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Final Version

Date: 15 August 2006

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Participants Agreement

CRC for [insert name of CRC]

[insert name of CRC company limited by guarantee] CRC Ltd
(Company)

[insert names of CRC Participants] (Participants)

As with Round 9 CRCs, all Round 10 CRCs are required to be incorporated entities unless the CRC Committee agrees otherwise.

The Participants Agreement template that was used for the Round 9 CRCs was prepared as part of a project to develop a template model for incorporated CRCs with associated template contractual documentation. In preparation for the Round 10 CRCs, the Round 9 Participants Agreement template has been amended as part of a project funded by DEST, led by Australian Institute for Commercialisation with the assistance of DEST, PricewaterhouseCoopers and Minter Ellison Lawyers. This project has involved consultation with organisations interested and experienced in the CRC Programme, with particular input from organisations involved in Round 9. These organisations include a number of research organisations and legal and accounting service providers who participated in the workshops and contributed to the drafting of Round 9 Participants Agreements. Some have also contributed more extensively by providing comments for inclusion in the draft Round 10 templates.

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The objective of this project and the previous project has been to minimise the time, resources and money spent on development of legal documentation. Achievement of that objective ultimately depends upon the extent of input from the CRC community and their stakeholders and ultimately the adoption of the template documentation (comprising this participants agreement and a company constitution).

Nonetheless it is recognised that DEST has not specified the template documentation as mandatory for any CRC. Each individual CRC and its participants must determine the extent to which the template documentation fits their circumstances. The template documentation should be treated as a starting point and each CRC and its participants must seek their own professional legal, accounting and taxation advice to determine whether they appropriately address the objectives and risks applicable to their own CRC.

For further enquiries, please contact the Australian Institute of Commercialisation at info@ausicom.com

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Participants Agreement - CRC for **[insert]**

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This agreement has been prepared by reference to the Commonwealth funding agreement for Round 10 of the CRC Programme available at

https://www.crc.gov.au/HTMLDocuments/Documents/PDF/Comm_Agreement.pdf

Some responses have been received from the CRC community regarding the nature of changes commonly made to the Round 9 template documentation and the working group preparing this version of the template documentation has had access to some de-identified final versions of the agreements signed by Round 9 CRCs and their participants. Many of the amendments made by the Round 9 CRCs and their participants were made to suit the particular circumstances of that CRC or the particular interests of the participants. Amendments made to the template by Round 9 CRCs have been reflected in the Round 10 template, where the changes were common across the CRC documentation that was available for review, and where the working group has considered that it is appropriate to do so.

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Any further guidance or feedback on drafting applied to Round 9 CRC documentation that is common across multiple CRCs would inevitably assist the working group to develop templates that achieve greater efficacy and cost effectiveness.

All key variables to the Participants Agreement that relate to the general operations of the CRC are to be in Schedule 1 - Centre Details.

All key variables foreshadowed in the Participants Agreement that relate to a Project are to be set out in Schedule 3 -Template Project Details.

Yellow shaded sections are for completion by the Participants.

In some **yellow shaded sections**, Participants will have an optional clause or a choice of clause depending on whether it is intended that the CRC company will pursue income tax exemption.

It is recommended that before you finalise your documents that you delete this page, the Assumptions section and the user notes.

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Assumptions & Notes

Whilst the AIC Steering Committee believes this template document will be of benefit to the CRC community, users of the draft template documentation are strongly encouraged not to assume any particular CRC structure will satisfy the ATO's requirements. Users of the template documentation should seek their own independent advice especially in relation to any taxation implications and the ability of CRC Participants to be entitled to the R&D tax concession.

- A This is a template agreement. It is designed to reflect principles and address issues that would commonly arise with an incorporated CRC structure of the type set out in the template Constitution. Nevertheless each CRC and its Participants must determine to what extent this document fits their circumstances and what (if any) changes are required.
- B Footnotes appear throughout this document to assist users to understand the implications of various clauses. They should all be deleted before this document is finalised for any particular CRC.
- C This agreement should be read in conjunction with the template Commonwealth Funding Agreement, the template Constitution (version 4.0) for a company limited by guarantee and the [Summary of Key Principles and Risks (version 3.0)]¹.
- D The Centre Details set out the issues that are likely to vary between CRCs. The Template Project Details set out the issues that are likely to vary between Projects. This document does not purport to set a template for operational issues that will vary between CRCs such as IP management protocols and procedures.
- E This template Participants Agreement has been prepared on the basis of the following assumptions. Every Participant should satisfy themselves that these assumptions apply to the CRC in which they will be involved. If not, they should seek advice as to what changes if any are required to reflect their own objectives and circumstances.

	Issue	Assumptions	✓
1.	Incorporation	The CRC will be incorporated as a company limited by guarantee. ²	
2.	Commonwealth Agreement	The Commonwealth Agreement to be used for Round 10 CRCs is that published at https://www.crc.gov.au . The only parties to the Commonwealth Agreement are the Commonwealth and the	

¹ This document has not been updated to reflect changes to the template documents for Round 10. We would welcome feedback on whether the CRC community believes that an updated version of this document is required.

² It is of course open to the Parties to establish a company limited by shares. See the Summary of Key Principles for the rationale for adopting a company limited by guarantee.

³ Note that this differs to the parties to the Commonwealth Agreement under the Round 9 CRCs, where all Participants, the Company and the Commonwealth were parties to the Commonwealth Agreement.

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	Issue	Assumptions	✓
		Company. ³ There are a number of obligations and liabilities under certain clauses in the Commonwealth Agreement that must be imposed on Participants in the Participants Agreement. ⁴	
3.	Relationship with the Constitution of the Company	The Constitution and the Participants Agreement will be consistent. Some Participants of the CRC may not be a member of the Company. They will want to be assured that changes to the Constitution will not prevail over the rights and obligations set out in this Participants Agreement. ⁵	
4.	Variation of Participants Agreement	The issues addressed in this Participants Agreement cannot be changed without the consent of all of the Parties to this Participants Agreement.	
5.	Timing of execution of documents	The Constitution will need to be signed and the Company incorporated before this Participants Agreement can be executed. Recital E to the Commonwealth Agreement contemplates that the Participants Agreement will have been signed before the Company signs the Commonwealth Agreement.	
6.	Tax status of the Company	The Participants may intend that the Company be eligible for income tax exemption as a scientific institution. In those circumstances, it is the ATO's current view that this agreement should reflect that the Company will be the legal and beneficial owner of all of the Centre IP. <i>Note: In the last six months there has been some discussion involving the ATO regarding a model that would enable the CRC to be tax exempt and allow relevant participants to claim the R&D tax concession ("hybrid" model). Under the hybrid model, Participants contribute to the CRC which holds all funds in a deemed tax partnership at project level. The members own a proportionate share of IP based on their relative Contribution. The Company also owns a proportion of the IP based on the proportion of Commonwealth funds contributed. The ATO has not expressed a view regarding the hybrid model although it is open to parties to approach the ATO and attempt to obtain a private binding ruling in this regard. Discussions with the ATO have yet to be progressed regarding this model.</i>	

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⁴ See Schedule 8 of the Commonwealth Agreement.

⁵ In a number of the Round 9 CRCs a concept of a Participants Committee or similar governing body was introduced into the Participants Agreement. Parties should be aware that there may be a risk that such a committee may give rise to the participant being construed as a shadow director. The degree of such risk will be determined by the roles and responsibilities given to that committee. We have not included such a concept in the revised template and each CRC and especially its participants need to carefully consider whether or not such a concept is required under the Participants Agreement.

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	Issue	Assumptions	✓
		<i>This document does not purport to reflect the hybrid model but can be adjusted to do so.</i>	
7.	Commonwealth Funds	The Commonwealth Agreement provides that the Commonwealth Funds will be received by the Company in its own right. The ATO's position in relation to the derivation of funding is that the Company derives the Commonwealth Funding and that income is not earned until spent.	
8.	Participant's Contributions	The total commitment by all Participants to make Contributions for the CRC is set out in Schedule 3 of the Commonwealth Agreement and Schedule 4 of this Participants Agreement. ⁶ The individual Contributions and the obligations under which those Contributions are to be made by each Participant are set out in this Participants Agreement. Details of contributions on a Project basis will be set out in a separate arm's length Project Details (which may take the form of separate agreements if it involves third parties) between the Company and the respective Participants for that Project.	
9.	Company's Contribution	As the Company will receive the Commonwealth Funds in its own right, the payment by the Company towards a Project will be characterised as a 'Contribution'.	
10.	Voting rights	Contributions by the Participants (to each Project and the CRC generally) will be the basis for determining the voting rights of the members of the Company for Company issues. Voting rights for Participants Agreement issues will be equal for all Participants and the Company (where it is relevant for the Company to have a vote).	
11.	Project Documentation	Projects only involving Parties to the Participants Agreement will not require a separate discrete set of terms to govern the Project other than the relevant Project Details. In those circumstances the Participants will rely upon the terms set out in this Participants Agreement. Non-Participants may also be parties to Projects. In those circumstances the Company will arrange for the non-Participant to sign a separate project agreement that would ideally be consistent with the terms in this Participants Agreement that apply to the conduct of Projects.	
12.	Participants	The Participants will be those persons or bodies <u>(other than the Company) who sign the Participants Agreement.</u> <u>Some Participants are considered by the Commonwealth to be essential to the success of the CRC and these are listed in Schedule 7</u>	

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⁶ As the Participants are not parties to the Commonwealth Agreement in Round 10, for ease of reference the Contributions of the Participants are reproduced in a Schedule to this agreement.

⁹ See definition of 'Supporting Participants' in the Commonwealth Agreement.

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	Issue	Assumptions	✓
		of the Commonwealth Agreement. <u>DEST advise that where those Participants do not sign the Participants Agreement, the Commonwealth will require the Company and each of Participants to have entered into an agreement that contains certain commitments made in the CRC's application for funding, including the issues specified in Schedule 8 of the Commonwealth Agreement, before it executes the Commonwealth Agreement.</u>	
13.	Supporting Participants	Supporting Participants are entities, other than the Participants, who have agreed to support the CRC activities and provide Contributions to the CRC. ⁹ Supporting Participants may contribute to the CRC under either a Third Party Project Agreement or other agreement specifying their Contributions, rather than becoming a Party to the Participants Agreement.	
14.	Non-member Participants	Participants entering this Participants Agreement are not required to be members of the CRC Company, but are entitled to become members. Participants that are Company members will have additional rights to non-member Participants, such as the right to participate in voting for the Governing Board. It is assumed that Participants will become Company members, unless prevented from doing so by legislation or, in the case of some government bodies, internal policy.	
15.	Centre IP	<p>If the Company will be pursuing income tax exemption as a scientific institution¹⁰, Centre IP will be legally and beneficially owned by the Company.</p> <p>If the Company will not be pursuing income tax exemption, it is open for the Parties to choose between 2 options:</p> <ol style="list-style-type: none"> (1) the participants entitlement to beneficial interest in IP is determined according to IP created at the Project level (Project IP); or (2) the participants entitlement to beneficial interest in IP is determined on the basis of all IP developed through the Centre (ie, Centre IP). <p>In either case the preparation of IP held by a participant should be commensurate with their Contribution to that Project or the whole Centre, as the case may be.</p> <p>Note: The ATO has not provided a clear indication that such an allocation of beneficial ownership in Project IP will be necessary or sufficient to enable entitlement to the R&D Tax concession. Each Party should seek their own advice and ruling from the ATO,</p>	

Deleted: and, consequently, the entities that are the parties to this Participants Agreement.
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¹⁰ Being a scientific institution is not the only means of achieving tax exempt status although it is often the most relevant criterion.

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	Issue	Assumptions	✓
		particularly in light of the Company receiving the Commonwealth Funds in its own right. If IP ownership is to be determined at the Project level, the Company will legally and beneficially own all Non-Project Centre IP regardless of whether exemption will be pursued.	
16.	Background IP	Background IP will be contributed only for the purpose of the undertaking of Projects and not for the general operations of the Company or general overhead activities. Background IP may only be used for the commercialisation of resulting Project IP where terms are agreed with the Participant owning the Background IP. ¹¹	
17.	R&D tax concession	Tax paying Participants may wish to qualify for the R&D tax concession. Having regard to the current non-binding views expressed by the ATO it is unlikely that such concession will be available to participants to a Company pursuing income tax exemption as a scientific institution.	
18.	Use of Project IP by Project Participants	Project Participants will wish to use the Project IP for their own internal purposes. ¹² The Project Details may provide for further rights. If not, the Project Participants will need to obtain the approval of the Governing Board for such use.	
19.	Use of Project IP by other Participants	If IP is determined on a Project basis, Participants who are not parties to a Project will not have access to, or use of, the IP arising from that Project. ¹³ Participants who were not parties to the Project but wish to use the Project IP for the Activities will need to get approval through the Governing Board.	
20.	Commercialisation	The Company will be responsible for determining who commercialises the Centre IP (including Project IP).	
21.	Withdrawal from CRC	A Participant may withdraw from the CRC on 12 months notice (or such other period as agreed by the Parties).	
22.	Tax Implications	The Company and the Participants will obtain tax rulings on whether the documentation prepared for their specific CRC meets their objectives, specifically where the company wishes to obtain income tax exemption status or (for a taxable Company) the Company's and Participants' entitlement to R&D tax concessions.	

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¹¹ Feedback from the CRC Workshop on 7 June 2006 was that it would assist if there was a mechanism to resolve disputes on agreeing on commercial terms in the template. This has not yet been included in the revised template and comments from the CRC community on this would assist.

¹² See clause 22.15. Feedback from the CRC Workshop on 7 June 2006 was that a number of CRCs wanted to allow Participants to use all Centre IP internally for research purposes, not just Project IP. The template has been amended to reflect this concept.

¹³ See previous footnote.

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Details

Date

Parties

Name [insert name of CRC company] Ltd
 ABN [insert]
 Short form name **the Company**
 Notice details [address]
 Facsimile :
 Attention :

Name [insert name of Participant]
 ABN [insert]
 Short form name [insert]
 Notice details [address]
 Facsimile : [insert]
 Attention : [insert]

Name [insert name of Participant]
 ABN [insert]
 Short form name [insert]
 Notice details [address]
 Facsimile : [insert]
 Attention : [insert]

Background

- A The Commonwealth of Australia, by the provision of financial assistance under a programme known as the Cooperative Research Centres Programme, wishes to enhance scientific and technological capabilities and support linkages between researchers, and between researchers and users of the research.
- B The objective of the Cooperative Research Centres Programme is to enhance Australia's industrial, commercial and economic growth through the development of sustained, user-driven, co-operative public-private research centres that achieve high levels of outcomes in adoption and commercialisation.
- C The Parties wish to establish a research collaboration to be known by the name set out in item 1 of the Centre Details (**Centre**).
- D The Centre will be operated by the Company.

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- E Contemporaneously with this agreement, the Company will enter an agreement with the Commonwealth by which the Company will be partially funded by the Commonwealth (under the Cooperative Research Centres Programme) to contribute toward the operation of the Centre.¹⁴
- F As a necessary precondition of the Commonwealth funding arrangement described in paragraph E, the Parties have agreed between themselves that the Activities are to be regulated on the terms and conditions set out in this agreement.

¹⁴ Note change to Commonwealth Agreement for Round 10 CRCs in that the Participants are no longer parties to the Commonwealth Agreement. This agreement and the Constitution are being amended to deal with this change.

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Agreed terms

Part A Introduction

1. Defined terms and interpretation

1.1 Definitions

In this agreement:

Activities means the activities set out in Schedule 2, and includes the Projects.¹⁵

Activity Payment has the meaning set out in clause 9.1.

Annual Budget means the annual budget for the Centre prepared and approved under clause 9.1.

Applicable Jurisdiction means the jurisdiction specified in item 9 of the Centre Details.

Asset means an item of real or personal property, including a Capital Item, but does not include Intellectual Property.

Background IP means, in relation to a Project:

- (a) the Intellectual Property specified in the Project Details that a Project Party has agreed to contribute as Background IP to the Project; and
- (b) any other Intellectual Property that the Project Party has offered to contribute as Background IP for the Project and has been agreed in writing by all Project Parties as being accepted as Background IP for the Project,

and, for the avoidance of doubt, does not include any Centre IP.

Budget has the same meaning as Budget in the Commonwealth Agreement and includes any Budget which might be substituted for it in accordance with the Commonwealth Agreement.

Business Day means, in relation to the doing of any action in a place, a weekday other than a public holiday or bank holiday in that place.

Business Hours means from 9.00am to 5.00pm on any Business Day.

Capital Item means an Asset of a durable nature, the purchase price of which exceeds \$20,000.¹⁶

Centre means the research collaboration operated by the Company referred to in paragraph C of the Background.

Centre Account has the same meaning as 'Account' in the Commonwealth Agreement.

¹⁵ The definition of Activities has been amended to stand alone (separate from Commonwealth Agreement). It is central to determining the nature of the Centre and the scope of the rights and obligations of the Participants.

¹⁶ This reflects the definition of Capital Item in the Commonwealth Agreement and has been inserted to accommodate the new clause 11.2.

Centre Confidential Information means Confidential Information generated as a result of the Activities.

Centre Details means the details specified in Schedule 1.

Centre Field means the field of research specified in item 3 of the Centre Details.

Centre Funds means the money comprised in the Centre Account including the cash Contributions (including the Commonwealth Funding), cash contributions to the Centre received from third parties and interest on the Centre Account, but not including any proceeds derived from the Commercialisation of Intellectual Property.

Centre IP means

- (a) Project IP; and
- (b) Non-Project Centre IP.

Centre Objectives means the objectives of the Participants for the Centre as set out in clause 5.1.

Centre Resources means the non-cash resources made available for use by the Parties in carrying out the Activities, including the non-cash Contributions and any non-cash resources procured from third parties.

Commencement Date means the date specified in item 2 of the Centre Details.

Commercialisation Expenses means expenses incurred by the Company in carrying out Commercialisation of Centre IP (not including costs attributed to time spent by its employees) including:

- (a) government fees, taxes (other than income and withholding taxes), duties, charges or imposts paid or payable in relation to Commercialisation Income;
- (b) costs of registering or otherwise protecting the Centre IP, including patent attorney fees;
- (c) legal expenses incurred in relation to Commercialising Centre IP;
- (d) relevant travel, insurance, packaging or transportation costs;
- (e) costs of seeking licensees of the Centre IP or other Parties to be involved in Commercialisation of Centre IP; and
- (f) and any other out-of-pocket expenses incurred by the Company in carrying out Commercialisation of Centre IP.

Commercialisation Income means all royalties, licence fees, and other monetary proceeds (including monetary proceeds from the use or disposal of any non-monetary assets) from Commercialisation of Centre IP received by the Company.

Commercialisation Plan means, with respect to particular Centre IP, a plan specifying the general approach to be adopted by the Company with respect to commercialisation of that Centre IP, subject to any obligations of confidentiality owed to third parties, including:

- (a) objectives and strategies;
- (b) target markets;
- (c) resources to be utilised; and
- (d) risks and risk management strategies.

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Commercialise, in relation to Intellectual Property, means to:

- (a) manufacture, sell, hire or otherwise exploit a product or process, that uses or incorporates part or all of that Intellectual Property; or
 - (b) provide a service, incorporating that Intellectual Property; or
 - (c) license any third party to do any of those things; or
 - (d) otherwise license or assign the Intellectual Property,
- regardless of whether any revenue is generated or intended to be generated.

Commonwealth means the Commonwealth of Australia.

Commonwealth Agreement means the agreement referred to in paragraph E of the Background.

Commonwealth Confidential Information has the same meaning as in the Commonwealth Agreement.

Commonwealth Funding means the financial assistance to be provided by the Commonwealth to the Company under the Commonwealth Agreement for expenditure on the Activities.

Company means the name of the company as specified in item 1 of Schedule 1.

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Confidential Information means all information that is not in the public domain that is by its nature confidential or that has been designated as confidential by the disclosing Party, and includes all trade secrets, know-how, financial information and other commercially or scientifically valuable information of whatever description and in whatever form (whether written, or oral, visible or invisible).

Constitution means the constitution of the Company.

Contract Material has the same meaning as in the Commonwealth Agreement.

Contribution, in relation to a Party, means all of the money, Assets, Specified Personnel, facilities and services to be contributed by the Party to the Centre, as set out in the Budget, but does not include any Intellectual Property.

Corporations Act means the *Corporations Act 2001* (Cth).

CRC Indicia has the same meaning as in the Commonwealth Agreement.

CRC Programme means the programme referred to in paragraph A of the Background.

CRC Programme Objective means the objective listed in paragraph B of the Background.

Deliverables means the required deliverables for a Project as described in the Project Plan.

Draft Commercialisation Plan means a draft version of a Commercialisation Plan.

Financial Year has the same meaning as in the Commonwealth Agreement.

Funding Period has the same meaning as in the Commonwealth Agreement.

Governing Board means the board of directors of the Company.

Head of Expenditure has the same meaning as in the Commonwealth Agreement.

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Improvements means a modification, enhancement or improvement of Centre IP such that the improved Centre IP cannot be used without infringing the Intellectual Property rights in the underlying Centre IP.

Initial Projects means the Projects that are specified in item 8 of the Centre Details.

Intellectual Property or IP includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patents), plant varieties, trade marks (including service marks), designs, circuit layouts, all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields and any right to have confidential information kept confidential, but does not include Moral Rights or rights of performers.

Milestones means the milestones for a Project as set out in the Project Plan.

Moral Rights has the same meaning as in the *Copyright Act 1968* (Cth).

Net Commercialisation Income means Commercialisation Income for a period in relation to particular Centre IP less payments or reimbursements of Commercialisation Expenses pursuant to clause 23.10 for that period for that Centre IP.

Nominated Commonwealth Agreement Clauses means the clauses of the Commonwealth Agreement specified in item 4 of the Centre Details.

Non-Project Centre IP means Intellectual Property developed by the Parties in the course of carrying out the Activities but excludes:

(a) Project IP; and

(b) Background IP.

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Objective of the CRC Programme has the same meaning as in the Commonwealth Agreement.¹⁷

Participant The Participants are those persons or bodies (other than the Company) who sign the Participants Agreement.¹⁸

Deleted: means a person whom the Commonwealth considers provides essential support for the Activities or essential cash or in-kind contributions and who the Commonwealth has determined must be a Participant, with the initial Participants listed in Schedule 7 of the Commonwealth Agreement

Party means a party to this agreement.¹⁹

Party Confidential Information means any information of a Party, not including Centre Confidential Information:

- (a) treated by that Party as confidential; and
- (b) disclosed by that Party to another Party, or of which another Party becomes aware, whether before or after the date of this agreement.

Personal Information has the same meaning as in the Commonwealth Agreement.

¹⁷ Inserted due to inclusion of clause relating to IP in Contract Materials (see clause 33 of this agreement) – this clause is required to be included in this agreement as part of the Company's obligations under the Commonwealth Agreement.

¹⁸ In relation to this definition, note DEST's requirements at item 12 of the Assumptions.

¹⁹ The Company is a 'Party', but not a 'Participant' (as defined).

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Project means a discrete, time-bounded research, training or Commercialisation activity or series of activities to be carried out under clause 16 by some or all of the Parties or third parties and that has been recognised as a 'Project' by the Company agreeing to Project Details (being a Third Party Project Agreement in the case of third party participation) in accordance with this agreement.²⁰

Project Asset means any Asset:

- (a) included as part of a Project Participant's Project Contribution; or
- (b) acquired by a Responsible Participant in whole or in part from any payment made to it by the Company (under clause 17.1(a)) or another Project Participant (under clause 17.2).

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 Confidential Information means confidential information generated as a result of a Project.

Project Contribution means a Contribution to a Project to be contributed by a Party.

Project Details means the details applicable for a Project as agreed in writing by all Project Parties, including the issues contained in Schedule 3, as amended by the Project Parties. In the case of a Project including one or more third parties as Project Participants, the Project Details means the details contained in the respective Third Party Project Agreement.

Project Funds means the money to be paid to the Responsible Participants, for conducting the Project and may include the Commonwealth Funds received by the Company.

Project IP means Intellectual Property developed in the course of carrying out a Project.

Project Leader means the person appointed under clause 16 to act as a leader of a Project.

Project Objectives means the objectives for a Project as set out in the Project Plan.

Project Participants means, with respect to a Project, the Project Parties other than the Company.

Project Parties means the participants in a Project including the Company.

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.

Project Shares means, with respect to a Project, the proportional entitlement of a Project Party as specified in the Project Details, as varied pursuant to 0. **[delete this definition if option 2 in clause 22.1 is selected]**

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

²⁰ There is no restriction on the scope of a Project. A 'Project' may be in the form of what could often be called a 'Programme'.

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Responsible Participants mean, with respect to a Project, the Project Participants specified in the Project Details who are responsible for carrying out specified research, education, training or Commercialisation under the Project.

Rules means the constitution, enacting legislation and its provisions, or any other form of provisions or policy statements governing the organisation and operation of a Party.

Special Board Resolution means a resolution of the Governing Board requiring approval of [special majority number to be inserted] the directors able to attend and vote.

Special Majority Issues means the Company issues listed in item 5 of the Centre Details²¹.

Specified Division means, in relation to a Responsible Participant, the division, department or faculty of that Responsible Participant specified in the Project Details.

Specified Personnel means the personnel of a Party allocated to the Centre or to a Project as part of that Party's Contribution.

Term means the term of this agreement ascertained in accordance with clause 2.

Third Party Project Agreement means an agreement between the Company and one or more third parties (and possibly also one or more Participants) setting out the terms upon which a Project will be funded and conducted.

Use Field means, with respect to a Project, the purpose for which each Project Participant may use the Project IP as specified in the Project Details but does not include Commercialisation.

Use Field Conditions means any conditions relevant to a Use Field specified in the Project Details.

Valuation Principles means the principles specified in item 10 of the Centre Details for valuation of non-cash Contributions to Projects.

1.2 Interpretation

In this agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this agreement, and a reference to this agreement includes any schedule or annexure;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to 'A\$', '\$A', 'dollar' or '\$' is to Australian currency;
- (f) a reference to a Party to a document (including this agreement) includes the Party's executors, administrators, successors and permitted assigns and substitutes;
- (g) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;

²¹ These are issues requiring special majority approval under clause 4.6.

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- (h) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (i) the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
- (j) a rule of construction does not apply to the disadvantage of a Party because the Party was responsible for the preparation of this agreement or any part of it;
- (k) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
- (l) headings are for ease of reference only and do not effect interpretation.

2. Term of this agreement

2.1 Condition precedent

Nothing in this agreement will have any force or effect until:

(a) the Company is formed; and

(b) the Commonwealth Agreement is executed by the Company and the Commonwealth.

To the extent that the fulfilment of these conditions require or would be assisted by conduct of a Party, that Party must use all reasonable efforts to ensure that the condition is fulfilled.

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2.2 Term²²

This agreement will commence on the earlier of the Commencement Date or the fulfilment of the conditions precedent specified in clause 2.1 and will remain in force until one of the following occurs:

- (a) the Parties by unanimous written agreement terminate this agreement;
- (b) following the retirement or expulsion of a Party under clause 30, only one Party remains as a party to this agreement;
- (c) the Commonwealth Agreement is terminated pursuant to the terms of that agreement;
- (d) the Funding Period expires²³; or
- (e) the Company fails to receive the Commonwealth Funding or an instalment of the Commonwealth Funding other than through a temporary or unintended failure²⁴.

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²² Parties should consider what the term of the agreement should be and address accordingly in this clause. Some possible options to consider to determine the term are listed here.

²³ If the Parties wish this agreement continue beyond the Funding Period this paragraph should be removed.

²⁴ This paragraph may not be appropriate if the Commonwealth Funding is not to the Centres' continued operation.

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2.3 Extension of Term

Notwithstanding the occurrence of one or more of the events in clause 2.1 (other than in clause 2.1 (a) and (b)), the Parties may by written agreement determine that this agreement will continue upon the terms specified in that written agreement.

2.4 Review²⁵

The Parties will conduct a review during the sixth year after the Commencement Date to consider the operation of the Centre following the expiry of the Commonwealth Agreement, including whether this agreement should be terminated, whether the Company should be wound up following the completion of all obligations of the Company under the Commonwealth Agreement and any other matters requiring resolution at that point.

3. Relationship to other agreements²⁶

3.1 Relationship to the Commonwealth Agreement

Nothing in this agreement will reduce or otherwise affect the obligations of the Company under the Commonwealth Agreement. In the event of any inconsistency between this agreement and the Commonwealth Agreement:

- (a) the Commonwealth Agreement will prevail to the extent of any inconsistency if such inconsistency would mean that the Company would be in breach of its obligations under the Commonwealth Agreement; and
- (b) otherwise this agreement shall prevail.

3.2 Company authority to vary the Commonwealth Agreement²⁷

The Company must not:

- (a) waive any of its rights or benefits under the Commonwealth Agreement; or
- (b) agree with the Commonwealth to a variation of the Nominated Commonwealth Agreement Clauses

without:

- (i) [unanimous/Special Board Resolution]²⁸ of the Governing Board approving the variation; and/or

²⁵ Some of the Round 9 CRCs had more extensive review clauses in the Participants Agreement. [Those issues may include for a tax paying CRC company : distribution of Centre IP to Participants, third party contracts.](#)

²⁶ This clause does not address any agreements between the Parties that may predate this Participants Agreement concerning the subject matter, such as a pre-existing CRC. In such case, either additional clauses or a separate agreement are likely to be needed to address the transition to this new relationship.

²⁷ See clause 5.10(b) of the Commonwealth Agreement. The reference to requiring resolutions of the Board and/or members is optional. The parties should consider the scope of authority that the company has to vary the Commonwealth agreement without some notice or reference back to the parties. Ultimately this will depend upon the issues that might concern the parties.

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- (ii) if the matters specified in clauses 3.2(a) or (b) are Special Majority Issues, in compliance with clause 4.6.

3.3 Relationship to the Constitution

In the event of any inconsistency between this agreement and the Constitution this agreement will prevail and the Parties will use their reasonable efforts to remove the inconsistency from the Constitution.²⁹

3.4 Relationship to the Project Details

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, subject in the case of a Third Party Project Agreement to any necessary consent of third parties to the Third Party Project Agreement.³⁰

Part B The Company

4. The Company

4.1 Role of Company

The Company will operate the Centre in accordance with [the Commonwealth Agreement](#), this agreement and the Constitution. The Company will be responsible for the overall management and governance of the Centre.

4.2 Company objects and powers

The objects of the Company will correspond with the Centre Objectives. The Company will only exercise its powers to carry out such objects and do things that are incidental or convenient to such exercise of powers.

4.3 Company Constitution

The Constitution may only be amended by a resolution of the members of the Company in accordance with the Corporations Act, provided that any amendment to the Constitution that would be inconsistent with this agreement requires the prior written agreement of all Parties.³¹

²⁸ Delete whichever is inapplicable or if neither are applicable then delete this subparagraph. Note the definition of Special Board Resolution should be deleted if that is not required.

²⁹ Most, if not all, of the Participants will be members of the Company and so they can cause a special resolution to be passed to amend the Constitution to ensure consistency with this Participants Agreement.

³⁰ This Participants Agreement can only bind the parties to it, hence the reference to any necessary consent of third parties to the Third Party Project Agreement. The Third Party Project Agreement should contain a mirror provision in order to bind such third parties.

³¹ The Corporations Act requires a 75% majority resolution. A Participant will not have a vote in changing the constitution of the company if it is not a member of the Company, although its agreement is required for any change that would be inconsistent with this agreement.

4.4 Management of the Company

The Company will be managed by the Governing Board in accordance with the Constitution.

4.5 Membership of Company

The Participants are either members of the Company, or entitled to become members of the Company, in accordance with the Constitution. The Company and the Participants agree to promptly admit as a member of the Company any Participant that is not a member but has requested to be admitted.

4.6 Special majority approval of Company members

The Company must not do, or commit to do, any of the Special Majority Issues³² without a resolution passed by, or written consent given by, members of the Company who would together hold more than 75%³³ of the votes³⁴ in the event of a poll.

4.7 Other consents required

Clause 4.6 does not limit or prevail over any other consent or approval required under the Corporations Act, the Commonwealth Agreement or the Constitution.

Part C General principles

5. Centre Objectives

5.1 Objectives³⁵

The Parties intend for the Company to [be a non-profit scientific institution to]³⁶:

- (a) create a cooperative research centre in the Centre Field with the capability of pursuing world class research and training relevant to the Centre Field;
- (b) ensure that the Parties with their differing disciplines and background will, through their participation in the Centre, add value to each other so that the performance of the Centre will be greater than that of each Party acting independently;

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³² If there are no Special Majority Issues then item 5 of the Centre Details is to be left blank. [See the attachment to the Centre Details which gives examples of possible issues to be included.](#)

³³ This figure is the minimum percentage required under the Corporations Act for a special resolution to change the constitution of a company. It is possible for that figure to be more than 75%.

³⁴ The Constitution provides that the calculation of votes of members of the Company is determined on the basis of the proportional contributions to the Centre by the members. Participants that are not members of the Company will not have a vote on Company issues.

³⁵ Although this objects clause was drafted with the intention of seeking tax exempt scientific institution status for the Company, it remains suitable even if the Company is not seeking such status. If the Company intends to seek tax exemption as a scientific institution, it should not amend any of the words in this objects clause without obtaining specific tax advice. The Company objects in the Constitution correspond with these Centre Objectives.

³⁶ The parties should consider whether these words are appropriate for the particular CRC – will only need a reference to non-profit scientific institution if the CRC is seeking tax exemption.

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- (c) increase the skills of persons already working in the Centre Field and to train and equip new postgraduate and other students with skills and attributes to continue being productive in the Centre Field;
- (d) to promote a managed and cooperative approach to research and education in the Centre Field so as to maximise the benefits from that research and education;
- (e) to carry out education activities in the Centre Field for students and for the professional development of persons working in the Centre Field;
- (f) promote the CRC Programme Objective; and
- (g) as an ancillary and supportive purpose, to commercialise Centre IP in such a manner as to ensure that the maximum benefit accrues to Australia, including Australian industry, the Australian environment and the Australian economy generally.

5.2 Interpretation

In the interpretation of a provision of this agreement, a construction that would promote the Centre Objectives will be preferred to a construction that would not promote the Centre Objectives.

6. Major promises³⁷

6.1 Mutual promises

Each Party agrees:

- (a) to diligently conduct its part of the Activities and observe and perform its respective obligations and commitments set out in this agreement and the Constitution;
- (b) to carry out its part of the Activities to a high standard, and in doing so, actively promote both the Centre Objectives and the CRC Programme Objective and raise the profile of the CRC Programme;
- (c) to provide its Contributions to the Centre in accordance with the terms of this agreement and Project Details to which it is a party (including Third Party Project Agreements);
- (d) to apply the Centre Funds and Centre Resources only for the purpose of carrying out the Activities in accordance with this agreement and Project Details to which it is a party (including Third Party Project Agreements);
- (e) not unreasonably delay any action, approval, direction, determination or decision which is required of it in relation to the Centre;
- (f) use reasonable efforts to ensure that its directors, officers, employees, agents, contractors, students and other representatives involved in any way with the Centre give full force and effect to the provisions of this agreement including the other provisions of this clause 6;
- (g) that all Activities will be carried out by or through the Company; and
- (h) to act reasonably and in good faith in performing its obligations under this agreement.

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³⁷ Some of these paragraphs are general statements of principle and may therefore be difficult to legally enforce.

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6.2 Participant promises

Without limiting any other obligation of a party under this agreement each Participant agrees to³⁸:

- (a) cooperate with and provide to the Company any information about its Contributions and Activities reasonably required by the Company;³⁹
- (b) cooperate with the Company and provide information necessary to enable the Company to fulfil its obligations to the Commonwealth in accordance with clause 15 of the Commonwealth Agreement;⁴⁰ and
- (c) cooperate with the Company in relation to the Company's obligations under clause 16 of the Commonwealth Agreement to commission and report on any review, audit, evaluation or survey under that clause.⁴¹

7. Relationship of the Parties

7.1 General

The Parties agree that:

- (a) the rights, duties, obligations and liabilities of the Parties in relation to the Centre shall in every case, be several and not joint or joint and several;
- (b) in relation to the Activities, they do not carry on business in common with a view to joint profit and do not receive income jointly;
- (c) [except for the trust described in clause 22.1, - **delete these words in brackets if option 2 in clause 22.1 is selected**] nothing contained in this agreement constitutes any of them as agent, partner or trustee of any other of them, or creates any agency, partnership or trust for any purpose whatsoever; and
- (d) except as otherwise specifically provided in this agreement, a Party does not have any authority or power to act for, or to create or assume any responsibility or obligation on behalf of, any other Party.

³⁸ A number of these obligations are repeated or addressed in further detail elsewhere in this agreement.

³⁹ Inserted to comply with clause 5.10(a)(iii) of the Commonwealth Agreement, The level of information requested by the Company under this clause may be a sensitive issue for Participants, particularly in relation to non-cash Contributions. The Parties may wish to consider including examples of what might be considered 'reasonable' in the context of a particular Centre.

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⁴⁰ Inserted to comply with clause 5.12 & Schedule 8 of the Commonwealth Agreement relating to clause 15 of the Commonwealth Agreement.

⁴¹ Inserted to comply with clause 5.12 & Schedule 8 of the Commonwealth Agreement relating to clause 16 of the Commonwealth Agreement.

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7.2 Variation Agent⁴²

Each Participant other than those specified in item 6 of the Centre Details authorises the Company to negotiate and sign for and on its behalf documents that have the purpose of:

- (a) varying Project Details and Third Party Project Agreements for Projects in which that Participant is a party;
- (b) admitting new parties to this agreement; or
- (c) rectifying an error in this agreement,

so as to bind that Participant provided that:

- (i) the Governing Board has approved the variation;
- (ii) the variation does not require the Participant to increase its Contribution; or
- (iii) the variation does not have a material adverse impact upon the Participant.

Part D Centre resources

8. Contributions

8.1 Obligation

- (a) Each Participant agrees to pay to the Company the cash component of its respective Contributions for the purpose of pursuing the Activities and to apply to the Activities the non-cash component of its respective Contributions, as specified in this agreement and any relevant Project Details (including any Third Party Project Agreement).⁴³
- (b) Any cash Contribution not paid by a Participant in accordance with this agreement is to be treated as a debt due to the Company and payable upon demand.

8.2 Timing

Each Participant must pay to the Company the cash component of its respective annual Contributions by equal quarterly instalments in advance.

9. Budgeting

9.1 Annual Budget

Prior to the commencement of each Financial Year, the Company shall prepare an Annual Budget conforming to the Budget and setting out the financial requirements for the carrying out of the Activities for that year, including:

- (a) each Party's Contribution for the year (including cash and non-cash components);

⁴² This has been inserted in an attempt to provide a procedure to vary Project Details, which was an issue raised by a number of Round 9 CRCs.

⁴³ Need to ensure that respective Contributions are adequately specified in this agreement, the Project Details or Third Party Project Agreement.

- (b) cash and non-cash Contributions to the Centre to be procured from third parties⁴⁴;
- (c) the allocation of Centre Funds and Centre Resources to Projects and other Activities;
- (d) the allocation of Centre Funds and Centre Resources to Heads of Expenditure;
- (e) the portion of the Centre Funds (**Activity Payment**) and the Centre Resources to be made available, for the purpose of carrying out the Activities, to:
 - (i) each Participant; and
 - (ii) any third parties;
- (f) the portion of the Centre Funds and the Centre Resources to be used by the Company for the purpose of carrying out the Activities; **and**
- (g) the proposed allocation of Centre Funds to be paid to the Company for its operating expenses in accordance with clause 12.1(h).

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9.2 Circulation of Annual Budget

The Company must provide a copy of each Annual Budget to all Participants promptly after the Annual Budget is approved.

9.3 Forward forecasts

At the time of preparing the Annual Budget, the Company shall also prepare indicative budget forecasts for the two Financial Years following the Financial Year to which the Annual Budget relates.

10. Specified Personnel

10.1 Make available

Each Party agrees to make its Specified Personnel available for the operation of the Centre or the respective Project (as the case may be).

10.2 Terms of employment

Specified Personnel of each Participant will remain subject to the terms and conditions of employment of that Participant and will be replaced on reasonable request by the Company in accordance with clause 18 of the Commonwealth Agreement.

10.3 Centre IP

Each Party must procure that Centre IP created by any of its Specified Personnel will be owned and dealt with according to the provisions of this agreement.

10.4 Withdrawal

A Participant may withdraw any of its Specified Personnel upon 90 days' notice to the Company provided it provides replacements for such personnel who are reasonably acceptable to the Company. The Company may withdraw any of its Specified Personnel upon 90 days' notice to the Participants.

⁴⁴ Such third parties include supporting participants named in the Commonwealth Agreement.

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11. Assets

11.1 Application of clause

This clause 11 applies to an Asset;

- (a) included as a part of a Contribution by a Participant to the Activities;
- (b) acquired by a Participant in whole or in part from the Activity Payment made to that Participant;
- (c) acquired by the Company from the Centre Funds; or
- (d) forming part of the Centre Resources made available to a Participant for the purposes of carrying out the Activities.

11.2 Acquisition of Assets⁴⁵

The Participants must only use the Commonwealth Funding for Capital Item expenditure that is specified in item 11 of Schedule 1)

11.3 Ownership

Unless otherwise agreed between the Parties, an Asset will remain vested in the Party having title to the Asset (Asset Owner).

11.4 Obligations of Asset Owner

For the term of this agreement, the Asset Owner:

- (a) must make the Asset available for use by the Company or any Project Party as and when required;
- (b) must not sell, hire, charge, mortgage, pledge or otherwise encumber the Asset; and
- (c) is responsible for insurance, maintenance and, if required, repair and replacement of the Asset, and any other costs and liabilities associated with the Asset.

11.5 Costs

The Company may, at its discretion, treat the costs mentioned in clause 11.4(c), or part of them, as an additional Contribution by the Asset Owner.

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Part E Centre accounting and reporting

12. Financial management

12.1 Company obligations

The Company shall:

- (a) establish and operate the Centre Account;

⁴⁵This clause mirrors the effect of clause 7.2(c) of the Commonwealth Agreement which prohibits the use of Commonwealth Funding for 'Capital Item expenditure not specified in Schedule 3' of the Commonwealth Agreement.

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- (b) pay the Commonwealth Funding into the Centre Account;
- (c) liaise with, report to and meet any other accounting and financial requirements of the Commonwealth under the Commonwealth Agreement, in order to secure instalments of the Commonwealth Funding in a timely fashion;
- (d) seek and accept from each Participant the cash component of its Contribution;
- (e) seek and accept any money to be procured from third parties contributing to the Activities⁴⁶;
- (f) ~~pay the~~ amounts received under clause 12.1(d) and (e) into the Centre Account;
- (g) draw on the Centre Account to make Activity Payments; and
- (h) draw on the Centre Account to meet the operating costs of the Company, including:
 - (i) the costs associated with the protection of Centre IP as described in clause 22.12;
 - (ii) the costs associated with Commercialising Centre IP, including legal and other professional fees; and
 - (iii) the costs of remuneration of the Governing Board, the Company's chief executive officer and the Company's other employees.

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12.2 Company not agent

Except as expressly permitted under clause 3.2, the Company shall not be taken to be an agent for any of the Participants.⁴⁷

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12.3 No authority

Nothing in this agreement shall be taken to in any way authorise or permit the Company or a Participant to incur any liabilities or undertake any obligations on behalf of, or in the names of, any of the other Participants except as specifically authorised in this agreement or, in the case of the respective Project Participants, any Project Details to which it is a party (including any Third Party Project Agreement).

13. Accounting⁴⁸

13.1 Participant accounts

Each Participant shall be responsible for keeping separate financial accounts which shall record:

- (a) the cash component of its Contribution;
- (b) the Activity Payments made to it by the Company;

⁴⁶ Such third parties include supporting participants named in the Commonwealth Agreement.

⁴⁷ Participants will need to understand the tax status of the Company. This clause means that the Company will not receive moneys as agent for Participants who are tax exempt bodies. It is anticipated under the Commonwealth Agreement that the Company will derive the Commonwealth Funding for income tax purposes.

⁴⁸ Consider whether the Participants who are not members of the Company wish to have a right to review the Company accounts, and who should bear the costs.

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- (c) all expenditure incurred by the Participant from its Activity Payments in carrying out the Activities; and
- (d) any royalties or licence fees paid to it by the Company.

13.2 Company accounts⁴⁹

The Company shall keep separate financial accounts which shall record:

- (a) receipt of the Commonwealth's payments of the Commonwealth Funding to the Company;
- (b) the cash component of each Participant's Contribution received;
- (c) the cash component received from third parties contributing to the Activities;
- (d) the Company's payments of Centre Funds to the Participants and third parties;
- (e) withdrawals from the Centre Account under clause 12.1(h);
- (f) Commercialisation Income and Commercialisation Expenses; and
- (g) any other income of or expenditure by the Company.

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13.3 Provision of information by Participants

Each Participant must provide to the Company, within 14 days of a written request from the Company:

- (a) all necessary information from the accounts referred to in clause 13.1 or (if applicable to the Participant) clause 18.5, for the Company to:
 - (i) comply with the financial reporting requirements contained in the Commonwealth Agreement;
 - (ii) report to the Participants as required under this agreement; or
 - (iii) conduct its operations in accordance with best practice principles of governance; and
- (b) any other information reasonably requested by the Company relating to the Projects and any other Activities involving the Participant including that required to meet the reporting and monitoring requirements in clauses 15 and 16 of the Commonwealth Agreement.

13.4 Accounting for non-cash Contributions⁵⁰

Each Participant is responsible for keeping separate documentation that records each non-cash Contribution and it must provide such documentation to the Company if reasonably requested to do so by the Company.

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⁴⁹ Some Round 9 CRCs chose to split these accounts into a Centre Account, and a Company Account. Each CRC should seek accounting and tax advice on the merits of this.

⁵⁰ It may be appropriate to elaborate on what is a non-cash Contribution, depending on the nature of the CRC. It is open to the parties to specify how non-cash contributions are to be measured such as recording time spent.

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14. Reporting by Company

14.1 Reporting on Activities

The Company must, within 90 days of the end of each Financial Year, provide a written report to each Participant⁵¹ on the Activities conducted in that Financial Year, including information regarding:

- (a) entry into Projects and major agreements;⁵²
- (b) progress in relation to the Company's strategic plan and operational plan;
- (c) likely or actual achievement of any Milestones and Deliverables that are material to the fulfilment of the Centre Objectives;
- (d) progress on research and development activities, including Projects; and
- (e) progress on Commercialisation of Centre IP.

14.2 Quarterly reports

Without limitation to its obligations under the Corporations Act, the Company must:

- (a) within 30 days of the end of each Quarter, provide a written report to each Participant on the financial position of the Company, including:
 - (i) the income of and expenditure by the Company during the Quarter;
 - (ii) its assets and liabilities as at the end of the Quarter; and
 - (iii) cash flow statement; and
 - (iv) cash Contributions paid and owing by the Participant; and
- (b) within 60 days of the end of each Quarter, provide a written report to each Participant on non-cash Contributions made and owed by the Participants.

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14.3 Other reporting

Subject to the consent of the Commonwealth⁵³ and any obligations of confidentiality or privacy owed by the Company or any members of the Governing Board, the Company must as soon as they are available provide to each Participant a copy of:

- (a) all reports provided to the Commonwealth other than the information provided in accordance with clause 14.2 or normal correspondence between the Company and the Commonwealth; and
- (b) any notices, other than normal correspondence, the Company receives from the Commonwealth.

⁵¹ Consider whether these reports should also be provided to Supporting Participants.

⁵² It is open to the Parties to set a materiality threshold.

⁵³ This consent has been expressly requested by DEST.

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14.4 Notification of critical events

The Company must, as soon as reasonably practicable, but in any event within 14 days of becoming aware, give written notice to each Participant 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;
- (c) any substantial dispute between the Company and any Participant;
- (d) any substantial dispute between the Company and any third party⁵⁴;
- (e) the receipt by the Company of an application to a court to wind up the Company; or
- (f) the Company becomes aware that a Participant is in default of its material obligations under this agreement (including a failure to pay its cash Contributions).

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Part F Project provisions

15. Background IP

15.1 Contribution of Background IP for General Activities⁵⁵

Each Party may make its Background IP available for Activities that relate to purposes not directly related to the conduct of a Project:

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- (a) in accordance with this clause 15; and
- (b) such other terms agreed in writing between the Company and the Party providing the Background IP.

15.2 Contribution of Background IP to Project

Each Project Participant will make its Background IP available to the Project:

- (a) as specified in the applicable Project Details; and
- (b) in accordance with:
 - (i) this clause 15; and
 - (ii) any written agreement between the Company and the Project Participant that offers to provide that Background IP subsequent to the Project Details being agreed.⁵⁶

15.3 Warranty

Each Project Participant represents and warrants to the other Project Parties that:

⁵⁴ For example, a dispute with a licensee of Centre IP.

⁵⁵ To address Background IP that is needed for general operations of the CRC.

⁵⁶ To accommodate provision of new Background IP after the commencement of the Project.

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- (a) to its actual knowledge or belief,⁵⁷ without the need to make additional enquiries, conduct searches or seek legal or patent opinion⁵⁸; it is the owner of, or is otherwise entitled to provide, the Background IP which it makes available for the Project;
- (b) except to the extent:
- (i) disclosed in the Project Details; or
 - (ii) in the case of any Background IP not specified in the Project Details, notified in writing to the other Project Parties at the time of offering such Background IP, the Participant has not entered any agreement regarding, or otherwise dealt with, that Background IP that is inconsistent with the rights granted to the other Project Parties as described in the Project Details or this clause 15; and
- (c) it will not enter any agreement in relation to or otherwise deal with that Background IP in a manner that restricts the exercise of the rights granted to the other Project Parties as described in the Project Details or this clause 15.

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15.4 Licence for Project use

Each Project Participant in a Project grants to the other Project Parties an irrevocable, non-exclusive⁵⁹, royalty-free, worldwide licence ~~to use the Project Participant's Background IP made available to that Project during the term of the Project for the purposes of carrying out the Project, subject to any restrictions on its use:~~

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- (a) specified in the Project Details ~~(including a right to sublicense)~~⁶¹; or,
- (b) in the case of any Background IP not specified in the Project Details, notified in writing to the other Project Parties at the time of offering such Background IP ~~(including a right to sublicense)~~⁶².

15.5 Licence for general use

If a Party makes available its Background IP in accordance with clause 15.1, that Party grants to the other Parties an irrevocable, non-exclusive⁶³, royalty-free, worldwide licence ~~to use the Party's~~

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⁵⁷ Whether the warranty is limited to actual knowledge may depend upon the nature of the intellectual property that is expected to be provided as background IP. In relation to patents particularly it would be unusual to give an absolute guarantee that there are no prior rights to the invention and it may be appropriate to state that Participants do not warrant to have undertaken due diligence or patent searches. It is open to the parties to include other promises (either instead of, or in addition to, this warranty in which the promisor warrants that it has made/will make appropriate due diligence enquiries).

⁵⁸ Commonly requested by researchers. The parties should consider who should bear the risk of IP due diligence.

⁵⁹ It is open for the grantor of the Background IP to give an exclusive licence.

⁶¹ The right to sub-license may be contentious for the providers of the Background IP.

⁶² Refer to the above footnote.

⁶³ It is open for the grantor of the Background IP to give an exclusive licence.

⁶⁵ The right to sub-license may be contentious for the providers of the Background IP.

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Background IP during the term of this agreement for the purposes of carrying out Activities that relate to purposes not directly related to the conduct of a Project, subject to any restrictions on its use:

- (a) specified in the Project Details (including a right to sublicense)⁶⁵; or,
- (b) in the case of any Background IP not specified in the Project Details, notified in writing to the other Project Parties at the time of offering such Background IP (including a right to sublicense)⁶⁶.

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15.6 Licence for Commercialisation

- (a) If the Company requires for the purposes of Commercialisation of Project IP a licence to use Background IP that was licensed in accordance with clause 15.4 or 15.5 the Company must notify that Participant in writing.
- (b) If a Participant has received a notice in accordance with clause 15.6(a) that Participant will grant a licence to the Company⁶⁷, on reasonable terms to be agreed by the Participant and the Company, to use the Participant's Background IP for the purposes of Commercialising Project IP from the Project (including the right to sub-license) provided that:
 - (i) the Project IP has been developed using that Background IP in accordance with this agreement and, where applicable, the relevant Project Details; and
 - (ii) that Background IP is required for the Commercialisation of such Project IP,
 subject to any restrictions on its use specified or notified in accordance with clause 15.4 or 15.5⁶⁸.

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15.7 Acknowledgment

Subject to the rights granted in this clause 15, applicable Project Agreement or Third Party Project Agreement the Parties acknowledge and agree that a Party retains the right to control and use its Background IP and that ownership of the Background IP does not change. The Background IP owner may continue to use its Background IP freely (provided that the use is not inconsistent with the terms of this agreement, Project Details or any Third Party Project Agreement).

15.8 Register

The Company shall maintain a register recording all Background IP under this agreement, including any encumbrances or restrictions on its use specified or notified in accordance with clause 15.4.

⁶⁶ Refer to the above footnote.

⁶⁷ The Company will not necessarily commercialise the Project IP itself. However the Company would decide who else is to commercialise the Project IP and for that purpose the Company's rights to use the Background IP for Commercialisation must include a right to sub-license.

⁶⁸ The parties may wish to expressly foreshadow that the licensor of the Background IP will receive remuneration. To make such a clause legally enforceable the parties will need to specify an objectively determinable methodology for calculation of the remuneration.

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15.9 Infringement of Background IP

The Parties agree that they will take all necessary steps to give each other prompt notice of any infringement of Background IP which comes to their attention.

16. Projects⁶⁹

16.1 Activities through Projects

The Activities may be carried out in part through discrete Projects.

16.2 Research Activities

All Activities involving research will be carried out through Projects.⁷⁰

16.3 Determined by Company

Subject to the Commonwealth Agreement, the Projects to be carried out:

- (a) will be determined from time to time by the Governing Board;⁷¹; and
- (b) must not commence until all applicable approvals have been obtained from the Governing Board and applicable ethics committees.

16.4 Project Plan

In relation to every proposed Project other than the Initial Projects⁷², the proposed Project Participants must submit to the Company a draft Project Plan, with such plan to specify details of the following matters with respect to the Project:

- (a) the Project Leader;
- (b) the Project commencement date and completion date;
- (c) the Project objectives;
- (d) the proposed strategy to be followed;
- (e) potential outcomes;
- (f) Project milestones;
- (g) Project deliverables;

⁶⁹ There is no restriction on the scope of a Project. A 'Project' may be in the form of what would often be called a 'Programme'.

⁷⁰ This agreement has been drafted on the basis that research work carried out by the Participants will be governed by the terms of this agreement (for example, as to ownership of IP outcomes). This clause has been included to ensure that the project-related provisions of this agreement apply to all research activities. Note that the only administrative requirement to establish a Project is for the relevant parties to agree on the Project Details, a template of which is set out in Schedule 3 (unless a third party is involved, in which case an additional agreement with that third party is required).

⁷¹ The Governing Board may choose to establish a research committee to provide advice on selection of Projects and Project Participants.

⁷² Project Plans for the Initial Projects will be incorporated in the Project Details for those Initial Projects.

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- (h) a Project budget;
- (i) contributions to be made by third parties;
- (j) resource requirements, including Contributions, Background IP, Centre Funds;
- (k) student requirements (if any);
- (l) required expenditure on new Assets (if any);
- (m) an analysis of Project risk; and
- (n) an analysis of the likely opportunities for Commercialisation of potential Project outcomes.

16.5 Selection of Project Participants

Subject to this agreement and the Commonwealth Agreement, selection of Project Participants to participate in a Project (other than the Initial Projects) is a decision for the Governing Board in its absolute discretion.

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16.6 Initial Projects

The Parties acknowledge that Project Details concerning the Initial Projects (if any) will be agreed and entered into contemporaneously with this agreement (including Third Party Project Agreements in the event of third party participation).

16.7 Project Documents

The Participants acknowledge that the Company will require:

- (a) that Project Details be agreed in writing by all Project Parties;⁷³ and
- (b) without limitation to clause 16.7(a), in the case of each Project which includes third parties as Project Participants,⁷⁴ that a Third Party Project Agreement be executed by all Project Parties.

16.8 Project Details

- (a) In the case of each Project which does not include third parties as Project Participants, the Project Details must include as a minimum the issues listed in Schedule 3.
- (b) For the avoidance of doubt each Project which does not include third parties as Project Participants is governed by the Project Details and the terms of this agreement.

16.9 Third Party Project Agreements

The Participants that will be parties to a Third Party Project Agreement must use their reasonable efforts to ensure that the Third Party Project Agreement:

- (a) addresses the issues listed in Schedule 3;

⁷³ If the Project Participants are the Participants only then the only new forms/documents to be completed will be the schedule setting out the Project Details.

⁷⁴ If third parties are involved in the Project then it is prudent for the Company to arrange for the third party to sign an agreement that is consistent with the terms of this Participants Agreement that apply to the conduct of the Projects to ensure that they are legally bound to their commitments.

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- (b) contains provisions that are consistent with this agreement⁷⁵; and
- (c) may be subsequently amended with the agreement of all Project Parties.

16.10 Third party Project Participants

Without limitation to clause 16.9(b), for the avoidance of doubt the rights and obligations applicable to Project Participants under this agreement do not apply to third party Project Participants except to the extent that such third parties have entered a Third Party Project Agreement containing corresponding rights and obligations.

17. Project Funds and Project Contributions

17.1 Project Funds

- (a) Each Project Participant must pay its cash Project Contributions to the Company at the times and in the manner specified in the Project Details.
- (b) Subject to clause 17.1(d), the Company must pay the Project Funds to the Responsible Participants for the Project in accordance with the Project Details.
- (c) The Company:
 - (i) may withhold Project Funds if any Milestones have not been achieved or Deliverables have not been provided by their required dates; and
 - (ii) must release the withheld Project Funds once the Responsible Participants have achieved the missed Milestones or provided the required Deliverables as the case requires.
- (d) If a Project Participant has not paid a cash Project Contribution that is due to the Company in accordance with the Project Details, the Company is relieved from its obligation to pay to the Responsible Participants that part of the Project Funds corresponding to those unpaid cash Contributions while they remain unpaid. The obligations of the Responsible Participants to carry out the Project will be reduced to the extent of any Project Funds withheld pursuant to this clause 17.1(d).

17.2 Project Contributions⁷⁶

- (a) Contributions to a Project by Project Parties must be specified in the respective Project Details.
- (b) Each Project Participant must make its non-cash Project Contributions available for the Project at the times and in the manner specified in the Project Details.

⁷⁵ Consistency between the terms for all Projects, irrespective of which parties participate in them, will facilitate sound management of the Centre assets, especially intellectual property. Third party projects will often give rise to discrete issues that require separate negotiation and departure from the terms contemplated in this agreement. That should be addressed on a case by case basis. It is open to the Participants to establish a separate project agreement to address additional contributions by an existing participant where that contribution is not to be treated as a 'top up' to its Centre Contribution (so that there is no change to its Project Share).

⁷⁶ Consider whether the parties may wish to have a mechanism for Participants to increase contributions, with consent of other parties, over and above the contributions specified in the Project Details.

- (c) The Company must make its non-cash Project Contributions available for the Project at the times and in the manner specified in the Project Details.
- (d) The valuation of non-cash Project Contributions for the purposes of this agreement must be in accordance with the Valuation Principles and must exclude the value of Intellectual Property contributions.

17.3 Use of Project Funds and other Project Contributions

The Responsible Participants may use the Project Funds and other Project Contributions provided to them:

- (a) for the purposes of the Project only; and
- (b) in accordance with the Project Plan.

18. Project management and reporting⁷⁷

18.1 Project Leader

Each Project shall be managed by a Project Leader. The Project Party that employs the Project Leader must use its reasonable efforts to ensure that the Project Leader:

- (a) uses his or her reasonable efforts to ensure the Project is conducted:
 - (i) in accordance with the Project Plan;
 - (ii) so as to achieve the Milestones and Project Objectives; and
 - (iii) so as to provide the Deliverables;
- (b) manages the day to day conduct of the Project;
- (c) provides scientific leadership to the Project;
- (d) is responsible for administration of all Project personnel including any students; and
- (e) maintains financial records and research and technical records as directed by the Company.

18.2 Carrying out the Project

The Responsible Participants for a Project must carry out the Project:

- (a) in accordance with the Project Plan, 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;⁷⁸
- (e) so as to provide the Deliverables by their required dates; and
- (f) in accordance with the Project Leader's reasonable directions.

⁷⁷ The parties may wish to consider having a project review committee to manage this process.

⁷⁸ The Parties should ensure that the Milestones and Deliverables are reasonable, given the potential consequences of failing to comply (eg. clauses 17.1(c) and 21.1).

18.3 Project reporting

A Project Participant that employs the Project Leader must:

- (a) immediately report to the Company:
 - (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 Contributions;
- (b) provide three monthly reports to the Company 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 Contributions;
 - (iii) any significant difficulties encountered during the Project and measures taken or plans to resolve them;
 - (iv) any Centre IP created (including a description of the Centre IP, when it was created and by whom); and
 - (v) the Background IP used in the Project.

18.4 Parties reporting to the Project Leader

- (a) The Project Parties acknowledge that a Project Participant employing the Project Leader will require information on the status and results of the Project from time to time in order to fulfil its obligations under this agreement.
- (b) Each Project Party agrees to provide such information in a timely fashion when requested by the Project Leader.

18.5 Separate Project financial accounts

Each Project Participant must keep separate financial accounts which must record:

- (a) any Project Contributions it makes under clause 17.2;
- (b) any payments of Project Funds made to it by the Company under clause 17.1(a);
- (c) all expenditure incurred by the Project Participant from Project Funds in carrying out the Project; and
- (d) any other expenditure associated with its carrying out the Project.

18.6 Divisional limitation

Notwithstanding any other provision of this agreement, the Parties acknowledge that the obligations of each Responsible Participant under this agreement to carry out any Project are limited to using the resources of the Specified Division of that Responsible Participant.

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19. Withdrawal and expulsion from Projects

19.1 Withdrawal from Projects⁷⁹

- (a) A Project Participant may withdraw from the Project by giving six months notice to each other Project Party.
- (b) If a Project Participant withdraws from the Project the remaining Project Parties must meet for the purpose of agreeing on whether or not to continue the Project or a variation of the Project and the terms to which that continuation would be subject.
- (c) A Project Participant may not withdraw from a Project without the agreement of the other Project Parties if it would result in the Project Parties being in breach of any agreement with a third party.

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19.2 Expulsion from Projects

- (a) A Project Participant may be expelled from the Project by notice from the Company if Due Cause exists in relation to that Project Participant and remains unremedied after 21 days following notice to that Project Participant.
- (b) For the purposes of clause 19.2(a), **Due Cause** means:
 - (i) failure to make Project Contributions when required by the Project Details;
 - (ii) unauthorised use or Commercialisation of Centre IP or Background IP;
 - (iii) any other material breach of this Agreement in relation to the Project or of the Project Details;
 - (iv) change or proposed change to personnel that is likely to adversely affect the Project;
 - (v) failure to remedy a Conflict in relation to the Project under clause 45 to the satisfaction of the Company;
 - (vi) change in the direct or indirect beneficial ownership or control of the Project Participant in question that would affect its ability to comply with its obligations under this agreement;
 - (vii) disposal of whole or any part of the Project Participant'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 Participant's assets, operations or business;

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⁷⁹ Alternatively, the parties may wish to consider whether there is a need to ensure that a Project Participant may not withdraw from a Project without the agreement of the other Project Parties if the withdrawal would result in:

- (a) the Project Parties being in breach of any agreement with a third party (including a Third Party Project Agreement), or
- (b) the Company being in breach of the Commonwealth Agreement.

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- (xi) steps taken to enter into any arrangement between the Project Participant 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 Party's assets, operations or business;
- (xiii) appointment of an investigator to investigate its affairs; or
- (xiv) assignment of its rights or obligations under this agreement other than in accordance with clause 50.2 (assignment).

19.3 Consequences of withdrawal or expulsion from Project

- (a) If a Project Participant withdraws or is expelled from the Project, the Project Participant will from the date of effect of the withdrawal or expulsion:
 - (i) cease to be a Project Party;
 - (ii) retain any rights to a beneficial interest in the Project IP and a share of the Net Commercialisation Income with respect to such Project IP, subject to future variation to its Project Share pursuant to the Project Details; ***[delete this subparagraph (ii) if option 2 in clause 22.1 is selected. Also consider deletion if the parties prefer the Centre IP held on trust approach]***
 - (iii) subject to clause 19.3(b), relinquish all rights with respect to the Project and the Project IP⁸⁰; and
 - (iv) subject to clause 19.3(b), be relieved of its obligations to make Project Contributions, to carry out, report on or manage the Project, or otherwise participate in the Project.
- (b) The withdrawal or expulsion of any Project Participant from the Project:
 - (i) will not affect:
 - (A) the enforceability of any obligations of that Project Participant;
 - (B) rights against that Project Participant accrued at that time or arising as a result of the withdrawal or expulsion; or
 - (C) any obligation upon the Project Participant to make available its Background IP under clause 15;
 - (ii) will not relieve that Project Participant of the obligations imposed upon it under this agreement other than as specified in clause 19.3(a)(iv); and
 - (iii) subject to clause 19.1(b), will not relieve the remaining Project Parties of their obligations under this agreement with respect to the Project and they shall continue to carry out the Project and perform the terms of this agreement with respect to the Project.

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⁸⁰ The withdrawing or expelled Party will need to negotiate a licence from the Company if it wishes to obtain the rights to use the Project IP for any purpose.

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20. Variation to Projects⁸¹

- (a) Any variation to a Project, including to Milestones or Deliverables, must be agreed in writing by the Company and all Project Participants.
- (b) A Project Participant will not be compensated for any work performed in relation to a variation that has not been authorised in accordance with this clause.

21. Termination of Projects

21.1 Termination of Projects by the Company⁸²

The Company may terminate a Project upon 30 days written notice to the Project Participants if:

- (a) a Milestone is not achieved by the date by which it was required to be achieved and remains not achieved after 30 days following a notice from the Company to the Project Participants (or longer period of time specified by the Company in the notice);
- (b) a Deliverable has not been provided by the date by which it was required to be provided and remains not provided after 30 days following a notice from the Company to the Project Participants (or longer period of time specified by the Company in the notice); or
- (c) in the opinion of the Company, the Project Objectives are unlikely to be achieved and remain unlikely to be achieved after 30 days following a notice from the Company to the Project Participants of such opinion,

provided that:

- (i) if required by the Commonwealth Agreement, the Commonwealth has been informed of the proposed termination and does not object to the termination of the Project; and
- (ii) if the Project is subject to a Third Party Project Agreement, any such termination by the Company is in accordance with the terms of the Third Party Project Agreement.

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21.2 Consequences of termination

- (a) If the Project is terminated pursuant to clause 21.1(c) (regarding likelihood of achievement of Project Objectives), then the Company must, subject to having sufficient Centre Funds, reimburse each Project Participant for its reasonable expenses necessarily incurred as a result of the early termination (if any), ~~the~~ total amount paid to each Project Participant ~~is~~ not to exceed the balance of the Project Funds that would have been paid to that Project Participant if there had been no early termination.

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⁸¹ Some Round 9 CRCs made significant changes to this clause preferring to give the Company greater discretion to alter projects subject to consultation. Given the specific nature of most changes made, we have not attempted to incorporate them into this version of the document. However, any comments or suggestions on this clause from the CRC community would assist in determining whether or not to expand this clause in the template.

⁸² If the project involves a third party then any termination by the Company must be subject to the terms of the Third Party Agreement.

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- (b) If there are insufficient Centre Funds to reimburse all expenses, each Project Participant will be reimbursed out of the Centre Funds on a pro rata basis according to their respective Project Contribution at the date of Termination.
- (c) The Company must advise the Participants of the termination of any Project.
- (d) Termination of a Project for any reason will be without prejudice to the continuing enforceability of any rights or obligations of the Project Parties accrued at the time of termination.

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21.3 Termination of Participants Agreement

All Projects will terminate if this agreement is terminated for whatever reason.

Part G Centre outcomes

22. Centre IP⁸³

22.1 Ownership of Project IP

Option 1(a): Participants to beneficially own the Project IP - As a result, Company is unlikely to be regarded by the Australian Taxation Office as an income tax exempt scientific institution.⁸⁴ Delete Option 1(b) and 2.

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Upon its creation, Project IP will be owned as follows:

- (a) the Company will be the owner of the legal interest in the Project IP;
- (b) the beneficial interest in the Project IP will be owned by:
- (i) the Project Participants; and
- (ii) the Company,

as tenants in common in the Project Shares specified in the Project Details for the relevant Project⁸⁵ (or in equal shares for all Project Parties if shares are not specified in the Project Details)⁸⁶, [as varied pursuant to clause 22.2 - **delete these words in square brackets if option 2 is selected**], and

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⁸³ Many of the Round 9 CRCs made changes to this clause to suit their particular CRC arrangements. Given the specific nature of these changes, we have not attempted to incorporate these into this version of the template. However, comments from the CRC community in relation to this clause are welcome.

⁸⁴ As advised by the ATO in July 2004.

⁸⁵ The Company share can be specified as nil if required. The ATO has expressed a non-binding view that a participant is unlikely to be entitled to the R&D tax concession if the participant cannot show that its share of Project IP and other benefits is not commensurate with its contribution. Project Participants should seek specialist advice and/or obtain a tax ruling.

⁸⁶ Parties should consider whether to retain the words in brackets if their intention is to enable Project Participants to be eligible for the R&D Tax concession given the ATO's expectation that such applicants for the R&D tax

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(c) the Company will hold the interest of the Project Participants in the Project IP on trust.

Option 1(b): Members of CRC (but not the Company) beneficially own Centre IP (in proportion to their Contribution) and Company holds legal interest on trust.. As a result, Company is unlikely to be regarded by the Australian Taxation Office as an income tax exempt scientific institution⁸⁷ Delete Option 1(a) and 2.

Upon its creation, Centre IP will be owned as follows:

- (a) the Company will be the owner of the legal interest in the Centre IP;
- (b) the beneficial interest in the Centre IP will be owned by the Participants as tenants in common in undivided shares proportionate to their respective Participating Shares; and
- (c) the Company will hold the interest of the Participants in the Centre IP on trust.

Participating Shares means a Participant's interest in the Centre IP and the Net Commercialisation Income as specified in the Centre Details as varied in accordance with clause 22.2.

Option 2: Company to beneficially own all Project IP - This is necessary if the Company wishes to pursue income tax exemption as a scientific institution.⁸⁸ Delete Option 1(a) and 1(b).

Upon its creation, all Centre IP will be owned by the Company legally and beneficially.

22.2 Variations to Project Shares

[delete this clause 22.2, if option 1(b) or option 2 in clause 22.1 is selected]

If the Project Contributions contributed by one or more Project Parties in a Financial Year differs from that specified in the Project Details for that Financial Year, each Project Party's Project Share will be recalculated by the Company in accordance with the following formula as at 1 July of the following Financial Year and will apply to that following Financial Year :

$$PS = (PC/TPC) \times (100\% - CPS\%)$$

where:

PS is the Project Share for a Project Party;

CPS is the Company's Project Share;

TPC is the total of all Project Parties' Project Contributions made (not Project Contributions owing nor future Project Contributions promised) up to the most recent 30 June; and

concession are able to demonstrate that their share of R&D expenditure is commensurate with the benefits received by those Project Parties and is undertaken on 'their own behalf'.

⁸⁷ This option is to reflect the concept of the participant's entitlement to beneficial interest in IP being determined on the basis of all IP developed through the Centre (ie, Centre IP) (see assumptions regarding Centre IP referred to at beginning of this document. The working group is not aware as to whether the ATO has approved this model.

⁸⁸ This is the non-binding view expressed by the ATO. See the summary of ATO's position as at 15 June 2005 as set out in the letter from PricewaterhouseCoopers to the AIC dated 15 June 2005 at www.usicom.com.au.

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PC means the Project Contributions of a Project Party made (not Project Contributions owing nor future Project Contributions promised) up to the most recent 30 June,

provided that the deemed monetary valuation of non-cash Project Contributions for the purposes of this clause 22.2 is made in accordance with clause 17.2(d).

22.2 Calculation of Participating Share

[Only use if Option 1(b) is adopted in clause 22.1]

A Participant's Participating Share must reflect its proportionate contribution to the conduct of the Activities and the general operation of the Centre calculated in accordance with the following formulae:

$$PS = (PC/TPC)$$

where:

PS is the Participating Share for a Participant;

TPC is the total of all Participants' Contributions made (not Contributions owing nor future Contributions promised) up to the most recent 30 June; and

PC means the Project Contributions of a Participant made (not Contributions owing nor future Contributions promised) up to the most recent 30 June,

provided that the deemed monetary valuation of non-cash Contributions for the purposes of this clause 22.2 is made in accordance with clause 17.2(d).⁸⁹

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22.3 Non-Project Centre IP

[Only use if Option 1(a) is adopted]⁹⁰

By executing this agreement, the Participants assign to the Company all of their right, title and interest in all existing and future Non-Project Centre IP.

22.4 Vesting of ownership

The Parties must co-operate with each other Party 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 Centre IP as required under this agreement.

22.5 Dealing with Centre IP

No Participant may deal with, Commercialise, dispose of or encumber any interest which it might hold in Centre IP, without the written consent of the Company.

22.6 Use of Centre IP

A Participant wishing to use Centre IP for any purpose, whether for research or otherwise, not authorised under clause 22.15 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 must include provisions

⁸⁹ This formula does not account for contributions made by the Company.

⁹⁰ Under Option 1(a) Centre IP is split into Project IP (which is owned by the project parties) and other IP created outside projects that are usually related to the general operation of the CRC (reports etc) (which is owned by the Company). If Options 1(b) or 2 are selected then this distinction is not required.

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governing ownership and Commercialisation of further Intellectual Property developed from such use. If the proposed use of Centre IP relates to the Activities then the Company will not unreasonably withhold its consent to such use.

22.7 Decision to protect

The Company must decide whether any outcomes from the Activities warrant pursuing patent protection, or other forms of Intellectual Property protection, and if it does, in which countries protection should be sought.

22.8 Apply for protection

Unless otherwise agreed by the Company, the Company is to apply for, maintain and prosecute any form of Intellectual Property protection decided on under clause 22.7.

22.9 Registration in Company name

For the avoidance of doubt, if patenting or other registrable forms of Intellectual Property protection of Centre IP is pursued, such registration:

- (a) is to be in the Company's name; and
- (b) where required, will identify:
 - (i) the inventors of the Centre IP; and
 - (ii) the beneficial owners of the Centre IP.

22.10 IP register

The Company must maintain an IP register recording Centre IP notified to the Company, containing at least the following details:

- (a) date of entry on register;
- (b) description of Centre IP; and
- (c) identity of the inventor and the Party that developed the Centre IP; and
- (d) details of any agreements made by the Company with Participants or with third parties in relation to disclosure or use of the Centre IP.

22.11 Notice of infringement

The Participants must give the Company prompt notice of any infringement of Centre IP which comes to their attention and each Party agrees to give the Company all assistance which it may reasonably require in order to protect the Centre IP (but only if the Company pays the Participant providing the assistance for all reasonable costs and expenses of doing so).

22.12 Costs of protection

The Centre Account may be drawn upon by the Company to meet all costs associated with applying for, maintaining and prosecuting patent or any other form of Intellectual Property protection associated with Centre IP (including any action for infringement of the Centre IP) and the application, maintenance and prosecution of any actions which may be associated with any such Intellectual Property and such drawings shall be taken to be expenses incurred in the performance of the Activities.

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22.13 Dealing with Centre IP

Each Participant:

- (a) must respond to a request from the Company to provide information in its possession regarding Centre IP that has been developed by the Participant or is under development by the Participant;
- (b) must use its reasonable efforts to ensure that itself and its employees, agents, contractors, students under their supervision or other persons participating in the Project:
 - (i) identify Centre IP generated or developed by them;
 - (ii) promptly communicate details of
 - (A) Project IP to the Project Leader; and
 - (B) Non Project Centre IP to the Company;
 - (iii) not prejudice protection of Centre IP;
- (c) must not use, Commercialise, dispose of, encumber or otherwise deal with or enter any agreement in relation to any interest that it might hold in Centre IP, except as authorised in this agreement; and
- (d) must not seek to revoke any appointment of the Company as trustee of that Participant's interest in the Centre IP except in accordance with clause 24.1. **[delete this paragraph (d) if option 2 in clause 22.1 is selected]**

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22.14 Company's right to use Centre IP

The Company may at all times:

- (a) Commercialise the Centre IP in accordance with clause 23;
- (b) use the Centre IP for the research, training and education purposes of the Centre; and
- (c) license any Participant or any other person to use the Centre IP for the research, training and education purposes of the Centre,

and must not use or license the Centre IP for any other research, training and education purposes except with the written consent of all Project Participants.

22.15 Project Participants' right to use Project IP

[This clause confines licences to the participants who were involved in the relevant project. Some CRCs take a more universal approach – i.e all participants are entitled to the use the outcomes of the CRC activities. This will in large part depend upon the nature of the CRC and whether they are 'divisible'. If parties prefer the latter approach replace 'Project IP' with 'Centre IP' and 'Project Participant' with 'Participant']

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Subject to this agreement, each Project Participant has a non-exclusive royalty-free right to use the Project IP (excluding the right to sublicense):

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- (a) for the purpose of undertaking the Project in accordance with this agreement; or

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- (b) for internal research, education and teaching purposes⁹¹ other than Commercialisation;
- (c) for any other purpose, other than Commercialisation⁹², within the Project Participant's respective Use Field and subject to any Use Field Conditions;

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provided that the Project Participant:

- (i) maintains the confidentiality of Confidential Information;
- (ii) does not prejudice the Company's ability to:
- (A) protect the Project IP;
- (B) use the Project IP to achieve the Centre Objectives; or
- (C) maximise the commercial return from any Project IP that has significant commercial potential⁹³.

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22.16 Improvements

- (a) Any Intellectual Property in any Improvements made by a Participant arising from the exercise of the licence granted under clauses 22.15(b) or 22.15(c) will be owned by that Participant.
- (b) The Participant:
- (i) must notify the Company of any Improvements as soon as practicable after that Improvement is created; and
- (ii) grants to the Company a perpetual, irrevocable, royalty-free, non-exclusive licence to use the Improvement and the Intellectual Property in the Improvements for the Activities other than Commercialisation.

22.17 Publication and disclosure

Subject to any Third Party Project Agreement and unless authorised under clause 42, each Party must not publish or disclose to any third party any Centre Confidential Information.

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⁹¹ These rights are commonly requested by researcher and education institutions. It is open to the parties to define these rights in more detail. For example confining such rights to specified persons whilst that person remains an employee of the participant; defining the research as being publicly funded; extending the licence to research that is not related to the Projects to be conducted; extending the licence to IP that has lawfully entered into the public domain.

⁹² Use Field does not include Commercialisation. A Project Participant has no automatic right to Commercialise the Project IP - if it wishes to do so, it will need to obtain a separate licence from the Company (either at the time of this agreement or in the future).

⁹³ The parties may consider whether it is appropriate to extend or limit this restriction to Participants competing with the Company.

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23. Commercialisation of Centre IP⁹⁴

23.1 Right and responsibility of Company

The Company has the exclusive right to Commercialise the Centre IP at its discretion (including a right to sublicense), provided that it:

- (a) complies with all obligations under the Commonwealth Agreement regarding Commercialisation;
- (b) complies with all obligations under this agreement and any applicable Project Details regarding Commercialisation (including the applicable Commercialisation Plan and any additional obligations agreed specifically for that Project);
- (c) endeavours to achieve the Centre Objectives; ~~and~~
- (d) agrees to terms with counter parties to such Commercialisation transactions that are on an arm's length basis.

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23.2 Discretion of Company

Without limiting clause 23.1, the Company may⁹⁵:

- (a) determine that Commercialisation of Centre IP may be undertaken by itself, a Participant, a Project Participant, a person not connected with the Centre⁹⁶, a related Party of the Company (as defined in the Corporations Act)⁹⁷ or any combination of them; and
- (b) grant licences to persons who will undertake Commercialisation of the Centre IP; and
- (c) may enter into such other arrangements with the persons specified in clause 23.2(a) as the Company sees fit.

23.3 Commercialisation Income

Select one option and delete other option and both option headings

Option 1: This option is to be selected if option 1 in clause 22.1 is selected. Participants to be beneficially entitled to Net Commercialisation Income⁹⁸ - If this option is selected, it will be unlikely that the Company will be regarded by the Australian Taxation Office as an income tax exempt scientific institution.

⁹⁴ Many of the Round 9 CRCs made changes to this clause to suit their particular commercialisation arrangements. As an example, the parties may wish to consider whether a first right of refusal to enable certain Participants to commercialise certain IP should be inserted in the agreement. Given the specific nature of most changes made by Round 9 CRCs, we have not attempted to incorporate these into this version 4.0. However, we seek the views of the CRC community in relation to this clause.

⁹⁵ It is open to the parties to expressly restrict the Company from Commercialising the Centre IP other than to grant a licence and right of sub-license to Commercialise the Centre IP.

⁹⁶ This could be a separate Commercialisation company. The parties may wish to set out additional procedures here regarding such a company.

⁹⁷ This could be a subsidiary of the Company.

⁹⁸ Caution - If the CRC Company is to be entitled to commercialisation income there may be taxation implications regarding a Participant's entitlement to claim the R&D tax concession.

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If the Centre IP held on trust option (option 1(b)) is preferred, replace 'Project IP' with 'Centre IP' and 'Project Participant' with 'Participant'. If the Company is to be beneficially entitled to Commercialisation Income then the clause will need further adjustment.

Subject to clause 23.10, the Company holds all Commercialisation Income with respect to Project IP on trust for the Project Participants as tenants in common in proportion to their respective Project Shares.^{99 100}

Option 2: This option is to be selected if option 2 in 22.1 is selected. Company to be beneficially entitled to all Commercialisation Income - This may be necessary if the Company wishes to pursue income tax exemption as a scientific institution.

The Company is entitled to retain all Commercialisation Income with respect to Centre IP for its own purposes.

23.4 Protocol prior to Commercialisation

If Option 1(b) is preferred, replace 'Project IP' with 'Centre IP' and 'Project Participant' with 'Participant'.

Before the Company Commercialises any Project IP, it must comply with the following procedure:

- (a) the Company must provide to each Project Participant a Draft Commercialisation Plan with respect to the Project IP;
- (b) each Project Participant may, within 14 days after receipt of the Draft Commercialisation Plan, provide comments to the Company on the Draft Commercialisation Plan and the Company must endeavour to discuss such comments with the respective Project Participants;
- (c) following the consultation process described in paragraphs (a) and (b), if it wishes to proceed with Commercialisation, the Company must provide to each Project Participant a Commercialisation Plan with respect to the Project IP;
- (d) the Company must obtain confirmation that each Project Participant has received each Commercialisation Plan and each Project Participant must promptly provide such confirmation;
- (e) each Project Participant may, within 14 days after receipt of the Commercialisation Plan, (the **Notice Period**) advise the Company in writing if it:

⁹⁹ If the Company is to own a share of Project IP then it would retain its proportionate share of the Commercialisation Income in its own right and not on trust for the other project Participants. The ATO has expressed a non-binding view that a participant is unlikely to be entitled to the R&D tax concession if the participant cannot show that its share of Project IP and other benefits is not commensurate with its contribution. Project Participants should seek specialist advice and/or obtain a tax ruling.

¹⁰⁰ Commonwealth Government agencies that are subject to the *Financial Management and Accountability Act 1997* may need to obtain the consent of the Commonwealth Finance Minister to enter into the Third Party Project Agreement as it could be construed that the agency's share of the Commercialisation Income is 'public money' and the Company would have receipt or custody of public money as an 'outsider' (see section 12 of that Act).

- (i) objects to the Commercialisation Plan but does not wish to withdraw from involvement in the Commercialisation; or
- (ii) objects to the Commercialisation Plan and wishes to withdraw from involvement in the Commercialisation;
- (f) if a Project Participant advises the Company within the Notice Period that it objects to the Commercialisation Plan and wishes to withdraw from involvement in the Commercialisation then:
 - (i) its risk position will be as specified in the Project Details; and
 - (ii) its rights to a share of Net Commercialisation Income will be as specified in the Project Details; and **[delete this subparagraph (ii) if option 2 in clause 22.1 is selected]**

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After completion of the process described in this clause 23.4, the Company may commence Commercialisation of the Project IP in accordance with the Commercialisation Plan.

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23.5 Protocol after Commercialisation commences

If option 1(b) is preferred, replace 'Project IP' with 'Centre IP' and 'Project Participant' with 'Participant'.

After commencing Commercialisation of any Project IP:

- (a) the Company must provide a progress report to the Project Participants every 6 months with respect to Commercialisation of the Project IP as against the Commercialisation Plan;¹⁰¹
- (b) the Company may amend the Commercialisation Plan from time to time at its absolute discretion, provided that the Company must notify the Project Participants of any substantial amendments prior to the amendments being made;
- (c) within 30 days following notification of any substantial amendments to the Commercialisation Plan, a Project Participant may provide written notice to the Company that it objects to the amendments to the Commercialisation Plan and elects to withdraw from involvement in the Commercialisation, in which case
 - (i) its risk position will be as specified in the Project Details; and
 - (ii) its rights to a share of Net Commercialisation Income will be as specified in the Project Details. **[delete this subparagraph (ii) if option 2 in clause 22.1 is selected]**

23.6 Commercialisation Income - Non-Project Centre IP

If the Company receives any Commercialisation Income from the Commercialisation of Non-Project Centre IP it may retain it for its own purposes.¹⁰² **[delete this clause if option 1(b) or option 2 in clause 22.1 is selected]**

¹⁰¹ See clause 14.1 for general obligation of Company to report annually to all Participants on Commercialisation.

