BIOLOGICAL RESOURCES ACCESS AGREEMENT

Between

Commonwealth of Australia

And

J. Craig Venter Institute

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THIS AGREEMENT is made on the 4th day of November 2004.

BETWEEN:

COMMONWEALTH OF AUSTRALIA **("Australia")**

AND:

J CRAIG VENTER INSTITUTE **("the Collaborator")**

RECITALS:

A. Australia possesses megabiodiversity within its jurisdiction, and seeks to facilitate access to biological resources for research and development activities.

B. As a party to the Convention on Biological Diversity (CBD), Australia is committed to the conservation of biodiversity, the sustainable use of its components, and equitable sharing of benefits derived from its use, and has embraced the 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization', which were adopted by the CBD Conference of the Parties in 2002.

C. The Collaborator is undertaking a global sampling expedition to survey microorganisms that live in the oceans, and in some places soils, to better understand overall species diversity, discover and characterize new bacterial and viral species, evaluate the ecological roles that dominant (but generally unculturable) microbes play in the ecosystem, and establish a freely shared, global environmental genomics database that can be used by scientists around the world for any purpose.

D. At the date this agreement is made 14 nations have agreed to collaborate in the expedition and have agreed to the publication of the freely-shared global environmental genomics database, even though such publication and free use of that database theoretically may decrease each nation's benefits arising from potential commercial utilization of that portion of the genomics database that contains genomic data from their national biodiversity.

E. Australia seeks to maximise the benefits to the nation arising from allowing access to its biodiversity, from access to the genomic data reflecting the biodiversity of other nations, and from contributing with other nations to a freely-shared global environmental genomics database; such benefits specifically including improvements in Australia's knowledge base about its own biodiversity and its capacity for effective conservation, and research and development participation by Australian individuals and organisations.

F. In order to develop the freely-shared global environmental genomics database, the Collaborator is seeking access to biological resources within Australia's jurisdiction in order to prepare a genomic survey of Australia's biodiversity, comprising or contained in the biological resources, and has submitted a proposal to conduct marine scientific research in areas within Australia's jurisdiction.

G. The Collaborator has obtained U.S. government and private philanthropic financial support to conduct the sampling expedition, and partial support for genomic sequencing, at no cost to Australia.

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H. Wishing to become a contributor to the multi-national genomics database and obtain the benefits of access to genomics data from Australia as well as other nations around the world, Australia has agreed to the Collaborator having access to biological resources from Australia's jurisdiction and this agreement sets out the terms that the parties agree are to apply to the taking and use of the biological resources by the Collaborator.

I. This agreement sets out the terms that the parties agree are to apply to the taking and use of the biological resources by the Collaborator.

IT IS AGREED:

1. DEFINITIONS & INTERPRETATION

1.1 Definitions

(a) **"Access Arrangements"** means the arrangements for access to the Materials specified in the Schedule.

(b) **"Access Proposal"** means the proposal specified in the Schedule submitted by the Collaborator for access to the Materials.

(c) **"Approved Research"** means the research described in the Schedule;

(d) **"Collaborator"** includes the officers, employees, agents and contractors of the Collaborator.

(e) **"Commencement Date"** means the date specified in the Schedule

(f) **"Confidential Information"** means all know-how, financial information and other commercially valuable or sensitive information in whatever form, which a party marks as confidential or proprietary and discloses to the other party. The following are exceptions to such information:

(i) information which is lawfully in the public domain prior to its disclosure to a party by another party;

(ii) information which enters the public domain otherwise than as a result of an unauthorised disclosure;

(iii) information which is or becomes lawfully available to the recipient party from a third party who has the lawful power to disclose such information to the recipient party on a non-confidential basis; and

(iv) information which is rightfully known by the recipient party (as shown by its written record) prior to the date of disclosure.

(g) **"Derivative"** means anything derived from or using the Materials, including without limitation:

(i) improvements, developments, modifications, structural or functional analogs and homologs of the Materials;

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(ii) expression products, replicates and progeny of any of the above; and

(iii) polynucleotides coding for any of the above.

(h) **"Intellectual Property"** means statutory and other proprietary rights in respect of copyright and neighbouring rights; all rights in relation to inventions, patents, plant varieties, registered and unregistered trade marks, registered and unregistered designs, circuit layouts and confidential information, but does not include moral rights that are not transferable.

(i) **"Lead Investigator"** means the person named in the Schedule.

(j) **"Materials"** means the materials described in the Schedule.

(k) **"Results"** means all information and tangible objects arising from the Collaborator's use of the Materials and any Derivatives, including information published in accordance with clause 6.2.

1.2 Interpretation

(a) Headings are for convenience only and do not affect interpretation.

(b) The singular includes the plural and conversely, and a gender includes all genders.

(c) Where the Collaborator is comprised of more than one person the Collaborator's obligations apply to each person jointly and severally.

(d) A reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it.

2. COMMENCEMENT OF AGREEMENT

2.1 This agreement commences on the Commencement Date.

3. ACCESS TO AND TRANSFER OF MATERIALS

3.2 The Collaborator will access and transfer the Materials to its research facility located at 9704 Medical Center Drive, Rockville, Maryland, 20850 in the United States of America subject to and in accordance with:

(a) the laws of Australia and of the United States of America; and

(b) the Access Arrangements.

3.3 The Collaborator is responsible for all costs incurred by the Collaborator in accessing and transferring the Materials.

3.4 The Collaborator acknowledges that the Materials are sourced from Australian's jurisdiction and are of considerable value in terms of research use and the development of a freely-shared global environmental genomics database.

4. USE OF THE MATERIALS AND RESULTS

4.1 The Collaborator must only use the Materials and Results:

(a) for the Approved Research;

(b) in accordance with the Access Proposal (including working and collaborating with Australian scientists), and

must not make Derivatives from the Materials.

4.2 The Collaborator must keep the Materials secure and under the personal care and control of the Lead Investigator or their delegate.

4.3 The Collaborator must notify Australia immediately the name and contact details of any delegate appointed under clause 4.2.

4.4 The Collaborator must not, without the prior written permission of Australia:

(a) sell, loan, or otherwise provide the Materials or the Results to any third party;

(b) use the Materials or the Results for any purpose other than the Approved Research; or

(c) use or store the Materials in any location other than in the laboratory of the Lead Investigator and under his or her direct supervision (or delegate appointed under clause 4.2).

4.5 Australia acknowledges that the Materials will be of limited quantity and may be exhausted during the Approved Research, and agrees that the Collaborator is not required to maintain the Materials that are used in the Approved Research.

4.6 The Collaborator warrants that the Approved Research is non-commercial and that the Collaborator, and to the best of the Collaborator's knowledge no associated entity of the Collaborator, or any entity that carries on or proposes to carry on any business with Collaborator, holds any option, licence or other rights to the use or commercialisation of the Materials or the Results, or Intellectual Property arising from the Approved Research.

4.7 The Collaborator must ensure that its use of the Materials complies with all relevant laws, codes of practice and ethical principles.

5. OWNERSHIP OF THE MATERIALS & INTELLECTUAL PROPERTY RIGHTS

5.1 All property rights in and in relation to the Materials and the Results, including Intellectual Property arising (directly or indirectly) from the Collaborator's use of the Materials or the Results vests, or will vest, in Australia.

5.2 Without limiting clause 5.1, all Intellectual Property rights arising from use of the Materials, the Results or any Derivative other than for the Approved Research, or from any other breach of this agreement by the Recipient, will vest in Australia.

5.3 Australia grants the Collaborator a non-exclusive licence to use the Materials and the Results for the purpose of the Approved Research, and in particular to publish data in accordance with clause 6.2.

5.4 Nothing in this agreement, or the use of the Materials by the Collaborator, will give the Collaborator any property rights in and in relation to the Materials or the Results, including Intellectual Property arising (directly or indirectly) from the Collaborator's use of the Materials.

5.5 Australia gives no warranty that any use of the Materials will not infringe the Intellectual Property rights or other rights of any third party.

5.6 If the Collaborator wishes to commercialise or have commercialised any Results or Intellectual Property arising from its use of the Materials, including intellectual property protection, it must first enter into an appropriate agreement with Australia with the understanding that Australia agrees to negotiate non-exclusively in good faith with a view to concluding such an agreement on terms acceptable to the parties.

5.7 The Collaborator will use reasonable effort to notify Australia as soon as possible of any inquiries for commercial purposes received from a third party regarding rights in, or use, copying, or distribution of Results published or publicly disclosed in accordance with this Agreement.

6. PUBLICATIONS AND REPORTING

6.1 Subject to clause 6.2 and 6.3, the Collaborator must not publish or publicly disclose details of the Materials or the Results without the prior written approval of Australia.

6.2 The Collaborator will publish or publicly disclose genomic sequence data, including a limited and reasonable description, of the Materials consistent with generally accepted database curation standards in accordance with the Publication Requirements specified in the Schedule.

6.3 The Collaborator may at the time of publication or public disclosure under clause 6.2 publish an article relating to the Approved Research in an appropriate magazine or journal or other publication.

6.4 The Collaborator agrees to acknowledge, Australia as the source country and that the Materials were obtained in accordance the laws and requirements of Australia, the role of Australian scientists, in any publication arising out of the Collaborator's use of the Materials and, where any significant advice or recommendations have been provided by an Australian scientist, the Collaborator agrees to acknowledge the authorship of that person.

6.5 In demonstration of their good faith, Australia and the Collaborator agree to make copies of this agreement available to the public by electronic and other means.

6.6 The Collaborator will report in writing to Australia every 90 days providing details of progress with, and the results of the Approved Research, and Australia will keep such results confidential, subject to Australia's rights described in clause 5.

6.7 Each report under clause 6.8 must set out the progress of the Approved Research since the last report and anticipated activities during the next reporting period, and describe any Intellectual Property arising from the Approved Research.

6.8 The Collaborator will provide Australia with the Results, assessment of data, samples as reasonably requested, and provide Australia with reasonable assistance in their assessment or interpretation.

6.9 Within 90 days of the conclusion of the Approved Research the Collaborator will provide Australia with a final written report setting out the Results, and certifying compliance with the Collaborators obligations under clause 4.1.

7. CONFIDENTIALITY

7.1 The Collaborator must restrict access to the Materials, the Results, and the reports required under clause 6, to those persons who are directly involved in the Approved Research and who are placed under an obligation to observe the terms of this Agreement.

7.2 Each party will treat all Confidential Information owned by the other party as Confidential, and will not to disclose any Confidential Information owned by the other party relating to this Agreement to any third person without prior approval in writing from the other party.

7.3 The obligations of the parties under this clause will not be taken to have been breached where Confidential Information referred to is legally required to be disclosed.

7.4 Subject to clause 7.5, the obligations of the parties under this clause will survive the expiration or termination of this Agreement.

7.5 The obligations of the parties under clause 7.2 will continue for a period of 3 years after the date of expiration or termination of this Agreement.

8. LIABILITY & INDEMNITY

8.1 The Collaborator releases and indemnifies Australia, its officers and employees from and against any loss or liability arising out of or relating to the taking, possession, use, storage or transport of the Materials, however that loss or liability may arise. For the avoidance of doubt, the fact that Australia has reviewed a description of the Approved Research does not constitute any advice by Australia, nor any endorsement of the Approved Research.

8.2 The Collaborator indemnifies Australia and its representatives and agents against all loss, liability, damage (whether to persons or property), costs and expenses (including without limitation legal expenses) claims, demands, suits and other actions arising out of the Collaborator's taking, use and disposal of the Materials and publication or disclosure of the genomic sequence data, including a limited and reasonable description, of the Materials.

9. COMMERCIAL EXPLOITATION OF THE MATERIALS AND PUBLISHED DATA

9.1 Nothing in this Agreement prevents Australia from exploiting the Materials, the Results or any other modifications or Derivatives, distributing the Materials, or any other modification or derivatives to any third party, including both profit and non-profit organisations.

9.2 Subject to clause 9.3, nothing in this Agreement is intended to prevent any person or entity (including Australia and the Collaborator) freely using all data published or made publicly available under clauses 6.2 and 6.3 for any purpose, including for research and development.

9.3 Any use of such data for commercial purposes will be subject to Australia's rights under clauses 5.1 and 5.2 of this Agreement.

10. TERMINATION, DEALING WITH MATERIALS & ASSIGNMENT

10.1 Australia may terminate this Agreement for material breach of this Agreement at any time by giving 14 days written notice to the Collaborator.

10.2 The Collaborator must return any unused Materials to Australia at its cost:

(a) on demand of Australia;

(b) on termination of this agreement; and

(c) once the Materials are no longer required for the Approved Research.

10.3 The Collaborator's rights under this agreement are not assignable.

11. DISPUTE RESOLUTION

11.1 If a dispute arises out of or related to this Agreement no party may commence court or arbitration proceedings (other than proceedings for urgent interlocutory relief) unless it has complied with this clause.

11.2 A party to this Agreement claiming that a dispute has arisen under or in relation to this Agreement must give written notice to the other party specifying the nature of the dispute. On receipt of that notice by the other party the parties' representatives must endeavour in good faith to resolve the dispute expeditiously and failing agreement within 30 days must commence use informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed to by them.

11.3 If the parties do not agree within 30 days of receipt of the notice referred to in this clause as to the dispute resolution technique and procedures to be adopted, the time table for all steps in those procedures, and the selection of compensation of the independent person required for such a technique, then the parties must mediate the dispute and the President of the Law Society of the Australian Capital Territory or the President's nominee will select the mediator and determine the mediator's remuneration. The mediator will determine the procedure for the mediation.

12. GENERAL

12.1 Any notice under this agreement may be served by hand delivery or by being forwarded by prepaid post, return receipt requested, to the address of the party or to such other address as may be notified in writing by the party from time to time and in the case of service by post is deemed to have been received upon receipt. Notices may be served by recognized overnight courier, facsimile transmission or e-mail and are valid if in fact received, as

demonstrated by a valid transmission report or notification of delivery to the Collaborator's computer.

12.2 This agreement contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

12.3 This agreement may be varied only by written agreement signed by both parties.

12.4 No waiver by Australia of any provision of or right, remedy or power of Australia, and no amendment to this agreement, will be effective unless it is in writing signed by Australia and any such waiver will be effective only in the specific instance and for the specific purpose for which it is given.

12.5 No failure or delay by Australia to exercise any right, remedy or power under this agreement or to insist on strict compliance by the Collaborator with any obligation under this agreement, and no custom or practice of the parties at variance with the terms of this agreement, will constitute a waiver of the right of Australia to demand full compliance with this agreement.

12.6 If any provision of this agreement is unenforceable or invalid for any reason, the relevant provision will be deemed to be modified to the extent necessary to remedy such unenforceability or invalidity or, if this is not possible, then such provision will be severed from this agreement, without affecting the enforceability or validity of any other provision of this agreement.

12.7 This agreement is governed by the laws of the Australian Capital Territory without regard to conflicts of laws principles, and the parties submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and the Commonwealth of Australia.

12.8 Each signatory to this agreement warrants that he or she has authority to bind to this agreement the party that he or she is stated to represent.

SCHEDULE 1

1. Commencement Date:
3 November 2004

2. Lead Investigator:
J. Craig Venter, Ph.D.,

3. Description of the Materials:
Seawater, sediments, and in some areas, soil and any biological resources contained within it.

4. Access Proposal:
Application for Consent to Conduct Marine Scientific Research in Areas under National Jurisdiction of Australia dated 28 June 2004.

5. Access Arrangements:
The Collaborator will access the Materials in accordance with the Access Proposal, and:

(a) if access is taking place within the Great Barrier Reef Marine Park, in accordance with any requirements of the Great Barrier Reef Marine Park Authority, including any permit issued under the *Great Barrier Reef Marine Park Act 1975*;

(b) if access is taking place within a Commonwealth reserve under the *Environment Protection and Biodiversity Conservation Act 1999*, in accordance with any requirements of the Director of National Parks, including any permit issued under the Act;

(c) if access is taking place within the Australian Fishing Zone established by the *Fisheries Management Act 1991* and a permit is required under that Act for the activity, in accordance with the conditions of any permit issued under the Act;

(d) if access is taking place within the coastal waters or lands of a State of Australia or the Northern Territory of Australia in accordance with any requirements of the government of that State or the Northern Territory (as the case may be), including any permit issued under the laws of that State or Territory.

6. Approved Research:

Inventory the microorganisms that live in oceans within Australia's jurisdiction, and in soils in some places within Australia or its Territories, to better understand overall species diversity, discover and characterize new bacterial and viral species, evaluate the ecological roles that dominant (but generally unculturable) microbes play in the ecosystem, and establish and publish a freely shared, global environmental genomics database that can be freely used by any person or entity.

7. Publication Requirements:

The Collaborator will publish all the results of any genomic analysis of the Materials into a freely accessible public domain by means accepted by the global scientific community, such as GenBank® or through the U.S. National Institutes of Health environmental genomics database.

EXECUTED as an AGREEMENT this 4th day of November 2004.

Signed for and on behalf of

COMMONWEALTH OF AUSTRALIA

Signature

BRUCE HERBERT LEDGER.
Name in Full

Signature of Witness

BENJAMIN PAUL PHILLIPS
Name of Witness

Signed for and on behalf of

J. CRAIG VENTER INSTITUTE

Signature

J. Craig Venter
Name in Full

Signature of Witness

Heather E. Kowalski
Name of Witness

Signed for and on behalf of