

Custodian-Node data provision terms and conditions

Parties

Node Operator

of

Data Custodian

of

Background

- A The Node Operator operates a research data centre and its activities include identification storage, dissemination and development of research data collections.
- B The Data Custodian has applied to make the Collection available to End Users via the Nodes by submitting an Allocation Proposal Form.
- C Based on the Allocation Proposal Form, the Node Operator has approved the allocation of storage for the Collection.
- D The Data Custodian makes the Collection available to the Node Operator on the terms and conditions set out in this agreement.
- E The Node Operator accepts the Collection from the Data Custodian on the terms and conditions set out in this agreement.

Operative terms

1 Definitions and interpretation

1.1 Definitions

In this agreement:

Allocation Proposal Form	means the form titled "Allocation Proposal Form" completed by the Data Custodian in relation to the Collection and provided to the Node Operator or another Node operator.
Collection	means the collection identified the Allocation Proposal Form and includes any associated metadata.
End User	means the users of the services offered via the Nodes and which may include foreign nationals.
End User Terms	means the terms of use contemplated under clause 3.1
IAMA	the Institute of Arbitrators and Mediators Australia.
Nodes	means the Queensland Cyber Infrastructure Foundation Limited, the Australian National University, The University of Melbourne, The University of Tasmania, Commonwealth Scientific and Industrial Research Organisation as iVEC Centre Agent, The University of Adelaide as the authorised contracting agent for eResearch SA and Intersect Australia Ltd and includes the operation of data centres where the data is stored

1.2 Interpretation

In this agreement:

- (a) no rule of construction applies to the disadvantage of the party that drafts this agreement on the basis that the party suggested the relevant drafting;
- (b) references to a party mean the Node Operator or the Data Custodian and references to the parties mean both of the Node Operator and the Data Custodian; and
- (c) words such as "includes" and "including" do not impose any limitation on the construction of general language that is followed by specific examples.

2 Collection

2.1 Provision of Collection

In the course of providing the Collection, the Data Custodian acknowledges and agrees:

- (a) to make the Collection available in the format required by the Node Operator;
- (b) the Data Custodian has the right to make the Collection available to the Node Operator and to the End Users;
- (c) the Collection is in appropriate format for storage in accordance with these terms and conditions;
- (d) it will bear all costs connected with uploading the Collection onto the Node;
- (e) to comply with all applicable laws;
- (f) the Collection may be shared between various Nodes according to the provisions of the Allocation Proposal Form;
- (g) to de-identify any personal information contained within the Collection unless otherwise expressly agreed by the Node Operator;
- (h) subject to any directions in the Allocation Proposal Form, the Node Operator may determine where the Collection is stored; and
- (i) that the Node Operator may:
 - (i) suspend or terminate use of or access to the Collection at any time and is not obliged to give any period of notice or reasons for that suspension or termination; or
 - (ii) issue a 'take down' notice to the Data Custodian if the Node Operator is aware or suspects that the Collection is in breach of this Agreement, any applicable laws or the intellectual property rights of any third party.

2.2 Permission to use

- (a) The Data Custodian grants permission to the Node Operator to use the Collection for the purposes set out in the Allocation Proposal Form including by making the Collection available to:
 - (i) the End Users;
 - (ii) third party service providers; and
 - (iii) other Node operators for replication.

- (b) Without limiting clause 2.2(a), the Data Custodian grants the Node Operator a perpetual, non-exclusive, world-wide, sublicensable, royalty free licence to exercise any copyright subsisting in the Collection for the purpose of providing access to the Collection as specified in the Allocation Proposal Form including the rights to reproduce, publish, perform, communicate, adapt and modify the Collection.

2.3 Warranty

The Data Custodian warrants and represents that:

- (a) to the best of the Data Custodian's knowledge, the Data Custodian has the right to provide the Collection to the Node Operator in accordance with this agreement;
- (b) to the best of the Data Custodian's knowledge, use of the Collection and the grant of the licence contemplated by clause 2.2 will not infringe the intellectual property rights (including copyright and patent rights) of any third party;
- (c) the manner in which the Collection was created is consistent with any applicable privacy laws;
- (d) the Data Custodian has obtained all necessary permissions, consents and ethical approvals required to provide the Collection to the Node Operator for use in accordance with this agreement;
- (e) the Data Custodian will not engage in fraudulent behaviour, defame any third party, harass any third party or gain unauthorised access to or interfere with any third party's online resources or systems in the provision of the Collection;
- (f) storage of the Collection by the Node Operator and other Node operators will not breach:
 - (i) any laws including laws relating to discrimination, terrorism, hate-based material or weapons of mass destruction; or
 - (ii) regulations concerning material that is restricted from public display; and
- (g) the Collection does not incorporate any data or content that contains:
 - (i) viruses, worms or other software agents; or
 - (ii) files or programs that are designed to interrupt, destroy or limit the functionality of any computer software, hardware or telecommunications equipment.

2.4 Limitations

The Data Custodian acknowledges and agrees that:

- (a) the Node Operator is not obliged to update or otherwise maintain the Collection but may elect to do so;
- (b) the Node Operator or other Node operators may charge a fee to End Users:
 - (i) for value-added services in connection with the Collection;
 - (ii) for storing the Collection after 31 December 2014; or
 - (iii) for storing data other than research collections approved by the Node;
- (c) the Data Custodian must not rely solely on the Node Operator or any other Node operator to backup the Collection; and
- (d) the terms and conditions of removal of Collections will be provided by the Node as required from time to time.

3 End Users

3.1 Terms for End Users

- (a) The Data Custodian may provide the Node Operator with terms of use that are applicable to End Users' use of the Collection in the Allocation Proposal Form.
- (b) If the Data Custodian does not provide the Node Operator with terms of Use as contemplated by clause 3.1(a), then the "Creative Commons v3.0 Attribution Australia" licence will be applicable to the End Users' use of the Collection.

3.2 Access by End Users

The Data Custodian acknowledges and agrees that:

- (a) the Data Custodian appoints the Node Operator as its agent for the purpose of making the Collection available to the authorised End Users;
- (b) the Collection will be made available by the Node Operator to the authorised End Users only in its capacity as agent for the Data Custodian;
- (c) the Node Operator will notify the End Users that access is granted by the Data Custodian on the basis of the End User Terms; and
- (d) any contract formed or licence granted is between the Data Custodian and each End User.

3.3 Warranty in relation to End Users

The Data Custodian warrants and represents that:

- (a) to the best of the Data Custodian's knowledge, the Collection does not contain any material inaccuracies that are likely to cause significant loss or damage to any End User if used in accordance with the End User Terms; and
- (b) the Data Custodian has obtained all necessary permissions and consents required to provide the Collection to the End Users for use in accordance with the End User Terms.

4 Term

This Agreement commences on the Commencement Date and continues unless either party terminates this agreement by giving 60 days written notice to the other party.

5 Liability

5.1 Limitation and disclaimer

- (a) Except to the extent that any express guarantees have been given by a party as contemplated by section 59 of the *Competition and Consumer Act 2010* (Cth), the Node Operator excludes all guarantees, conditions, warranties and representations in relation to:
 - (i) availability of the Collection to End Users;
 - (ii) suitability of the Collection for End Users;
 - (iii) integrity, value and quality of the Collection;
 - (iv) maintenance of the Collection; or
 - (v) security of the Collection.
- (b) Subject to clause 5.2, the Node Operator does not accept liability for any loss or damage however caused (including due to the negligence of the Node Operator, or breach of this Agreement by the Node Operator and even if that liability for any loss or damage was reasonably foreseeable and the Node Operator had been notified of the possibility of that liability for any loss or damage arising) in connection with the contents of, use of or access to the Collection by the Node Operator, another Node operator, Data Custodian, End Users or any third party including as a result of:

- (i) storage of the Collection:
 - (A) containing, viruses, worms or other software agents or files or programs that are designed to interrupt, destroy or limit the functionality of any computer software, hardware or telecommunications equipment being obtained in connection with uploading the Collections to the Node or access to the Collections;
 - (B) being interrupted, being error or fault free, being insecure;
 - (C) being corrupted;
- (ii) access to the Collection being withdrawn or restricted by the Node Operator or any other Node operator in its discretion;
- (i) the Collections lacking data integrity;
- (ii) the content of any Collections breaching any laws or regulatory requirements;
- (iii) the Collections infringing any third party rights (including copyright and moral rights);
- (iv) unauthorised release of the Collection; or
- (v) the Data Custodian not maintaining a backup copy of the Collection.
- (c) Subject to clause 5.2, the Data Custodian indemnifies the Node Operator from and against, and is liable for, any loss or damage suffered or incurred by the Node Operator in connection with use of or access to the Collection by the Node Operator, another Node operator, Data Custodian, End Users or any third party.
- (d) Subject to clause 5.2, the Node Operator's liability for any loss or damage however caused (including due to the negligence of the Node Operator) in connection with this agreement is limited to \$100.
- (e) Subject to clause 5.2, the Node Operator is not liable to the Data Custodian in connection with this agreement for any loss or damage however caused (including due to the negligence of the Node Operator) that constitutes consequential loss, indirect loss, loss of profits, loss of revenue, loss of reputation, loss of bargain or loss of opportunity.

5.2 Requirements of law

If any applicable legislation prohibits the exclusion of liability by a party in the manner contemplated by this clause 5 with respect to particular loss or damage, then:

- (a) the exclusion does not apply to that loss or damage; and
- (b) that party's liability is only limited or excluded with respect to that loss or damage in the manner permitted under that legislation (if any).

6 General

6.1 Intellectual property rights

The Node Operator and Data Custodian agree and acknowledge that the Node Operator has no claim over the intellectual property rights in the Collection and any modifications to the Collection.

6.2 Further assurances

Each party must do all things necessary or desirable to give effect to the provisions of this agreement including by signing all documents and performing all acts.

6.3 Entire agreement

This agreement (including any End User Terms):

- (a) contains the entire agreement of the parties; and
- (b) supersedes all prior representations, conduct and agreements,

with respect to its subject matter, except to the extent that any express guarantees have been given by a party as contemplated by section 59 of the *Competition and Consumer Act 2010* (Cth).

6.4 Costs

Each party is responsible for its own costs of entering into and performing this agreement.

6.5 Mediation

- (a) The parties must attempt to resolve any dispute or difference which may arise between them in relation to this agreement without delay.
- (b) Any dispute arising between the parties may be referred in writing in the first instance to senior representatives of the parties who must endeavour to identify a solution.
- (c) If the dispute has not been resolved within 60 days of first being referred in writing to the senior representatives of the parties then any party may refer the dispute to mediation and subject to clause 6.5(g) must do so before initiating proceedings in a court to resolve the dispute.
- (d) A dispute which is referred to mediation must be referred to IAMA and be conducted in accordance with the mediation rules as determined by IAMA by a mediator nominated by the parties or, if the parties cannot reach agreement, by IAMA.
- (e) If the dispute has not been resolved within 30 days of referral to IAMA or a longer period agreed between the parties, any party is free to initiate proceedings in a court.
- (f) Each party must bear its own costs, and equally share the costs incurred through mediation, associated with the resolution of any dispute prior to the matter being initiated as a court proceeding.
- (g) Nothing in this clause will prevent a party from seeking urgent interlocutory relief through courts of appropriate jurisdiction.

6.6 Severability

To the extent that any portion of this agreement is void or otherwise unenforceable then that portion will be severed and this agreement will be construed as if the severable portion had never existed.

6.7 No agency

Except as expressly set out in clause 3.2, this agreement does not create a relationship of employment, trust, agency or partnership between the parties.

6.8 Waiver

A right under this agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in the waiver.

6.9 Discretion

Unless otherwise expressly contemplated, where a provision of this agreement contemplates that a party may exercise its discretion then that party is entitled to exercise that discretion absolutely, with or without conditions and without being required to act reasonably or give reasons.

6.10 Jurisdiction

The laws of Queensland, Australia apply to these terms and conditions and you irrevocably submit to the non exclusive jurisdiction of the courts of Queensland, Australia, Australia and courts competent to hear appeals from those courts.

6.11 Variation

You acknowledge that we may amend these terms and conditions in our discretion by making new terms available on the Node Operator websites from time to time and those amended terms apply from the date they are made available.

Execution

SIGNED for and on behalf of

[Insert legal name of node]

by its duly authorised officer: in the presence of:

.....
(Print Name) Witness (Print Name)

.....
Title Date:

SIGNED for and on behalf of

**[Insert legal name of
custodian]**

by its duly authorised officer: in the presence of:

.....
(Print Name) Witness (Print Name)

.....
Title Date: