**CO-FUNDING AGREEMENT**

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| --- | --- |
| Parties | |
| **Between:** | *<If Company:* [Company A],having its registered offices at [Insert registered offices]> <*if Individual* [Insert Full Name], residing at [Insert residential address]>, (“KiwiNet Partner”); |
| **And:** | *<If Company:* [Company B],having its registered offices at [Insert registered offices]> <*if Individual* [Insert Full Name], residing at [Insert residential address]>, (“Co-funder”); |

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| --- |
| Background: |
| 1. The KiwiNet Partner is undertaking a project relating to [*brief description of the Project*]. 2. The Co-funder has agreed to co-fund the Project with the KiwiNet Partner on the terms below. |

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| --- | --- |
| Specific terms | |
| **Project** | [*insert short description*] |
| **KiwiNet Partner contribution** | [*describe the KiwiNet Partner’s contribution, both in cash and in-kind.*  *Cash contribution is money that the KiwiNet Partner is contributing to the project, plus GST.*  *In-kind contribution can include materials, consumables, access to facilities and time donated to the project (e.g. project management and IP management, expertise in the development of the relevant technologies for industry, goods and services, on site facilities).*  *Set out dates when contributions to be made*.] |
| **Co-funder contribution** | [*describe the Co-funder’s contribution which should be only cash plus GST.*  *Set out dates when contributions to be made.*]  *\*\*If Co-Funder is providing more than just funding, then consider using the Collaboration Agreement template\*\** |
| **Payment to KiwiNet Partner** | Bank: [insert Bank name]  Account Name: [insert Account name]  Account Number: [insert account number] |
| **Intellectual Property** | (*The default position for the ownership of IP is set out at clause 4.3. However, if those provisions are not appropriate in the circumstances, IP terms and conditions may be dealt with on a case by case basis reflecting the variety of projects the KiwiNet Partner undertakes. Describe IP arrangements and check your wording with the KiwiNet Partner IP Manger/ legal counsel* ) |
| **Liaibility** | [*maximum amount of both parties liability if different to the total value of Contributions provided by the liable party under this contract – clause 7.4 refers*] |
| **KiwiNet Partner contact person** | [*name, email address and phone number of the KiwiNet Partner contact person*] |
| **KiwiNet Partner address for notices** | C/- WaikatoLink Limited, Level One, Core Facilities Building, Waikato Innovation Park, Hamilton, New Zealand |
| **Co-funder contact person** | *[name, email address and phone number of Co-funder contact person*] |
| **Co-funder address for notices** | [*street address and or fax number – not PO Box*] |
| **Variations** | The General Terms below are varied as follows: [*Any amendments to the General Termssjpuld be identified in this section, not in the body of the General Terms*] |

**GENERAL TERMS**

Except as varied by the Specific Terms above, the following General Terms apply to the Project and the parties Contributions to the Project.

# Definitions and Interpretation

## In this contract the following terms have the following meanings:

**Background IPR** means all IPR owned by a party at the date of this contract or developed or acquired by a party after the date of this contract that is outside the terms of this contract.

**Confidential Information** means:

## all information and materials relating to or arising from the Project in any form whatsoever;

## information which is by its nature confidential or which the owner of the information advises the other party, is confidential and includes the terms of this contract; and

## anything disclosed before the date of this contract that relates to paragraphs (a) or (b);

but does not include:

1. information which at the date of this contract is in the public domain or subsequently enters the public domain without fault on the part of the party to whom the information has been disclosed;
2. information that is received in good faith by a party from a third party not owing (directly or indirectly) any obligation of confidentiality to the party who owns that information; or
3. information which is at the date of this contract, independently acquired or developed by a party and which is owned by that party; or
4. information already properly in the possession of a party and which that party can demonstrate by written record to be previously known to them.

**Contributions** means the KiwiNet Partner Contribution and the Co-funder Contribution as described in the Specific Terms.

**IPR** means all intellectual property rights and industrial property rights of any nature whether conferred by statute, common law or equity, including without limitation, all rights in any patent, copyright, trade mark, design, database, circuit lay-out, know-how, trade secret, Confidential Information, or right of confidence including all such rights or similar rights in any invention, device, material, data, drawing, sample, method, process, text, algorithm, schematic, software, hardware, firmware, get-up, any other original works or materials, or any component of the same, and any application to register the same, whether or not registered or capable of registration.

