

Collaboration Agreement

Australian Research Collaboration
Service to facilitate long-term
eResearch

Australian Centre for Advanced Computing and
Communication Pty Ltd (**ac3**)

The Australian National University (**ANU**)

Commonwealth Scientific and Industrial Research
Organisation (**CSIRO**)

iVEC - The hub of advanced computing in Western Australia
(**iVEC**)

eResearch SA (**eRSA**)

Tasmanian Partnership for Advanced Computing (**TPAC**)

Victorian Partnership for Advanced Computing Limited
(**VPAC**)

(known collectively as the “Parties”)

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Details

Date

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(Collectively “the Parties”)

Descriptive preamble

- A. The Australian Research Collaboration Service (ARCS) (**the Collaboration**) is an unincorporated collaborative venture to provide long-term eResearch support to the Australian research community with activities that include, but are not limited to, the provision of interoperability and collaboration infrastructure and services. During the Interoperation and Collaboration Infrastructure (**ICI**) Funding Period, this will be achieved in a manner that is consistent with the aims of the National Collaborative Research Infrastructure Strategy (**NCRIS**) Programme, and specifically the Platforms for Collaboration's (PfC) ICI programme. The Collaboration is intended to be an enduring arrangement for the national delivery of these services well into the future and certainly beyond the ICI Funding Period.
- B. The Collaboration is a collaboration of equals and the original Parties are a number of the original APAC partners and CSIRO. The original Parties have an established track record of successful collaboration in the provision of e-Research support and services.
- C. The Parties acknowledge that they have a role and responsibility to:
- (a) deliver efficiently and effectively eResearch support services to the broad Australian research community so as to assist and enhance research outcomes;
 - (b) maintain a service-oriented approach to the research community that they serve;
 - (c) promote eResearch adoption and "best practices" within their own constituencies (the States or organizations that they represent);
 - (d) recognize each other as the eResearch infrastructure and service providers who have joined in this Agreement for the reasons set out in Schedule 2;
 - (e) collaborate constructively and proactively with each other, while recognizing that each Party has unique organizational structures, resources, goals and a community that they serve as a first responsibility; and
 - (f) recognize that therefore Collaboration exists solely to provide services to the research community, and so that community must be engaged at all levels in determining services and projects and evaluating the ongoing performance of the Collaboration.
- D. The Collaboration will be governed by an Executive Committee. The Executive Director will be an ex-officio member of the Executive Committee. Each Party will have a nominated representative member on the Executive Committee, who would normally be a Party CEO or Director.
- E. The Collaboration will at all times carry out its legal business through a nominated "Lead Agent". During the ICI Funding Period, the services to be provided by the Collaboration will be funded in large part by the Commonwealth, under the ICI program. VPAC has been nominated, and has agreed to act, as the initial Lead Agent. The Lead Agent will, at all times, act under the direction of the Executive Committee when carrying out any of its obligations in its role as Lead Agent and as needed will hold assets of the

Collaboration on behalf of all of the Parties. From time to time, the designated Lead Agent of the Collaboration may be changed by a more than 75% majority vote of the Parties, provided that the requirements of any Authorised Agreement are satisfied.

- F. This Agreement establishes the Collaboration and sets out the terms under which it will operate and is drafted to take into account several characteristics which the Parties wish the Collaboration to have, namely:
- (a) simplicity and flexibility so as to be not overly prescriptive, as the Collaboration is expected to evolve significantly as eResearch is rapidly evolving;
 - (b) IP creation will largely be a by-product of the provision of services (as the Collaboration is expected to focus primarily on service delivery);
 - (c) parties may, from time to time, evolve into new entities or leave the Collaboration; and
 - (d) it is envisaged that new Parties, representing new constituencies, and Affiliates should be encouraged to join, subject to adherence to the terms of this Collaboration Agreement, although the roles, terms and conditions of Affiliates will reflect the nature of the Affiliate.

Background

- A. The Commonwealth of Australia, by the provision of financial assistance to the Collaboration under the NCRIS Programme, wishes to assist with the provision of major research facilities, supporting infrastructure and networks necessary for world-class research in Australia.
- B. The objectives of the NCRIS Programme are to:
 - (a) provide researchers in Australia with open access to state of the art interoperation and collaboration infrastructure and facilities;
 - (b) ensure that the research infrastructure supported using funds provides researchers in Australia with the capability to access core grid services;
 - (c) provide necessary training or technical support to users of that infrastructure;
 - (d) ensure effective and efficient operation of the facilities and services; and
 - (e) ensure that relationships with funding agencies and users are successfully managed.
- C. In 2005 and 2006, the NCRIS Committee undertook a process of identifying Australia's strategic infrastructure priorities. As part of that process, PfC were recognised as a key area for future strategic infrastructure funding.
- D. On 27 November 2006, the Minister for Education, Science and Training, announced on behalf of the Commonwealth government, that \$75 million had been provisionally allocated under the NCRIS Programme to support PfC pending the development of a suitable investment plan.
- E. On 13 April 2007, the NCRIS Committee accepted the *NCRIS Investment Plan for Platforms for Collaboration*. The *NCRIS Investment Plan for Platforms for Collaboration* identified specific priorities for PfC and a strategy for implementing them and recommended, amongst other things, ICI as a key area for investment funding for the PfC capability.
- F. VPAC has entered into a funding agreement with the Commonwealth pursuant to which VPAC will receive funds from the Commonwealth (under the NCRIS Programme) to be applied for the purpose of the operation of the ICI (the "**ICI Funding Agreement**").
- G. Under Clause 7A of the ICI Funding Agreement, VPAC may, with the approval of the Commonwealth, enter into a joint venture or consortium arrangement in relation to the operation of the ICI.
- H. The first milestone of the ICI Funding Agreement was that VPAC should submit an establishment plan for the ICI to the Commonwealth for approval. VPAC has submitted an establishment plan to the Commonwealth which has been approved by the Commonwealth (the "**Establishment Plan**").

- I. The Establishment Plan provides that during the Establishment Period, the proposed Parties identified in the ICI Funding Agreement will enter into an agreement for the establishment of a collaboration to operate and further develop the ICI. The Department has agreed to receive the Agreement by no later than 30 October 2007.
- J. In furtherance of the milestone and to satisfy the condition for further funding referred to in Recital H and to provide a mechanism for the Parties to continue their collaboration in relation to the operation and further development of the ICI both now and after funding under the ICI Funding Agreement has come to an end, the Parties wish to establish a collaboration to be known as the Australian Research Collaboration Service.
- K. The Parties have agreed between themselves that their collaboration in relation to the Australian Research Collaboration Service is to be regulated on the terms and conditions set out in this Agreement.

Agreed terms

1 Defined terms and interpretation

1.1 Definitions

In this Agreement:

Activities means the activities set out in Schedule 1, and includes the Projects.

AeRIC means the Australian e-Research Infrastructure Council established by the Department to facilitate the identification, development and delivery across Australia of world-class services and expertise in ways that support e-research within and across all research disciplines.

Affiliate means a person who has entered into an Affiliation Agreement under clause 11.

Affiliation Agreement means an agreement between an Affiliate and the Lead Agent by which the Affiliate agrees to become an affiliate of the Collaboration, such agreement being on terms approved by the Executive Committee.

Agreement means this collaboration agreement and each of the Schedules as varied in accordance with clause 15.

Annual Business Plan has the meaning ascribed to that term in clause 17.1(b)(i);

APAC means an unincorporated collaborative venture known as the Australian Partnership for Advanced Computing funded (in part) by the Commonwealth Government through the Department.

Applicable Jurisdiction means Victoria, Australia.

Authorised Agreement means any agreement entered into by the Lead Agent in relation to the Collaboration provided the entry into such agreement has been authorised in accordance with the provisions of this Agreement (and includes, without limitation, the ICI Funding Agreement).

Background IP means Collaboration Background IP and Project Background IP.

Budget means the budget approved by the Executive Committee each year for the carriage of the Collaboration, including the budget for the costs and expenses of the Lead Agent relevant to the Collaboration and Projects.

Business Day means a day which is not a Saturday, Sunday or government declared public holiday in the city in which the head office of the Lead Agent is located.

Chairperson means the chairperson of the Executive Committee.

Collaboration means the collaborative venture established pursuant to clause 3 and including the Activities and the rights and obligations of the Parties under this Agreement.

Collaboration Background IP means Intellectual Property which a Party has agreed in writing to contribute to the Activities and which has been accepted as a contribution to the Activities by the Lead Agent but always excluding Project Background IP and, for the avoidance of doubt, does not include any IP that is created in the course of carrying out of the Activities.

Collaboration Objectives means the objectives set out in clause 4.1 and, in addition, during the term of the ICI Funding Agreement, the objectives set out in the ICI Implementation Schedule.

Collaboration Share means the proportional entitlement of a Party in the Collaboration determined in accordance with clause 12.

Commencement Date means 1 July 2007.

Commonwealth means the Commonwealth of Australia.

Confidential Information means all information that is not in the public domain and that is by its nature confidential, 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) belonging to or in the custody of the disclosing party.

Constituent Member means, in relation to a Party, if the Party is:

- (a) a company, each member (from time to time) of the company; or
- (b) a participant in an unincorporated joint or collaborative venture and is entering into this Agreement in its capacity as a participant in the joint or collaborative venture each venturer (from time to time) of the joint or collaborative venture.

Contribution in relation to a Party, means all of the money, assets, personnel, facilities and services to be contributed by the Party to the collaboration but does not include any Intellectual Property.

Department means the Commonwealth Department of Education, Science and Training or any Commonwealth Government Department which is the successor to it in relation to the NCRIS Program.

Executive Committee means the committee established under clause 8.

Executive Committee Member means a person who is, from time to time, a member of the Executive Committee.

Executive Committee Special Resolution means a decision requiring a 75% majority vote of the Executive Committee in favour of such resolution to be a valid and binding decision of the Executive Committee.

Executive Director means the person who is, from time to time, appointed as the chief executive officer of the Collaboration under clause 9.1.

Financial Year means the period of time commencing 1 July of any calendar year and concluding 30 June of the immediately succeeding calendar year.

ICI Funding Agreement means the NCRIS PfC ICI agreement between VPAC and the Commonwealth dated 22 June 2007.

ICI Funding Period means the ICI Project Period (as defined in the ICI Funding Agreement, Schedule 1, Item D).

ICI Implementation Schedule means the schedule set out in Schedule 3.

ICI Project has the same meaning as the term Project in the ICI Funding Agreement.

Implementation Plan means a document setting out the details of certain activities forming part of the Activities which will be undertaken as a part of the Collaboration and terms upon which those activities will be taken out (including, without limitation, the terms upon which any IP provided by a Party as part of, or in, connection with, those activities or generated as a result of those activities will be owned and may be used by the Parties and by third parties) but always excluding the ICI Implementation Schedule.

Independent Member means a person who is not:

- (a) a director, officer or employee of a Party or an Affiliate or of an organisation that is a member of, or venturer or participant in, a Party or an Affiliate;
- (b) currently engaged in providing services to a Party or an Affiliate (whether directly or indirectly); and
- (c) a director, officer or employee of an organisation that is a major source of funding of a Party or an Affiliate.

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.

Lead Agent means in the first instance VPAC and subsequently such other Party appointed in accordance with clause 3.3 to be the lead agent of the Collaboration.

Loss means any and all liability, loss, harm, damage, cost or expense.

Nominated Member means a member of the Executive Committee appointed under clauses 8.2 or 8.3.

Non-ICI Activities means activities other than the ICI Project.

Office means a division of the Lead Agent which will provide administrative services (including human resource management services), financial services, contract and legal services and information technology support services in relation to the Collaboration and the Activities.

Project means a discrete, time-bounded research project identified and described in Schedule 1, which forms the subject of a Project Agreement and which has been approved by the Executive Committee or its delegate in accordance with this Agreement.

Project Agreement means an agreement entered into between one or more Parties (which may also include a third party) setting out the terms upon which a Project will be funded and carried out.

Project Background IP means:

- (a) the Intellectual Property specified in a Project Agreement that a Project Party has agreed to contribute as Intellectual Property to the Project, the subject of the Project Agreement; and
- (b) any other Intellectual Property that a Project Party has offered to contribute as Background IP for a Project which has been agreed in writing by all Project Parties as constituting 'Background IP' for the Project,

and, for the avoidance of doubt, does not include any IP that is created in the course of carrying out of the Activities.

Project Party means, in relation to a Project, that is:

- (a) the subject of a Project Agreement, a Party or a third party that is a party to the Project Agreement; and
- (b) not the subject of a Project Agreement, a Party that contributes Intellectual Property to, or participates in the carrying out of the Project.

Schedules mean the schedules to this Agreement.

Secretary means the Secretary of the Executive Committee

Simple Majority means in relation to a resolution, the resolution being approved by more than at least 50% of those entitled to vote.

Third Party Claim means any claim, action, proceeding, judgement, damage, loss, cost, expense or liability and whether present, unascertained, immediate, future or contingent, brought by a person who is not a Party (which person may include the Commonwealth).

Third Party Project Agreement means a Project Agreement that has as a party to that Project Agreement a person that is not a Party.

Valuation Principles mean the principles specified in Schedule 4 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 agent or other entity;
- (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 will be performed or an event will occur is not a Business Day, the obligation will be performed or the event will occur on or by the next Business Day;
- (l) headings are for ease of reference only and do not affect interpretation; and
- (m) the Schedules constitute and form part of this Agreement.

1.3 Inconsistencies between the provisions of this Agreement

In the event of an inconsistency between this Agreement and any of the Schedules, any such inconsistencies will be resolved in the following order of priority:

- (a) ICI Schedule (Schedule 3) or any Schedule containing an implementation plan attached to this Agreement as a schedule in accordance with clause 20.5;
- (b) Clauses 1 to 30 (inclusive) of this Agreement; and
- (c) all other Schedules other than those referred to in clause 1.3(a).

1.4 Inconsistencies between the provisions of this Agreement and the provisions of the ICI Funding Agreement

In the event of any inconsistency between the provisions of the ICI Funding Agreement and the provisions of this Agreement (including all Schedules), the provisions of the ICI Funding Agreement will prevail to the extent of the inconsistency.

2 Condition precedent

To the extent that the approval of this Agreement requires or would be assisted by conduct of a Party, that Party will use all reasonable efforts and do all things reasonably necessary to ensure that the approval is given.

3 The Collaboration

3.1 Establishing the Collaboration

The Parties hereby form and agree to constitute themselves in a collaborative venture to be known as the Australian Research Collaboration Service or such other name as may be agreed by all of the Parties in writing.

3.2 Scope of the Relationship

The Parties agree that:

- (a) other than where specifically provided to the contrary in this Agreement, the rights, duties, obligations and liabilities of the Parties in relation to the Collaboration will, in every case, be several and not joint or joint and several;
- (b) the relationship of the Parties is one of collaborative venturers and is limited to carrying out the Activities in pursuit of the Collaboration Objectives so that, except as expressly stated in this Agreement, nothing in this Agreement:

- (i) constitutes a Party as agent, partner or trustee of any other of the Parties;
or
- (ii) creates any agency, partnership or trust for any purpose whatsoever other than for the appointment of the Lead Agent to act on behalf of the Parties;
- (c) in relation to the Collaboration and the Activities, they do not carry on business in common with a view to joint profit and do not receive income jointly;
- (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; and
- (e) except as otherwise specifically provided in this Agreement, liabilities incurred by or on behalf of the Parties for the purposes of the Collaboration or the Activities will be incurred by each Party in proportion to its Collaboration Share.

3.3 Appointment of Lead Agent

- (a) The Parties have appointed VPAC for the time being to be the Lead Agent in relation to the Collaboration. From time to time, the designated Lead Agent of the Collaboration may be changed by a more than 75% majority vote of the Parties (by number), provided that the requirements of any Authorised Agreement are satisfied in relation to such change of Lead Agent.
- (b) The Lead Agent will act, at all times, under the direction of the Executive Committee in relation to its activities as Lead Agent, including the carrying out of the Collaboration business, managing Collaboration finances and entering into contractual arrangements on behalf of the Collaboration.
- (c) The Lead Agent will only enter into any contractual arrangements, in its capacity as Lead Agent, upon being directed to do so by the Executive Committee in accordance with clause 8.15(f).
- (d) The Lead Agent will in addition act as the Lead Agent for the purposes of the ICI Funding Agreement and should any conflict arise, between the obligations of the Lead Agent under this Agreement and the obligations of the Lead Agent under ICI Funding Agreement, the obligations of the ICI Funding Agreement will take precedence and any failure by the Lead Agent to comply with this Agreement in such circumstances, will not constitute a breach of this Agreement.
- (e) The Parties severally assume in equal shares all liability of whatsoever kind incurred by the Lead Agent within the scope of its authority expressly granted under this Agreement in carrying out its obligations as Lead Agent pursuant to the Collaboration including without limitation the costs of doing the same.
- (f) The Parties will co-operate fully with the Lead Agent and do all things necessary or desirable to enable the Lead Agent to comply with the requirements of any Authorised Agreement, including without limitation:

- (i) approving (or where the case requires, procuring their representatives on the Executive Committee to so approve) in a timely fashion all necessary Budgets, plans and other proposals necessary or desirable for the carriage of the Collaboration and the Activities;
 - (ii) providing any other assistance reasonably requested by the Lead Agent from time to time to enable due, proper and timely completion of the Activities and fulfilment of the requirements of the Collaboration and any Authorised Agreement.
- (g) Any appointment or removal of a Lead Agent will be subject to:
 - (i) such appointment or removal complying strictly with the requirements of any Authorised Agreement; and
 - (ii) in the case of removal of a Lead Agent, the continuance of the obligations of the Parties in relation to the responsibilities and liabilities assumed by the Lead Agent in its capacity as Lead Agent pursuant to the Collaboration and the continuance of the obligation to indemnify the Lead Agent pursuant to clause 13.
- (h) If a Party is removed from its role as Lead Agent, the Party will comply with all directives given to it by the Executive Committee in relation to the transfer of its rights, role and responsibility to the Party which will replace it as Lead Agent.
- (i) The Parties unanimously agree that any costs incurred or to be incurred by the Lead Agent in acting as Lead Agent pursuant to the Collaboration (including costs of the secretary) will:
 - (i) in respect of any Activities (the subject of the ICI Funding Agreement) be payable out of funds provided pursuant to the ICI Funding Agreement; and
 - (ii) in all other cases, be payable by the Parties in equal shares.

3.4 Licence for general use

- (a) If a Party makes available its Background IP to the Collaboration, that Party grants to the other Parties an irrevocable, non-exclusive, royalty-free, worldwide licence to use the Party's Background IP for the purposes of carrying out the Collaboration, subject to any restrictions on its use notified to the Lead Agent and the other Parties at the time the Party makes its Background IP available for the purposes of the Collaboration.
- (b) Provided that a Constituent Member of a Party enters into a licence agreement with the Lead Agent on terms reasonably acceptable to the Lead Agent (acting on the direction of the Executive Committee), the licence granted to a Party to Background IP pursuant to clause 3.4(a) will be deemed to be granted to the Constituent Member.

3.5 Licence for Commercialisation

- (a) If a Party requires, for the purposes of Commercialisation of IP generated as part of the Collaboration, a licence to use Background IP licensed in accordance with clause 3.4, such Party will notify the Party that owns the Background IP in writing.
- (b) Subject to any provision of any agreement in relation to the Collaboration in respect of the IP referred to in clause 3.5(a), if a Party has received a notice in accordance with clause 3.5(a), such Party will negotiate, in good faith, with the Party issuing the notice as to the terms upon which the Party receiving the notice will allow the Background IP to be used for the purposes of Commercialising the IP referred to in clause 3.5(a).

4 Collaboration Objects

4.1 Primary Objectives

The objectives of the Collaboration are to:

- (a) establish and operate an unincorporated collaborative venture know as the 'Australian Research Collaboration Service' or such other name as may be agreed by all of the Parties in writing;
- (b) establish and maintain a collaboration of equal Parties, in which each of the Parties have an equal voice and equal rights;
- (c) nominate one of the Parties in the collaboration to have Lead Agent responsibilities which will initially be VPAC but which in the future may be another Party, provided that no legal impediment exists to such replacement;
- (d) establish appropriate structures for the governance and management of the Collaboration including ensuring that the Lead Agent and the Executive Director will act (in relation to the Collaboration and its activities) in accordance with the instructions of the Executive Committee;
- (e) empower the Lead Agent of the Collaboration to execute documents on behalf of the Parties to the Collaboration (in their capacity as Parties in the Collaboration) with the Commonwealth and others;
- (f) ensure that the Lead Agent (when it is acting in its capacity as Lead Agent) is adequately protected from liability; and
- (g) contribute to a strategic plan for, and delivery of, e-research support services within Australia.

4.2 Interpretation

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

5 Major covenants

5.1 Mutual covenants

Each Party will

- (a) diligently conduct its part of the activities of the Collaboration and observe and perform its respective obligations and commitments set out in this Agreement;
- (b) not unreasonably delay any action, approval, direction, determination or decision which is required of it in relation to the Collaboration;
- (c) use reasonable efforts to ensure that its directors, officers, employees, agents, contractors, students and other representatives involved in any way with the Collaboration give full force and effect to the provisions of this Agreement including the other provisions of this clause 5;
- (d) participate in the activities of the Collaboration by:
 - (i) contributing to a strategic plan for eResearch infrastructure and services in Australia;
 - (ii) representing the interests of the Party's members in the Collaboration's plans and activities;
 - (iii) developing eResearch infrastructure and services and delivering these to users in a user-oriented and accessible manner;
 - (iv) participating in education, outreach and training activities; and
 - (v) participating in national promotional events and publicity on eResearch infrastructure and services; and
- (e) act reasonably and in good faith in performing its obligations under this Agreement.

5.2 Additional mutual covenants during term of the Collaboration

In addition to the covenants set out in clause 5.1, each Party will during the term of the Collaboration carry out its part of the Activities to a high standard, and in doing so, actively promote the Collaboration Objectives.

5.3 **Party promises**

Without limiting any other obligation of a Party, each Party agrees to cooperate with and provide to the Executive Committee and the Lead Agent any information about its Contributions and Activities reasonably required by the Executive Committee or the Lead Agent (as the case may be).

6 **Term of Collaboration**

6.1 **Term**

This Agreement will commence on the earlier of the Commencement Date or the fulfilment of the conditions precedent specified in clause 2 and will remain in force until one of the following occurs:

- (a) the Parties by unanimous written agreement terminate this Agreement; or
- (b) following the retirement or expulsion of a Party under clause 17, only one Party remains as a party to this Agreement.

6.2 **First Review**

The Parties will conduct a review during the third year after the Commencement Date to consider the operation of the Collaboration following the expiry of the ICI Funding Agreement, including how the infrastructure established and operated under this Agreement will be managed and operated after the ICI Funding Agreement is terminated and any other matters requiring resolution at that point. Each Party may, subject always to complying with its obligation to provide 12 months notice of any retirement under clause 17.1(a), voluntarily retire from the Collaboration as part of the review process, in which case the retirement will become effective upon the conclusion of the ICI Funding Period.

6.3 **Subsequent Review**

The Parties will conduct a review at least twelve months prior to the conclusion of each fourth year anniversary of the last day of the ICI Funding Period or as otherwise determined by the Parties. Each Party may, subject always to complying with its obligation to provide 12 months notice of any retirement under clause 17.1(a), voluntarily retire from the Collaboration as part of the review process, in which case retirement will become effective upon the conclusion of the fourth anniversary of the last day of the ICI Funding Period or such other date as may be otherwise determined by the Parties.

7 Management responsibility and structure

7.1 Management responsibility

The management of the Collaboration will be the responsibility of the Executive Committee, through the Executive Director, in accordance with the powers and responsibilities set out in this Agreement.

7.2 Management Structure

The management structure of the Collaboration will consist of:

- (a) the Executive Committee;
- (b) the Executive Director; and
- (c) such persons other than the Executive Director that the Executive Committee may from time to time determine.

7.3 Lines of communication and control

Lines of communication and control within this management structure will be determined by the Executive Committee from time to time in accordance with the operating protocols determined by the Executive Committee in accordance with clause 8.20.

8 Executive Committee

8.1 Composition of Executive Committee

The Executive Committee will consist of the following members:

- (a) one member appointed by each of the Parties;
- (b) one member who does not vote appointed by the Affiliates collectively;
- (c) the Executive Director who does not vote; and
- (d) not more than three Independent Members appointed by the Executive Committee by the passing of an Executive Committee Special Resolution.

8.2 Initial members of the Executive Committee

- (a) The members of the Executive Committee at the Commencement Date are as described in Schedule 2.

- (b) The composition of the Executive Committee may change, from time to time, in accordance with this clause 8.

8.3 Replacement of Nominated Members

A person who is entitled to appoint a member of the Executive Committee (“**Nominator**”) has the right to remove such person as a member of the Executive Committee by notice in writing to each of the Parties and to replace such person with such other person as the Nominator so determines provided the Nominator, by written notice, informs the Parties such person is its nominee on the Executive Committee.

8.4 Removal of Independent Members

An Independent Member may be removed as an Executive Committee Member by the passing of an Executive Committee Special Resolution. The vote of the Member whose removal is the subject of the resolution is not to be counted in determining whether an Executive Committee Special Resolution has been passed in relation to the removal of that person.

8.5 Remuneration of members of the Executive Committee

- (a) All remuneration and costs of Nominated Members will be the responsibility of the Party or Affiliate nominating the Nominated Member.
- (b) An Independent Member may be paid or provided remuneration for their services as a member of the Executive Committee. The remuneration to be paid to an Independent Member for the provision of services by the Independent Member as a member of the Executive Committee will be determined by the Executive Committee by the passing of an Executive Committee Special Resolution. In addition to any other payment or remuneration paid to Independent Members, Independent Members will also be paid all travelling, hotel and expenses properly incurred by them in attending and returning from meetings of the Executive Committee or otherwise in connection with the Collaboration.
- (c) The Executive Director will be remunerated and the expenses of the Executive Director will be paid or reimbursed on such terms as may be determined by the Executive Committee under clause 9.2.

8.6 Alternate members

The Party appointing an Executive Committee Member under clauses 8.1(a) or 8.1(b) may nominate a person to be the alternate of the Executive Committee Member at meetings of the Executive Committee provided that:

- (a) an Executive Committee Member may only nominate one person at a time to be the Executive Committee Member’s alternate at meetings of the Executive Committee; and
- (b) if the Executive Committee Member is an Executive Committee Member appointed under clauses 8.1(a) or 8.1(b), the alternate:

- (i) has the same power to bind the Party or Affiliate nominating the Nominated Member, and
- (ii) is permitted to provide information in relation to the Party or Affiliate nominating the Nominated Member,

as the Nominated Member for whom the alternate is acting as an alternate.

8.7 Chairperson

The Executive Committee will appoint one of their number to act as Chairperson for a period not exceeding two years. Such person may be re-appointed at the end of each such two year term. Any person may be removed from his or her office as Chairperson by the passage of a resolution of the Executive Committee in favour of the removal of the Chairperson from office passed by all members of the Executive Committee (other than the person whom the resolution states is to be removed from office as Chairperson).

8.8 Delegated Authority

- (a) Each Party's representative on the Executive Committee (other than CSIRO) will be deemed to have full authority to bind that Party in relation to any decisions made by the Executive Committee which fall within the authority of the Executive Committee under this Agreement.
- (b) CSIRO must notify each of the other Parties, in writing, of the actual authority of each and every person whom CSIRO wishes to represent CSIRO at any meeting of the Executive Committee.
- (c) Any notice issued in accordance with clause 8.8(b) must be sent to each of the other Parties not less than 10 Business Days prior to any person attending any meeting of the Executive Committee as the representative of CSIRO.
- (d) The Executive Committee may only make decisions binding on CSIRO, if the representative of CSIRO has the delegated authority to bind CSIRO in relation to the decision.
- (e) If a representative of CSIRO on the Executive Committee does not have the delegated authority to make a decision, such representative must inform the meeting, as soon as reasonably practicable, of the representative's lack of delegated authority.
- (f) If a representative of CSIRO has informed the Executive Committee, pursuant to clause 8.1(d), that the representative does not have the delegated authority to bind CSIRO, for the decision to be binding in relation to CSIRO, the decision must be:
 - (i) referred to CSIRO, in writing, by the respective representative for determination; and

- (ii) either:
 - (A) agreed to, in writing by CSIRO within 15 Business Days of the referral outlined in clause 8.8(f)(i);or
 - (B) within 15 Business Days of the referral outlined in clause 8.8(f)(i) CSIRO has failed to notify the Executive Director in writing as to the determination of CSIRO in relation to the decision of the Executive Committee, the subject of the referral to CSIRO under clause 8.8(f)(i).
- (g) If the delegated authority of a representative of CSIRO on the Executive Committee is altered by CSIRO, after CSIRO has appointed the representative to be CSIRO's representative on the Executive Committee, CSIRO must inform each of the other Parties, in writing, of the representative's new delegated authority.
- (h) Any change in the delegated authority of a representative of CSIRO will only have force and effect, for the purposes of this Agreement, on and from 10 Business Days after the provision of notice by CSIRO of the change in the representative's delegated authority to the last of the other Parties to receive such notice.
- (i) If a representative of CSIRO on the Executive Committee fails to inform the other members of the Executive Committee in accordance with clause 8.8(e) that the representative does not have the delegated authority to make a decision, such representative will be deemed to have the delegated authority to make such decision and any such decision will be binding on CSIRO.

8.9 Secretariat Services

- (a) Secretariat services for the Executive Committee will be provided by the Office and the Executive Committee will appoint a member of the Office to be secretary of the Executive Committee, who in this clause 8.9 will be referred to as the Secretary.
- (b) The Secretary will keep minutes which will record all resolutions and proceedings of all meetings of the Executive Committee which will be distributed to the Executive Committee, the Executive Director and the persons nominated by the Parties to receive information within 10 Business Days of the relevant meeting.
- (c) The Secretary will notify the Executive Committee Members in writing in advance of an Executive Committee meeting and will, at the time, also provide the agenda for the forthcoming meeting of the Executive Committee together with relevant papers.

8.10 Meetings

The Parties will ensure that the Executive Committee meets at least four times each calendar year, or at such other frequency as may be agreed by at least fifty per cent of the Parties in writing.

8.11 Quorum

A quorum for a meeting of the Executive Committee is not less than two thirds of the members of the Executive Committee appointed by the Parties.

8.12 Voting on the Executive Committee

- (a) Any decision of the Executive Committee (other than a decision requiring an Executive Committee Special Resolution or the removal of the Chairperson under clause 8.7), will require a Simple Majority of the Executive Committee present and voting to be in favour of the decision.
- (b) Each member of the Executive Committee appointed pursuant to clause 8.1 will have one vote with the exception of the Executive Director and the member appointed by the Affiliates (each of whom will have no vote).
- (c) In the event of an equality of votes on any decision before the Executive Committee for determination (other than a decision requiring an Executive Committee Special Resolution or the removal of the Chairperson under clause 8.7), the Chairperson will have a casting vote (in addition to the Chairperson's deliberative vote).

8.13 Executive Committee Special Resolutions

The following issues may only be determined by an Executive Committee Special Resolution:

- (a) the appointment or removal of an Independent Member;
- (b) the remuneration to be paid to an Independent Member for the provision of services by the Independent Member as a member of the Executive Committee;
- (c) the appointment or expulsion of an Affiliate; and
- (d) the appointment or removal of the Executive Director.

8.14 Decisions beyond the control of the Executive Committee

The following issues may only be determined by a vote of the Parties in the following proportions:

- (a) amendments to this Agreement (unanimous);
- (b) the expulsion of a Party (more than 75% by number);

- (c) any decision to replace the Lead Agent (more than 75% by number); and
- (d) any decision to accept a new source of funding for over \$1,000,000 with an associated funding agreement (and particular conditions attached to such funding) for the Collaboration (more than 75% by number) subject always to the operation of clause 20.4,

and the Executive Committee may not make any binding decisions in relation to or connected with any of those issues.

8.15 Responsibilities of the Executive Committee

The Executive Committee is responsible for:

- (a) the development and the review of strategic plans for the Collaboration in response to the needs of users (including without limitation approval of relevant Activities, business plans, Budgets and Projects);
- (b) implementation of instructions received from any third party in accordance with an Authorised Agreement (including applicable funding bodies) in relation to the Collaboration;
- (c) the review, allocation and approval of budgets to Projects and other activities forming part of the Activities;
- (d) the direction of the implementation of the Collaboration and the delivery of the coordinated services;
- (e) the promotion of the Collaboration and facilitating cooperation between the Parties and other research counterpart organisations nationally and internationally; and
- (f) reviewing third party agreements (including Project Agreements) and directing the Lead Agent to enter into such agreements.

8.16 Advisory Committees

The Executive Committee may, from time to time, establish advisory committees, whose terms of reference and the manner in which they will operate will be determined by the Executive Committee, provided that any such committee will have only advisory functions and will have no power whatsoever to make any decisions which are binding on the Executive Committee or in relation to the Collaboration generally.

8.17 Proceedings of the Executive Committee

Except as otherwise provided in this Agreement, proceedings of the Executive Committee will be conducted in such a manner as the Executive Committee in its discretion deems fit.

8.18 Reporting

The Executive Committee will determine the nature and frequency of reporting to the Parties by it, any sub committees and the Office and such reports will be prepared and completed in such manner and at such times as the Executive Committee deems fit provided always that such reporting:

- (a) complies with the requirements of any Authorised Agreement;
- (b) is otherwise reasonable and adopts appropriate accounting and prudential standards;
- (c) where such reporting is to be provided by the Lead Agent, the Lead Agent has agreed in writing to the frequency and form of such reporting, provided that the Lead Agent agrees that it will not unreasonably withhold its agreement to such reporting requirements; and
- (d) complies with clause 8.20.

8.19 Required reports

The Executive Committee will:

- (a) provide an annual report for each year ending 30 June outlining the activities of the Collaboration and adherence to the Budget to each Party on, or before, the 1 October immediately succeeding such 30 June;
- (b) ensure the proper auditing of the Collaboration on an annual basis;
- (c) provide each Party with a copy of the accounts and any other material relevant to the operation of the Collaboration within 90 days of the end of Financial Year; and
- (d) provide each Party with a copy of an annual business plan in relation to the Collaboration for each year commencing on 1 July on, or before 31 March immediately preceding such 1 July.

8.20 Operating Protocols

- (a) The Executive Committee will determine relevant operating protocols providing always that such operating protocols may not be inconsistent with any of the express terms of this Agreement.
- (b) In determining any operating protocols, the Executive Committee will (where relevant) have regard to and comply with the requirements of any Authorised Agreement.

8.21 Assets

The Executive Committee will establish protocols for determining ownership and access rights in relation to non Intellectual Property assets of the Collaboration.

9 Executive Director and Personnel

9.1 Appointment

The Executive Director will be appointed, and may be removed, by an Executive Committee Special Resolution following appropriate consultation with relevant funding bodies and/or government agencies. In appointing the Executive Director, the Executive Committee will have regard to the suitability of the Executive Director taking into account the Executive Director position description in place at the time of appointment.

9.2 Employment and secondment arrangement

The Executive Director will be an employee of a Party and will be seconded to the Lead Agent on such terms as the Executive Committee, the Lead Agent and the Party employing the Executive Director deem fit, provided that in performing his or her duties as the Executive Director, the Executive Director will be responsible to the Executive Committee.

9.3 Responsibilities of the Executive Director

The Executive Director is responsible for the day to day management of the Collaboration, which responsibility will include:

- (a) developing operational plans and other strategic planning documents and submissions, and in particular, the interim implementation plan and subsequent Annual Business Plans and any associated funding agreements;
- (b) managing the Collaboration in accordance with the interim implementation plan and subsequent Annual Business Plans as directed by the Executive Committee;
- (c) preparing and providing to the Executive Committee in draft Budget and other financial statements required under this Agreement;
- (d) overseeing expenditure on major items which have significant risk or liability implications;
- (e) co-ordinating all activities including those across Projects, under the general direction of the Executive Committee;
- (f) providing the Executive Committee with regular performance reports; and
- (g) liaising with the research community, other eResearch service providers and relevant funding bodies and government agencies

9.4 Limitations on the power of the Executive Director

The Executive Director may not make any decisions regarding the items listed in clauses 8.13 or 8.14, which issues must be determined by the Executive Committee in accordance with clause 8 or where identified as such in clause 8.15, by the Parties, including, without limitation:

- (a) changes to Projects;
- (b) changes to Budget(s);
- (c) changes to reporting obligations; and
- (d) any matter which is required to be dealt with by another person or persons under the terms of any Authorised Agreement entered into, or is inconsistent with or has or is likely to have the effect of placing the Lead Agent in breach of any Authorised Agreement and will otherwise comply with the directions of the Executive Committee.

9.5 The Office

The Parties will ensure that an office is established and maintained with such personnel as the Executive Committee reasonably deems necessary to:

- (a) enable the Executive Director to fulfil the responsibilities required of the Executive Director as set out in clause 9.3; and
- (b) perform the secretariat services as the Executive Committee may require, from time to time.

9.6 Executive Director may delegate

The Executive Director may delegate, by notice in writing, any of the authority, power, rights or obligations of the Executive Director under this Agreement to any person, and on such terms, as the Executive Director deems appropriate.

10 Confidential Information

10.1 Obligation

Except as otherwise provided in this clause 10, each Party must keep confidential and not disclose any Confidential Information belonging to another Party.

10.2 Permitted use and disclosure

Each Party may:

- (a) use another Party's Confidential Information only for the purposes of this Agreement;
- (b) disclose another Party's 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 10.1;

- (c) use and disclose another Party's Confidential Information where authorised; and
- (d) disclose another Party's Confidential Information to the extent required by law.

10.3 Exceptions

- (a) The obligations imposed on a Party by this clause 10 will not apply to another Party's Confidential Information which:
 - (i) prior to disclosure is in the public domain or subsequent to disclosure to the recipient Party becomes part of the public domain other than as a result of an unauthorised act or failure to act by that recipient Party;
 - (ii) is received by a recipient 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 other Party;
 - (iii) is independently developed by an employee or officer of the recipient Party owing the obligation of confidentiality while having no knowledge of the Confidential Information (which independent development can be proven by the receiving Party's written record); or
 - (iv) the Party claiming confidentiality 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.

10.4 Onus

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

10.5 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.

10.6 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 10 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.

10.7 Survival

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

11 Affiliates

11.1 Determination of who may be an affiliate

The Executive Committee may, from time to time, determine that an organisation or other persons may be an Affiliate.

11.2 Terms upon which an Affiliate becomes associated with the Collaboration

If the Executive Committee determines, under clause 11.1, that an organisation or person is to be an Affiliate of the Collaboration, the Executive Committee will not permit the Affiliate to become part of, or connected with, the Collaboration unless:

- (a) such organisation or person has executed an Affiliation Agreement; and
- (b) has agreed to such other terms (and executed such other documents) as the Executive Committee may require as a condition of such organisation or person becoming an affiliate of the Collaboration.

12 Collaboration Share

The share of a Party in the Collaboration will be determined in accordance with the following formula:

$$CS = (PC/TPC)$$

where:

CS is the share in the Collaboration held by the Party;

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

PC is the Contributions of a Party 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 12 is made in accordance with the Valuation Principles.

13 Indemnities

13.1 Mutual Indemnity in the case of fault

Subject to clauses 13.3, 13.4 and 13.5, each Party (referred to in this clause 13 as **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 (referred to in this clause 13 as **those indemnified**) from and against any and all Loss (including reasonable 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 or wilful misconduct by the indemnifying Party or any of its directors, officers, employees, agents or contractors arising in connection with the Collaboration; or
- (c) the exercise by the indemnifying Party of any rights granted to it under this Agreement or any Authorised Agreement in relation to any Intellectual Property.

13.2 Indemnity

If neither the indemnity provided under clause 13.1 nor the indemnity provided under clause 3.3(e) operates in respect of any Loss suffered, incurred or sustained by a party or its directors, officers, employees, agents and contractors (referred to in this clause 13 as **those indemnified**) in relation to a Third Party Claim arising out of or in connection with the Collaboration, each Party (referred to in this clause 13 as the **indemnifying Party**) irrevocably and unconditionally indemnifies and agrees to keep indemnified each of those indemnified in respect of such Loss (including legal fees on a full indemnity basis and net of any GST input tax credits to which those indemnified are entitled) in proportion to its Collaboration Share.

13.3 Reduction of indemnity

The indemnities given by an indemnifying Party pursuant to clause 13.1 will be reduced proportionately to the extent that the liability, loss, harm, damage, cost or expense referred to in clause 13.1 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 or their directors, officers, employees, agents or contractors; or

- (c) the exercise by any of those indemnified of any rights granted to it under this Agreement or any Authorised Agreements in relation to Intellectual Property.

13.4 Commonwealth Exception

If the Commonwealth is a party it is excluded from the obligation under clause 13.1 to indemnify any other Party. This clause 13.4 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.

13.5 Consequential losses

Nothing in clauses 13.1 and 13.2 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.

13.6 Notification of acts

Each of those indemnified under clauses 13.1 and 13.2 will promptly notify every indemnifying Party of any event or circumstance that may reasonably give rise to those indemnified relying upon the indemnities in clauses 13.1 and 13.2.

13.7 Survival

The indemnities provided under clauses 13.1 and 13.2 are a continuing obligation, separate and independent of each Party's other obligations and will survive the expiration or, where relevant, earlier termination of this Agreement and will continue to apply (both as a right and as an obligation) to any Party who is expelled or retires from the Collaboration.

13.8 Indemnity of Lead Agent as trustee

The Lead Agent 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 Lead Agent as trustee of that particular trust (other than for breach of fiduciary duty). This entitlement survives the termination or expiration of this Agreement.

14 Insurance

14.1 Obligation to insure

Each Party will effect and maintain adequate insurance that a prudent person participating in the Activities would maintain, to cover its participation in the Activities. Such insurance will:

- (a) cover loss or damage the Party may suffer or any liability the Party may incur in connection with its participation in the Activities; and

- (b) will include adequate run-off cover after this Agreement has expired or terminated with respect to the Party.

14.2 Act as own insurer or put in place alternative arrangements

- (a) A Party may act as its own insurer provided that it receives the consent of the Lead Agent, such consent not to be unreasonably withheld.
- (b) This may take the form of an underwriting arrangement provided by a constituent member of a Party, provided that such arrangements are acceptable to each of the other Parties, such acceptance not to be unreasonably withheld.

14.3 Evidence of insurance

Within 14 days of a request, each Party will provide the Lead Agent with a certificate of currency of its relevant insurance policies or alternative arrangements as requested by the Lead Agent from time to time.

15 Amendments

No agreement or understanding varying this Agreement will be legally binding unless it is in writing and signed by all Parties.

16 Admission of new Parties

16.1 Admission

Subject to the terms of any Authorised Agreement, the Executive Committee may, from time to time, by the passage of an Executive Committee Special Resolution:

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

16.2 Deed of accession

As a condition of the admission of any new Party to this Agreement, the new Party will be required by deed signed by the Lead Agent and the new Party 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.

17 Retirement and expulsion from the Collaboration

17.1 Retirement and expulsion from the Collaboration

Subject to the terms of any Authorised Agreement and this clause 17:

- (a) a Party may retire from the Collaboration by giving 12 months' notice to each other Party; and
- (b) in addition to its right to retire pursuant to clause 17.1(a), a Party may also retire from the Collaboration by giving 3 months notice to each other Party, if:
 - (i) an annual business plan for the Collaboration approved by the Executive Committee (the **Annual Business Plan**) is amended by a vote of the Executive Committee;
 - (ii) the amendment to the Annual Business Plan referred to in clause 17.1(b)(i) is a radical alteration to the Annual Business Plan; and
 - (iii) the amendment to the Annual Business Plan referred to in clause 17.1(b)(ii) gives rise to a significant increase in the potential Liability of the retiring Party than would be the case if the amendment had not been made; and
- (c) a Party (the **Defaulting Party**) may be expelled from the Collaboration by the resolution of at least 75% of the Parties, provided Due Cause has arisen with respect to the Defaulting Party and remains unremedied (if capable of remedy) after 15 Business Days following notice to the Defaulting Party.

17.2 Due Cause

For the purpose of clause 17.1, Due Cause means:

- (a) failure to make Contributions when required by this Agreement or any agreements entered into between the Parties as part of or in connection with the Collaboration unless otherwise agreed by the Parties;
- (b) unauthorised disclosure of another Party's Confidential Information;
- (c) unauthorised publication of information or material failure to act in accordance with the ICI Implementation Schedule or any other Implementation Plan;
- (d) 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;
- (e) assignment of its rights or obligations under this Agreement other than in accordance with clause 30.2;

- (f) such other matters as the Parties other than the Party to be expelled may by unanimous decision reasonably and properly declare to be Due Cause provided that if the Party to be expelled has requested mediation in accordance with clause 26, the Parties have participated in such mediation for a period not less than 20 Business Days and the Parties (other than the Party to be expelled) still reasonably and properly declare that Due Cause exists.

17.3 Consequences

- (a) If a Party is expelled or retires from the Collaboration, the Party:
 - (i) will cease to be a Party;
 - (ii) relinquishes all rights under this Agreement other than those specified in Schedule 3 or any implementation plan approved in accordance with clause 20.4;
 - (iii) 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; and
 - (iv) will continue to provide any Background IP that it has provided to the Collaboration on the terms upon which such Background IP was provided immediately prior to such expulsion or retirement.
- (b) The retirement or expulsion of any Party from the Collaboration:
 - (i) will not affect the enforceability of any other obligations of that Party or rights against that Party accrued at that time;
 - (ii) will not relieve the Party of the obligations imposed upon it under this clause 17 and clauses 13 (Indemnities), 14 (Insurance), 18 (Effect of Termination) and 10 (Confidential Information); and
 - (iii) will not relieve the remaining Parties of their obligations under this Agreement and they will continue to carry on the Activities and perform the terms of this Agreement between them.

18 Effect of termination

18.1 Expiration

Unless the Parties otherwise agree, this Agreement will terminate upon expiration of the term in accordance with clause 6.

18.2 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.

19 Continuing obligations

Unless agreed otherwise by the Parties, on the termination of this Agreement the Parties and any former Parties will continue to be bound by the obligations under clauses , 13 (Indemnities), 14 (Insurance), 17 (Retirement and Expulsion from the Collaboration) 18 (Effect of Termination) and 10 (Confidentiality) (to the extent that these obligations are applicable to them).

20 ICI Activities

20.1 ICI Project

During the ICI Funding Period and in relation to the ICI Project, the Parties acknowledge and agree that:

- (a) the Collaboration will be operated in accordance with the provisions;
- (b) the rights and obligations of each of the Parties are as; and
- (c) the Parties provide each of the warranties and give each of the indemnities,

set out in Schedule 3 in particular and in this Agreement as a whole (to the extent that the provisions of this Agreement are not inconsistent with any provision of the ICI Funding Agreement).

20.2 Executive Committee to determine Non-ICI Activities

The Executive Committee may, subject to clauses 20.5 to 20.10, by an Executive Committee Special Resolution determine to undertake Non-ICI Activities as a part of the Collaboration.

20.3 Preparation of an Implementation Plan

If the Executive Committee determines to undertake a Non-ICI Activity in accordance with clause 20.2, the Executive Committee will cause an Implementation Plan to be prepared in relation to such Non-ICI Activity.

20.4 Approval of Implementation Plan

If the value of the goods or services to be provided under an Implementation Plan prepared in accordance with clause 20.3 is:

- (a) equal to, or greater than \$500 000 (+GST) per annum, if the Non-ICI Activity is to form part of the Collaboration, the Implementation Plan in relation to the Non-ICI Activity must be approved by each of the Parties in writing; and
- (b) less than \$500 000 (+GST) per annum, if the Non-ICI Activity is to form part of the Collaboration, the Implementation Plan in relation to the Non-ICI Activity, must be approved by an Executive Committee Special Resolution.

20.5 Approve Implementation Plan to form Schedule

Any Implementation Plan approved in accordance with clause 20.4 will be deemed to be scheduled to, and form part of, this Agreement and the Executive Committee will cause a copy of the Implementation Plan to:

- (a) be attached to the "Master Copy" of this Agreement maintained by the Office at the office of the Executive Director; and
- (b) be provided to each Party.

20.6 Non-ICI Activities

- (a) If a Party wishes Non-ICI Activities to form part of the activities of the Collaboration, such Party must refer the Non-ICI Activities to the Executive Committee and must procure that such Non-ICI Activities are referred to in the notice paper issued for a meeting of the Executive Committee.
- (b) If at a meeting of the Executive Committee:
 - (i) the notice paper for the meeting refers to the proposed Non-ICI Activity in accordance with clause 20.6(a); and
 - (ii) the Executive Committee agrees (in accordance with clause 8.13 or otherwise) for the Non-ICI Activity to form part of the activities of the Collaboration,

then a Party must (within 15 Business Days, of being informed by the Executive Director, in writing, of the Executive Committee's decision) notify the Executive Director, in writing, as to whether it wishes to be involved in the Non-ICI Activity.

20.7 Liability for Non-ICI Activity

If a Party notifies the Executive Director pursuant to clause 20.6 that the Party:

- (a) wishes to participate in the Non-ICI Activity, the subject of the notice referred to in clause 20.6, the Party will participate in the Non-ICI Activity on the terms of this Agreement (including, without limitation, the obligation to indemnify the Lead Agent under clauses 3.3(e) and 13.8, and to indemnify the other Parties under clauses 13.1 and 13.2); or
- (b) does not wish to participate in the Non-ICI Activity, the subject of the notice referred to in clause 20.6, the Party will:
 - (i) not participate in, or receive any benefits in respect of, the Non-ICI Activity;
 - (ii) be deemed not to form part of the Collaboration in relation to the Non-ICI Activity; and
 - (iii) will be relieved of all its obligations under this Agreement (other than under clause 10) in relation to the Non-ICI Activity.

20.8 Deemed Election to Participate if Failure to Notify

If a Party does not notify the Executive Director within the 15 Business Day period referred to in clause 20.6 as to whether the Party wishes to participate in the Non-ICI Activity, the subject of the notice referred to in clause 20.6, the Party will be deemed to have elected to participate in the Non-ICI Activity.

20.9 Deemed Election to Participate if involved in Non-ICI Activity

If, notwithstanding the fact that a Party has elected pursuant to clause 20.7 not to participate in a Non-ICI Activity, the Party actually participates in the Non-ICI Activity, the Party will be deemed to have elected to participate in the Non-ICI Activity notwithstanding such election.

20.10 No Contribution required to be made without agreement

Notwithstanding anything to the contrary in this Agreement, no Party will be required to make a contribution to a Non-ICI Activity without its prior written consent.

21 Records and Access

Each Party must:

- (a) ensure its records and accounting books in relation to the Activities are maintained in accordance with applicable Australian accounting standards and controls; and

- (b) either maintain such records and accounting books for a period of 7 years after termination of this Agreement or deliver them to the Lead Agent or other person as directed by the Lead Agent.

22 Publications

22.1 Publication of information or material

The Parties acknowledge that the dissemination of knowledge is an important function of the Collaboration. Nonetheless, the Parties will not publish any information or material arising from the Activities except in accordance with this clause 22.

22.2 Publication by the Lead Agent

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

22.3 Request for permission

Prior to any submission for publication, a Party wishing to publish information or material arising from the Activities (the **Requesting Party**) will forward a request in writing to the Executive Director, seeking permission to publish the information or material, and specifying in the request any Confidential Information contained or referred to in the proposed publication.

22.4 Notification

The Executive Director will notify the Requesting Party of the Collaboration's decision as to publication of the relevant information or materials within 10 Business Days of receipt of a request. The Executive Director's permission may be subject to any conditions that the Collaboration through the Executive Committee may reasonably impose, including a requirement that the publication comply with any relevant provisions of the Authorised Agreement, and include acknowledgments of:

- (a) the Collaboration'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 Collaboration.

22.5 Grant of Permission

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

22.6 Declining permission

If the Executive Director decides in his absolute discretion that the benefits of publication, having regard to the Collaboration Objectives, do not outweigh the potential loss of commercially valuable Intellectual Property rights or other potential disadvantage for the Collaboration, then the Executive Director 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 as determined by the Executive Committee, but not exceeding 18 months from the date of the request in the case of a student thesis.

22.7 Party Confidential Information

Notwithstanding the other provisions of this clause 22, no Party may publish any information or material containing the Confidential Information of a Party unless authorised by that Party or unless an exception in clause 10 applies.

22.8 Recognition

Subject always to clause 24 each Party will ensure that any publication which it makes pursuant to this clause 22 acknowledges the contributions (if any) made by other Parties and the support of the Commonwealth and the Collaboration:

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

23 Public Announcements

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

24 Use of a Party's Name

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

25 Conflicts

25.1 Definition of Conflict

For the purpose of this clause 25, **Conflict** refers to a conflict of interest, or risk of a conflict of interest or an apparent conflict of interest through a Party engaging in any activity or obtaining any interest that is likely to interfere with or restrict the Party in participating in the Collaboration fairly and independently.

25.2 Warranty

Each Party warrants to the other Parties that, to the best of its knowledge after making reasonable 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. For the avoidance of doubt, any Conflict declared by a Party is not material where researchers in the Party organisation conducting research in competition with the Collaboration:

- (a) are not part of the Collaboration; and
- (b) the researchers have not received Confidential Information related to the Collaboration.

25.3 Dealing with Conflict

If a Conflict arises, or appears likely to arise, in relation to a Party, that Party agrees to notify the other Parties immediately;

- (a) subject to any obligations to maintain confidentiality, make full disclosure of all relevant information relating to the Conflict to the other Parties;

- (b) make full disclosure of all relevant information relating to the Conflict to the other Parties (subject to the Executive Committee agreeing to keep such information confidential and only disclose such information to the Commonwealth, if the Executive Committee, in its absolute discretion, deems such disclosure to be necessary or desirable); and
- (c) take such steps as the Executive Committee may reasonably require to resolve or otherwise deal with the Conflict.

25.4 Register of Conflicts

The Lead Agent will maintain on behalf of the Collaboration a register of Conflicts disclosed under this Agreement.

26 Dispute resolution

26.1 No Arbitration or court proceedings

If a dispute arises out of this Agreement (**Dispute**), a Party will comply with this clause 26 before starting arbitration or court proceedings (except proceedings for interlocutory relief).

26.2 Notification

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

26.3 Parties to resolve Dispute

During the 14 days after a notice is given under clause 26.2 (or longer period if the Parties to the Dispute agree in writing), each Party to the Dispute will use its reasonable efforts to resolve the Dispute. If the Parties cannot resolve the Dispute within that period, they will either:

- (a) if the Dispute relates to a matter of valuation, refer the Dispute to a valuer in accordance with clause 26.4; or
- (b) refer the Dispute to a mediator if one of them so requests.

26.4 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.

26.5 Appointment of mediator

If the Parties to the Dispute cannot agree on a mediator within seven days after a request under clause 26.3, the President of the Institute of Arbitrators and Mediators Australia or the President's nominee will appoint a mediator.

26.6 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.

26.7 Confidentiality

Any information or documents disclosed by a Party under this clause 26:

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

26.8 Costs

Each Party to a Dispute will pay its own costs of complying with this clause 26. The Parties to the Dispute will equally pay the costs of any mediator.

26.9 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 26.1-26.3. Clauses 26.7 and 26.8 survive termination of the dispute resolution process.

26.10 Continue to perform obligations

Notwithstanding the existence of any Dispute, each Party acknowledges and agrees that it is bound to and it will continue to perform all of its obligations under this Agreement.

27 GST

27.1 Meaning of words

In this clause 27:

- (a) **GST exclusive consideration** means the consideration payable or to be provided for a Supply, but for the application of this clause 27.
- (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 27.

27.2 **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.

27.3 **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 will 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 27.3(a) will 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.

27.4 **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.

27.5 **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.

28 Force Majeure

28.1 Definition

- (a) In this clause 28, a **Force Majeure Event** affecting a Party means, subject to clause 28.1(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.

28.2 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 Event 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.

28.3 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.

28.4 Exceptions

Nothing in this clause 28

- (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.

29 Notices and other communications

29.1 Service of notices

A notice, demand, consent, approval or communication under this Agreement (**Notice**) must be in writing, in English and signed by a person duly authorised by the sender; and 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.

29.2 Effective on receipt

A Notice given in accordance with clause 29.1 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.

30 General

30.1 Approval 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.

30.2 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.

30.3 **Sub-contracting**

A Party will not sub-contract the performance of a substantial part of the Activities of the Collaboration, except with the prior approval of the Executive Committee.

30.4 **Costs**

Each Party will pay its own costs of negotiating, preparing and executing this Agreement.

30.5 **Survival**

The continuing obligations described in clause 19 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.

30.6 **Counterparts**

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

30.7 **No merger**

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

30.8 **Entire agreement**

With the exception of any Authorised Agreement entered into by the Parties in respect of the Collaboration after the date of this Agreement (in accordance with the terms of this Agreement) this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all previous agreements or understandings between the Parties in connection with its subject matter.

30.9 **Further action**

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

30.10 **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.

30.11 **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.

30.12 **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.

Signing Page

Signed for the Australian National University] by an authorised officer in the presence of

Signature of officer

Signature of witness

Professor Lawrence Cram

David Whisker

Deputy Vice-Chancellor

Signed for Victorian Partnership for Advanced Computing Limited 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 Australian
Centre for Advanced
Computing and
Communication Pty Ltd 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 eResearch
SA 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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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