¹⁰² Some alternatives to this arrangement include (a) Company holds income on trust for Participants, must record details in accordance with clause 23.9 and the Governing Board must determine the use of that income; OR (b)

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23.7 Company obligation

The Company shall ensure that Commercialisation of Centre IP complies with this agreement and the Commonwealth Agreement.

23.8 No veto power

For the avoidance of doubt, no Participant or any other person involved in a Project has the power to veto a decision of the Company regarding Commercialisation of Centre IP.

23.9 Commercialisation records

The Company must keep written records of:

- (a) all Commercialisation Income it receives; and
- (b) all Commercialisation Expenses it incurs.

23.10 Commercialisation Expenses

[delete this clause 23.10 if option 2 in clause 22.1 is selected.]

[if option 1(b) is selected replace 'Project IP' with 'Centre IP']

Without limiting clause 26.8, the Participants agree that the Company may use the Commercialisation Income with respect to particular Project IP to pay Commercialisation Expenses or reimburse the Company for previously incurred Commercialisation Expenses with respect to that Project IP. For the avoidance of doubt, the Participants acknowledge that the Company may in any Financial Year use Commercialisation Income received that Financial Year to reimburse Commercialisation Expenses **with respect to that Project IP** incurred in previous Financial Years. Any Commercialisation Expenses relating to various Project IP may be apportioned between the various Project IP by the Company for the purposes of this clause 23.10.

23.11 Payment of Net Commercialisation Income

[delete this clause 23.11 if option 2 in clause 22.1 is selected.]

[if option 1(b) is selected replace 'Project IP' with 'Centre IP'; 'Project Participant' with 'Participant'; 'Project Shares' with 'Participating Shares']

By 31 August each year, the Company must remit to each Project Participant its share of Net Commercialisation Income with respect to the respective Project IP for the previous Financial Year corresponding to Project Shares as at 1 July that year, subject to any adjustments pursuant to clauses 23.4 or 23.5.¹⁰³

23.12 Survival

This clause 23 survives expiration or earlier termination of this agreement.

Company holds all Commercialisation Income with respect to Centre IP other than Project IP for the purpose of reinvestment in the activities of the Company.

¹⁰³ Note that for each taxpaying Project Participant its share of the gross income will be taxable income, while its share of expenses may be deductible. It is open to the parties to agree that a minimum amount of Commercialisation Income must be earned before it is to be distributed and that below such amount that Commercialisation Income will be retained by the Company to be applied towards the Activities. If this is applied, a clause should acknowledge that the company is acting as trustee in handling such funds.

24. End of trustee appointment

[delete this clause 24 if option 2 in clause 22.1 is selected]

24.1 Removal¹⁰⁴

The Project Participants may, with the prior approval of all Participants,¹⁰⁵ by notification in writing to the Company without the consent of the Company revoke the appointment of the Company as trustee with respect to specified Project IP for which the Project Participants have beneficial ownership rights. Following such revocation:

- (a) all other rights and obligations of the Company in relation to the Project IP survive; and
- (b) the Company must sign and execute all documents necessary or convenient to vest the Project IP and the Commercialisation Income and Commercialisation Expenses with respect to the Project IP:
 - (i) in a new trustee appointed by the Project Participants; or
 - (ii) if directed by the Project Participants, in the Project Participants that are beneficially entitled to it.

24.2 Resignation

The Company may retire as trustee with respect to specified Project IP by giving at least 6 months¹⁰⁶ notice in writing to the Project Participants. On resignation as trustee the Company must sign and execute all documents necessary or convenient to vest the Commercialisation Income and/or the Project IP in the Project Participants that are beneficially entitled to it.

24.3 Survival

Any trust in relation to Project IP and the provisions of this clause survive termination of this agreement, provided that following termination any Project Participant may revoke a trust with respect to specified Project IP for which it has beneficial ownership rights.

25. Moral rights

Each Project Participant will use its reasonable efforts to obtain from its respective employees (including Specified Personnel), agents, sub-contractors and students under their supervision any consents in relation to their Moral Rights that may be reasonably necessary for the Project or for Commercialisation of the Project IP.

¹⁰⁴ This clause reflects accepted trust law.

¹⁰⁵ During the term of this agreement, a trust in place for any particular Project IP may not be ended by the Project Participants that have beneficial ownership rights in relation to that Project IP without the consent of all Participants. After the termination of this agreement, those Project Participants may end the trust without such consent (see clause 24.3).

¹⁰⁶ This should be a period that is sufficient to enable the Project Participants to appoint an alternative person to act as trustee.

Part H Allocation of risk

26. Indemnities¹⁰⁷

26.1 Mutual Indemnity¹⁰⁸

Subject to clauses 26.2, 26.3, 26.4 and 26.5, each Party (**the indemnifying Party**) irrevocably and unconditionally indemnifies and agrees to keep indemnified each of the other Parties and their respective directors, officers, employees, agents and contractors (**those indemnified**)¹⁰⁹ from and against any and all liability, loss, harm, damage, cost or expense (including legal fees on a full indemnity basis and net of any GST input tax credits to which those indemnified are entitled) howsoever arising that those indemnified may suffer, incur or sustain as a result of:

- (a) any breach of this agreement (including material breach of any warranty given under this agreement) by the indemnifying Party;
- (b) any unlawful or negligent act or omission by the indemnifying Party or any of its directors, officers, employees, agents or contractors arising in connection with the Centre; or
- (c) the exercise by the indemnifying Party of any rights granted to it in relation to the Centre IP or Background IP.

26.2 Company indemnity

In addition to any indemnity provided by the Company under clause 26.1, and subject to clauses 26.3, 26.4 and 26.5, the Company irrevocably and unconditionally indemnifies and agrees to keep indemnified each of the Participants and their respective directors, officers, employees, agents and contractors (**those indemnified**)¹¹⁰ from and against any and all liability, loss, harm, damage, cost or expense (including legal fees on a full indemnity basis and net of any GST input tax credits to which those indemnified are entitled) howsoever arising that those indemnified may suffer, incur or sustain as a result of any breach of the Commonwealth Agreement by the Company.

¹⁰⁷ CRCs and Participants may wish to consider whether an additional indemnity is needed here to provide for the situation that may arise if a Participant does not provide its Contribution, resulting in a 'Shortfall' as defined in the Commonwealth Agreement. Under clause 6.4 of the Commonwealth Agreement, the Company may be required to make good any Shortfall, and a failure to do so has consequences, including an ability of the Commonwealth to reduce the total amount of Commonwealth Funding by all or part of the value of the Shortfall (see clause 6.5 of the Commonwealth Agreement). The parties to this agreement may wish to address this potential situation here.

¹⁰⁸ It is prudent for any person giving such an indemnity to obtain advice from its insurer that the indemnity is within the person's insurable risks.

¹⁰⁹ The Participants do not indemnify the Chairperson or any other director because it is assumed the Company will acquire directors and officers insurance.

¹¹⁰ The Participants do not indemnify the Chairperson or any other director because it is assumed the Company will acquire directors and officers insurance.

26.3 Reduction of indemnity

The indemnities given by an indemnifying Party pursuant to clause 26.1 and the Company under clause 26.2 shall be reduced proportionately to the extent that the liability, loss, harm, damage, cost or expense referred to in clauses 26.1 and 26.2 was caused or contributed to by:

- (a) any breach of this agreement (including material breach of any warranty given under this agreement) by any of those indemnified;
- (b) any unlawful or negligent act or omission by any of those indemnified or any of its directors, officers, employees, agents or contractors; or
- (c) the exercise by any of those indemnified of any rights granted to it in relation to the Centre IP or Background IP.

26.4 Commonwealth exception¹¹¹

If the Commonwealth is a Party it is excluded from the obligation under clause 26.1 to indemnify any other Party. This clause 26.4 does not exclude or reduce the liability of, or benefit to, the Commonwealth that may arise by operation of the common law or breach of statute.

26.5 Consequential losses

Nothing in clauses 26.1 and 26.2 will render a Party liable for any special, indirect or consequential loss or damages (including loss of income or profits, and loss of expectation of income or profits) arising under or pursuant to this agreement.

26.6 Notification of acts

Each of those indemnified under clauses 26.1 and 26.2 must promptly notify every indemnifying Party of any event or circumstance that may reasonably give rise to those indemnified relying upon the indemnities in clauses 26.1 and 26.2.

26.7 Survival

The indemnities provided under clauses 26.1 and 26.2 are a continuing obligation, separate and independent of each Party's other obligations and shall 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 Party who is expelled or retires from the Centre.

26.8 Indemnity of the Company as trustee

[delete this clause if option 2 in clause 22.1 is selected]

The Company is entitled to be indemnified out of the assets of a particular trust created by, or pursuant to, this agreement for any liability incurred by the Company as trustee of that particular trust (other than for breach of fiduciary duty). This entitlement survives the termination of this agreement.

¹¹¹ Historically agencies of the Commonwealth that are subject to the *Financial Management and Accountability Act 1997* have faced difficulties in approving indemnity clauses such as clause 26.1 because of the Financial Management and Accountability Regulations and the Commonwealth's 2003 guidelines for granting indemnities. Clause 26.4 seeks to provide an exception to enable the Commonwealth's position to be accommodated while still ensuring that the other Parties can rely on common law principles to claim contribution from the Commonwealth if the Commonwealth agency has caused the loss or damage.

27. Insurance

27.1 Obligation to insure

Each Party¹¹² must effect and maintain adequate insurance that a prudent person participating in the Activities would maintain, to cover its participation in the Activities, including all Projects in which it participates.¹¹³ Such insurance must cover loss or damage the Participant may suffer or any liability the Participant may incur in connection with its participation in the Activities, and must include adequate run-off cover after this agreement has expired or terminated with respect to the Participant.

27.2 Act as own insurer

A Participant may act as its own insurer provided that it receives the consent of the Company.

27.3 Evidence of insurance

Within 10 Business Days of a request, each Participant must provide the Company with a certificate of currency of its relevant insurance policies as requested by the Company from time to time.¹¹⁴

Part I Changes

28. Amendments

28.1 Variation to be in writing

Subject to clause 7.2, no agreement or understanding varying this agreement shall be legally binding unless it is in writing signed by all Parties.

28.2 Commonwealth approval

Any changes to this agreement that require the prior approval of the Commonwealth under the Commonwealth Agreement being changes which:¹¹⁵

- (a) affect the Company's ability to comply with any of its obligations under the Commonwealth Agreement, particularly clauses 5.1 and 5.3 of the Commonwealth Agreement; or
- (b) changes the Participants from those listed in Schedule 7 of the Commonwealth Agreement (including an admission of new Parties under clause 29 of this agreement or the retirement or expulsion from the Centre under clause 30 of this agreement),

must not be made without such prior written approval of the Commonwealth.

¹¹² This includes the CRC Company.

¹¹³ It is open to Project Participants to expressly specify the type and level of insurance cover required.

¹¹⁴ For example, the Company may seek evidence of insurance from Project Participants upon commencement of a Project. The 10 day period has been inserted for consistency with clause 23.2 of the Commonwealth Agreement.

¹¹⁵ See clause 5.11 of the Commonwealth Agreement which outlines what changes require prior written approval of the Commonwealth.

29. Admission of new Parties

29.1 Admission

Subject to the Commonwealth Agreement, the Parties may, from time to time, by a resolution of the Parties at that time by a majority not less than that specified in item 7 of the Centre Details (each Party having one vote):

- (a) decide to admit any person to be a Party to this agreement; and
- (b) set the terms of the Party's admission.

29.2 Deed of accession

On the admission of any new Party to this agreement, the new Party will be required by deed signed by the Company, the new party and any Participant who has not authorised the Company to be its variation agent pursuant to clause 7.2 to acknowledge the receipt of a copy of this agreement and to confirm and agree to be bound by the provisions of this agreement, as if the new Party was a signatory to this agreement.

29.3 Membership of Company

On the admission of any new Party to this agreement, the Parties agree to admit the new Party to membership of the Company in accordance with clause 4.5 and the Constitution if requested by the new Party.

30. Retirement and expulsion from the Centre

30.1 Retirement and expulsion from the Centre

Subject to the Commonwealth Agreement and this clause 30:

- (a) a Participant may retire from the Centre by giving 12 months' notice¹¹⁶ to each other Party; and
- (b) a Participant (the **Defaulting Participant**) may be expelled from the Centre by the resolution of at least 75% of all other Participants at that time (each Participant having one vote), provided Due Cause has arisen with respect to the Defaulting Participant and remains unremedied after 21 days following notice to the Defaulting Participant¹¹⁸.

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30.2 Due Cause

For the purposes of clause 30.1, Due Cause means:

- (a) failure to make Contributions when required by this agreement or Project Details (including a Third Party Project Agreement) unless otherwise agreed by the Parties;
- (b) unauthorised disclosure of Confidential Information;

¹¹⁶ It is open to the parties to agree a different period of notice

¹¹⁸ Consider whether there should be immediate expulsion (ie no vote) if the Defaulting Participant becomes insolvent or bankrupt (Due Cause paragraph (g)).

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- (c) unauthorised publication of information or material;
- (d) unauthorised use or Commercialisation of Centre IP or Background IP;
- (e) proposed changes to Specified Personnel that are contrary to the Commonwealth Agreement and likely to adversely affect the Centre's performance with respect to the Centre Objectives;
- (f) any other material breach of this agreement or Project Details (including a Third Party Project Agreement);
- (g) becoming insolvent, bankrupt or being subject to the appointment of a mortgagee, a receiver or manager or an investigator to investigate its affairs, or making any arrangement or composition for the benefit of creditors or being the subject of winding up proceedings;
- (h) assignment of its rights or obligation under this agreement other than in accordance with clause 50.2.
- (i) such other matters as the Parties other than the Party to be expelled may by unanimous decision reasonably and properly declare to be a due cause.

30.3 Consequences¹¹⁹

- (a) If a Party is expelled or retires from the Centre, the Party:
 - (i) will cease to be a Party to this agreement;
 - (ii) retains any rights it has, under Project Details to which it is a party, to beneficial ownership of Project IP **for 'Centre IP' of option 1(b) is selected** and a share of Net Commercialisation Income with respect to such Project IP **for 'Centre IP' of option 1(b) is selected**, subject to the provisions of such Project Details;
 - (iii) relinquishes all rights under this agreement other than those specified in clause 30.3(a)(ii);
 - (iv) will cease to be a member of the Company¹²⁰;
 - (v) will cease to be a Project Party with respect to any Project, except any Project for which Third Party Project Agreement in force to which it remains a Party in which case it remains a Party in accordance with its terms; and
 - (vi) will be relieved of its obligation to make further Contributions, other than Contributions required to be made under any Third Party Project Agreement in force to which it remains a Party.
- (b) The retirement or expulsion of any Party from the Centre:
 - (i) will not affect the enforceability of any other obligations of that Party or rights against that Party accrued at that time;

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¹¹⁹ The parties should consider what consequences should apply in the particular circumstances. Are there any licences to Background IP **or use of Assets** that should continue after expulsion or retirement. On what terms?

¹²⁰ The Constitution has a corresponding provision.

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- (ii) will not relieve the Party of the obligations imposed upon it under this clause 30 and clauses 6.2(b) (Provision of information to Company), 22 (Centre IP), 23 (Commercialisation), 26 (Indemnities), 31 (Effect of Termination), 33 (IP in Contract Material under Commonwealth Agreement), 34 (Commonwealth Confidential Information), 37 (Safe and ethical research), 38 (Privacy), 39.2 (Access to premises by Commonwealth) and 42 (Confidential Information); and
- (iii) will not relieve the remaining Parties of their obligations under this agreement and they shall continue to carry on the Activities and perform the terms of this agreement between them.

31. Effect of termination¹²¹

31.1 Expiration

Unless the Parties otherwise agree, this agreement will terminate upon expiration of the Term in accordance with clause 2.

31.2 Accrued rights and obligations

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

31.3 Centre IP¹²²

Notwithstanding the termination of this agreement, unless the Parties agree otherwise (including pursuant to clause 24.1), ownership of Centre IP will not change and the Company will remain responsible for Commercialisation of Centre IP.

32. Continuing obligations

Unless agreed otherwise by the Parties, on the termination of this agreement the Parties and any former Parties shall continue to be bound by the obligations under clauses 6.2(b) (Provision of information to Company), 22 (Centre IP), [24 (end of trustee appointment) - **delete this reference to clause 24 if option 2 in clause 22.1 is selected**], 26 (indemnities), 27 (insurance), 30 (retirement and expulsion), 33 (IP in Contract Material under Commonwealth Agreement), 34 (Commonwealth Confidential Information), 37 (Safe and ethical research), 38 (Privacy), 39.2 (Access to premises by Commonwealth) and 42 (confidentiality) (to the extent that these obligations are applicable to them).

¹²¹ The parties may choose to insert additional procedures to deal with the winding up of the Company.

¹²² It is good practice for Parties to address the issue of distribution of assets (including IP) prior to termination of this agreement. However, be aware that whether Centre IP is transferable to a Participant will depend upon the tax status of the Company. If the Company is to be wound up the legal and/or beneficial interest in the CentreIP/Project IP will need to be assigned.

Part J Commonwealth Agreement obligations and liabilities

33. IP in Contract Material under Commonwealth Agreement¹²³

33.1 Participant acknowledgment

Each Participant acknowledges and agrees that:

- (a) subject to the licence granted under clause 11.2 of the Commonwealth Agreement, Intellectual Property in the Contract Material does not vest in the Commonwealth;¹²⁴
- (b) the licence granted by the Company to the Commonwealth under clause 11.2 of the Commonwealth Agreement applies in relation to any material provided by a Participant to the Company under this agreement which would constitute Contract Material;¹²⁵
- (c) any Commercialisation or utilisation of the Intellectual Property in Contract Material must:
 - (i) maximise the national benefits accruing to Australia, including Australian industry, and the Australian economy generally; and
 - (ii) be consistent with the Objective of the CRC Programme,¹²⁶
- (d) for the purposes of clause 33.1(b), the maximum national benefits accruing to Australia will be deemed to have been delivered where the Intellectual Property in Contract Material is Commercialised or otherwise made available in a way that results in industry expansion or activity within Australia. Where there are no opportunities for Commercialisation within Australia and the Commercialisation of Intellectual Property occurs in a country other than Australia, the Intellectual Property must be Commercialised in such a way that substantial national benefits will accrue to Australia.¹²⁷
- (e) if at any time, the Commonwealth is of the reasonable view that the Participant, including by any third party, is not Commercialising or utilising the Intellectual Property as contemplated by clauses 33.1(b), 33.1(d), and 33.4 below, the Commonwealth may, by notice at its sole and unfettered discretion:¹²⁸
 - (i) withhold any further payment of the Commonwealth Funding;

¹²³ Insertion of clause 11 of the Commonwealth Agreement. The order of the clause has changed slightly, but all of the relevant clauses are reproduced so that obligations and liabilities are imposed on the Participants, with the exception that a Participant may publish Contract Material if it has a statutory obligation to do so (see Schedule 8, Commonwealth Agreement).

¹²⁴ Reproduces clause 11.1 of the Commonwealth Agreement.

¹²⁵ Participants are unable to grant a direct licence to the Commonwealth (as Commonwealth is not a party to this agreement) but this attempts to ensure that the licence granted under clause 11.2 the Commonwealth Agreement also applies to Contract Material produced under this agreement.

¹²⁶ Reproduces clause 11.5 of the Commonwealth Agreement.

¹²⁷ Reproduces clause 11.6 of the Commonwealth Agreement.

¹²⁸ Reproduces clause 11.8 of the Commonwealth Agreement.

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- (ii) reduce the amount of Commonwealth Funding;
- (iii) require the Company to repay some or all of the Commonwealth Funding spent Commercialising or utilising Intellectual Property contrary to the requirements of clause 11 of the Commonwealth Agreement; or
- (iv) exercise any right it may have under the Commonwealth Agreement including termination under clause 19 of that agreement.

33.2 Procedures for publication of Contract Material

Subject to clause 41, each Participant must at all times during the Funding Period have in place and adhere to documented procedures to ensure that, before any Contract Material is published or disclosed to any person other than the Commonwealth, a Participant or the Company, consideration is given to the potential prejudice to the subsistence or Commercialisation of any Intellectual Property in that material, including the possibility that publication or disclosure might preclude the grant of a patent or cause the loss of Intellectual Property. Nothing in this clause prevents a Participant from publishing Contract Material where the Participant has a statutory obligation to do so.¹²⁹

33.3 Endeavours to Commercialise Intellectual Property in Contract Material

Each **Party** must use its best endeavours to ensure that any Intellectual Property in Contract Material developed as part of the Activities (but not including reports or other such Material to be provided to the Commonwealth for the Commonwealth's benefit) is whenever possible Commercialised or otherwise utilised.¹³⁰

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33.4 Consistency

Each **Party** must ensure that any Commercialisation or utilisation of Intellectual Property in Contract Material, including by any third party, is consistent with the nature of the Activities and the purpose of the Commonwealth Funding and undertaken in accordance with the Commercialisation and Utilisation Plan described in Schedule 1 of the Commonwealth Agreement.¹³¹

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34. Commonwealth Confidential Information¹³²

34.1 No disclosure without approval

Subject to clause 34.3, each Participant must not disclose any Commonwealth Confidential Information to a third party, other than to another Participant, the Company or a Supporting Participant, for the purposes of undertaking the Activities, without the prior written approval of the Commonwealth.

34.2 Conditions of approval

Each Participant acknowledges and agrees that:

¹²⁹ Reproduces clause 11.3, with the exception provided (see Schedule 8, Cth Agreement).

¹³⁰ Reproduces clause 11.4 of the Commonwealth Agreement.

¹³¹ Reproduces clause 11.7 of the Commonwealth Agreement.

¹³² Reproduces clause 14 of the Commonwealth Agreement.

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- (a) in giving written approval, the Commonwealth may impose conditions as it thinks fit, and each Participant agrees to comply with the conditions;
- (b) the Commonwealth may at any time require the Participant to arrange for any person engaged in, or in relation to, the performance or management of this agreement, to give written undertakings, in a form required by the Commonwealth, relating to the non-disclosure of Commonwealth Confidential Information;
- (c) if the Participant receives a request under paragraph (b) above, it must promptly arrange for all required undertakings to be given.

34.3 Non-application of confidentiality obligations

The obligations on the Participants under this clause will not be taken to have been breached if the Commonwealth Confidential Information:

- (a) is disclosed by the Commonwealth to the responsible Minister;
- (b) is disclosed by the Commonwealth in response to a request by a House or Committee of the Parliament of the Commonwealth of Australia;
- (c) is required by law to be disclosed; or
- (d) is in the public domain otherwise than due to a breach of this clause.

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34.4 No limitation

Nothing in this clause limits a Participant's obligations under clause 38 or clause 39.

35. Relationship with Commonwealth

Each Participant must not:

- (a) by virtue of this agreement, be or for any purpose be deemed to be, an employee, partner or agent of the Commonwealth;
- (b) represent itself, and must ensure that its employees, partners, agents or sub-contractors do not represent themselves, as being the Commonwealth's employees, partners or agents.

36. Compliance with law and policy

36.1 Agreement to comply with law

Each Participant must in carrying out this agreement, comply with the provisions of any relevant statutes, regulations, by-laws and requirements of any Commonwealth, State, Territory or local authority.

36.2 Acknowledgment of effect of Criminal Code etc.

Each Participant acknowledges that:

- (a) Chapter 7 of the Criminal Code provides for offences which attract substantial penalties, including theft of Commonwealth property and other property offences, obtaining property or financial advantage by deception, offences involving fraudulent conduct, bribery, forgery and falsification of documents;

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- (b) it is aware that giving false or misleading information is a serious offence under the Criminal Code;
- (c) the publication or communication of any fact or document by a person which has come to their knowledge or into their possession or custody by virtue of the performance of this Contract (other than a person to whom the Participant is authorised to publish or disclose that fact or document) may be an offence under section 70 of the *Crimes Act 1914*, punishment for which may be a maximum of two years imprisonment;
- (d) in respect of data, including personal information, held in connection with this agreement, any unauthorised and intentional access, destruction, alteration, addition or impediment to access or usefulness of the data stored in any computer in the course of performing this agreement is an offence under Part 10.7 of the Criminal Code which may attract a substantial penalty, including imprisonment;
- (e) it is aware of the provisions of section 79 of the *Crimes Act 1914* relating to official secrets; and
- (f) it is aware of its obligation under the *Charter of The United Nations Act 1945* and the Charter of United National (Anti-Terrorism Measures) Regulations 2002.

36.3 Obligations relating to officers etc.

Each Participant undertakes with respect to any officer, employee, agent or subcontractor who will have access to documents, materials or information within the meaning of section 79 of the *Crimes Act 1914* that prior to having access the officer, employee, agent or subcontractor will first be required by the Participant to provide the Participant with an acknowledgment that the officer, employee, agent or subcontractor is aware of the provisions of the section.

36.4 Other legislation

Each Participant must:

- (a) comply with its obligations, if any, under the *Equal Opportunity for Women in the Workplace Act 1999*;
- (b) in its dealings with its employees, have due regard to Commonwealth policies on employment, including the *Workplace Relations Act 1996*, and obligations under relevant occupational health and safety laws.

37. Safe and ethical research

37.1 Compliance with codes

When research in Australia is conducted on or involving humans or animals, each Participant, in relation to any such research conducted by the Participant for the Centre, must ensure that the research complies with, and that it observes, all relevant ethics codes and guidelines adopted by the National Health and Medical Research Council, the Office of the Gene Technology Regulator and all other relevant regulatory agencies operating in Australian and any place in which the research is being conducted being codes and guidelines in force from time to time during the Term, including requirements to obtain prior approval in writing (including from any relevant ethics committee) that the research to be undertaken is so compliant.

37.2 Assistance to Commonwealth

Each Participant must assist the Company to comply with clause 28.2 of the Commonwealth Agreement.

37.3 Ionising radiation

When conducting research in Australia which involves the use of ionising radiation, each Participant must ensure that persons performing procedures involving ionising radiation are appropriately trained and hold a relevant current licence from the appropriate State authority.

37.4 Evidence of compliance

Whenever reasonably required by the Company or the Commonwealth, each Participant must promptly furnish to the Company or the Commonwealth written evidence of compliance with the requirements of this clause.

38. Privacy

38.1 Agreement to comply with privacy law

Each Participant agrees to comply with its obligations, if any, under:

- (a) the Privacy Act 1988 (Cth); and
- (b) a privacy law of a State or Territory,

(Privacy Legislation).

38.2 Procedures

Subject to clause 38.1, where a Participant has no obligations under the Privacy Legislation, that Participant agrees to ensure that it has procedures in place to deal with Personal Information received, created or held by it for the purposes of this agreement which comply at a minimum with the National Privacy Principles under the *Privacy Act 1988 (Cth)*.

38.3 Obligations

Each Participant agrees:

- (a) to use Personal Information received, created or held by it for the purposes of this agreement only to fulfil its obligations under this agreement;
- (b) to ensure that any person whom it allows to access Personal Information which is received, created or held by the Participant for the purposes of this agreement is made aware of, and undertakes in writing, to comply with the requirements of this clause 38;
- (c) to ensure that any subcontract made by it in connection with this agreement contains enforceable obligations requiring the subcontractor to comply with the obligations in this clause, as if the subcontractor were the Participant; and
- (d) to cooperate with reasonable requests or inquiries made by the Federal Privacy Commissioner or the Commonwealth in relation to the management of Personal Information by it in connection with this agreement.

Part K Other matters

39. Records and access

39.1 Maintenance of records

Each Participant must:

- (c) ensure its records and accounting books in relation to the Activities are maintained in accordance with applicable Australian accounting standards and controls; and
- (d) either maintain such records and accounting books for a period 7 years after the termination of this agreement or deliver them to the Company or other person as directed by the Company.

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39.2 Access to premises and records

Each Participant must:

- (a) ensure that at all reasonable times it provides the Commonwealth and its agencies (including the persons outlined in clause 26 of the Commonwealth Agreement) with:
 - (i) reasonable access to its premises, records and staff; and
 - (ii) reasonable assistance to:
 - (A) inspect the performance of the Participant;
 - (B) locate and inspect records; and
 - (C) make copies of records and remove those copies, relevant to the operations of the Centre as it applies to that Participant;¹³³
- (b) at all reasonable times allow the Company and its directors, officers, employees, agents and contractors to:
 - (i) access the part of the Participant's premises where the Activities are being conducted and view the performance of the Project; and
 - (ii) access, inspect and copy material, records, accounts and other financial material relevant to the Activities, including for the purposes of an audit; and
- (c) ensure that any sub-contract entered into by it for the purpose of this agreement contains an equivalent clause granting the rights specified in this clause 39.

39.3 Limitation on access

Notwithstanding clause 39.2(b), a Participant granting access (**Host**) to the Company, or its directors, officers, employees, agents or contractors, may impose as a condition, that the Company directors, officers, employees, agents and contractors and execute an agreement, in a form acceptable to the Host, which:

- (a) sets out reasonable terms of the visit, including compliance with the Host's reasonable policies and guidelines;

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¹³³ Reproducing relevant section of clause 26 of the Commonwealth Agreement.

- (b) contains reasonable obligations of confidentiality and non-disclosure that protect the interests of the Host;
- (c) reasonably addresses the liability of the Parties in the event of injury to the Company or its directors, officers, employees, agents or contractors while visiting the premises; and
- (d) contains obligations of compliance with relevant security and workplace health and safety legislation.

39.4 Commonwealth right of access¹³⁴

The Commonwealth's rights referred to in clause 39.2(a) are subject to:

- (a) the provision of reasonable prior notice to the Participant; and
- (b) reasonable security and safety procedures of the Participant,

except that paragraph (a) will not apply if a matter is being investigated which, in the opinion of a member of the National Investigations Unit in the Department, or any person authorised in writing by the Secretary, may involve an actual or apprehended breach of the law.

40. Student involvement

Participants who have enrolled students who are involved in the Activities, or who have students under their supervision, acknowledge and agree that:

- (a) they must ensure that those students comply with clause 42 (Confidential Information);
- (b) they must ensure that Centre IP developed by the student is owned in accordance with clause 22 (Centre IP), provided that the student will own the copyright in his or her thesis;
- (c) the only restrictions on publishing a student's thesis will be those reasonably necessary to protect Party Confidential Information, Background IP, Centre IP or Centre Confidential Information;
- (d) the Company will not inhibit the right of a student to have his or her thesis examined, but an examiner may be required to sign a confidentiality agreement to protect Confidential Information; and
- (e) before a student becomes involved in any Activities, the Company may require that the student and the institution in which the student is enrolled enter into a written agreement, in a form approved by the Company, setting out the terms on which the student is involved in the Activities, which shall be consistent with the principles in this clause 40.

41. Publications

41.1 Publication of information or material

The Parties acknowledge that the dissemination of knowledge is an important function of the Centre. Nonetheless, the Parties shall not publish any information or material arising from the Activities except in accordance with this clause 41.

¹³⁴ Reproducing rights and obligations under clause 26 of the Commonwealth Agreement.

41.2 Publication by the Company

The Company may publish information or material arising from the Activities if it decides at its absolute discretion that the benefits of publication, having regards to the Centre Objectives, outweigh any potential loss of commercially valuable Intellectual Property rights or other potential disadvantage for the Company or the Centre.

41.3 Request for permission

At least 30 days prior to any submission for publication, a Participant wishing to publish information or material arising from the Activities (**Requesting Party**) must forward a request in writing to the Company, seeking permission to publish the information or material, and specifying in the request any Centre IP or Centre Confidential Information contained or referred to in the proposed publication.

41.4 Notification

The Company must notify the Requesting Party of its decision as to publication of the relevant information or materials within 30 days of receipt of a request. The Company's permission may be subject to any conditions that the Company may reasonably impose, including a requirement that the publication comply with any relevant provisions of the Commonwealth Agreement, and include acknowledgments of:

- (a) the Centre's role in and contribution to the creation of the information or material in the publication; and
- (b) the Requesting Party's affiliation with the Centre.

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41.5 Grant of permission

If the Company decides in its absolute discretion that the benefits of the Requesting Party's publication, having regards to the Centre Objectives, outweigh the potential loss of commercially valuable Intellectual Property rights or other potential disadvantage for the Company or the Centre, then the Company will notify the Requesting Party that permission to publish has been granted, and notify the other Parties to that effect.

41.6 Declining permission

If the Company decides in its absolute discretion that the benefits of publication, having regards to the Centre Objectives, do not outweigh the potential loss of commercially valuable Intellectual Property rights or other potential disadvantage for the Company or the Centre, then the Company will notify the Requesting Party to that effect, giving reasons for the decision, and either:

- (a) suggest alterations to the publication so that it does not disclose information affecting the commercially valuable Intellectual Property rights; or
- (b) if altering the publication is impractical, delay publication for a stipulated period not as determined by the Governing Board, but not exceeding 18 months from the date of the request in the case of a student thesis.

41.7 Party Confidential Information

Notwithstanding the other provisions of this clause 41, no Party may publish any information or material containing Party Confidential Information of a Party unless authorised by that Party or unless an exception in clause 42.3 applies.

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41.8 Recognition

Subject always to clause 44, each Participant must ensure that any publication which it makes pursuant to this clause 41 acknowledges the contributions (if any) made by other Participants and the support of the Commonwealth and the Company:

- (a) unless directed otherwise by a Participant to be acknowledged or by the Commonwealth or the Company (as the case requires); and
- (b) provided that a Participant may not use the logo of any other Party without the prior written consent of that Party.

42. Confidential information

42.1 Obligation

Except as otherwise provided in this clause 42, each Party must keep confidential and not disclose any Confidential Information.

42.2 Permitted use and disclosure

Each Party may:

- (a) use Confidential Information only for the purposes of this agreement;
- (b) if the Party is the Company, use and disclose Centre Confidential Information as required at its discretion for the purposes of this agreement or otherwise for the purposes of the Centre Objectives;
- (c) disclose Confidential Information to its:
 - (i) employees;
 - (ii) directors and officers; and
 - (iii) legal, financial or other professional advisers
 - who have a need to know for the purposes of this agreement (and only to the extent that each has a need to know), provided the disclosure is made subject to an obligation of confidentiality in accordance with clause 42.6;
- (d) use and disclose Confidential Information where authorised under Project Details;
- (e) disclose Confidential Information to the extent required by law; and
- (f) if the Party is the Commonwealth, disclose Confidential Information to its responsible Minister or in response to a request by a House or a Committee of the Parliament.

42.3 Exceptions

- (a) The obligations imposed on a Party by this clause 42 will not apply to Confidential Information which:
 - (i) prior to disclosure is in the public domain or subsequent to disclosure to the Party becomes part of the public domain other than as a result of an unauthorised act or failure to act by that Party;

- (ii) 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 any Party;
 - (iii) is independently developed by an employee or officer of the Party owing the obligation of confidentiality while having no knowledge of the Confidential Information;
 - (iv) in the case of Party Confidential Information, the Party claiming confidentiality has agreed may be disclosed by that other Party; or
 - (v) in the case of Centre Confidential Information, the Company has agreed may be disclosed by that other Party.
- (b) A Party is not obliged to maintain the confidentiality of its own Party Confidential Information.

42.4 Onus

The receiving Party has the onus of showing that any of the above exceptions apply.

42.5 Combination of information

A combination of information will not be taken to be in the public domain merely because it contains information in the public domain.

42.6 Employees

Each Party must use its reasonable efforts to ensure that:

- (a) its respective employees, directors, officers and advisers who participate in the Activities or acquire access to Confidential Information, must comply with the obligation of confidentiality under this clause 42 as though Parties to this agreement; and
- (b) any of the above mentioned employees, directors, officers and advisers who cease to be employees, directors, officers or advisers must continue to be bound by such obligations of confidentiality.

42.7 Survival

The obligations of confidentiality imposed on a Party will survive termination of this agreement or the Party's expulsion or retirement from the Centre.

43. Public announcements

The Company is principally responsible for making public announcements about the Centre and a Participant must not make any public announcement in relation to the Centre or this agreement without obtaining the Company's approval, except if required by law or a regulatory body (including a relevant stock exchange), in which case the Participant required to make an announcement must, to the extent practicable, first consult with and take into account the reasonable requirements of the Company and each other Participant.

44. Use of Party's name & CRC Indicia

44.1 Use of Party's name

A Party must not use the name or logo of any other Party without the prior written consent of that other Party.

44.2 Sub-licence to use CRC Indicia¹³⁵

- (a) The Company grants each Participant a non-exclusive licence to use the CRC Indicia, during the Funding Period, subject to any reasonable conditions required by the Commonwealth (as notified by the Company to the Participants).
- (b) Unless otherwise agreed in writing with the Company, during the Funding Period, each Participant must ensure that all publications and publicity by the CRC use the CRC indicia prominently, in any manner specified by the Commonwealth (as notified by the Company to the Participants), from time to time.
- (c) Unless otherwise agreed in writing with the Company:
 - (i) at the end of the Funding Period, each Participant must cease using the CRC Indicia; or
 - (ii) at the time that a Participant is expelled or retires from the Centre, that Participant must cease using the CRC Indicia.
- (d) During the Term, each Participant must ensure that all publications (including reprints) and publicity relating to the Activities of the CRC, whether published by the Participant or other persons:
 - (i) contain an acknowledgment as is required by the Commonwealth (as notified by the Company to the Participants from time to time) of the funding of the Activities of the CRC by the Australian Government; and
 - (ii) refer to the CRC Programme.

45. Conflicts

45.1 Definition of Conflict

For the purposes of this clause 45, **Conflict** means any matter, circumstance, interest, or activity affecting a Party (including the officers, employees, agents and subcontractors of the Party) which may or may appear to impair the ability of the Party (**Affected Party**) to carry out its part of the Activities diligently and independently in accordance with this agreement.

¹³⁵ The previous version of the template did not require a separate sub-licence of the CRC Indicia as each Participant was granted a licence under the Commonwealth Agreement. We have inserted a sub-licence here to ensure that the Participants can use the CRC Indicia, subject to these terms and conditions.

45.2 Warranty¹³⁶

- (a) Each Party warrants to the other Parties that, to the best of its knowledge after making diligent enquiries, at the date of signing this agreement no Conflict exists or is likely to arise in the performance of that Party's obligations under this agreement.
- (b) For the avoidance of doubt, any Conflict declared by a Participant is not material where researchers in the Participant organisation conduct research in competition with the Centre if:
 - (i) those researchers are not part of the Centre; and
 - (ii) the researchers have not received Confidential Information related to the Centre.

45.3 Dealing with Conflict

If, a Conflict arises, or appears likely to arise, the Affected Party agrees to:

- (a) notify the other Parties immediately;
- (b) subject to any obligations to maintain confidentiality, make full disclosure of all relevant information relating to the Conflict to the other Parties; and
- (c) take such steps as the Company may reasonably require to resolve or otherwise deal with the Conflict.

45.4 Register of Conflicts

The Company will maintain a register of Conflicts disclosed under this agreement.

46. Dispute resolution

46.1 No arbitration or court proceedings

If a dispute arises out of this agreement (**Dispute**), a Party must comply with this clause 46 before starting arbitration or court proceedings (except proceedings for interlocutory relief).

46.2 Notification

A Party claiming a Dispute has arisen must give the other Parties to the Dispute notice setting out details of the Dispute.

46.3 Parties to resolve Dispute

During the 14 days after a notice is given under clause 46.2 (or longer period if the Parties to the Dispute agree in writing), each Party to the Dispute must use its reasonable efforts to resolve the Dispute. If the Parties cannot resolve the Dispute within that period, they must either:

- (a) if the Dispute relates to a matter of valuation, refer the Dispute to a valuer in accordance with clause 46.4; or
- (b) refer the Dispute to a mediator if one of them requests.

¹³⁶ This clause is amended to reproduce the warranty set out in clause 13.1(a) of the Commonwealth Agreement, with the exception listed in Schedule 8 of the Commonwealth Agreement.

46.4 Independent valuation

If the Dispute relates to a matter of valuation the Dispute will be determined by a valuer agreed by the Parties involved in the Dispute or otherwise appointed by the President or acting President of the Institute of Chartered Accountants in Australia.

46.5 Appointment of mediator

If the Parties to the Dispute cannot agree on a mediator within seven days after a request under clause 46.3, the chairman of LEADR or the chairman's nominee will appoint a mediator.

46.6 Role of mediator

The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in writing.

46.7 Confidentiality

Any information or documents disclosed by a Party under this clause 46:

- (a) must be kept confidential; and
- (b) may only be used to attempt to resolve the Dispute.

46.8 Costs

Each Party to a Dispute must pay its own costs of complying with this clause 46. The Parties to the Dispute must equally pay the costs of any mediator.

46.9 Termination of process

A Party to a Dispute may terminate the dispute resolution process by giving notice to each other after it has complied with clauses 46.1 to 46.3. Clauses 46.7 and 46.8 survive termination of the dispute resolution process.

47. GST

47.1 Meaning of words

In this clause 47:

- (a) **GST exclusive consideration** means the consideration payable or to be provided for a Supply, but for the application of this clause 47;
- (b) **Recipient** means a Party to whom a Supply is made;
- (c) **Supply** means a supply made under or in connection with this agreement;
- (d) **Supplier** means a Party making a Supply; and
- (e) words or expressions that are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 47.

47.2 Presumption

Any consideration to be paid or provided for a Supply, unless specifically described in this agreement as 'GST-inclusive', does not include an amount on account of GST.

47.3 Gross-up

Despite any other provision in this agreement if a Supplier makes a Supply on which GST is imposed (not being a Supply the consideration for which is specifically described in this agreement as 'GST-inclusive'):

- (a) the GST-exclusive consideration for that Supply, is increased by, and the Recipient must also pay to the Supplier, an amount equal to the GST-exclusive consideration multiplied by the prevailing rate of GST; and
- (b) the amount by which the GST-exclusive consideration is increased under clause 47.3(a) must be paid to the Supplier by the Recipient without set-off, deduction or requirement for demand, at the same time as the GST-exclusive consideration is payable or to be provided.

47.4 Reimbursement or indemnification

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

47.5 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.

48. Force majeure

48.1 Definition

- (a) In this clause 48, a **Force Majeure Event** affecting a Party means, subject to clause 48.1(b), anything outside that Party's reasonable control including, but not limited to, fire, storm, flood, earthquake, explosion, war, invasion, rebellion, sabotage, epidemic, labour dispute, labour shortage and failure or delay in transportation and act or omission (including laws, regulations, disapprovals or failures to approve) of any third person (including but not limited to, subcontractors, customers, governments or government agencies).
- (b) If a Party to this agreement is a government agency it will not be within the reasonable control of that Party merely because that Party is part of the government that has the legal capacity to perform an act or omission that may otherwise constitute a Force Majeure Event.

48.2 Suspension of obligation

Where a Party is unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation under this agreement (other than an obligation to pay money), and that Party:

- (a) gives each other Party prompt notice of that Force Majeure Event 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 affected by the Force Majeure Event during the continuance of that Force Majeure Event and that Party will be allowed a reasonable extension of time to perform its obligations.

48.3 Parties to meet

If, after 30 days, the Force Majeure Event has not ceased, the Parties will meet in good faith to discuss the situation and endeavour to achieve a mutually satisfactory resolution.

48.4 Exceptions

Nothing in this clause 48:

- (a) affects any obligation to pay money; or
- (b) requires the settlement of strikes, lockouts or other labour disputes or claims or demands on terms contrary to the Rules or policies of the Party affected.

49. Notices and other communications

49.1 Service of notices

A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or facsimile to the recipient's address for Notices specified in the General Details, as varied by any Notice given by the recipient to the sender.

49.2 Effective on receipt

A Notice given in accordance with clause 49.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

50. General

50.1 Approvals and consents

Except where this agreement expressly states otherwise, a Party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this agreement.

50.2 Assignment

No Party may assign or attempt to assign or otherwise transfer or encumber any right or obligation arising out of this agreement except with the written consent of the other Parties.

50.3 Sub-contracting

A Party shall not sub-contract the performance of a substantial part of the Activities of the Centre, except with the prior approval of the Company.

50.4 Costs

Each Party must pay its own costs of negotiating, preparing and executing this agreement.

50.5 Survival

The continuing obligations described in clause 32 are independent and survive termination of this agreement. Any other term by its nature intended to survive termination of this agreement survives termination of this agreement.

50.6 Counterparts

This agreement may be executed in counterparts. All executed counterparts constitute one document.

50.7 No merger

The rights and obligations of the Parties under this agreement do not merge on completion of any transaction contemplated by this agreement.

50.8 Entire agreement

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

50.9 Further action

Each Party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this agreement and any transaction contemplated by it.

50.10 Severability

A term or part of a term of this agreement that is illegal or unenforceable may be severed from this agreement and the remaining terms or parts of the terms of this agreement continue in force.

50.11 Waiver

A Party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the Party giving the waiver.

50.12 Governing law and jurisdiction

This agreement is governed by the law of the Applicable Jurisdiction and each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Applicable Jurisdiction.

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Signing page

Signed **[insert]** by an authorised officer in the presence of

Signature of officer



Signature of witness



Name of officer (print)

Name of witness (print)

Office held

Signed for **[insert]** by an authorised officer in the presence of

Signature of officer



Signature of witness



Name of officer (print)

Name of witness (print)

Office held

Signed for **[insert]** by an authorised officer in the presence of

Signature of officer



Signature of witness



Name of officer (print)

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Schedule 1 - Centre Details

Item	Issue	Clause Ref	Details
1.	Name of the CRC	Background C	'Cooperative Research Centre for <i>[insert]</i>
2.	Commencement Date	Clause 2	<i>[insert date upon which the CRC will commence]</i>
3.	Centre Field	Clause 5.1	<i>[insert a description of the field of research that is the focus of the CRC]</i>
4.	Nominated Commonwealth Agreement Clauses	Clause 3.2	<i>[insert list of clauses from the Commonwealth Agreement]</i>
5.	Special Majority Issues	Clause 4.6	<i>[Insert Company issues requiring special majority approval of Company members under clause 4.6]</i> ¹³⁷
6.	Variation Agent	Clause 7.2	<i>[Insert names of parties who do not authorise the company to be their variation agent]</i>
7.	Majority required to admit new Participant	Clause 29.1	<i>[insert required percentage. eg. 75%, or unanimous]</i>
8.	Initial Projects	Clause 16.6	The Projects that are the subject of Project Details (including Third Party Project Agreements if there are third parties participating) entered into contemporaneously with this agreement are: <i>[insert names of projects]</i>
9.	Applicable Jurisdiction	Clause 50.12	<i>[insert the name of the State or Territory whose law will govern this agreement]</i>
10.	Valuation Principles	Clause 17.2(d)	<i>[insert agreed principles for valuation of non-cash Contributions to Projects]</i> ¹³⁸
11.	<u>Capital Item</u>	<u>Clause</u> 11.1	<i>[insert details of the Capital Items listed in Schedule 3 of the Commonwealth Agreement]</i>

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¹³⁷ Examples of the major issues that CRCs may decide to include as Special Majority Issues are set out in the Attachment.

¹³⁸ These principles are important, given that voting rights at Company meetings and (in the case of the non-tax exempt model) shares of ownership of Project IP are dependent on such valuations.

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Attachment

[For considering what issues might be included in items 5 of Schedule 1]

Things requiring Special Majority Approval of Shareholders (clause 4.6)

12. (Establishment of Commercialisation company) Establishment or acquisition of a controlling interest in an entity to Commercialise Centre IP.

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13. (Expulsion of a Member) Expulsion of a Member other than in accordance with this Agreement.

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14. (New Directors) Appoint a Director (except as permitted by the Participants Agreement).

15. (Remuneration of Directors) Increase the remuneration payable to Directors.

16. (Bonuses) Pay any executive, profit or other bonus to a Director, Increase the remuneration payable to Directors.

17. (Winding up) Take a step to dissolve or wind up the Company.

18. (Change in nature of Business) Carrying on activities that are inconsistent with clause 5.1 (Objectives).

19. (Overseas presence) the registration or recognition as a body corporate in any place outside Australia.

20. (Company type) Change the type of the Company.

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Schedule 2 - Activities

Repeat the description of Activities that appears in the Commonwealth Agreement

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Schedule 3 - Template Project Details¹³⁹

Item	Issue	Clause Ref	Details
1.	Project Participants	1.1	
2.	Responsible Participants	1.1, 17, 18	
3.	Specified Division	18.6	
4.	Project Funds	17	
5.	Project Contributions	17.2	Amount per Project Party Timing for Contribution Manner of payment
6.	Background IP	15	Description ¹⁴⁰ : Warranties Restrictions
7.	Project Shares [delete this item 7 from this Schedule if option 2 in clause 22.1 is selected]	22.1	Company ¹⁴¹ Project Participants (subject to variation under clause 0) ¹⁴²
8.	Commercialisation Plan	23.4(f)	Risk Position Share of Commercialisation Income
9.	Use Field	1.1 22.15	

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¹³⁹ This is a list of issues that should be addressed. It is not a document that needs to be signed (although that is a matter for the Project Participants).

¹⁴⁰ This should include descriptions of 'know how' (without destroying any confidentiality that applies).

¹⁴¹ The Company share or a Project Participant's share can be specified as nil if required. The ATO has expressed a non-binding view that a participant is unlikely to be entitled to the R&D tax concession if the participant cannot show that its share of Project IP and other benefits is not commensurate with its contribution. Therefore there is a risk that entitlement to a share of the Commercialisation income by the Company may result in the taxpaying Project Participants not being entitled to the R&D concession. Project Participants should seek specialist advice and/or obtain a tax ruling.

¹⁴² The formula set out in clause 0 may be appropriate to use to determine the Project Participant's Project Shares.

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10.	Use Field Conditions	22.15	
11.	Risk position where withdrawal from involvement in Commercialisation	23.4 23.5	[Project Participant that has withdrawn from Commercialisation of particular Project IP in accordance with clauses 23.4 or 23.5 might be required to indemnify the withdrawing Project Participant. You may wish to have a different position for withdrawals under 23.4 versus withdrawals under 23.5]
12.	Rights to Net Commercialisation Income where withdrawal from involvement in Commercialisation [delete this item 12 from this Schedule if option 2 in clause 22.1 is selected]	23.4 23.5	[State whether or not a Project Participant's rights to a share of Net Commercialisation Income will reduce if its withdraws from Commercialisation, and if so by how much or by what formula. Your approach to whether income rights reduce may depend on whether and to what extent risk has reduced under item 14 (otherwise there may appear to be an incentive to withdraw). eg. if a broad indemnity is granted in item 11, it may be reasonable to state that the share is to reduce to nil or by some large % with respect to the particular Project IP. You may wish to have a different position for withdrawals under 23.4 versus withdrawals under 23.5]
13.	Project Plan	16.4	[Note: this is likely to be a separate attachment] Plan should include, as a minimum, the following details specified in clause 16.4: <ul style="list-style-type: none"> (a) the Project Leader; (b) the Project commencement date and completion date; (c) the Project objectives; (d) the proposed strategy to be followed; (e) potential outcomes; (f) Project milestones; (g) Project deliverables; (h) a Project budget; (i) contributions to be made by third parties; (j) resource requirements, including Contributions, Background IP, Centre Funds; (k) student requirements (if any); (l) required expenditure on new Assets

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			<p><i>(if any);</i></p> <p><i>(m) an analysis of Project risk; and</i></p> <p><i>(n) an analysis of the likely opportunities for Commercialisation of potential Project outcomes.</i></p>
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Schedule 4 – Participant's Contributions

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