**MSI** means Ministry of Science and Innovation or any replacement ministry.

#### **Project IPR** means new IPR produced by either or both parties, in the course of undertaking the Project.

**Working Day** means any day other than a Saturday, Sunday, public holiday in Wellington, Auckland or Christchurch, New Zealand, and any day from 24 December to 5 January inclusive in any year.

## In this contract:

1. in addition to the definitions in clause 1.1, unless the context otherwise requires, terms given a meaning in the Specific Terms have that meaning.
2. a reference to a person includes any other entity or association recognised by law and the reverse.
3. words referring to the singular include the plural and the reverse.
4. a reference to a paragraph, section, clause or a party is a reference to that paragraph, section, clause or party in this contract.
5. where two or more persons are listed as a party to this contract, their liability is joint and several.
6. all monetary amounts are in New Zealand dollars unless stated otherwise.
7. clause headings are for reference purposes only.
8. time is of the essence.

# Project Co-Funding

## The KiwiNet Partner and the Co-funder agree to co-fund the Project by way of the Contributions as detailed in the Specific Terms.

## The parties shall provide their Contributions in accordance with the timeframes set out in the Specific Terms.

## If a party is unlikely to be able to provide its Contribution (in-kind or in cash), or any part thereof, in accordance with the timeframes set out in the Specific Terms it shall:

## notify the other party as soon as possible;

1. use its best endeavours to overcome the issue that may cause a delay in the provision of its Contribution (or part thereof);
2. use its best endeavours to minimise loss to the other party;
3. continue to perform its obligations as far as practicable; and
4. use its best endeavours to recommence provision of the delayed Contribution (or part thereof) as soon as reasonably possible.

### For the avoidance of doubt and notwithstanding clause 9.10, if a Contribution of a party (in part or in full) is likely to unreasonably hinder either the commencement or progression of the Project to the detriment of the other party, that delay shall be considered a material breach for the purposes of clause 5.2(a).

# Payment

3.1 All monetary amounts referred to in this contract that form part of a party’s Contribution are plus GST (if any).

3.2 Upon receipt of an invoice from the KiwiNet Partner for any part of the Co-funder’s Contribution, the Co-funder will pay that invoice and any applicable GST by the due date set out in the Specific Terms, or if no due date is specified, on the 20th day of the month following the date of the invoice.

3.3 All payments to the KiwiNet Partner are to be made by electronic transfer into the bank account set out in the Specific Terms or by such other method as advised by the KiwiNet Partner.

# Intellectual Property

## Background IPR owned by a party will remain with that party. Except to the extent necessary to undertake the Project or expressly stated otherwise in this contract, neither party grants any rights in its Background IPR to the other party.

## KiwiNet Partner may use the Co-funders Background IPR to the extent necessary to perform its obligations under the Project and for the duration of the Project.

## Unless otherwise specified in the Specific Terms:

#### All Project IPR shall vest with the KiwiNet Partner.

#### Both parties will do all things and execute all documents reasonably necessary and as required by the KiwiNet Partner for Project IPR to vest with the KiwiNet Partner.

#### The Co-funder shall not at any time including after the termination of this contract contest or challenge in any legal proceedings or otherwise the KiwiNet Partner’s ownership or rights in and to the Project IPR or the validity of the Project IPR.

#### The Co-funder shall not disclose, publish or do anything which may adversely affect the KiwiNet Partner’s ability to obtain legal protection for the Project IPR anywhere in the world unless otherwise agreed in writing by the KiwiNet Partner.

#### Subject to clause 4.3 (d) and only with the prior written consent of the KiwiNet Partner, the Co-funder may publish information based on the Project in scientific journals or academic publications (“Publication”). The Co-funder shall deliver the proposed text of the Publication to the KiwiNet Partner at least 20 Working Days prior to submission to any publisher or other third party. The KiwiNet Partner’s consent may be withheld if in the KiwiNet Partner’s opinion the Publication could prejudice any of its IPR including but not limited to the protection or commercialisation of its IPR including the Project IPR..

#### If the Co-funder wishes to obtain a licence to use the Project IPR, upon receipt of written notice by the KiwiNet Partner from the Co-funder, the parties shall enter into discussions regarding the potential licence of the Project IPR to the Co-funder upon terms reasonably acceptable to both parties. The terms and conditions of any licence arrangement between the parties shall be recorded in a separate agreement. If the terms of licence for the Project IPR cannot be agreed within 20 Working Days of receipt of written notice by the KiwiNet Partner from the Co-funder, the parties rights and obligations under this clause 4.3(f) shall be at an end unless otherwise agreed between the parties.

# Term and Termination

## Subject to earlier termination pursuant to this Clause 5, this contract will terminate on completion of the Project as advised by the KiwiNet Partner.

## A party (“Terminating Party”) may terminate this contract by written notice to the other party (“Defaulting Party”) on the happening of any of the following::

#### The commission of a material breach of this contract by the Defaulting Party provided that if the breach is capable of remedy, notice of termination will not take effect unless the Defaulting Party has failed to remedy such breach to the reasonable satisfaction of the Terminating Party within 15 Working Days following receipt by the Defaulting Party of notice of termination specifying the breach concerned; or

#### is insolvent, enters into liquidation or is otherwise unable to pay its debts when due.

## the KiwiNet Partner may terminate this contract by written notice to the Co-funder if the Ministry of Science and Innovation or any replacement government ministry cease providing funding to the KiwiNet Partner in connection with the Project.

## Termination of this contract will be without prejudice to the rights and remedies of the parties that have accrued prior to termination, including for any prior breach of this contract.

# Confidentiality

## The holder of Confidential Information (“the holder”) belonging to the other party (“owner”) shall:

#### keep it in the holder’s possession and treat it as confidential regardless of when disclosed;

#### not use any Confidential Information belonging to the owner for any purpose other than as required in terms of this contract; and

#### only disclose Confidential Information to employees, officers, approved subcontractors or professional advisers on a need to know basis, ensure that those persons are bound by the same obligations of confidence and the holder shall be liable to the owner for any breach by those persons of these confidentiality obligations.

## The restrictions in this clause 6 do not apply where disclosure is required by law or by a government agency or government authority.

## For the avoidance of doubt, the owner of Confidential Information shall be entitled to disclose and use such information at its sole discretion.

## The holder shall, on demand by the owner, or where the purpose of this contract has been served, at the option of the owner promptly:

#### return to the owner Confidential Information which is reasonably capable of being returned; and/or

#### destroy Confidential Information;

### (including copies or reproductions of the same) which is in the possession or control of the holder.

## The parties acknowledge that any breach of these confidentiality obligations may result in damages for which monetary compensation would not be an adequate remedy and that the affected party is entitled to specific performance or injunctive relief in addition to any other remedies at law or in equity.

## No party gives any representation or warranty with respect to any information other than that it has the right to disclose such information.

## If requested by the KiwiNet Partner, at any time, the Co-funder will provide all information and assistance required to complete a report on the status of the Project to MSI or such other relevant government agency to which the KiwiNet Partner is obliged to report. This report will only be disclosed by the KiwiNet Partner to MSI or such other relevant government agency on a confidential basis.

# Warranties/Exclusion of Liability/Insurance

## All information, materials, project outcomes or IPR disclosed, used, or created in connection with the Project is provided “as-is” with all faults. Neither party makes any warranty that the Project will not infringe any third party rights, provide any particular functionality, yield any particular results, or be useful for any particular purpose.

## Each party warrants and represents for the benefit of the other party that:

#### it has the legal right, authority and full power to enter this contract and to perform its obligations under it and has taken all necessary corporate and other action to authorise the execution, delivery and performance of this contract;

#### this contract constitutes a valid and binding obligation of that party enforceable against that party in accordance with its terms;

#### a party will not be liable to the other party for damages, under the law of contract, tort, equity or otherwise, arising out of or in connection with this contract, to the extent arising out of or in connection with:

##### any error or inadvertent omission in any information obtained from the other party;

##### any inadvertent act or inadvertent omission of the other party; or

##### any infringement by the other party of any IPR of a third party.

## To the extent permitted by law, the KiwiNet Partner will not be liable (in contract, tort, negligence or in any other way), to the Co-funder for:

#### loss of revenue or profit, loss of goodwill or opportunity, loss of production; or

#### loss, damage, cost or expense of any kind that is indirect, consequential, or of a special nature,

arising, directly or indirectly, out of this contract.

