



THE UNIVERSITY OF
MELBOURNE

EAAC Grants Training Guide

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TEMPLATE AGREEMENTS

USE OF TEMPLATE AGREEMENTS AT UOM

Research, Innovation & Commercialisation (RIC) reviews and negotiates research and research-related agreements on behalf of the University of Melbourne (UOM). There are a wide range of template agreements used to ensure that situations which arise in a research context are covered. Some of these are available to the wider University community and Faculty on the Research Gateway website. Some agreements are for use only within RIC.

The Standard University of Melbourne Research Agreements are primarily for use by Faculties in instances where they do not require assistance from RIC, unless there are changes needed to the templates. These templates can be located on the Research Gateway website.

In addition to these, there are agreements used by RIC Grants Teams in the course of their day-to-day work. For National Health and Medical Research Council (NHMRC) and Australian Research Council (ARC) funded research, there are template agreements available for routine schemes, and provide a standardised base intended to enable compliance with the relevant Head Funding Agreements. These templates are reviewed annually by a working group made up of different stakeholders who champion a new template with the intention of speeding up the contracting process between universities, Australia-wide. The templates are intended to enable a more streamlined post award grant establishment process. These and other standard templates can be located on SharePoint. They contain set terms and conditions so that you need to only fill in the key information such as details of the collaborator/s, a description of the project or service being provided, the payment and milestone/deliverable terms, and any other special conditions.

Standard form contracts are **not** suitable for complex or high-risk arrangements – even if that arrangement is, at a basic level, a kind of contract that could usually follow a standard form in simpler cases. For instance, even though a collaboration agreement is perfectly suited to a particular project, you may need a customised contract for a complex arrangement involving high risk or high value services, or the use of CRISPR.

TYPES OF AGREEMENTS

Accession Agreement	Used when a new party wants to become a party to a pre-existing agreement. Sometimes an Accession and Novation Agreement are combined. A variation may also be applicable if there is a change to the contract such as an extension of time; an increase in funding; withdrawal of a party, etc.	Available on SharePoint The site can be accessed here .
Data Transfer Agreement (DTA)	An agreement established between organisations that governs the transfer of one or more data sets from the owner/provider to a third party.	Available via Research Gateway The site can be accessed here .
Collaborative Research Agreement or Collaboration Agreement	An agreement between two or more researchers (that are engaged in a research project) about the nature of their working relationship. It specifies the intent of the parties to share data, research materials and facilities, and to publish research findings. While similar to Multi-institutional	Available on SharePoint or supplied by external party if they are the lead

	Agreements, Collaboration Agreements are executed between institutions irrespective of sponsored funding.	The site can be accessed here .
Confidentiality Agreement	Also known as a Non-Disclosure Agreement or simply as an NDA , is simply a contract between two or more parties where the subject of the agreement is a promise that information conveyed will be maintained in secrecy. These agreements can be mutual agreements, where both parties are obligated to maintain secrecy, or they can be unilateral agreements, where only the receiving party becomes obligated to maintain secrecy.	Available via Neota Logic The tool can be accessed here .
Consulting Agreement	A collaboration may be formalised through a Consulting Agreement, although Consulting Agreements are not typically compatible with the collaborators as we think of them. In a Consulting Agreement, the individual being hired is working under the direction of the other “collaborator”. Payments are made only upon satisfactory completion of a well-defined scope of work. In addition, the consultant agrees to be engaged on a “work for hire” basis- that is to say, the consultant has no rights at all to the work performed, the data or information collected or developed, or any IP of any kind.	Available via Legal and Risk site The site can be accessed here .
Funding Agreements	An Agreement between a Funder and the recipient of the funding (e.g., UOM) which outlines the terms under which the funding may be used.	Supplied by the Funder
Material Transfer Agreement (MTA)	This agreement covers situations in which one collaborator owns research materials such as a chemical compound or a biological substance and has received a request from another collaborator for samples of the material. Frequently MTAs are not a reflection of a true collaboration, but rather a contractual relationship established for the sole purpose of obtaining a given research material.	Available via Neota Logic The tool can be accessed here .
Memorandum of Understanding (MOU)	An MOU outlines the type of relationship that will be created, the objective of the relationship and the responsibilities of each party. An MOU is not a legally binding agreement and therefore should not address formal plans for compensation, confidentiality, or intellectual property and licensing rights. The planned activity may or may not come to fruition as described in an MOU, however there is no penalty for failure.	Available via Research Gateway The site can be accessed here .
Multi-Institutional Agreement (MIA)	Where a research project is multi-party and is subject to a funding agreement, an MIA is entered into by all of the collaborating institutions on the grant. It is used to govern the conduct of a grant and where applicable, disbursement	Available on SharePoint or supplied by the external party if they are the lead party

	of grant funding between the institutions where other CIs are located.	The site can be accessed here .
Novation Agreement	Used to transfer the rights and obligations of one party under a contract to another party, while the continuing contracting party/s remain the same. The new party may be said to “step into the shoes” of the outgoing party.	Available on SharePoint The site can be accessed here .
Partner Organisation/ Letter of Agreement	Used where an international collaborating organisation has a role in the proposed research project and cannot receive funding directly from the grant. The only exception to this is where the international collaborator is providing services or equipment that will go through a formal procurement process audited by the host research organisation. The international collaborator cannot receive any other funds from the grant, such as travel.	Available on SharePoint The site can be accessed here .
Services Agreement	An agreement under which one party (Supplier) agrees to provide services to another party (Client) in exchange for remuneration.	Available via Legal and Risk site The site can be accessed here .
Subaward Agreement	These are agreements between an institution (prime awardee) that has a sponsored agreement, and another institution (subrecipient) to which it transfers a portion of the work. The Subaward Agreement includes elements of the head agreement between the sponsor and the prime awardee by incorporating many of the terms and conditions that have been agreed to by the external sponsor and the prime awardee.	Available on SharePoint The site can be accessed here .
Subcontract Agreement	Sets out the terms and conditions between a contractor and subcontractor for the provision of services to a third party to carry out a project or a program. In other words, if a contractor is hired to complete a task and the contractor hires another party (a subcontractor) to assist them in a specific part of a task, then a Subcontractor Agreement will be used to specify the terms under which the subcontractor will perform the task for the contractor.	Available on SharePoint The site can be accessed here .
Variation Agreement	Suitable for any change to a contract, and is not strictly related to a novation or accession.	Available on SharePoint The site can be accessed here .

WHERE TO ACCESS TEMPLATES

Research Gateway	<p>RIC Contracts, in conjunction with Legal & Risk, has developed a range of Standard University of Melbourne Research Agreements which are available to researchers on the Research Gateway. If the terms are unchanged, they can be signed by either Deans, Heads of Departments/Schools or DVC Research depending on the nature of the agreement and the financial value of the agreement. Instructions and guidance relating to suitability have been provided in respect of each agreement. If changes to the Standard Research Agreement are required, RIC will review and negotiate the amendments on behalf of Faculty.</p> <p>The site can be accessed here.</p>	<p>-Data Transfer Agreement -IP Deed for Students and Visitors -Defence Science Partnering Deed (DSP) -Melbourne Academic Centre for Health (MACH) Template Agreement -Non-Research Standard Agreement -Simple Project Extension Letter -Clinical Trial Research Agreement -Student Research Project Agreement -Memorandum of Understanding</p>
SRPA Contracting Tool	<p>Standard Research Project Agreements (SRPAs) are used to govern arrangements between UOM and external parties wishing to engage and fund UOM to deliver a research project or research consultancy. The Standard Research Project Agreement Contracting Tool is intended to be used where UOM is undertaking stand-alone work with or for a third party where they are providing UOM with funds and UOM is providing them certain deliverables.</p> <p>The SRPA Tool should not be used in the following instances:</p> <ul style="list-style-type: none"> the work UOM is undertaking under the Agreement does not meet the HERDC definition of 'research'. UOM will receive more than \$2 million from the external party. UOM will need to transfer funds to the external party. UOM has already entered into an Agreement for the proposed project with another third party or the project will involve a number of third parties. UOM is using significant Background IP to deliver the project or is likely to generate significant Project IP. UOM will need to use or supply to the external party materials which UOM received from a third party. UOM will not receive any funding from the third party under the Agreement. <p>SRPAs can be progressed via the SRPA Tool via a simple process. The tool will allow an appropriate agreement to be generated and sent to the external party for review and execution. However, this may not be suitable for all projects. The tool asks a series of questions designed to determine whether an agreement can be created for a research project. If suitable, the contracting tool will generate an appropriate SRPA contract which can then be sent to the external party for review and signing via one-span sign. You can read more here: Standard research project agreement (SRPA) : Research Gateway (unimelb.edu.au)</p>	<p>-Standard Research Project Agreement</p> <p>If appropriate, the SRPA Tool can be used to generate three different types of SRPAs:</p> <p>(1) An agreement where the only deliverable is a report;</p> <p>(2) An agreement where the university will own any IP developed in the course of the project, and grants the external party an option to negotiate an exclusive licence over that IP; or</p> <p>(3) An agreement where the external party will own any IP arising in the course of the project with UOM retaining the ability to use that IP for our future research, teaching and educational purposes.</p> <p>This agreement may only be generated by the tool, where the external party is fully funding the project.</p>

	The tool can be accessed here .	
Neota Logic-Confidentiality Agreements	<p>This tool can be used to generate a University standard contract that can be sent to the other organisation/person(s) where it is intended to share information that is not publicly available with an external organisation or person.</p> <p>This tool is not suitable:</p> <ul style="list-style-type: none"> for preparing a contract to govern the conduct of a research project, joint venture, program or other arrangement that has already been scoped out by the parties (i.e., where each organisation/person knows what activities, they will be undertaking and where specific deliverables, contributions and payment arrangements have been agreed); or, where a third party has provided UOM with their draft confidential agreement template for review. <p>The tool can be accessed here.</p>	<p>This tool generates a University of Melbourne standard confidentiality agreement that is appropriate for the circumstances, including:</p> <ul style="list-style-type: none"> -One Way Confidentiality Agreement -Mutual Confidentiality Agreement -Multi-Party Confidentiality Agreement
Neota Logic-MTAs	<p>This tool can be used when UOM is supplying or receiving material. It generates an approved standard MTA that can be sent to the other party, or it will submit a referral to RIC so that a RIC Contracts Officer can assist with preparing or reviewing a bespoke agreement for the activity.</p> <p>This tool is not appropriate for:</p> <ul style="list-style-type: none"> data transfers fee for service arrangements (i.e., where you are paying a lab to test materials for you) research collaborations Pre-existing fast-tracked MTAs (<i>if you have an approved Fast Track MTA for your materials, please continue to follow your existing process</i>) <p>The tool can be accessed here.</p>	<p>-Material Transfer Agreement</p> <p>If UOM is supplying material (such as genetically modified organisms, chemicals, human samples or blood) to another organisation for research purposes, or when UOM is receiving material from another organisation for research purposes, a material transfer agreement (MTA) must be put in place. An MTA sets out the terms on which the material will be transferred, for example who owns the material and modifications to it.</p>
SharePoint	<p>SharePoint contains standard templates that are used within RIC.</p> <p>The site can be accessed here</p>	<ul style="list-style-type: none"> -Multi Institutional Agreements ARC/NHMRC (ARMS Templates) -ARC Linkage Agreement Template (Commercial) -Letters of Agreement (Researcher Development Schemes) -Partner Organisation Letters (ARC Discovery Projects) -Novation Agreement -Variation Agreement -Accession Agreement -Collaborative Research Agreement (UOM Lead) -Collaborative Research Agreement (Bona Fide) -Clinical Trial Research Agreements -Side Letter Agreements (with MRIs)

Legal & Risk Templates	<p>Legal & Risk has provided standard agreements that can be used in certain circumstances such as the following:</p> <ul style="list-style-type: none"> • When UOM is obtaining services from external parties (other than from independent contractors) • When UOM is providing services to external parties • When UOM is entering into sponsored activities. <p>The site can be accessed here.</p>	<ul style="list-style-type: none"> -Acquisition of Services Agreement -Supply of Services Agreement -Consultancy Services Agreement -Sponsorship Agreement
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HOW TO CHOOSE A TEMPLATE

Funders and sponsors usually issue their own agreements for UOM to review and sign. In some cases, there may be little or no scope to modify the terms that the party presents. However, even in those cases it is still important to thoroughly review the proposed agreement so that it is understood exactly what UOM is agreeing to. UOM has often been successful at negotiating a fairer position on some of the more extreme clauses.

When a Sponsor provides a Head Funding Agreement to a party (Lead/Administering Institution):

- the lead is responsible for ensuring compliance with the Head Funding Agreement. The lead must ensure that they flow down terms from the Head Funding Agreement via the templates they provide to the non-lead parties and subcontractors (where relevant). The reason for this is that the lead has the responsibility of ensuring that the contracts in place are as per the requirements of the Head Funding Agreement.
- the non-lead party has less risk than the lead party in terms of complying with the Head Funding Agreement, and only needs to ensure that the terms they are agreeing to in any subsequent agreements are fair and suitable.

In most cases, the lead party will draft an agreement or provide their template agreement to the other party/s. The lead is the administering institution and is usually the party that is instigating the contracting process with the other parties to the project. As a non-lead, a party to a project reviews the agreement provided to them and may suggest amendments to negotiate the final details and terms of the proposed agreement.

For Collaborations

- ➔ If UOM is the lead in an NHMRC Grant (NHMRC Ideas, NHMRC Discovery, NHMRC CTRA) with Participating institutions named in the application, use applicable **ARMS MULTI-INSTITUTIONAL AGREEMENT (MIA)**
- ➔ If UOM is the lead in an ARC Grant (Discovery Projects, Discovery Indigenous, LIEF, Linkage) with eligible institutions named in the application, use applicable **ARMS MULTI-INSTITUTIONAL AGREEMENT (MIA)**
- ➔ If UOM is the lead on a project funded by a party that is not the NHMRC/ARC and would like to obtain the services of a party, use **COLLABORATIVE RESEARCH AGREEMENT (LEAD)**
- ➔ If UOM is a party in a project with a MACH Partner, an Individual research project with no lead, which does not involve a clinical trial, and is not governed by a Head Funding Agreement terms and conditions, use **MACH AGREEMENT**

- ➔ If UOM is the lead and we are subject to a Head Funding Agreement from an unknown sponsor (non-ARC, NHMRC, or MRFF), use **COLLABORATIVE RESEARCH AGREEMENT (LEAD)**
- ➔ If UOM are collaborating with an external party and each party will be providing equal contributions, use **COLLABORATIVE RESEARCH AGREEMENT (BONA FIDE COLLABORATION)**
- ➔ If UOM is the lead in an ARC Grant (Discovery Projects) with eligible institutions named in the application that are overseas partners, use applicable **LETTER OF AGREEMENT**
- ➔ In Researcher Development Schemes projects (Early Career Researcher), where UOM are collaborating with an external institution, use applicable **LETTER OF AGREEMENT**

EXAMPLES (REFER TO WORKSHEET 1)

FAQ's

Q: Is a Letter of Agreement (LOA) equally legally binding as a Collaboration Agreement?

A: Yes. A Letter of Agreement is as legally binding as a Collaboration Agreement and is usually used for projects involving an international partner.

Q: What is the difference between a Collaborative Research Agreement (UOM Lead-Passing terms under Head Agreement) and Collaborative Research Agreement (Bone Fide Collaboration)?

A: The Collaborative Research Agreement (Lead) is intended to be used in a situation where UOM is subject to terms of a Head Funding Agreement and needs to pass those terms onto collaborators, whereas a Collaborative Research Agreement (Bona Fide) is intended to be used in a situation where there are no obligations to pass onto collaborators and there are equal contributions from collaborators.

Q: If UOM is a non-lead party and the Collaboration Agreement between UOM and the Lead has provisions which are not found in the Head Agreement, can we accept them?

A: We would resist inclusion of terms that do not flow through from a Head Agreement unless the lead party provides specific reasons as to why they have included them. If so, we can consider this on a case-by-case basis.

Q: What if there is a request from the external party to use their template even though UoM is the Lead?

A: Usually when UOM is the lead, we would insist on the UoM template unless there are specific reasons why the external party is requesting to use their template. We can consider this on a case-by-case basis.

Q: For Discovery Projects, what if an overseas partner wants to be included in a Multi-Institutional Agreement even though UOM's process is that overseas parties are contracted via a Letter of Agreement?

A: The reason overseas partners are excluded from the MIAs in the first place is due to there being many concerns from them about the comprehensive nature of the MIA which can take longer than usual to negotiate. The PO Letters were put in place to present a succinct version of the MIA so that negotiations do not take as long. If overseas partners wish to be included in the MIA, this should be OK, but it should be made clear that there is little room for negotiation of the contents of the MIA.

Q: ERCA related matters- What are they and what do I need to do?

A: UOM has several departments that have been established under an Enhanced Research Collaboration Agreement (ERCA) that UOM has entered with an external organisation. The current ERCA governed departments are:

1. **The Sir Peter MacCallum Department of Oncology** (established under the ERCA between UOM and the Peter MacCallum Cancer Centre). For more information, click [here](#).

2. **The Bionics Institute** (established under the ERCA between UOM and the Bionics Institute)
3. **The Florey Department of Neuroscience and Mental Health** (established under the ERCA between UOM and the Florey Institute of Neuroscience and Mental Health)
4. **Baker Department of Cardiometabolic Health** (established under the ERCA between UOM and the Baker Heart and Diabetes Institute. For more information, click [here](#)).

There are other Medical Research Institute (MRI's) affiliated with UOM which have ERCA-like agreements, including:

1. **Doherty (established under the Research Funding Collaboration Agreement (RCA) -Melbourne Health)** Rather than apply to researchers within a particular department created under the RCA, the Doherty RCA applies to the list of researchers (which is updated from time to time) specified in Schedule 2 of the RCA for certain categories of Agreement. For more information about the Doherty RCA process, click [here](#).
2. **Orygen** (for the Centre of Youth Mental Health). For more information, click [here](#).
3. **Phoenix Australia** (for the Department of Psychiatry). Please note that operational details regarding such arrangements are in the process of being confirmed.
4. **National Ageing Research Institute Ltd (NARI)**. For more information, click [here](#).

The respective ERCAs set out the processes governing how funded research grants and contracts are to be reviewed and contain provisions affecting key aspects of the review of the agreements and conduct of the research projects, such as IP ownership.

If the ERCA applies, UOM will act as the Administering Institution and will be required to comply with the provisions of the Head Funding Agreement with the external party on behalf of the ERCA- governed department. UOM will also be the party represented on any agreements with collaborators, if relevant.

As per the ERCA, the ERCA governed department will have the IP assigned to them. If the Head Funding Agreement states that the administering party must own the IP or that the Sponsor/Funder must own the IP, UOM will not be able to fulfil its requirements under the ECRA relating to assignment of IP (from UOM to the ERCA- governed-department).

In these situations, we would need to issue a Side Letter Agreement which states that the IP assignment as per the ERCA will not be applicable. Please also note that the ERCA arrangements are internal and do not need to be disclosed to any external parties.

Q: Who should be a party to an MTA/DTA/CDA when it involves an MRI?

A: All agreements should be entered into by UOM (as opposed to the MRI). The exception to this is if the IP, Data, and/or the Material cannot be assigned by UOM to the MRI as per the ERCA. In this case, the relevant MRI would need to be a party to the MTA/DTA/CDA rather than UOM.

CHANGING TERMS OF AN EXECUTED AGREEMENT

Sometimes it is necessary to change the terms of an agreement mid-way through completion. This could be due to CI's moving to a different institution, changes to the timeframes, description of deliverables, or even substantive clauses. Almost all agreements will contain a provision that requires variations to be made **in writing**. Some agreements include a specific process by which variations can be proposed and accepted.

Minor variations such as extension of an end date, or adjustment of the due date for a deliverable under a research contract can be varied using a Simple Project Extension Letter. Other changes (i.e., changes to the prices and other dates) may be formalised simply by exchange of letters or emails – and making it very clear in that document that this is intended to vary the terms of the agreement via a formal Variation Agreement or Deed.

For changes in a current agreement:

- ➔ If a new party is joining an agreement, use an **ACCESSION AGREEMENT**
- ➔ If a party is withdrawing from a project and is not being replaced, use a **VARIATION AGREEMENT**
- ➔ If a party is leaving a project and is being replaced by another party, use a **NOVATION AGREEMENT**
- ➔ If a party needs to change the due date of a deliverable, use a **SIMPLE PROJECT EXTENSION LETTER**

EXAMPLES (REFER TO WORKSHEET 2)

FAQ's

Q: What do I do if I need to change the date (and only the date) of the term in an agreement?

A: Use a Simple Extension Letter Agreement for this purpose. It is a streamlined approach designed to be used to extend the end date of a project or adjust the due date for deliverables under a research contract.

Q: What do I do if the contract is executed and then there is a minor change? For example, we have inserted the wrong CI name or the wrong signatory's name. Do we send the agreement through for execution again?

A: If there is a clause in the agreement that states something along the lines of "this agreement can be varied in writing, signed by the parties" and if we are seeking to make a very minor change (such as changing an incorrect name), we would strike out the wrong name and type the correct name in a different colour. We would then ask the signatory to initial the change and send the agreement across to the other signatories to initial the same change.

Q: What is the difference between a Deed and an Agreement:

A: One of the significant differences between a deed and an agreement are the formalities required. A deed requires no consideration and requires more formalities to solidify the transaction. The formalities include:

- The requirement that the deed be 'signed' 'sealed' and 'delivered'.
- individual signs the document; and
- the document is signed and attested to by at least one witness not being a party to the document.

Deeds at UOM must be signed by the DVCR and the University Secretary which would satisfy the requirements of sealing, delivering and attesting.

HOW TO READ A CONTRACT (BOILERPLATE CLAUSES)

PART 1: INTRODUCTION OF A CONTRACT

Date of the Agreement	A specific date could be identified as the date of the agreement. Alternatively, it may be agreed between the parties that the agreement will be effective from the date on which the agreement is executed.
Parties and Legal Destination	The contracting parties should be clearly identified. This includes names, addresses, ABNs, and emails. How they are identified in the agreement (E.g. UOM is the Administering Organisation). The part of the contract which sets out the details of the contracting parties, their official address details and other pertinent information is known as the <i>legal destination</i> .
Background / Recitals	This should cover details of the source of funding (i.e., ARC Discovery Projects), details of the extent to which parties are involved (i.e., the Administering Organisation and the Collaborating Organisations have successfully applied for an ARC Discovery Project Grant) and the reason that the agreement is needed (i.e., the ARC requires that an Administering Organisation must not allow a Project to commence nor Grant to be expended until it has entered into a written agreement.)

PART 2: MAIN CONTENTS OF A CONTRACT

Definitions	<ul style="list-style-type: none"> • Check that the terms in the Agreement are defined. The use of definitions avoids ambiguity with respect to the meaning of particular words. This is particularly important when a word is used in a different way that differs from its dictionary meaning, or a word that has many dictionary meanings. • Generally, definitions follow the Recitals. Sometimes they are at the end of the agreement. • All nouns commencing with a capital letter are Defined Terms and therefore are intended to have particular meanings that should be defined in the Definitions section. • Check the Defined Terms against the Definitions. • There should be consistent use of Defined Terms throughout the agreement (i.e., a particular term is consistently capitalised throughout the agreement). • Where a noun is not capitalised, it would be expected to have its ordinary meaning relevant to the context. • Definitions should be in alphabetical order. • Make sure that the definitions section does not include any obligations to do something. • Please look out for definitions of Project IP that are too broad, especially if they include Background IP. Also look out for how Confidential Information is defined. If it includes IP in the definition, we may need to delete the IP reference as we would be restricted from using that IP if it is considered confidential information. It should not be included in the definition of Confidential Information, as IP is not information. This will need to be pointed out to EAAC via a referral for negotiation.
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Term/Duration of the Agreement	This clause outlines when the Agreement starts and when it is completed. This includes either specific start and end dates, or something a bit more flexible. For example, “upon signature” rather than a specific start date, and “upon completion of a project” rather than a specific end date. On occasion, the commencement date may be retrospective – this must be clearly agreed by all parties to the agreement. If in doubt, check with the researcher.
Head Agreement/Funding Agreement (if applicable)	<p>Ensure that there is a clause referencing the Head/Funding Agreement if applicable, particularly if we are the lead. Some of the agreements found on the Research Gateway or provided by the external party may not reference a Head Agreement. Please refer it through to EAAC to make the necessary adjustments. Generally, the clause that is required to be included is as follows:</p> <p>1. Head Agreement</p> <p>1.1 Each Collaborator acknowledges that funding has been received by UOM for this Project under the Head Agreement and that Collaborator’s acts or omissions may cause UOM to breach or otherwise incur liabilities under the Head Agreement.</p> <p>1.2 The Collaborator acknowledges that it has read and understood the Head Agreement and agrees to comply with the terms of the Head Agreement, to the extent that such terms are relevant to the Collaborator’s involvement in the Project, as if it were named in UOM’s place in the Head Agreement.</p> <p>1.3 Each party will:</p> <p>(a) comply with the reasonable directions of UOM, and do all things necessary, to enable UOM to comply with the terms of the Head Agreement; and</p> <p>(b) must not do or fail to do anything that would be reasonably expected to place UOM in breach of its obligations under the Head Agreement.</p>
Project	A Project can also be referred to as Service/s, but the terms have different meanings. A project results in a new, modified good or service, or result. A Service has an operational aspect and delivers value that the recipient uses to achieve outcomes while removing the ownership of specific costs and risk.
Payment	<p>If the agreement is financial, there would be a payment clause which sets out expectations for payment (including when the client needs to pay UOM and the penalties for missing a payment).</p> <p>There are often situations where UOM is passing through funding obtained via a funder to a collaborator. In those instances, it is important to ensure that payment timelines align.</p>
Subcontracting	<p>Refers to engaging with another party outside of the collaboration. A subcontract clause in an agreement describes whether the arrangement is possible and what needs to occur under that arrangement.</p> <p>For example, the clause may state that permission needs to be sought before we can engage with a subcontractor if we are the non-lead. If we are the lead, we would generally expect to be notified of the intention. If the agreement is subject to a Head/Funding Agreement, there may be terms that need to be flowed down to the agreement with the subcontractor.</p> <p>Generally, the party subcontracting another party remains fully responsible for the performance of all the work provided by the subcontractor.</p>

<p>Conflict of Interest</p>	<p>To assist researchers in assessing whether an interest qualifies as a COI, it is important to understand the relationship between personal interests and professional duties.</p> <p>A researchers' personal interests are those outside a researchers' employment at UOM that can bring financial or material benefits or result in disadvantages to the interests of UOM.</p> <p>Personal interests can be (i) financial; where a researcher has a secondary or an honorary appointment, or has shareholdings in an organisation other than UOM; or (ii) non-financial; where a close connection of a researcher may gain financially or otherwise from the researcher engaging the party.</p> <p>Professional duties are those duties that are part of researchers' employment contracts, and incorporate the duty to comply with UOM policies and procedures, specifically the Research Integrity and Misconduct Policy and the responsibilities outlined in the Code.</p> <p>A COI arises where there is a logical overlap or connection between a researchers' personal interest and their professional duties. This can influence or bias a researchers' judgment when conducting, evaluating or reporting on research, engaging staff or contractors, or in the procurement of materials. Broad categories of COIs can be found on the Legal and Risk staff hub page. (https://staff.unimelb.edu.au/legal-and-risk/conflict-interest).</p> <p>The Office of Research Ethics and Integrity (OREI) advises and assists researchers with disclosures and COI managements plans.</p> <p>If RGCF staff have questions or need to check if someone is conflicted or has a COI plan, please contact Nathan Page Research Governance Senior Officer (Conflict of Interest)</p> <p>UOM's policy related to Conflicts of Interest is found in the 'Managing Conflicts of Interest Policy (MPF1366)' https://policy.unimelb.edu.au/MPF1366/</p>
<p>Termination</p>	<p>Sets forth the circumstances under which agreements may be terminated (including the effects of termination- payments and other rights and obligations).</p> <p>Some problematic termination clauses include clauses that are too one-sided, that lack clarity or that are too broad.</p> <p>For example, a termination clause that allows one party to terminate the agreement for any reason, without notice, and without providing the other party with any compensation, could be problematic.</p> <p>Another problematic termination clause would be one that is too vague, such as a clause that simply says, "either party may terminate this agreement for cause," without defining what constitutes "cause".</p>

	<p>A third problematic termination clause would be one that is too broad, such as a clause that allows one party to terminate the agreement for any breach, no matter how minor or unintentional.</p> <p>It is important that the termination clauses include a term that UOM is able to retain unspent but committed funds to enable it to discharge its contractual obligations, especially in relation to the payment of staff salaries and student stipends.</p>
GST	<p>If the funding is GST inclusive (i.e. GST is not being paid on top of the amount), it means that the amount the researcher would be able to spend is less. If the amount is GST exclusive, then they would pay us GST on top of the quoted amount.</p> <p>For example, if the contract outlines that the sum is \$110,000 incl. GST, the researcher would have \$100,000 to spend, and \$10,000 would be reserved for GST. If the contract outlines that the sum is \$110,000 excl. GST, the researcher would have the entire \$110,000 to spend. (UOM would collect the GST amount of \$10,000 separately).</p>
Dispute Resolution	<p>The benefits of having a dispute resolution clause is that it can act as a “buffer” to prevent the parties from going to court. It is a way to resolve any issues before, or instead of, going to court. Ensure that there is a dispute resolution clause included in external party agreements, particularly if the project is high risk. Usually there are triggers to enter dispute resolution processes as identified in the clauses, which can include internal mediation, external mediation, and arbitration, with litigation considered as a last resort. An example of a dispute resolution clause is as follows:</p> <p>Dispute Resolution</p> <p><i>(a) If any dispute or difference arises in connection with this Agreement, then the parties involved in this dispute shall negotiate in good faith using their best endeavours to resolve the dispute or difference. If the dispute or difference cannot be resolved in the first instance, the parties agree to refer the dispute to, in the case of UOM, the Deputy Vice-Chancellor (Research) and, in the case of each Collaborator, its Chief Executive Officer or equivalent officer, or their nominee.</i></p> <p><i>(b) Any Dispute which cannot be settled under clause 17(a) within a reasonable time must be referred for determination by a person appointed for that purpose by the parties and failing Agreement, appointed by the Chair of the Resolution Institute or the Chair’s designated representative.</i></p> <p><i>(c) Any determination made under the above clause is binding on the parties and the Commercial Arbitration Act 2011 (Vic) applies to the determination except to the extent otherwise agreed by the parties.</i></p> <p><i>(d) Nothing in this clause 17 will prevent a party from seeking urgent interlocutory relief.</i></p>

Force Majeure	<p>A problematic force majeure clause might include a broad or vague definition of what constitutes as a force majeure event, or it might allow one party to terminate the contract without providing any compensation to the other party.</p> <p>For example, a force majeure clause that simply says “any event beyond the reasonable control of the parties” would be problematic because it is too broad and could be interpreted in different ways by different parties. Another problematic force majeure clause would be one that completely excuses performance by one party, rather than just delaying it, even if the event is only partially responsible for the non-performance.</p>
Notices	<p>Contracts usually include information on a designated person to whom official notices should be sent. For example, UOM standard contracts usually identifies the Director of Research Grants Contracts and Finance as the relevant person for notices, alongside their contact details.</p>
General	<p>The ‘General’ section of a contract outlines the important sections which can be set out in one line. For instance, clauses relating to jurisdiction and governing law; the parameters regarding when a contract may be varied; and signatures via counterparts are commonly included in the General section.</p>
Governing Law and Jurisdiction	<p>Jurisdiction relates to the authority of a court or legal system to make decisions on a particular case. The Governing Law sets out which laws the Parties will be bound by.</p> <p>The preferred UOM position in all agreements (where UOM is the lead) is that the Governing Law is Australian Law, and the jurisdiction limited to Australia. This position is not always accepted when negotiating with international partners.</p> <p>An acceptable UOM position (where UOM is not the lead, and the external party is international and rejects our first preference) is for the Governing Law & Jurisdiction to be silent.</p> <p>In assessing whether to divert from the UOM standard approach, the following points need to be considered:</p> <ul style="list-style-type: none"> (a) The level of risk for the project in considering all the various risks (b) Whether there is a Dispute Resolution clause, and how liberal it is. (c) Who the collaborator is, and the likelihood of the matter ending up in court. (d) What the likelihood is of commercially valuable IP being developed.
Entire Agreement	<p>It is important to ensure that any previous representations relating to the terms of the contract are not relied upon. An Entire Agreement clause outlines that it is only the current contract and its terms and conditions that are legally binding, and that all previous documents or conversations cannot be relied upon as being part of the contract.</p>

Variations	Inclusion of a variation clause means that we can vary the agreement when changes are required after the contract has been executed/signed. For this reason, it is important to ensure that a variation clause is included when reviewing agreement templates from external parties.
Branding	A Branding clause outlines the parameters within which each party to the contract may use the other party's brand in communications relating to the project. A commonly adopted position related to branding is that neither of the parties to the contract will use, or authorise the use of, each other's name, brand or logo unless such use has expressly been agreed to in writing.
Notification of Significant Events	<p>In some Commonwealth agreements, there is a requirement that UOM notifies the Commonwealth in the event that a 'Significant Event' occurs.</p> <p>Examples of instances of 'Significant Events' would be:</p> <ol style="list-style-type: none"> 1. Adverse comments or findings of judicial and other bodies; and 2. Events that may adversely impact compliance with Commonwealth policy or legislation. <p>The provision also requires suppliers to, on request, produce and comply with a 'remediation plan' in connection with any such 'Significant Event'.</p> <p>If a Notification of Significant Event clause is included, please refer the matter to EAAC.</p>

PART 3: CONCLUSION OF A CONTRACT

Signing Page & Execution	<p>The Signing Page and execution block outlines the names of the organisations, investigators, authorised signatories, and the date signed.</p> <p>RGCF Signing Register</p> <p>Once an agreement has been prepared for signature, it must be presented to the RGCF Director for their signature. A Microsoft Teams page titled 'Director RGCF Signing' has been created, and access has been provided to all RGCF staff. The page contains a spreadsheet where grants officers are expected to set out details of the agreement for signing, including background information related to the signing request.</p> <p>One Span Sign</p> <p>One Span Sign is an online method for signing contracts adopted by RGCF. OneSpan Sign leverages digital signature technology to create secure electronic signatures.</p> <p>The OneSpan Sign process applies where RGCF is managing the end-to-end processing of a research or research-related Deed, Agreement > \$2M, Tender or Application > \$2M, or other document which requires signing or approval by the Deputy Vice-Chancellor Research (DVCR). OneSpan Sign will be used by the responsible grant or contract officer for electronic signing of the:</p> <ol style="list-style-type: none"> 1. Memo for DVCR by Director, RGCF;
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	<ol style="list-style-type: none"> 2. Deed / Agreement > \$2M by the DVCR; and 3. Where accepted by the external party, by the authorised representative of the external party. <p>To use One Span Sign, the user needs to create an account and login to the portal. Once logged in, the user will be able to upload relevant documents for signing which can be viewed and signed by the delegate.</p> <p>Signing delegations</p> <p>The delegate for signing for most agreements that come to RGCF would be the RGCF Director. Some types of agreements such as Deeds require sign off from the DVCR.</p> <p>Agreements signed off in Faculty</p> <p>RIC Contracts, in conjunction with Legal & Risk, have developed a range of standard University of Melbourne Research Agreements. They can be signed by either Deans, Heads of Departments/Schools, or the DVCR depending on the nature of the agreement and the financial value of the agreement. These are found on the Research Gateway.</p> <p>https://gateway.research.unimelb.edu.au/resources/contracts/standard</p>
Milestones/Deliverables	<p>Any milestones that the project is expected to achieve, and the timeframes during which these must be met, are outlined in this section. Milestones and deliverables are included either within the substantive contract or in an attached Schedule (the latter of which is most common). A milestone may be tied to a payment, and milestones must always be confirmed with the CI. E.g. Milestone [X] must be achieved by 1st January 2024, which coincides with the payment made from the funder to the recipient of \$50,000.</p>
Payment Details	<p>Payment Details outline the ways in which payments can be received. It would include the mode of payment and details of the recipient's bank account name, BSB, and bank account number.</p> <p>It is imperative that we understand how funding will be received when executing an agreement as it can cause unnecessary delays in disbursement of funds where this is not clear. In most circumstances, we will send invoices to the funder per an agreed timeline, or we will receive funds through an RCTI. We may also receive funds through a claim of expenditure where we can only invoice for actual costs incurred.</p> <p>The sponsor's timelines usually drive the payment requirements, but we cannot honour monthly invoicing. If monthly invoicing is non-negotiable then we should be clear that the finance teams will do their best but there will be delays. Only in rare circumstances should we accept this requirement.</p>
Reporting Obligations	<p>Reporting obligations related to the project may be set out in the substantive terms of the agreement or in an attached Schedule and must</p>

	<p>always be confirmed with the CI. Sometimes, reporting obligations go hand in hand with the completion of certain milestones.</p> <p>All agreements with reporting requirements should specify that the researchers should provide a report in an agreed format acceptable to the other party. Ensure that agreements do not contain a provision imposing an obligation on the University to provide a report “to the satisfaction of the outside body”.</p> <p>The agreement may stipulate certain financial reporting requirements, often in line with milestone payments or at the conclusion of a project. In most cases this will be a financial acquittal/statement. For claims of expenditure, these will also need to be accompanied by a financial report in most cases.</p> <p>When evaluating financial reporting conditions, please note the below practical considerations:</p> <p>Financial Reports: preparation requires 1 month from the end of the designated reporting period. For example, a financial report covering January – June 2024 would require a due date of 31st July 2024.</p> <p>Some agreements will also include a requirement for an <i>audited</i> financial report. There are two kinds of audits: an internal audit, and an external audit.</p> <p>Internal Audit Report: can be performed by employees of UOM. A Financial Report must be prepared before an Internal Audit Report can be prepared. Therefore, preparation of an Internal Audit Report requires a due date 8 weeks from the end of the specified reporting period (4 weeks for the Financial Report, and another 4 for the Internal Audit Report).</p> <p>For example: for reporting period ending June 2024, a Financial Report can be completed by 31st July, and internally audited by 31st August.</p> <p>External Audit: The process for an external audit is much the same as an internal audit, with the additional requirement that the audit be completed by an external party. A Financial Report and Internal Audit Report must be completed before the External Audit Report can be prepared. Therefore, an External Audit Report requires a due date 12 weeks from the end of the reporting period. For example, for reporting period ending 30th June 2024, the Financial Report will be due 31st July, the Internal Audit Report by 31st August and the External Audit by 30th September. There are significant costs associated with External Audit Report that need to be considered when establishing the project budget.</p>
Party Representatives Details	<p>Party representative details include names of the organisations, investigators, authorised signatories, contact details, invoicing details, and acquittal details.</p>

Schedules	Schedules may include a collection of details in the conclusion and can include a Schedule that outlines payment arrangements; party representative details, etc.
Annexures	Any other documents referred to in the agreement and attached for reference. E.g. A Multi-Institutional Agreement would usually have the Funding Agreement and Application annexed to it.

IMPORTANT TERMINOLOGY

Background Intellectual Property or “Existing Intellectual Property”	Intellectual property that exists prior to performance of a research project, or that is conceived or developed at any time independently of the research project but relates to the research project.
Breach of Contract	A failure by one or more parties to comply with the terms or perform their obligations.
Contract or “agreement”	A legally enforceable agreement. “Contract” and “Agreement” are used interchangeably in this document to mean any legally binding arrangement. What makes something a contract is its intention and content, not its name or form. Any agreement between UOM and an outside party should be documented in some way, but whether a more comprehensive or formal written contract is required will depend on the circumstances.
Copyright	The rights to reproduce, distribute, publish, perform, broadcast, or translate literary and artistic works fixed in a tangible medium, including computer programs and technical drawings.
Improvements	Technology that builds upon existing intellectual property to improve a product or service. An improvement may require access to background IP to be practiced. Conversely, it may effectively block full enjoyment of existing inventions.
Know-how	A type of intellectual property created through experience gained in performing tasks.
Moral Rights	Moral rights are legal rights of an author to protect the integrity and ownership of their work and include the following: (1) <i>the right to attribution and ownership</i> - the right to be named as the author/creator of the work; (2) <i>the right against false attribution</i> - the right not to have authorship of the work falsely attributed; and (3) <i>the right of integrity</i> - the right not to have the work altered in a prejudicial way.
Negotiation	The process through which parties offer and accept terms to reach consensus.

Obligations or “Deliverables”	The tasks, things or commitments agreed to in the contract, which the parties are required to perform or deliver as part of the deal.
Parties	The people or organisations entering the contract.
Performance	Carrying out the tasks or meeting the obligations agreed to under a contract.
Project Intellectual Property	Intellectual property that is conceived, created, or developed during the performance of the research project.
Risk	A potential threat or event that could compromise UOM’s position if it occurred.
Terms	The details in the agreement and the obligations imposed, or deliverables expected.
Third Party Intellectual Property	Refers to intellectual property owned by a party that is not a party to the agreement. This arises in instances where IP owned by a third party is or is sought to be incorporated into, or used with respect to, a project the rights to which are obtained by a party through a licence or other means.
Trademark	The right to exclusive use of a particular name, phrase, symbol, or design to identify a good or service, and to distinguish it from the goods or services of others.

FAQ’s

Q: The other party is requesting deletion of the witness signature panel. Can I delete the witness signature panel on the agreement?

A: Yes, the witness signature panel can be deleted in Agreements, but it cannot be deleted in Deeds.

RISK & LIABILITY

WHAT IS A WARRANTY?

A warranty is a statement of assurance that a party makes in an agreement. If a party is found to be in breach of a warranty, there is potential for the other party to claim damages for that breach. UOM's preference is to avoid asserting warranties. External parties may require UOM to make warranties.

For instance, UOM may be required to make a warranty that UOM's Background IP does not infringe the IP rights of a third party. UOM would seek to qualify the IP warranties by adding 'to the best of our knowledge and belief'.

EXAMPLE WARRANTY CLAUSE

- (i) *Each party warrants that it is the owner of, or is otherwise entitled to provide, the Background IP which is identified in Item [X] of Schedule [Y] as being owned or provided by it and it is authorised to license its Background IP to the other party in accordance with this agreement.*
- (ii) *Each party warrants that as at the commencement of this Agreement, neither it nor its personnel have any actual, perceived, or potential conflicts of interest in relation the Project.*

WHAT IS AN INDEMNITY?

An indemnity creates an obligation to compensate another party for any loss or damage that the other party may suffer during the performance of the contract. The details of the clause spell out: the conditions under which such a clause would be affected; allocate contractual risk; and define each party's liability or potential liability.

Indemnities required to be provided under agreements can vary in their degree of severity. Some agreements may include clauses containing broad indemnity clauses whereas some indemnity clauses may contain narrow indemnity clauses.

If the indemnity is broad (i.e. it includes loss of profits, economic loss, exemplary damages, consequential loss, and other matters that are unquantifiable in advance and potentially limitless), it can potentially lead to high exposure of risk to UOM. It will be appropriate for use in agreements which involve a higher degree of risk and complexity. Additional risks arise if the indemnity includes a requirement for UOM to indemnify for the actions of third parties, or is not limited to the Project, etc.

Clauses containing narrow indemnity provisions (i.e., that include the basic types of losses such as expense, and costs etc), are suitable in lower value, lower complex matters where the relationship between the parties is collaborative in nature.

EXAMPLE INDEMNITY CLAUSE

- (i) *Each Collaborator indemnifies UOM from and against any claims, demands, charges or expenses (including reasonable legal costs) (**Claim**) made against or incurred by UOM arising under the Head Agreement to the extent that such Claim was contributed to by such Collaborator.*

PROPORTIONAL REDUCTION OF LIABILITY

One way that UOM can reduce risks incurred by the inclusion of an indemnity clause is to seek for that indemnity to be mitigated. This position is intended to mirror Common Law by excluding an indemnified party's ability to recover losses incurred because of actions contributed by them, or that occurred because of their failure to take reasonable steps to mitigate the losses.

EXAMPLE PROPORTIONAL CLAUSE

- (i) *UOM's liability to indemnify the Collaborator under this clause [X] will reduce proportionately to the extent to which such liability, loss, damage, or expense is caused by or contributed to by the acts or omissions of UOM, their employees, personnel, contractor, consultant, agent or representative.*
- (ii) *UOM's liability under this Agreement is subject to the Collaborator having used all reasonable endeavours to mitigate the losses arising out of, in connection with, or otherwise concerning the indemnity being claimed.*

LIMITATION OF LIABILITY

Collaborators often request the inclusion of a clause that limits their liability by including a liability cap of the amount of funding provided to them in the agreement. This is a mechanism used to manage the risk that a company is exposed to upon entering into commercial agreements.

If UOM signs an agreement that includes a liability cap (for example, limited to the amount of the grant), UOM may not be able to recoup its losses from the external party. The capped amount may not be adequate to cover losses related to a breach of confidentiality, breach of third-party rights, and so forth.

EXAMPLE LIMITATION OF LIABILITY CLAUSE

- (i) *Liability of the Research Organisation under this clause [X] will be limited to an amount equal to the amount of the Fees.*

INSURANCE AT UOM

Insurance is a 'risk transfer, loss-spreading arrangement'. Its purpose is to distribute risk through providing a mechanism by which individuals and organisations purchase, by way of a premium, insurance products to mitigate that risk. Risk is then transferred to the insurer which indemnifies them against future events that may cause loss. For more information, visit <https://www.alrc.gov.au/publication/grey-areas-age-barriers-to-work-in-commonwealth-laws-dp-78/4-insurance/insurance-in-australia/>.

UOM has a variety of insurance policies that cover different insurable exposures including:

Travel	Personal Accident	Property	Fine Art	Crime	Aviation	Combined Liability
Cyber Liability	Directors & Officers Liability	Marine Hull	Workers Compensation	Marine Cargo	Motor Vehicle	

The most common insurance referred to in research contracts are in relation to Combined Liability, especially Public Liability, Professional Indemnity and Workers Compensation Insurance.

If the external party requires evidence that UOM has insurance, Certificates of Currency can be found at the following link:

https://unimelb.service-now.com/sp?id=kb_article&sys_id=f7a5d538872e79105420ab0a0cbb3580

Any specific queries related to insurance can be directed to Ash Hepburn, Insurance Lead-Risk & Insurance on T- 0383441874/ E- ash.hepburn@unimelb.edu.au

INSURANCE CLAUSES IN AGREEMENTS

There may be a clause that requires UOM to ensure that it has appropriate insurance. Any insurance obligations must relate to UOM, not for UOM to take out insurance for third parties. It can be problematic if UOM is required to insure third parties and/or if an insurance clause is based “per claim” rather than in the aggregate. Please note that UOM is unable to include a named party on its insurance policy as it holds a framework of global insurance and cannot make exceptions for the many stakeholders that we collaborate with.

Watch out for clauses that seek access to UOM insurance policies or include a term for the requirement of a copy of UOM’s insurance policy. The preference would be to provide a copy of the Certificate of Currency. If in doubt, please speak to your manager or contact the University Insurance Office.

All agreements should specify which party is to bear the liability for loss or damage arising out of work performed pursuant to an agreement. This should be done regardless of whether the parties are insured for public liability, professional indemnity, or any other class of insurance.

EXAMPLE INSURANCE CLAUSE

- (i) *The Research Organisation must take out and maintain:*
 - a. *public liability insurance against all usual risks and any other risks as reasonably required by the Company; and*
 - b. *any other insurance set out in Schedule [X].*
- (ii) *If requested by the Company, the Research Organisation must provide the Company with copies of the certificates of currency and any other information requested by the Company in relation to these policies.*

UNFAIR CONTRACTS TERMS REGIME

The regime applies to **standard form contracts** that are **consumer contracts** or **small business contracts**.

When reviewing a template, consider at the outset:

- Is the template presented to the other party without the opportunity for meaningful negotiation? (Most client templates that do not come through Legal & Risk will fall into this category, given the expanded definition of a standard form contract)
- How often, if ever, would the template be used with a small business (or a consumer)?

Standard form contracts	Consumer contracts	Small business contracts
<p>In determining if a contract is a standard form contract, a court may consider any matter it considers relevant, but must consider certain matters listed in the ACL including:</p> <ul style="list-style-type: none"> • whether one party has all or most of the bargaining power; • whether the other party was given an effective opportunity to negotiate the terms of the contract; • whether another party was forced to accept the contract on a “take it or leave it” basis; • whether the terms of the contract take into account the specific characteristics of the particular transaction; and • any other matter prescribed by regulations (currently, none). <p>A contract may be determined to be a standard form contract despite there being an opportunity for a party to:</p> <ul style="list-style-type: none"> • negotiate minor or insubstantial changes; • select a term from a range of options; and • negotiate terms of another contract. <p>In addition, the court must consider whether a party has used the same or similar contract before.</p> <p>There is a statutory presumption that a contract is standard form unless proven otherwise.</p>	<p>A consumer contract is a contract for:</p> <ul style="list-style-type: none"> • a supply of goods or services; or • a sale or grant of an interest in land, <p>to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption.</p>	<p>UCT laws will apply to any standard form contract where one party has:</p> <ul style="list-style-type: none"> • up to 100 employees; or • annual turnover of up to \$10 million.

Please be mindful that the positions outlined in this document are in the context of templates that are used with small businesses and which might be captured by the UCT regime.

When reviewing terms, remember that a term is **unfair** if all three of the following criteria are satisfied:

1. it would cause a **significant imbalance** in the parties’ rights and obligations arising under the contract;
2. it is not **reasonably necessary** to protect the **legitimate interests** of the party advantaged by the term; and
3. it would cause **detriment** to a party if it were to be applied or relied upon.

Types of clauses to look out for

- Clauses that enable one party (but not another) to:
 - avoid or limit performance of the contract;
 - vary the terms of the contract, the characteristics of the goods or services to be supplied, or the contract sum;
 - terminate the contract;
 - determine whether the contract has been breached or what it means;
 - assign the contract without consent to the other party's detriment;
 - renew or not renew the contract;
- penalise one party (but not another) for breaching the contract; or
- limit one party's right to sue another party.

For example:

- termination clauses
 - terms permitting one party (but not another party) to terminate the contract;
 - terms permitting one party to terminate in a much broader range of circumstances;
 - unduly short periods to rectify a breach before the other party can terminate;
 - terms permitting one party to vary the upfront price payable without the other party having a right to terminate;
- liability clauses
 - broad exclusion or limitation of liability provisions in favour of only one party;
 - no corresponding right for the other party to limit / exclude liability;
- indemnity clauses
 - broad indemnities in favour of one party only;
- renewal clauses
 - automatic roll over / renewal terms (with no / limited period to cancel);
- fees and payment terms
 - ability to charge unspecified / unfair late payment fees;
 - unfair payment terms (e.g. payment due regardless of delivery);
 - term imposing excessive / unclear / unjustified early exit fees or penalties / liquidated damages;
 - terms imposing additional costs on capital investment by other party;
 - restraints / buy out fees;

- boilerplate / other clauses
 - terms permitting one party (but not another party) to vary the terms of the contract (including other documents and price contract);
 - permitting one party to assign the contract to the detriment of the other party without consent;
 - entire agreement clauses (where pre-contractual representations are excluded but incentivised party to enter contract);
 - exclusivity terms where exclusivity is not necessary or is too restrictive;
 - non disparagement clauses (control / prevent public comment or reviews);
 - reliance on extraneous document where such documents are not provided or adequately brought to party's attention; and
 - imposing onerous positive obligations (e.g. co-operation requirement).

PUBLICATIONS AND CONFIDENTIALITY IN RESEARCH AGREEMENTS**WHAT QUALIFIES AS A PUBLICATION?**

“Publication” in a university context refers to the publication of an abstract, article or paper, presentation at a conference or seminar, or other public disclosure where such publication discloses any details or results of a project.

WHY IS IT IMPORTANT FOR RESEARCHERS TO BE ABLE TO PUBLISH FREELY?

Being an educational institution, the ability to freely publish is of paramount importance to UOM. As a public research university, most work done is for the public good and the intention is that the work is available as soon as possible. Publications also ensure that input from the wider academic community is obtained. From a practical perspective, researchers’ ability to obtain funding and to prove themselves in the academic world is increasingly linked to their ability to show how many publications they author and how much of an impact their publications are having in the real world.

UOM’S POSITION RELATED TO PUBLICATIONS

- UOM generally expects that its researchers are able to publish outcomes of the research project and therefore the aim is to include clauses within contracts to ensure this can happen.
- The accepted and most common publications position is for the researchers to submit the proposed publication to the other party 30 days before publication, providing the other party time to review and comment on the proposed publication.
- A specified timeframe is identified so that there are no indefinite delays related to publications.
- It is expected that the review and comments are provided within the identified period.
- A clause is included that specifies if the other party does not respond within the identified period, consent to publish is deemed to have been given.
- The other party is given the opportunity to identify confidential information belonging to them and can request the removal or modification of their confidential information from the publication.
- A right for the other party to modify the document for no rational or reasonable reason is not permitted.

HALLMARKS OF AN IDEAL PUBLICATIONS CLAUSE

A publications clause that contains minimum restrictions is usually found in agreements where the general intention is for the research results to be published. Such a clause will have the below hallmarks:

1. Acknowledgement that the parties wish to publish the results of the project.
2. Agreement between the parties that any proposed publications will be presented to the other party within a certain time frame (usually 30 days) for the other party to review the collaborator’s proposed publication.
3. Acknowledgement that the non-publisher may only object to the publication if it contains their confidential information, in which case it shall be removed before publication, upon request.
4. Acknowledgement that the non-publisher may object to the publication if publication at that time would jeopardise the non-publisher’s interest in any Project IP. In this case, a reasonable delay shall be agreed upon between the parties unless such Project IP can be protected.
5. Acknowledgement that the non-publisher will not have editorial rights over the content.
6. Agreement that the contributions of all parties are acknowledged and recognised in all publications.

EXAMPLE 1: REASONABLE PUBLICATIONS CLAUSES

- (a) If You or We wish to publish a scholarly work in relation to the Project (Publisher), the Publisher will provide the other (Non-Publisher) with a copy of the proposed publication (Publication) at least one month before it is published, and the Non-Publisher must notify the Publisher in writing within 20 days whether or not the Non-Publisher agrees to the Publication. The Non-Publisher may only object to the Publication if it contains the Non-Publisher's Confidential Information, in which case the Publisher will remove the Confidential Information and then the Publisher may release the Publication. If the Non-Publisher does not respond to the request to publish within 20 days, consent to the Publication will be deemed to be given.*
- (b) The Non-Publisher does not have editorial rights over the content of the Publisher's Publication.*
- (c) The Publisher will include in any Publication an appropriate acknowledgement of the Non-Publisher's contribution to the Project and the Deliverables.*

EXAMPLE 2: REASONABLE PUBLICATIONS CLAUSE

- (i) Subject to clauses (a) (Confidentiality) and (ii) (subclause below) each Participating Organisation agrees to provide the Administering Organisation with any publications resulting from the Project.*
- (ii) The Publishing Party will provide a copy of the proposed publication to each other Party at least 30 days in advance of submitting for publication. The other Parties may provide comments and/or reasonable amendments to the publication to protect their Confidential Information and/or Intellectual Property, including requesting removal or delay to the inclusion of information which may pre-empt the publication of their Project Intellectual Property, provided this is not jointly owned with the Publishing Party. Any such comments and/or amendments must be given to the Publishing Party in writing no later than 15 days before the publication is proposed to be submitted. If no such comments or amendments are provided within the 15-day period, the Publishing Party can submit the proposed publication, subject to any applicable requirements under the Grant Agreement. Where a Party requests that the proposed publication be amended in accordance with this clause (ii), the Publishing Party will use all reasonable efforts to amend the proposed publication accordingly and, if requested, delay submission of the publication for a period not exceeding 6 months to allow appropriate registration of any registrable Intellectual Property.*
- (iii) Each Party agrees that all publications, acknowledgments, and publicity must be in accordance with the requirements of clause 7 (Acknowledgements) of the Grant Agreement.*

RESTRICTIONS ON PUBLICATIONS

There may be limited circumstances under which the University agrees to accept some restrictions related to publications:

1. If there is valuable Project IP generated as a result of the project, where the publication of such material may jeopardise the protection of such Project IP (e.g., a provisional patent application).
2. For other commercial reasons.

In such cases, the time limitation would normally be no longer than 12 months. Indefinite restrictions on publication are not acceptable.

EXAMPLE: RESTRICTIVE PUBLICATIONS CLAUSE

The hallmarks of a restrictive publications clause would include a requirement for UOM to obtain written consent from the collaborator before publishing, with publications being entirely at the discretion of the collaborator.

- 1.1 *The Research Organisation must not publish or disseminate any information relating to the Methodology, the Results or the Final Report (**Publication**) without the Company's prior written consent, consent which shall be provided at the Company's absolute discretion.*
- 1.2 *The Research Organisation must ensure that any Publication permitted under clause [X]:*
 - (a) acknowledges the use of the funding provided by the Company; and*
 - (b) does not adversely affect the rights of a party to register, protect or commercially exploit the Project IP*

at least 30 days prior to any Publication being published by the Research Organisation, a draft of the Publication must be provided to the Company, and the Research Organisation must adopt any and all amendments requested by the Company within 30 days of the draft Publication being provided.

SAFEGUARDS WHEN RESTRICTIONS ON PUBLICATIONS ARE REQUESTED

UOM may accept restrictions on seeking approval for publications or delaying publications due to the need to protect Project IP or Confidential Information. Depending on the relationship UOM has with the collaborator and the nature of the project, further clauses could be included which limit the external party's ability to restrict publications. This can include the following:

1. A requirement that the collaborator provides UOM with reasons and/or substantiating evidence to demonstrate the reasons why the collaborator refused consent to publish.
2. That such reasons and/or substantiating evidence must be of reasonable satisfaction to UOM.

EXAMPLE- ADDITIONAL PROVISIONS

- 10.6 *Should the Company withhold consent to publication under clause 10.5, the Company must:*
 - (a) furnish such reasons; and*
 - (b) provide substantiating information, evidence (or both), as may be requested by the Research Organisation to demonstrate, to the Research Organisation's reasonable satisfaction, the Company's compliance with the requirements of clause 10.5.*

STUDENT PUBLICATIONS CLAUSE

- There may be students involved in projects whose rights to publish should specifically be carved out and protected even if UOM accepts other publication restrictions.
- There may be clauses in contracts that may prevent a student's thesis from being examined.
- Students always own copyright in their thesis and must be able to submit their thesis for examination.
- If student clauses appear unreasonable, and upon discussions with the external party it becomes clear that publications without restrictions are not possible, the CI/supervisor should consider whether the student should be involved in the project at all.
- If it is crucial that the student needs to be involved in the project and there are exceptional circumstances for accepting restrictions related to publication of the student's thesis, these must be discussed with the CI and the student prior to agreeing to such restrictions. There should be identified reasons and rationale as to why this should occur.

EXAMPLE- STUDENT CLAUSE

- 1.1. *The Parties acknowledge that any Party that has a Student involved on the Project may have obligations under its respective statutes to deposit in the library a copy of a Student's completed thesis or work submitted for a higher degree. Nothing in this agreement affects the operation of those statutes or creates any obligations contrary to those statutes.*
- 1.2. *The Parties agree that copyright in a Student's thesis will be owned by the Student but the Party where the Student is enrolled will ensure that the Student enters into written arrangements which are consistent with the terms of clause 4 of this agreement before the Student commences any research activities on the Project.*

CONFIDENTIALITY AND PUBLICATIONS

- Publication and Confidentiality are intrinsically linked.
- While publishing findings of research is the ultimate goal, it is important to recognise that some information must remain out of the public domain. The mechanism for approval of publications is important as it allows removal of confidential information such as valuable IP that is in the process of patent registration.
- It is reasonable for a party to include clauses in the agreement stating that their Confidential Information is to be kept confidential.
- It is important to ensure that 'Confidential Information' is not defined too broadly as to unacceptably limit the scope of the University's publication rights.
- One of the key things to look out for is whether the Project IP is included in the definition of what constitutes as "Confidential Information". This will restrict the researchers' and UOM's rights to use such Project IP, including the freedom to publish.

EXAMPLE: CONFIDENTIALITY CLAUSE

- (a) *Each Party acknowledges that all Confidential Information disclosed by one Party to the another Party, whether existing prior to the commencement of the Project or created in the course of the Project, is confidential and shall be kept confidential and shall not be disclosed to any other Party or any third party without the prior written consent of the Disclosing Party (such consent not to be unreasonably withheld or delayed), except where disclosure is:*

- A. *required by law;*
- B. *of information in the public domain other than due to a breach of this clause;*
- C. *pursuant to the terms of the Grant Agreement; or*
- D. *required for the purposes of the Project.*

The disclosing Party must ensure that any disclosure to a third party is on equivalent terms as to confidentiality as those contained within this clause.

- (b) *Notwithstanding clause (a), the Administering Organisation may disclose Confidential Information to the ARC, including the terms of this agreement, if required by the ARC under the terms of the Grant Agreement and each Collaborating Organisation acknowledges and agrees that the ARC may use and disclose the Confidential Information in accordance with clause 32 of the Grant Agreement.*

PUBLICATION CASE STUDIES (SEE WORKSHEET 3)

FAQ's

Q: Why do I need to enter into a confidentiality agreement if there are confidentiality clauses already in the agreement?

A: Some projects involve the researchers having access to very sensitive information that may have serious implications if the information is shared with other parties. While the standard confidentiality terms cover general obligations related to the need to keep information confidential, a specially catered Confidentiality Agreement would go into detail on the way in which the Confidential Information shared can be used outlining specific restrictions. It is standard that Confidentiality Agreements are signed by the individual researchers having access to sensitive information as well as requiring sign off at an institutional level.

INTELLECTUAL PROPERTY

WHAT IS INTELLECTUAL PROPERTY?

Intellectual Property (**IP**) is the property of a person's mind or proprietary knowledge. It is a productive new idea that a person creates. This can be an invention, trademark, design, brand or even the application of a person's idea. The idea must be something new or original but determining whether the idea is new or not is not always easy.

Intellectual Property means an intangible creation of the human intellect. It primarily encompasses copyright, patents, confidential information, and trademarks. It includes, but is not limited to, the following Intellectual Property subject matters:

- literary, artistic, musical and dramatic works in which copyright subsists
- the content of field and laboratory notebooks
- cinematographic and multimedia works in which copyright subsists
- performances of performing artists, sound recordings and broadcasts
- patentable and non-patentable inventions
- registered and unregistered designs, plant varieties and topographies
- circuit layouts
- registered and unregistered trademarks, service marks and commercial names and designations
- databases, computer software and related material not otherwise coming within any of the other items defined above as "Intellectual Property"
- scientific discoveries
- know-how and other proprietary information associated with any of the other items defined above as "Intellectual Property"

Intellectual Property also includes all research data and datasets.

TYPES OF INTELLECTUAL PROPERTY

Background Intellectual Property (BIP): Intellectual Property that exists prior to performance of a research project, or that is conceived or developed at any time wholly independently of the research project.

Project Intellectual Property (PIP): Intellectual Property that is conceived, created, or developed during the performance of the research project.

Third Party Intellectual Property (TIP): Intellectual Property owned by a party that is not a party to the agreement. This arises in instances where IP owned by a third party is or is sought to be incorporated into or used with respect to a project, the rights to which are obtained by a party through a licence or other means.

TYPES OF PROJECT INTELLECTUAL PROPERTY OWNERSHIP

UOM owns the PIP wholly:

This is UOM's preferred position when a funder is not paying the full costs of research. Given that UOM is contributing significant intellectual capital and resources to the project, UOM would request this position. PIP is preferably owned by UOM so that it can be appropriately managed and/or exploited, as single party ownership upfront makes this easier. This is common in ARC Projects, e.g., Discovery Project Scheme.

Ownership of PIP by UOM makes it easier for the PIP to be managed. This may be important, but it is not essential provided UOM have a licence to use it. If UOM own PIP wholly and other parties are involved, then there are likely to be licensing terms.

Another party wholly owns the PIP:

This should be considered on a case-by-case basis relative to the nature of the project. For research contracts, a commercial rate price should have been paid in a fully costed project. UOM would always expect a licence to use such PIP.

UOM jointly own the PIP as tenants in common in proportion to contributions to the Project:

Complexities are likely to arise around the scope of each party's rights to the PIP. In these cases, it is important that the relevant schedule clearly identifies the contributions being made. On some occasions, UOM may agree to joint ownership where the other party is contributing significant resources or has the core BIP which is being used in the project.

UOM jointly own the PIP as tenants in common in equal shares:

This means that there is no proportional ownership. There may be sound reasons why joint ownership in equal shares is appropriate. E.g., All parties are contributing equally in one way or another or one party is bringing substantial BIP to the activity.

OWNERSHIP OF INTELLECTUAL PROPERTY AT UOM

- UOM's position related to Ownership of Project Intellectual Property is found in UOM's Intellectual Property Policy. (<https://policy.unimelb.edu.au/MPF1320>)
- Ownership in Intellectual Property created by staff (including casual staff) is determined by the University of Melbourne Statute.
- Under the Statute, ownership varies depending on whether the material is scholarly material or teaching material.
- UOM owns Intellectual Property created by staff in the course of, or incidental to, employment with the UOM, except copyright in Scholarly Works.
- **Scholarly Works** means any article, book, musical composition, thesis, creative writing or like publication or any digital or electronic version of these works that contains material based on the creator's scholarship, learning or research. It does not include work that is Teaching Material, or any other work required to be disclosed under section 13(6)(b) of the UOM of Melbourne Statute.
- Copyright in all scholarly material is owned by the academic, unless there is a research, funding or other legal agreement to the contrary. UOM has a non-exclusive licence to use scholarly works freely for teaching and research, subject to preservation of the rights of the author.

LICENCING OF INTELLECTUAL PROPERTY**UOM owns the BIP:**

Licences are normally granted for the carrying out of the Project only. We would limit its use solely for the project but not automatically for commercial activities. It is expected that where BIP is required for commercialisation of Project IP, there will be an appropriate commercial negotiation.

It is important to note that the BIP is made available at the discretion of the party – no party can be forced into contributing BIP. On occasion, BIP may be listed in a schedule. This may occur where there are provisional patent applications or granted patents.

Another party wholly or jointly owns the BIP:

UOM requests a non-exclusive, irrevocable, perpetual, royalty free licence to use the BIP for further research, education, and scholarship purposes **OR** if the external party requests it, we would accept the minimum which is for the purposes of the project and to satisfy any requirements in a relevant Head Agreement.

UOM wholly owns the PIP:

To other research institutions, UOM would provide a non-exclusive, non-transferable, irrevocable, perpetual, royalty free licence for further research, education and scholarship purposes but not for commercialisation.

To commercial entities, UOM would generally provide a non-exclusive, non-transferable, free of cost licence for internal, non-commercial use by the relevant parties. Other terms are negotiable.

UOM would provide an option to commercialise the PIP. This option is exercisable in a defined time period, normally 12 months but it may be less in some cases. If a party wants to enter complex licensing negotiations, this would be escalated to EAAC or Legal & Risk.

Another party wholly or jointly owns the PIP:

If UOM is unable to secure sole ownership or is not entitled to it (which may arise if UOM is not contributing to the PIP), UOM would request a non-exclusive, irrevocable, perpetual, royalty free licence to use the PIP for further research, education, and scholarship purposes.

EXAMPLE CLAUSES OF LICENSING OF INTELLECTUAL PROPERTY

Background Intellectual Property

Each Party:

- (i) *agrees that it will not have any claim, ownership or interest in the other party's Background Intellectual Property; and*
- (ii) *grants the other party a non-exclusive, royalty-free licence to use its Background Intellectual Property for the purpose of carrying out the Project, but for no other purpose.*

Project Intellectual Property

- (i) *UOM will own the Project Intellectual Property and all such rights will vest in UOM immediately upon creation, and to the extent that any other party retains any rights in the Project Intellectual Property, such party hereby assigns all such rights to UOM.*
- (ii) *UOM will grant a royalty-free, non-transferable, non-exclusive licence to each other party to use the Project Intellectual Property for the purpose of carrying out the Project, and each party's own internal non-commercial, research and teaching purposes, but for no other purpose.*

Cross Licence of Project Intellectual Property for non-commercial purposes

The parties agree that each party is granted a non-exclusive, irrevocable, fee and royalty-free licence to use the Project IP for the:

- (i) *purpose of carrying out the Project; and*
- (ii) *each party's own non-commercial, research and teaching purposes.*

When Project Intellectual Property is Jointly Owned (Inventive Contribution)

- (i) *The Parties agree that Project Intellectual Property will be owned solely by the Party, or jointly by the Parties, that contribute to its development or creation. In the case of jointly owned Project Intellectual Property, the relevant Parties will own the Project Intellectual Property as tenants in common in shares proportionate to their respective intellectual contributions to the development or creation of that Intellectual Property.*
- (ii) *Each Party grants to each other Party a non-exclusive, non-transferable, perpetual, royalty free, worldwide licence to use the Project IP they own for during the Project and after completion of the Project for:*

- a. non-commercial research, education and training purposes; and*
- b. Publication purposes (subject to clause [X] of this Agreement).*

When Project Intellectual Property is Jointly Owned (Equal Shares)

- (i) *Ownership of any Project Intellectual Property shall vest jointly in the Parties in equal, indivisible shares. To the extent that one Party owns the Project IP, they grant to the other party an irrevocable, royalty-free, non-transferable, non-exclusive licence (including the right to sub-licence) to the use the Project IP at its own risk for any non-commercial academic, research and teaching purposes.*
- (ii) *The Parties will consult and decide what (if any) measures should be taken to protect the Project IP and negotiate in good faith and using all best endeavours to agree the terms of any program of commercialisation arising from the Project IP so as to fairly share in any commercial return associated with the Project and the Project IP having regard to each Party's inventive, in-kind, cash and other contributions to the Project and Project IP.*
- (iii) *The Parties will negotiate and agree which Party will be responsible for leading the commercialisation of Project Intellectual Property provided that:*
 - a. *no Party shall be entitled to commercialise the Project IP without the consent of the other Party; and*
 - b. *both Parties will review any potential deal terms or commercialisation plans.*
- (iv) *Each Party must at its own cost, if requested by the other Party, do all things reasonably necessary to give effect to this Project IP clause and assure the other Party's rights under it.*

WHAT IS VALUABLE INTELLECTUAL PROPERTY?

The term “valuable” is not used as a concept and it does not refer to a definition or type of IP. It refers specifically to intellectual property with commercial or economic potential. The value of an IP asset comes from the right the owner of that asset has to exclude competitors from using it. For an IP asset to have a quantifiable value it should:

1. generate a measurable amount of economic benefits to its owner; and
2. enhance the value of other assets with which it is associated.

The value of an IP asset represents the potential future economic benefits of the IP to the owner. Value can be derived through:

1. direct exploitation of the IP by integrating it within the product;
2. sale or licensing of the IP to a third party; and
3. other means, such as raising barriers to entry or reducing the threat of substitutes.

It is not up to RGCF to determine the value of IP. RGCF needs to be aware if the IP in question has the potential to be commercialised.

INTELLECTUAL PROPERTY AND KNOWLEDGE AND TECHNOLOGY TRANSFER TEAM

The Chief Investigator (CI) is expected to inform the Knowledge and Technology Transfer Team and/or their Business Development Manager (BDM) if they create IP or will potentially create IP that may have potential for commercial application.

If the project in general has the potential to lead to commercialisation of the PIP, it is likely that the CI is already aware of this, and that a BDM is already involved and has more in-depth information. RGCF needs to ensure that we are capturing the correct IP ownership and licencing terms in contracts.

Faculty may be aware of the commercial aspect but have not read or have misunderstood the clauses in the contract, and this may make it difficult to commercialise the PIP in a way that was envisioned, or in a way that

fairly benefits UOM. It may be the case that the BIP used for the project is a patent that UOM, a collaborator or a third party owns, and licencing needs to be determined or considered.

In this case, a BDM and the Knowledge and Technology Transfer Team would manage that aspect of it and would likely advise if RGCF need to capture this in the contract and may take charge of the matter or at least manage that component of it.

The Senior Agreements Advisors would incorporate any relevant licencing clauses into the agreement; advise whether Legal & Risk needs to manage the matter; or assist with a legal referral if required.

INTELLECTUAL PROPERTY DISCLOSURE

Protection and commercialisation of IP depends on early identification and protection of that IP. This requires careful monitoring of the progress of research and project outcomes by the CI. All researchers should review their research activities regularly, keep detailed project and research records, and disclose new IP with commercial value to UOM.

Public disclosure of publication prior to seeking patent protection may reduce the patentability and commercial value of the IP. All staff, honorary appointees, visitors and student creators of Intellectual Property have a duty to disclose inventions with potential commercial value, or where required by a third-party agreement. IP disclosure starts a process that could lead to the commercialisation for the discovery or creation. UOM's Knowledge and Technology Transfer team helps the researchers manage their IP.

What is IP Disclosure?

It is a process whereby standard IP information is collected to help record and assess IP within UOM.

What is Disclosed?

A brief description of the invention and dates of proposed publication.

Why is This Necessary?

- To determine IP protection needs.
- For assessment of commercial potential.
- To obtain financial support for patenting.
- Legal compliance with funding conditions.
- To enable UOM to meet its reporting obligations.

UOM will advise the CI within a reasonable time whether UOM intends to proceed with registered protection and commercialisation. Submission of an IP disclosure is completed via Themis.

COMMERCIALISATION

In instances where UOM owns Project IP, UOM may grant the external party a license to commercialise the Project IP. The agreement may also include clauses outlining that the parties will negotiate in good faith to allow for commercial use of the relevant Project IP.

Where UOM receives commercialisation revenue in respect of its Intellectual Property, creators of such Intellectual Property are entitled to share in the Net Proceeds (if any) in the proportion specified below (provided that they have assigned, or confirmed assignment of, their rights to such Intellectual Property to UOM).

Party		Share of Net Proceeds
Creator(s)		40%
UOM	Creators' academic division	40%
	Central UOM division	20%

Unless otherwise agreed between the co-creators, each Creator is eligible to receive an apportionment of the Net Proceeds and will receive an equal portion of the Creator(s) share of Net Proceeds.

Persons who are not Creators but who make contributions to the creation or exploitation of Intellectual Property, such as through the reduction of an invention to practice, are termed 'Contributors' and are not entitled to a share in the net proceeds of commercialisation for Intellectual Property.

Should all co-creators agree, a portion of the Creators' share of Net Proceeds of commercialisation may be directed to one or more contributors. This is at the discretion of Creators and is not an entitlement to share in the proceeds of commercialisation.

References:

For more information, refer to:

- UOM's Intellectual Property Policy (MPF1320) <https://policy.unimelb.edu.au/MPF1320>
- Section 13 of the University of Melbourne Statute.
https://about.unimelb.edu.au/data/assets/pdf_file/0031/19777/UOM-of-Melbourne-Statute-31Aug16-v02.pdf
- Industry IP Principles. <https://research.unimelb.edu.au/work-with-us/licensing-ip-and-technologies/industry-principles>

WHAT IS INDIGENOUS CULTURAL INTELLECTUAL PROPERTY?

Indigenous Cultural and Intellectual Property (**ICIP**) means the rights of indigenous peoples, including but not limited to Aboriginal and Torres Strait Islander Peoples, to their heritage. This heritage includes tangible cultural property (e.g. sacred sites, burial grounds), intangible cultural property (e.g. languages, stories passed on orally), and documentation of indigenous peoples' heritage in all forms of media (e.g. reports, films, sound recordings)

UOM'S POSITION ON ICIP

UOM makes no claims to ICIP belonging to another Party and undertakes to use its best endeavours to ensure that ICIP rights are respected and upheld. UOM would always use ICIP with the consent of the relevant Indigenous community.

UOM position is to always consult with the relevant ICIP rights holder/s or custodian/s regarding attribution of Indigenous communities, and any cultural protocols that should be specifically addressed when using this material.

UOM PROCESS REGARDING ICIP

When conducting and conceiving of research with respect to ICIP and Indigenous Knowledge Holders, Staff, Honorary Appointees, Visitors and Students are expected to have reference to the Charter for Research with Indigenous Knowledge Holders.

The Charter for Research with Indigenous Knowledge Holders is a set of research principles and guidelines in alignment with best international policies and practices designed to be applicable in situations involving ICIP at UOM.

Before undertaking any commercial development resulting from use of aspects of ICIP, the Managing Director, Research, Innovation and Commercialisation (or delegate), in consultation with the Associate Provost (or delegate) and Deputy Vice-Chancellor Indigenous (or delegate) must:

1. Negotiate benefit sharing arrangements with the provider(s) of such material, which the provider(s) consider to be appropriate and valuable; and
2. Ensure that such arrangements are documented and recorded.

References:

For more information about UOM's position regarding ICIP, refer to UOM's Charter for Research with Indigenous Knowledge Holders at the following link:

<https://indigenouknowledge.unimelb.edu.au/resources/indigenous-research2/research-ethics/charter-for-research-with-indigenous-knowledge-holders>

WHAT IS CRISPR?

CRISPR stands for ***Clustered Regularly Interspaced Short Palindromic Repeats***. It is a precision tool for genetic engineering. It is useful for both disease research and therapy. When considering CRISPR, we also need to include Cas-9 which is a protein that has supercharged the power and utility of CRISPR.

It is currently the simplest, most versatile and precise method of genetic manipulation and is therefore causing a buzz in the science world.

WHAT ARE UOM'S CRISPR ARRANGEMENTS?

There is an ongoing patent dispute between the University of California (Berkeley) and MIT/Harvard in relation to the ownership of fundamental rights relating to CRISPR technology. This dispute has resulted in uncertainty about which party has the right to licence the technology.

Any proposed use of CRISPR-Cas9 at UOM must be for research and satisfy all of the following conditions:

1. The research must have the primary objective of advancing scientific, agricultural, livestock or medical research;
2. UOM must be entitled to use any and all intellectual property rights resulting from the research for internal research use;
3. UOM must be entitled to publish results of the research; and
4. UOM must not provide materials generated using CRISPR-Cas9 technology to any organisation that is **not** a non-profit organisation.

CRISPR-related materials must be sourced from Addgene for research conducted by UOM. Addgene is a non-profit plasmid repository and has been provided with CRISPR-related materials by both University of California (Berkeley) and the Broad Institute as well as other CRISPR patent applicants and rights holders.

If a Researcher would like to conduct research using CRISPR-related materials or technology (including methods), they may only do so using Addgene reagents for **non-commercial purposes**. One of the conditions for obtaining reagents from Addgene is that the use of the reagents is limited to a **single nominated lab**. If the Researcher wishes to conduct research in more than one lab or to share reagents with collaborators, they will

need to enter into separate arrangements for each lab or collaborator. The Lab Head should be listed as the Chief Investigator on each request placed with Addgene.

Any proposed UOM research that does **not** meet the above criteria must be brought to the attention of UOM's Knowledge and Technology Transfer and Licensing Office at the earliest opportunity. Researchers must also be aware of the following:

1. Even if the research meets the criteria set in (a) to (d) above, materials generated using CRISPR-Cas9 technology may only be transferred to non-profit organisations on terms that prohibit commercial use. Researchers must contact RIC Contracts before making any such arrangements.
2. Other restrictions may apply to the proposed use of CRISPR-Cas9 materials, such as contractual restrictions on the use of third party CRISPR-Cas9 reagents received under a material transfer agreement (MTA). For example, reagents sourced from Addgene can only be used by a **single nominated laboratory** within UOM and require researchers to acknowledge reagent depositors in resulting publications.
3. If CRISPR-Cas9 technology is being used in non-commercial research that may have commercial potential in the future, third party patent rights may complicate future commercialisation prospects. Researchers should contact UOM's Technology Transfer and Licensing Office to discuss this.

QUESTIONS TO ASK RESEARCHERS REGARDING CRISPR

1. Are you using the technology to edit genome by removing, adding or altering parts of DNA or RNA sequences?
2. Are you conducting research using CRISPR-Cas9 related materials or technology (including methods) for non-commercial purposes?
3. Is your use of the reagents limited to a single nominated lab?

If the answers are all YES, we have a licence for this purpose.

Please note that consulting projects will constitute commercial activity and will not be covered under Addgene's conditions. A licence or transfer of the material, or any modification to the material, between labs at UOM or to another organisation may also constitute commercial activities.

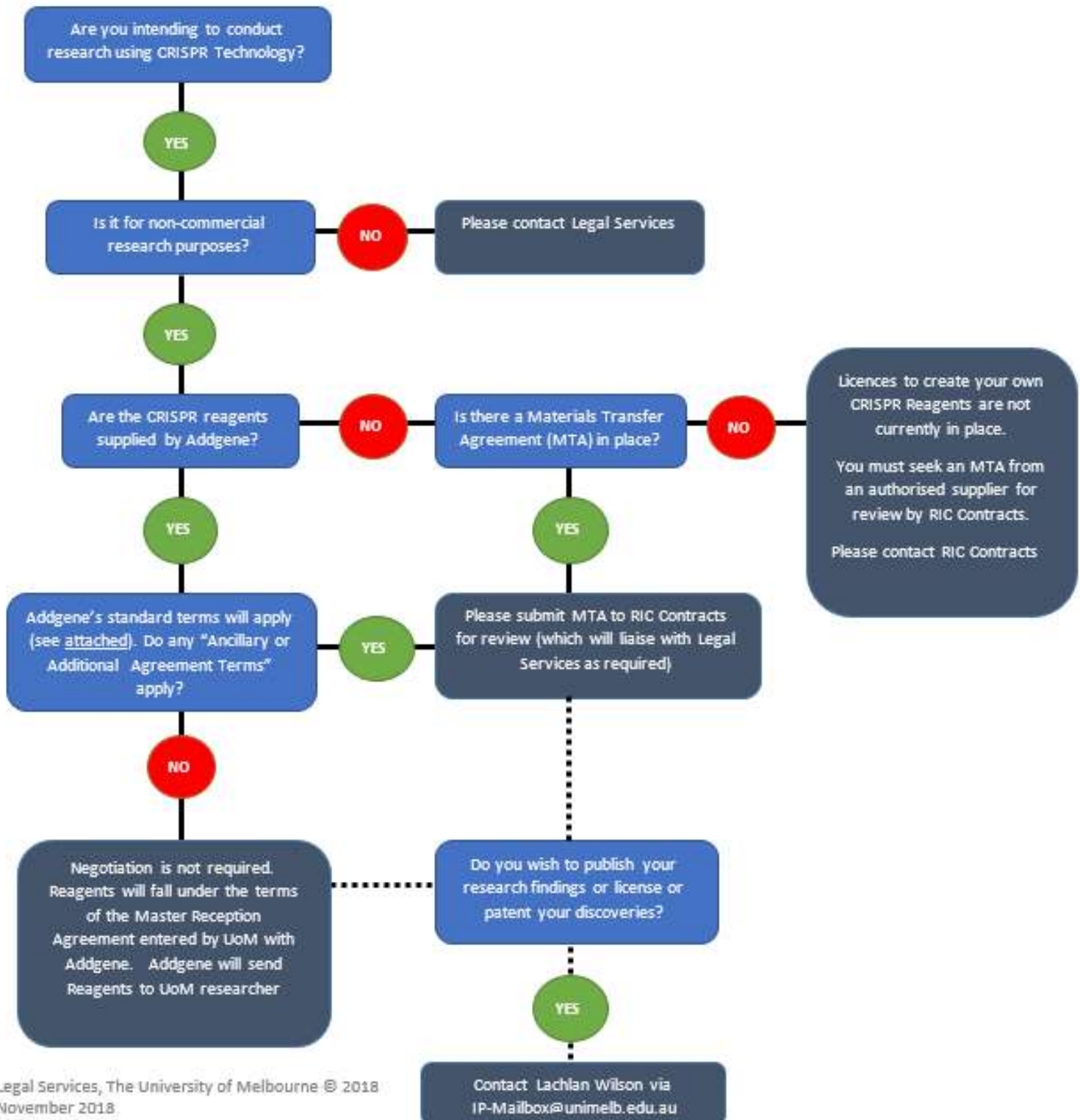
WHO CAN HELP WITH CRISPR ENQUIRIES?

The SAAs can review CRISPR-Cas9 related matters in instances where it is related to research and does not involve improvements to the technology or creation of CRISPR-Cas9 reagents.

If the researcher is intending to use CRISPR-Cas9 technology for commercial purposes or for the creation of their own CRISPR-Cas9 reagents, please refer directly to Legal & Risk.

If the researcher has used CRISPR-Cas9 to generate IP and wishes to publish their research findings or licence or patent their discoveries, please direct the researcher to the UOM's Knowledge and Technology Transfer and Licensing Office via IP-Mailbox@unimelb.edu.au. They must complete an IP Disclosure Form and provide it to Lachlan Wilson.

The following flowchart which may be used as a guide:



CONTROVERSIES REGARDING CRISPR

1. CRISPR dispute between UC Berkely and MIT/Harvard backed Broad Institute.
 - CRISPR patent dispute between the University of California Berkeley (UC Berkely) and the MIT and Harvard-backed Broad Institute regarding which institute was the first to invent the technology.
 - Dispute has been running for over a decade with the first publishing of CRISPR-Cas 9 technology taking place in 2012.
 - UC Berkely appealed a decision granted in Feb 2022 by the United States Patent and Trademark office which named Broad Institute as the first to invent the technology in question.
2. The He Jiankui Affair.
 - In 2018, He Jiankui of the Southern University of Science and Technology in Shenzhen, China shocked many by claiming to have altered the genomes of twin baby girls, using CRISPR-Cas9 technology, in a way that will pass the modification on to future generations.
 - The alteration is intended to make the twins' cells resistant to infection by HIV.
 - The scientist altered embryos for a couple where the father was infected with HIV and the mother was HIV-negative.
 - His goal was to introduce a rare, natural genetic variation that makes it more difficult for HIV to infect white blood cells.
 - Specifically, he deleted a region of a receptor on the surface of white blood cells known as CCR5 using CRISPR-Cas9.
 - The controversy in this case relates to the ethical issue of using the technology in the manner it was utilised.
 - In January 2020, a Chinese court sentences He Jiankui to 3 years in prison for 'illegal medical practice'.

UNDERSTANDING MORAL RIGHTS

Moral rights are personal rights which were introduced by way of amendments to the *Copyright Act 1968* (Cth), in 2000. These rights connect creators to their work and are personal, non-economic rights belonging to creators of materials. They are associated with the individual- not an organisation or company. They cannot be assigned to third parties.

Under the *Copyright Act 1968* (Cth) an author has three moral rights:

Right of attribution/authorship	<p>The right to be identified as the author of their work. For example, the authors name should always appear:</p> <ul style="list-style-type: none"> (i) next to their artwork in an exhibition. (ii) in the credits of a film in which they have performed. (iii) with any writing they have published.
Right not to have authorship falsely attributed	<p>The right not to have a person falsely assert or imply that they are the author of a work. For example:</p> <ul style="list-style-type: none"> (i) using the name of a well-known author to add credibility to a work. (ii) publishing low-quality or inappropriate material to damage a person's credibility. (iii) copying someone's content, adapting it, and maintaining that the original author is the author of the adapted work.
Right of integrity of authorship	<p>The right not to have their work subjected to derogatory treatment which is prejudicial to their honour or reputation. For example:</p> <ul style="list-style-type: none"> (i) no one can change your work without your permission. (ii) no one can destroy your work without first asking you if you want it back. (iii) no one can present your work in a way that damages its meaning.

WHO OWNS MORAL RIGHTS?

Moral rights vest in the creator of the copyright work, which may not always be the copyright owner. Under UOMS's Intellectual Property Policy, UOM owns any Intellectual Property (which includes copyright) created by a UOM staff member, except copyright in Scholarly Works (Clause 4.23 <https://policy.unimelb.edu.au/MPF1320>). Therefore, while UOM owns the copyright in the work that the staff member creates as part of their employment, because the staff members are the creators/authors, they will have moral rights in relation to these works.

WHAT ARE MORAL RIGHTS WAIVERS?

The very existence of 'Moral Rights' and the protection against violation of such moral rights under Australian Law means that UOM researchers who are authors of original work are, by law, protected from their moral rights being infringed.

The issue arises where a funder or collaborator includes clauses in agreements requesting that researchers 'waive' their moral rights. Such a waiver or consent can only be provided by the individual researcher involved in the project that is considered the author of the work. If a researcher permits for their moral rights to be waived, UOM will be able to accept the clauses in the agreement that are seeking moral rights waivers. UOM may only do so if they are permitted by the researcher.

By agreeing to such waivers, the researcher is also agreeing that they will not sue the collaborator or funder if their moral rights are infringed, whether accidentally or intentionally. By implication, this could mean that their work may be misrepresented, or authorship may not be attributed to them.

WHY ARE MORAL RIGHTS WAIVERS SOUGHT?

Often, the reasoning behind this request is that the funder or collaborator wants to be able to use extracts of reports, and so forth, without having to attribute authorship to the author each time. It also protects the funder or collaborator from being sued if they unintentionally misquote the author's work when extracting sections out of the report prepared by the author. Some authors have expressed concerns about the potential for the funder or collaborator to misrepresent their work by using sections in a way that justifies a policy position that they do not support. The author or researcher may choose not to waive their moral rights if they have concerns that their work will be misrepresented or could lead to reputational damage.

UOM'S POSITION ON MORAL RIGHTS WAIVERS

- The inclusion of moral rights waivers should be avoided wherever possible.
- They should not be included in an agreement associated with a national competitive grant.
- They may be accommodated where a third party is paying very generous rates.
- In some cases, it may be reasonable for a waiver to be requested where it is reasonable in the circumstances not to identify the author.
- The researcher/author must consent to the waiver, and UOM are not able to make that decision on their behalf.

WHAT TO DO WITH A REQUEST FOR A MORAL RIGHTS WAIVER

If a lead collaborator is requesting a waiver, UOM would review the relevant Head Agreement to confirm whether those terms are being flowed down. If so, we may not be able to exclude the waivers and will have to advise the researcher of this.

If the lead collaborator has decided to insert the waivers separately from the Head Agreement, UOM would seek to exclude them. However, the researcher may choose to provide their consent to waive their moral rights due to very generous rates being offered by the other party, or it may be reasonable in the circumstances not to identify the author.

The steps that UOM needs to take when a Moral Rights Waiver request is made is as follows:

1. Identify whether a moral rights waiver request is included in the contract. It is usually located in the intellectual property section. Read the definitions section to check if the term is defined (usually as 'Specified Acts'). It may also be referred to as 'consents.'
2. Read the clause carefully to consider the extent of the required waiver.
 - (a) Is it a request to waive all three moral rights, or just one?

- (b) Is it a mandatory requirement or a discretionary requirement?
- 3. Once you have determined that there is a moral rights waiver request and determined the extent of the waiver, contact the researcher and discuss the requirement.
- 4. Depending on what the researcher says (whether they agree to waive their moral rights or not), negotiate with the funder or collaborator.

Once we discuss the moral rights position with the researcher and obtain instructions, we would generally proceed with the following order or preference:

1. **Clause excluded:** Any references to moral rights waivers are excluded in their entirety, or only specific moral rights are excluded.

UOM would negotiate to exclude the clauses from the agreement. If UOM cannot exclude the waivers and the researcher would still like to be part of the project and to continue negotiating, UOM would seek to minimise our obligations, which would be as follows:

2. **'Reasonable Endeavours' Clause:** UOM will 'make reasonable endeavours' to obtain Moral Rights Waivers.

This means that UOM's obligations extend to advising researchers and/or collaborators that a request for a moral rights waiver has been made and asking them whether they would like to waive their moral rights. If the answer is 'no', it means that UOM have met their obligations in making 'reasonable endeavours' to obtain moral rights waivers.

3. **'Best Endeavours' Clause:** UOM will 'make best endeavours' to obtain Moral Rights Waivers.

This means that UOM's obligations extend to advising researchers and/or collaborators that a request for a moral rights waiver has been made and asking them whether they would like to waive their moral rights. UOM would also advise on the nature of moral rights and assist the researchers to weigh the pros and cons of the decision. This means that UOM has met the obligation to make best endeavours to obtain moral rights waivers.

The obligation to make 'best endeavours' is slightly higher than the obligation to meet the standards of 'reasonable endeavours.' However, practically speaking there is not much difference.

4. If the external party refuses to oblige, we must advise and consult with the researcher. If the researcher does not want to proceed with waiving their moral rights and with the Project in its entirety, we would need to consider withdrawing from the project as a last resort (with approval from the researcher).

EXAMPLES OF MORAL RIGHTS WAIVER REQUESTS

1. **Example of a mandatory obligation to obtain Moral Rights Waivers**

- (a) *"The Grantee **will obtain** written moral rights consents (other than in relation to acts of false attribution) from all authors of Reporting Material, and any Activity Material specified in the Grant Details to the use of that Material by the Commonwealth in accordance with this Agreement, prior to that Material being provided to the Commonwealth."*

2. Example of a Discretionary obligation to obtain a Moral Rights Waiver

- (a) *“To the extent permitted by law and for the benefit of the Customer, the Supplier consents, and must **use its best endeavours**, to ensure that each author of Material consents in writing, to the use by the Customer of the Material, even if the use may otherwise be an infringement of their Intellectual Property Rights and/or Moral Rights.”*
- (b) *“The Grantee **will make reasonable endeavours** to obtain written moral rights consents (other than in relation to acts of false attribution) from all authors of Reporting Material, and any Activity Material specified in the Grant Details to the use of that Material by the Commonwealth in accordance with this Agreement, prior to that Material being provided to the Commonwealth.”*

MORAL RIGHTS QUIZ (SEE WORKSHEET 4)

MORAL RIGHTS CASE STUDIES (SEE WORKSHEET 5)

WORKSHEET 1: WHAT TEMPLATE SHOULD BE USED?

Example 1:

- UoM is the lead in an ARC Discovery Projects Project.
- There are two Australian collaborators and one overseas collaborator.
- UoM is providing funding to the Australian collaborators, but the overseas collaborator will not be receiving any funding.

Example 2:

- UoM is a non-lead party to a grant funded project.
- There are several domestic collaborators involved in the project.
- UoM will be contributing significant Project IP and the CI would like for UoM to own the Project IP that UoM creates.
- The template agreement that we have been provided with by the lead party states that the lead party will own all of the Project IP that is created as part of the project.

ANSWERS

Example 1: In this instance, we would use the ARMS Template MIA for the Australian collaborators, and the Letter of Agreement Template for the overseas collaborator. The ARMS Template MIA goes into specific detail about the flow through obligations of the Head Funding Agreement from the ARC, whereas the Letter of Agreement Template makes a generic reference to the overseas collaborators' obligations to comply with and assist UoM to comply with the terms of the Head Funding Agreement. Having a less complex version for the overseas collaborators has made the negotiations process and sign off much quicker for the projects overall.

Example 2: As a non-lead, we do not have control over the type of template that will be used. Depending on the scheme, we may be provided with an ARMS template. If not, the lead party may use their own standard template. Since we will be contributing significant Project IP and the CI has stated their preferences to own what we create, we would need to review the Head Funding Agreement that the lead party has signed with the funder to determine how we can proceed.

If the Head Funding Agreement states that the lead party must own the Project IP created as part of the project, we will need to advise the CI of this restriction and decide whether to proceed with the project. If the Head Funding Agreement does not specify ownership of the Project IP, we could negotiate better terms with the lead party and request a more suitable IP position.

WORKSHEET 2- WHAT TEMPLATE SHOULD BE USED?**Example 1:**

- UoM is the lead/administering institution.
- One CI has moved from one university to another university. The CI's original university will no longer be a party to the agreement (outgoing party).
- There is no funding that will be transferred.

Example 2:

- UOM is the lead/administering institution.
- Addition of a new university (due to addition/contribution of AI/CI/PhD student to the project).

Example 3:

- UOM is the lead/administering institution.
- A CI is leaving their university to go to another university that is not part of the project.
- There will be a CI/AI remaining at the previous university and will continue working on the project.
- There will be a transfer of some funding from the previous university to the new university.

Example 4:

- UOM is the lead/administering institution.
- Our CI will be leaving UoM to go to another university that is not part of the project.
- There will be no other CI's/AI's remaining at UOM.
- There will be a transfer of funding from UOM to the new institution.

Example 5:

- UOM is a non-lead.
- The administering institution will be transferring additional funds to UoM.
- There will be no other changes.

Example 6:

- UOM is not a party to the original agreement.
- The lead CI from the administering institution will be transferring to UOM.
- There will be NO CI's/AI's remaining at the original institution.

ANSWERS**Example 1**

Proposed Agreement: Novation Agreement

UOM must ensure that the outgoing party assigns its PIP to the incoming party- or at least a licence to it. UOM also need to ensure that all of the other parties, including UOM, have a licence to the PIP and the BIP. Regarding BIP, a licence must be provided to the Incoming Party and the Continuing Parties (at the very least) limited to use for the Project, and to fulfil any obligations under the Head Funding Agreement related to granting of licences to the funder.

Example 2

Proposed Agreement: Accession Agreement

Use Accession Agreement Template. Ensure that the rights in the MIA/CRA also apply to the new party from the effective date (i.e., the date the party joins the project). If there is a change in funding, you will need to amend the accession template to include a variation.

Example 3

Proposed Agreement: Accession + Variation Agreement

UOM will need to account for the new university joining the project via an Accession Agreement. As there are CI's/AI's that are part of the project remaining at the former university, that university will still need to be part of the agreement. Note that a transfer of funding needs to be accounted for. This should be covered in the clauses as per the variation agreement template.

Example 4

Proposed Agreement: Novation + Variation Agreement

The CI is the lead CI and is transferring the project to the new institution. The new institution becomes the new administering institution. The new administering institution needs to prepare the novation/variation agreement for our review. UOM would look out for clauses that assign the PIP/BIP rights to the new institution.

UOM would prefer to keep the PIP/BIP and assign a licence to the new administering institution solely for the purpose of the project and for them to comply with the Head Funding Agreement (the IP clauses of the Head Funding Agreement will need to be reviewed so that UOM can be aware of our minimum requirements as a non-lead). UOM would agree to a transfer of funding, but the amounts need to be confirmed by the Grants Officer.

Example 5

Proposed Agreement: Variation Agreement

A variation agreement should be prepared to account for the changes in funding provided from the administering institution to UOM. Details related to the transfer of funding will need to be confirmed by the Grants Officer before finalising.

Example 6

Proposed Agreement: Novation (+ Variation, depending on the changes)

UOM will now be an administering institution and will be preparing the novation agreement to account for the changes. The former administering institution will be listed as "outgoing administering institution" and UOM will be listed as the "incoming administering institution".

WORKSHEET 3- CASE STUDIES**CASE STUDY 1: Science Scam in Academic Publishing**

Published 11th May 2023

A German study has found that one in five articles published in journals may contain faked data produced by unauthorised “paper mills” that are paid to fabricate scientific submissions. This mass production of faked research uses techniques such as AI supported text generation, data and statistical manipulation and fabrication technologies, image and text pirating. It is estimated that the proportion of fake papers is about 20%, which is equivalent to around 300,000 papers a year, and primarily occurs in neuroscience.

Why is this happening?

This surge in faked papers comes from researchers desperate for published work to boost their careers. Pressure to publish has been particularly intense in China with some Chinese hospitals and health authorities requiring physicians to be authors on a set number of papers. It also backs up recent evidence that the majority of fake research comes from China.

Why is this bad?

Publication of fakes research is possibly the biggest science scam of all time, wasting financial resources, slowing down medical progress and possibly endangering lives.

What is being done about this?

German researchers are using new techniques to “red flag” problematic papers. Rather than examining the papers, they identified red flags such as the use of private rather than institutional addresses, affiliation with a hospital rather than a university, and lack of international co-authors. However, it is important to note that this is not a definitive indication of fraud. Other investigations for tracking scientific fraud look for manipulated images and implausible genetic sequences.

How will this be fixed?

Academic publishers are beginning to adopt more sophisticated AI fraud detection tools. It is a race between the paper mills and those who try to detect them, with both sides using AI.

Others have suggested that the ultimate solution is to reduce the pressure to publish, and we can follow the example of the German Research Foundation, which tells applicants for funding to limit the number of their own papers cited to five.

CASE STUDY 2: Mass walkout at global science journal over unethical feesPublished 7th May 2023

The entire academic board of publishing giant “Elsevier”, resigned after the company refused to reduce publication charges. This was applauded by academics around the world, with many hoping that it is the start of a rebellion against the huge profit margins in academic publishing, which outstrip those made by Apple, Google, and Amazon.

Elsevier is a Dutch company that claims to publish 18% of the worlds scientific papers and reported a 10% increase in its revenue to \$5.5 billion last year. But it is the profit margins, nearing 40%, that anger academics the most. Authors are charged over \$5000AUD for a research paper to be published. The former editor says this is “unethical” and bears no relation to the costs involved.

Researchers put up with it because they want to publish in established journals that will be widely read. But they are now being urged to turn their backs on the Elsevier journal and submit papers to a nonprofit open-access journal which is being set up by the resigning board.

These exploitative price models also affect university libraries. Online textbooks are many times more expensive than their paper equivalent. For example, it costs \$145 dollars for a popular biology textbook in print, versus \$1900 for a three-user e-book licence. Publishers have justified their prices by stating that a print book could be checked out for weeks at a time whereas eBooks could be checked in and out rapidly and had a much wider distribution. They argue that it is a fair representation of their value.

WORKSHEET 4- QUIZ

Mandatory or Discretionary?

Question 1: Clause 12.8 Moral Rights - Unless the Parties have agreed otherwise in writing, the Research Organisation must ensure that the uses, as contemplated by this agreement, of the:

- (a) Project Intellectual Property;
- (b) Products;
- (c) Background Intellectual Property owned by the Research Organisation or Other Parties; and
- (d) Third Party IP Rights, will not infringe the Moral Rights of any person.

Question 2: The Collaborator must make best endeavours to procure from any person who is an author (in this clause called the Author) of any copyright work forming part of the Project Intellectual Property, consent in writing authorizing the Sax Institute, the Agency (in this clause the third-party agency specified in the Final Proposal for whose benefit the Project is undertaken) and any other person authorised by The Sax Institute to doing or omitting to do anything that, but for the consent, would constitute an infringement of the Author's Moral Rights.

ANSWERS

1. Mandatory
2. Discretionary

WORKSHEET 5- CASE STUDIES**MORAL RIGHTS CASE STUDIES**

CASE STUDY 1: *Corby v Allen & Unwin Pty Limited* [2013] FCA 370

Summary

Schapelle's family brought proceedings against the publishers of the book titled "Sins of the Father" written by Eamon Duff, for using photographs of the family that were not authorised for reproduction, and because permission was not sought in relation to their reproduction. Aside from not having permission to use the photographs, the name of the photographer was not included alongside each of the photographs.

Is this an example of infringement of moral rights?

CASE STUDY 2: *Fernandez v Perez* [2012] NSWSC 1242

Summary

Perez (more commonly known as Pitbull) provided an audio sample to a DJ and promoter (Fernandez) for an upcoming Australian Tour which was intended to be used by Fernandez to promote the tour on the radio. The lyrics included references to Pitbull and the Fernandez. The tour was subsequently cancelled. Fernandez then replaced the lyrics of one of Pitbull's songs (Bon, Bon) with that audio sample, hence modifying the song and including references to himself in the song. Fernandez also made the song available on his personal website.

Is this an example of infringement of moral rights?

CASE STUDY 3

Summary

"The Grantee will obtain written moral rights consents (other than in relation to acts of false attribution) from all authors of Reporting Material, and any Activity Material specified in the Grant Details to the use of that Material by the Commonwealth in accordance with this Agreement, prior to that Material being provided to the Commonwealth."

Is this an example of a request for a moral rights waiver?

CASE STUDY 4

Summary

"Each Collaborating Organisation must obtain from each of its Specified Personnel, employees, officers, Students and subcontractors (including its subcontractors' employees and contractors) who are authors of Reporting Material or Third-party Material, a written consent to the performance of the Specified Acts (whether occurring before or after the consent is given) by the Commonwealth or any person licensed by the Commonwealth to use, reproduce, adapt and exploit the Reporting Material, and provide to the Lead Institution or the Commonwealth, on request, the executed original of each consent."

Is this an example of a request for a moral rights waiver?

ANSWERS

Case Study 1: Yes, this is an example of infringement of moral rights. Their statutory right of attribution was infringed (by not including the name of the photographer alongside each of the photographs). There was also an infringement of copyright.

Schapelle's family were successful with their claim. The court awarded each of the various family members roughly \$2000 - \$5000 each in damages (for infringement of their copyright). They were also awarded \$45,000 for additional damages.

Case Study 2: Yes, this is an example of an infringement of moral rights. Specifically, it is an infringement of Pitbull's right of integrity of authorship.

The court found that Fernandez created an impression that Pitbull himself included the altered content in the song. This amounted to a material distortion of the work which infringed Pitbull's right of integrity of authorship. The court also found what Fernandez did to be prejudicial to Pitbull's reputation for the following reasons:

1. There would be a class of listener who would have presumed that the unauthorised alteration formed part of the original work, therefore making the DJ a subject of the song and that Pitbull has written and performed it about him.
2. Some listeners would be aware of the cancelled tour and court case and that the DJ was using the altered song as an act of retribution to mock Pitbull's reputation.

The court awarded Pitbull \$10,000 in damages for breach of his moral right not to have his work subject to derogatory treatment.

Case Study 3: Yes. This is an example of a request for a Moral Rights Waiver where the funder is requiring a mandatory waiver in respect of two moral rights- the right of attribution and the right of integrity of authorship. The Funder agrees to protect the author's right not to have authorship falsely attributed. When explaining the requirement to the researcher, it is important to state that the request is for a waiver for two of the moral rights, not all three.

Case Study 4: Yes. This is an example of a request for a Moral Rights Waiver. The obligation is to obtain 'written consent' in respect of 'Specified Acts'. Specified Acts are defined in the definitions section of the agreement and outline the three moral rights. It is important to read the definitions section in conjunction with the main clauses to spot hidden moral rights waiver requests.

RESOURCES

<https://www.mondaq.com/australia/copyright/265880/copyright-and-moral-rightstake-it-personally>