

Custodian-Node data provision terms and conditions

Parties

Node Operator [Insert legal name of node][Insert ACN/ABN/ARBN]
of [Insert address]

Data Custodian [Insert legal name of custodian][Insert ACN/ABN/ARBN]
of [Insert address]

Background

- A The Node Operator operates a research data centre and its activities may include identification, storage and dissemination 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 (whether hard copy or electronic means).
Collection	means the collection identified the Allocation Proposal Form and includes any associated metadata.
Collection User Terms	means the terms of use contemplated under clause 3.1
Commencement Date	means the date on which the last party signs this agreement.
Data Custodian	means the entity identified as the Data Custodian above.
End User	means the users of the services offered via the Nodes and which may include people and/or systems.
IAMA	the Institute of Arbitrators and Mediators Australia.
Node	means The University of Melbourne in partnership with Monash University together acting as VicNode,
Node Operator	means the entity identified as the Node Operator above.
Service	means the variety of options for storing research data, use of a common access layer to access the stored research data, advice on use of the service, and access to subsidised storage for merit assessed collections

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 Responsibility for Collection

The parties agree that the Node Operator will provide access to infrastructure through which the Data Custodian is providing the Collection to End Users but that responsibility for the Collection will remain with the Data Custodian.

2.2 Provision of Collection

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

- (a) the Data Custodian has the right to make the Collection available to the Node Operator and to the End Users;
- (b) the Collection is in appropriate format for storage on the VicNode infrastructure
- (c) it will bear all costs connected with uploading the Collection onto the Node (if any);
- (d) to comply with all applicable laws and regulations;
- (e) the Collection may be shared between various Nodes according to any arrangement made relating to the Collection between the Data Custodian and the Node Operator separately;
- (f) the Data Custodian is responsible for ensuring that the Collection complies, at all times, to the conditions of any ethics permit applying to the content and use of the Collection
- (g) the Node Operator may determine where the Collection is stored on VicNode infrastructure; and
- (h) the Node Operator may suspend access to the Collection for legal, security, or operational reasons and is not obliged to give any period of notice for that suspension and will notify Data Custodians within 5 business days of the reason
- (i) fees, as agreed and documented between the parties, will be paid to the Node Operator for the ongoing provision of the service.
- (j) provide and maintain up to date Data Custodian contact information including, but not limited to, a valid email address, for the duration of this agreement.

2.3 Permission to use

- (a) These Terms don't give VicNode any rights to the data stored on VicNode infrastructure except for the limited rights that enable us to offer the Service.

2.4 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 its knowledge the Data Custodian agrees that use of the Collection and the grant and exercise of the licence under clause 2.2 will not infringe the intellectual property rights (including copyright, patent rights or other rights) of any third party;
- (c) the manner in which the Collection was created is consistent with any applicable privacy laws and regulations;
- (d) the Data Custodian has obtained and is compliant with 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 of the Node Operator's or third party's online resources or systems in the provision of the Collection;
- (f) provision of the Collection through VicNode infrastructure will not breach:
 - (i) any laws including laws relating to privacy, 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 will interrupt, destroy or limit the functionality of any computer software, hardware or telecommunications equipment

2.5 Limitations

The Data Custodian acknowledges and agrees that:

- (a) the Node Operator is not obliged to update or otherwise maintain the Collection;
- (b) the Data Custodian must not rely on the Node Operator or any other Node operator to back up the Collection;
- (c) 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 Data Custodian Terms for End Users

- (a) Without limiting clause 2.2, the Data Custodian will provide Collection User Terms that are applicable to End Users' use of their Collection.
- (b) If the Data Custodian does not provide Collection User Terms 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 Data Custodian is responsible for ensuring agreement by End Users to any provided Collection User Terms; and

- (d) any contract formed or licence granted for the access of the collection is a contract between the Data Custodian and 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 Collection User Terms;
- (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 Collection User Terms; and
- (c) in the event that there is a conflict between the Collection User Terms and this agreement, the terms of this agreement will prevail.

4 Term and termination

4.1 Term

- (a) 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.
- (b) The Node Operator can, without notice, suspend access to the collection if it is aware of or suspects that the Collection is in breach of this agreement, any applicable laws or the intellectual property rights of any third party. The Node Operator will provide 60 day notice of the intent to terminate the agreement, during which time the Data Custodian may appeal the termination.
- (c) The parties agree that any rights accrued under this agreement at the date of termination survive termination of this agreement.
- (d) Upon termination of this agreement the Data Custodian's Collection will be removed by the Node Operator.
- (e) This clause 4 and clause 5 survive termination of this agreement.

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;
 - (iii) the Collection lacking data integrity;
 - (iv) the content of any Collections breaching any laws or regulatory requirements;
 - (v) the Collections infringing any third party rights (including copyright and moral rights);
 - (vi) unauthorised release of the Collection; or
 - (vii) 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 storage, 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 excludes all liability for any loss or damage however caused (including due to the negligence of the Node Operator) in connection with this agreement.
- (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, loss of data 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 except to the extent expressly set out in this agreement.

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:

- (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 give reasons.

6.10 Jurisdiction

The laws where the Node Operator resides apply to these terms and conditions and you irrevocably submit to the non-exclusive jurisdiction of the courts of that jurisdiction and courts competent to hear appeals from those courts.

6.11 Variation

Data Custodian acknowledge that the Node Operator may amend these terms and conditions in its discretion by making new terms available to the Data Custodian using contact information provided. Unless otherwise notified, the new terms and conditions will be considered agreed to within 30 days of notification.

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: