provide any notification to the Requesting Member within the

- thirty (30) day period shall be deemed to be regarded as the granting by the CEO of the permission sought by the Requesting Member under clause 28.4.
- 28.6 Where the CEO decides to delay the granting of permission, he shall have a further ninety (90) days in which to make his decision under this clause whether to grant or deny the request of the Requesting Party.
- 28.7 Subject only to clause 27.1, if the CEO determines that the proposed publication includes information which is commercially sensitive to the Company or a Member, then he will seek approval of the Board or the relevant Member (as is appropriate to the circumstance) prior to approving publication.
- 28.8 If the CEO determines that the publication may result in the potential loss of commercially valuable Intellectual Property rights for the Company, then the CEO may withhold consent to publication and:
- (a) seek the advice of the Board;
  - (b) suggest alterations to the publication so that it does not disclose information affecting the commercially valuable Intellectual Property rights; or
  - (c) if altering the publication is unacceptable to the Requesting Member, to delay publication for a stipulated period not exceeding eighteen (18) months from the date of the request in order to provide the Company with sufficient time to seek protection of the Intellectual Property rights.
- 28.9 A Member must comply with any decision of the CEO made in relation to its request to publish.
- 28.10 Notwithstanding clause 28.8(c), if the CEO determines to delay, for a stipulated period, publication of a thesis prepared by a student of a university, the CEO will request the Registrar of the university or the student as appropriate, to direct that any thesis or part thereof to be deposited in the university library be withheld from access to library users for an agreed period in accordance with the Academic Board Resolutions relating to Higher Degree Theses or Rules of that university.
- 28.11 A Member will not make any public announcement in relation to the Company or this agreement without first obtaining the approval of the CEO.

## **PART I: ALLOCATION OF RISK**

### **29. INDEMNITIES**

29.1 Each Member listed as a Project Party in a Project pursuant to clause 17 (“the indemnitor”) hereby irrevocably and unconditionally indemnifies and agrees to keep indemnified each other Member (including any other Member who is a Project Party in that Project) and their respective directors, officers, employees and authorised representatives (“the indemnitee”) from and against any and all direct liability, direct loss, direct harm, direct damage, direct cost or direct expense (including reasonable legal fees net of any GST input tax credits to which those indemnified are entitled) (“Relevant Loss”) that the indemnitee may suffer, incur or sustain as a result of:

- (a) any unlawful or negligent act or omission (“Relevant Default”) by the indemnitor or any of its Relevant Associates in connection with the Project; or
- (b) infringement of any third party’s Intellectual Property arising from the use or Commercialisation of the CIP by the indemnitor or any of its Relevant Associates.

The indemnity under this clause 29 will be reduced to the extent to which the indemnitee contributed to the Relevant Loss.

29.2 In the event that more than one Member is an indemnitor pursuant to clause 29.1, then as between each such Member they will bear responsibility for any Relevant Loss suffered, incurred or sustained by an indemnitee (who is not so listed as a party in that Project) as a result of the matters described in clause 29.1 according to the extent to which each committed or contributed to the conduct the subject of that clause.

29.3 Each Member (the “indemnitor”) hereby irrevocably and unconditionally indemnifies and agrees to keep indemnified the Company and its Relevant Associates (“the indemnitee”) from and against any Relevant Loss that the indemnitee may suffer, incur or sustain as a result of:

- (a) any Relevant Default by the indemnitor or any of its Relevant Associates,
- (b) any breach of this agreement by the indemnitor; or
- (c) any act or omission of the indemnitor that would knowingly cause the Company to be in breach of its obligations under any external funding agreement or any Project Agreement.

- 29.4 The Members acknowledge that a Member may enforce an obligation to indemnify any of its Relevant Associates under this clause 29 on behalf of those Relevant Associates.
- 29.5 The indemnities provided under this clause 29 are continuing obligations, separate and independent of each Member's other obligations and will survive the expiration or, where relevant, earlier termination of this agreement and will continue to apply (both as a right and as an obligation) to any Member which is expelled, withdraws or retires from the Company.
- 29.6 The Company hereby irrevocably and unconditionally indemnifies and agrees to keep indemnified each Member and its Relevant Associates ("the indemnitee") from and against any Relevant Loss that the indemnitee may suffer, incur or sustain as a result of:
- (a) any Relevant Default by the Company or any of its Relevant Associates,
  - (b) any breach of this agreement by the Company; or
  - (c) any act or omission of the Company that would knowingly cause the indemnitee to be in breach of its obligations under any external funding agreement or any Project Agreement.
- 29.7 Each party's liability under this clause will be several and not joint and several. Further, it is agreed that the maximum liability for a party for any single event where an indemnity is triggered under this clause 29 is limited to \$10,000,000.
- 29.8 For the purposes of this clause, "Relevant Associates" means its directors, officers, employees, or authorised representatives.

### **30. INSURANCE**

- 30.1 Each Member will effect and maintain insurance or similar protection to cover:
- (a) professional liability risks in respect of any claim or event in an amount:
    - (i) not less than \$10 million if a Industry or Research Member; or
    - (ii) which, in the case of a General Member or Associate Member, is sufficient to maintain adequate cover in respect of that Member's reasonable estimate of risk arising from their involvement in the Activities;
- provided that such insurance will be maintained effective at all times, and so as to cover acts or omissions of the Member arising from its participation in the Activities, notwithstanding that such claim may or may not be made or

notified until a time subsequent to the cessation of that Member's participation in the Activities; and

- (b) workers compensation as required by law.

30.2 A Member may act as its own insurer in respect of a particular risk or risks with:

- (a) if a Industry or Research Member, the written consent of the Board, provided that such consent will not be unreasonably withheld; and
- (b) if a General Member or Associate Member, notification to the Board and other Members to this agreement.

30.3 Subject to clause 30.2, each Member must provide the Company with a certificate of currency of its relevant insurance policies as requested by the Company from time to time, but not more than once in any twelve (12) month period.

## **PART J: CHANGING OR TERMINATING THE RELATIONSHIP**

### **31. EFFECT OF MEMBER BEING EXPELLED OR RETIRED**

31.1 If a party ceases to be a Member of the Company as a result of the occurrence of any of the circumstances specified in the Constitution, the Member will:

- (a) be relieved of its obligation to make further contributions in the manner specified in the Constitution, this agreement or, in the absence of such specification, as determined by the Board;
- (b) cease to be a party to this agreement
- (c) cease to be a Member of the Company as specified in the Constitution;
- (d) in regards to the use of its BIP:
  - (i) be bound to continue to observe any existing license by it of BIP or already entered into prior to such expulsion or termination;
  - (ii) where at the time of such expulsion or termination, a commercial proposal is the subject of negotiations with a third party, and being a commercial proposal in which CIP can only be commercialised with access to the retiring or expelled Member's BIP, which by prior written agreement of that Member had been made available for that commercialisation proposal, it will grant a licence to its BIP in accordance with clause 25.2 and 26.2; and

- (e) be released from its obligations under this agreement other than those obligations that are expressed to survive termination and provided that such expulsion or retirement will not affect the enforceability of any obligations of that Member or rights against that Member accrued to that time.

31.2 The Members agree that in the case of retirement, the Board may negotiate with the retired Member, a non-exclusive licence for the former Member to use CIP upon terms to be agreed between the retired Member and the Board.

31.3 Retirement or expulsion of any Member will not relieve the remaining Members of their obligations under this agreement and they will continue to carry on the activities and perform the terms of this agreement between them.

## **32. EFFECT OF TERMINATION**

32.1 This agreement:

- (a) will terminate automatically if there is only one party remaining as a Member of the Company;
- (b) may be terminated by a resolution of Members requiring a majority of at least 85% of votes at a meeting of the Company's Members.

32.2 Termination of the agreement for any reason will be without prejudice to the continuing enforceability of any rights or obligations of the Members or the Company accrued at the time of termination.

32.3 Prior to termination of this agreement or as soon as possible thereafter the Members will meet for the purpose of agreeing upon:

- (a) future Commercialisation of CIP and any necessary BIP;
- (b) any change to the Members' future obligations of secrecy with respect to Confidential Information and future obligations of insurance; and
- (c) any other matter not addressed in this agreement but requiring resolution at that time.

Failing agreement on any of the above matters, such matters will be resolved in accordance with clause 35 and clause 36.

## **33. SUB-CONTRACTING**

A Member's right to sub-contract the performance of any substantial part of the Activities of the Company will be subject to prior approval of the Board which the Board may grant or withhold in its absolute discretion.

## **PART K: CONFLICTS AND DIFFERENCES OF OPINION**

### **34. CONFLICT OF INTEREST**

34.1 Each Member will:

- (a) disclose to the other Members actual or potential Conflicts that may exist or might reasonably be thought to exist with respect to the Activities;
- (b) where such Conflict relates to research, training, or commercialisation which is in competition with the Activities, the Member will notify the Board within one (1) month of commencement of the competing activity; and
- (c) at the request of the Board, take such steps as are necessary and reasonable, or as may be required by the Board, to remove or ameliorate the impact of any Conflicts.

34.2 Each Member warrants to the other Members, except to the extent a Conflict has been disclosed to the Company, that to the best of its knowledge after making reasonable and diligent enquiries, at the Commencement Date the Member is not aware of an existing Conflicts and that a Conflict is not likely to arise in the performance of its obligations under this agreement.

### **35. SETTLEMENT OF DISPUTES**

35.1 The parties acknowledge that they will, without delay and in good faith, attempt to resolve any dispute or difference which may arise between them in relation to the agreement prior to commencing proceedings pursuant to this agreement.

35.2 Should any party require resolution of a dispute or difference with another party in relation to this agreement it undertakes to do so in accordance with the succeeding provisions of this clause. Each party acknowledges that compliance with these provisions is a condition precedent to any entitlement to a claim, relief or remedy, whether by way of proceedings in a court of competent jurisdiction, or by arbitration proceedings pursuant to this agreement or otherwise in respect of such dispute or difference.

35.3 If any party requires resolution of a dispute or difference:

- (a) that party will by notice notify the party causing the dispute that a dispute exists and forthwith submit such dispute or difference to the Board for resolution;
- (b) if the Board is unable to resolve the dispute or difference within a reasonable time, a meeting will be convened forthwith between senior representatives of

the disputing party, not being directors of the Board, for resolution of the dispute or difference; and

- (c) if the dispute or difference is not resolved by the persons referred to in paragraph (b) above, within such time as they agree but being not more than sixty (60) days, the provisions of clause 36 will apply.

35.4 Unless specifically provided otherwise in this agreement, any costs associated with settlement of disputes will be borne equally by the parties involved in the dispute in respect to matters on which the Board has been unable to reach a decision, and by the requesting party in respect to matters on which a Member disputes a decision of the Board.

### **36. EXPERT DETERMINATION**

Where a matter is to be referred for expert determination under this agreement:

- (a) the matter will be referred to an expert appointed by the agreement of the Board and the relevant party involved, or if they are unable to agree, to an expert appointed by the Institute of Arbitrators and Mediators Australia;
- (b) it will be conducted in accordance with the Rules for Expert Determination of Commercial Disputes of the Institute of Arbitrators and Mediators Australia;
- (c) the parties must cooperate with and assist the expert and must provide to the expert all information the expert may request to enable the expert to determine the matter requiring determination;
- (d) the costs of expert determination will be shared equally between the parties seeking the determination, unless otherwise determined by the expert;
- (e) the decision of the expert will be final and binding.

## **PART L: OTHER MATTERS**

### **37. APPOINTMENT OF REPRESENTATIVES**

37.1 A Member or their authorised representative may appoint a person to represent that Member at a meeting of Members, howsoever described, and that person shall be their Representative.

37.2 A Representative of a Member is able to exercise all the rights and privileges of the Member as if they were the Member.

- 37.3 The actions of a Representative will bind the Member as if those actions were done or not done (as is appropriate to the circumstances) by the Member. It is the responsibility of the Member to ensure that its Representative:
- (a) is aware of any limitations upon their authority to act as a Representative of that Member; and
  - (b) acts in accordance with those limitations upon their authority.
- 37.4 A Representative is appointed to that position by the provision of a written or electronic notice provided to the Company Secretary. A notice may be expressed to be of a specific duration or to have no fixed duration.
- 37.5 The appointment of a Representative is automatically revoked should that person cease to be employed by the Member. Where an appointment is revoked in such circumstances, the Member can appoint another person to be their Representative in accordance with clause 37.1.
- 37.6 A Member can, by the provision of a written or electronic notice to the Company Secretary, revoke the appointment of a Representative. The same notice can also set out the details of the replacement Representative appointed by that Member.
- 37.7 In the absence of a notice appointing a Representative of a Member, it shall be assumed that no person has been appointed as a Representative of that Member.
- 37.8 Subject to clause 37.5, in the absence of a notice revoking the appointment of a Representative of a Member, it shall be assumed that the person representing the Member is still the appointed Representative of that Member.

### **38. USE OF NAME**

A party must not use the name or logo of:

- (a) any other party without the prior written consent of that party; or
- (b) the Company without the prior written consent of the Board; or
- (c) any other party without the prior written consent of an authorised representative of that party.

### **39. FORCE MAJEURE**

- 39.1 Where a party is unable, wholly or in part, by reason of force majeure, to carry out any obligation under this agreement, and that party:
- (a) gives each other party prompt notice of that force majeure including reasonable particulars, and, in so far as known, the probable extent to which it will be unable to perform or be delayed in performing that obligation; and

(b) uses all possible diligence to remove that force majeure as quickly as possible,

that obligation is suspended so far as it is effected by force majeure during the continuance of that force majeure and that party will be allowed a reasonable extension of time to perform its obligations.

39.2 If after a period of six (6) months, the force majeure has not ceased, the parties will meet in good faith to discuss the situation and endeavour to achieve a mutually satisfactory resolution to the problem.

39.3 The requirement that any force majeure will be removed with all possible diligence does not require the settlement of strikes, lockouts or other labour disputes or claims or demands by any government on terms contrary to the wishes of the party affected.

39.4 In this agreement, "force majeure" means an act of God, strike, lockout or other interference with work, war (declared or undeclared), blockade, disturbance, lightning, fire, earthquake, storm, flood, explosion, governmental or quasi governmental restraint, expropriation, prohibition, intervention, direction or embargo, unavailability or delay in availability of equipment or transport, unforeseeable inability or delay in obtaining governmental or quasi governmental approvals, consents, permits, licenses, authorities or allocations, and any other cause, whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the party affected.

#### 39.5 **Reimbursement or indemnification**

If a payment to a Member under this agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that Member, then the payment will be reduced by the amount of any input tax credit to which that Member is entitled for that loss, cost or expense.

#### 39.6 **Tax invoices**

A recipient need not make a payment for a taxable supply until the supplier has given the recipient a tax invoice for the supply to which the payment relates and/or the supplier has otherwise complied with all of their obligations under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) so that the recipient is not disadvantaged.

### 40. **CLAUSE SEVERANCE**

If any provision of this agreement is prohibited, invalid or unenforceable in any jurisdiction, that provision will, as to that jurisdiction, be ineffective to the extent of the

prohibition, invalidity or unenforceability without invalidating the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction, unless it materially alters the nature or material terms of this agreement.

**41. WAIVER**

A waiver by a party of any rights arising from a breach or non-observance by any other party of a term of this agreement will not be taken to operate in any way as a waiver of any rights arising from any subsequent continuation of that breach or non-observance, or any further or other breach or non-observance of the same or any other term.

**42. GOVERNING LAW**

This Agreement will be governed by and construed in accordance with the law for the time being in force in South Australia. Each of the parties hereby submits to the jurisdiction of the courts of the South Australia.

**43. ENTIRE AGREEMENT**

With the exception of the Constitution, this agreement constitutes the entire agreement between the Members and the Company in connection with its subject matter and supersedes all previous agreements or understandings between the Members and/or the Company in connection with its subject matter.

**44. AMENDMENTS**

- 44.1 No agreement or understanding varying or extending this agreement will be legally binding unless it is in writing signed by all Members and the Company, the only exceptions being a variation arising from the execution of a deed of accession as set out in Schedule 1 by a New Member or a Member ceasing to be a Member.

**45. COUNTERPARTS**

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