## The Co-funder shall indemnify and hold harmless the KiwiNet Partner from and against all liability, claims, loss, damage, costs and expenses (including all reasonable legal, accounting and other professional fees) awarded against, suffered or incurred by the KiwiNet Partner as a result of any breach of this contract by the Co-funder.

## Each party’s liability to the other in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with the performance or contemplated performance of this contract shall be limited to the amount detailed in the Specific Terms, or if there is no amount specified, to the total value of the liable party’s Contribution.

## Each party agrees that it will maintain sufficient customary insurance to cover its potential liabilities under this contract.

# Dispute Resolution

## If any dispute arises as to the terms of this contract, then any party may give notice to the other party of that dispute. The parties will endeavour to resolve it quickly and fairly in good faith.

## If the dispute or difference cannot be settled by good faith negotiation between the parties within (5) five Working Days of the dispute or difference arising, such dispute or difference may be referred by either party to the mediation of a single mediator agreed to by both parties, or failing that, appointed by the President for the time being of the New Zealand Law Society or his/her nominee.

## If the dispute or difference cannot be settled within 15 Working Days of the dispute or difference being referred to mediation pursuant to clause 8.2, either party shall be entitled to exercise all rights and remedies available to it at law.

## Nothing in this clause 8 shall prevent either party from commencing court proceedings for the purposes of seeking urgent injunctive relief.

# General

## Nothing in this contract will create, constitute or evidence any partnership, joint venture, agency, trust or employer/employee relationship between the parties.

## The Co-funder shall not be entitled to assign any or all of its rights or obligations under this contract without the KiwiNet Partner’s prior written consent. the KiwiNet Partner and its successors or assigns may, on notice, transfer, subcontract or assign all or any of its rights or obligations under this contract to any other person without the consent of the Co-funder.

## Each party will bear its own costs in connection with the entry into, and implementation of this contract.

## No amendment to this contract is binding unless it is in writing and signed by an authorised representative of both parties.

## Except as specifically provided, nothing in this contract is intended to confer a benefit upon any third party under the Contracts (Privity) Act 1982.

## Each party must do everything (including executing agreements and documents) necessary to give full effect to this contract.

## A failure by a party to enforce a provision of this contract will not constitute a waiver of any right to future enforcement of that or any other provision.

## If any part of this contract is unenforceable, invalid or illegal, the other terms will remain in force.

## Any notice to a party under this contract will be deemed to have been delivered immediately upon hand delivery to the address of that party in the Specific Terms, three (3) Working Days after posting within New Zealand to the address of that party in the Specific Terms, 10 Working Days after posting overseas to the address of that party in the Specific Terms, or immediately on receipt by the sender of evidence the notice has been successfully faxed to the number of that party in the Specific Terms.

## No party shall be liable for any default in its obligations under this contract if that default arises from any cause reasonably beyond its control but does not include any circumstance which that party could have prevented, or overcome by reasonable care. This clause does not apply to an obligation to make payment under this contract.

## All clauses of this contract that are intended to continue after termination, including clauses 4 (Intellectual Property), 6 (Confidentiality), 7 (Warranties/Exclusion of Liability/Insurance), 8 (Dispute Resolution) and 9 (General) will continue in full force and effect.

## This contract records the entire understanding and agreement between the parties regarding its subject matter and supersedes and extinguishes all prior agreements, statements, correspondence and undertakings, whether written, oral or both made between the parties relating to the same subject matter. The parties agree that in entering this contract, they have not relied on any representation (including pre-contractual representations) other than those which are set out in this contract.

## Nothing in this contract shall prevent the KiwiNet Partner from undertaking activities in fields the same as or similar to the Project whether on its own account or on behalf of any third party.

## This contract may be signed in counterparts, including by facsimile or email, all of which, when taken together, will constitute one and the same document.

## This contract will be governed by New Zealand law and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

## The date of this contract shall be the date that the last party signed.

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| Signed by [Insert name of KiwiNet Partner] by:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Authorised signatory  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Full name of authorised signatory  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Signed by [*name of* ***Co-funder***] by:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Authorised signatory  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Full name of authorised signatory  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Signed by [name of Co-founder]:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Authorised signatory  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Full name of authorised signatory  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Signed by [*name of* ***Co-funder***] by:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Authorised signatory  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Full name of authorised signatory  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |