

# Sub-Licence agreement for the Provision of Software

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## PARTIES:

- (1) Commonwealth Scientific and Industrial Research Organisation (ABN 41 687 119 230) a body corporate established pursuant to the provisions of the Science and Industry Research Act 1949 (Commonwealth) and having its principal office at Limestone Avenue, Campbell, Australian Capital Territory, Australia, through its Division of Ecosystem Sciences of Clunies Ross Street, Black Mountain, Acton, ACT 2601, Australia (“**CSIRO**”)
- (2) [insert name of the third party that CSIRO is distributing a Seat for the Product] (“**Registered User**”)

## WHEREAS:

- (1) BioAware Sa (“**BioAware**”) has developed and is in the business of marketing computer programmes and providing maintenance, support and other professional services in relation to such computer programmes.
- (2) CSIRO is the head contractor with the Commonwealth of Australia as represented by the Department of Innovation, Industry, Science and Research (the Department) to deliver under the National Collaborative Research Infrastructure Strategy (NCRIS) and Education Investment Fund (EIF) the project entitled the Atlas of Living Australia (ALA). In order to deliver the ALA as contracted, CSIRO will require the services of others to contribute and deliver certain work. The Department also requires CSIRO to ensure that certain contractual terms in the head contract are also reflected in any subcontracts.
- (3) To address the ALA NCRIS Business Plan goal for ‘Collections Data Management’ to “create and develop tools and services to optimise the data supply chain through Australia’s natural history collections”, a software product developed by BioAware called BioloMICS (Product) was selected as the preferred tool to improve collection record keeping, management, analysis and publication.
- (4) BioAware has granted CSIRO a multi-user licence for the Product under which CSIRO is permitted to sub-license the Product to third party end-users of its choice in Australia.
- (5) CSIRO has agreed to sub-licence the Product to the Registered User in accordance with the terms and conditions of this Agreement.

CSIRO and the Registered User hereby agree as follows:

# 1 DEFINITIONS AND INTERPRETATION

## 1.1 Definitions

In this Agreement, unless the context otherwise requires:

**“Activities”** means those activities as laid out in Schedule A.

**“Agreement”** means this sub-licence agreement and any schedules, annexures and attachments to it.

**“BioAware Support Program”** or **“BSP”** means the programme under which BioAware supplies support services to the Registered User for the Product.

**“BSP Guidelines”** means the guidelines that specify the maintenance services and related functions to be performed by BioAware under the BSP as laid out in Schedule D.

**“Confidential Information”** means any information, in any form or media, which is:

- (a) by its nature confidential or which is identified by the disclosing party as being confidential; and
- (b) disclosed by the disclosing party to the receiving party whether before or after the date this agreement is signed,

other than information which:

- (c) was in the public domain at the time of its disclosure or subsequently comes into the public domain other than through breach of this Agreement by the receiving party;
- (d) was independently developed or created by an employee of the receiving party, without reference to the information of the disclosing party, as shown by its written records; or
- (e) was in fact known to the receiving party, without breach of any obligation of confidentiality by any third party, prior to its disclosure to the receiving party, as shown by its written records.

**“Contract Material”** means all material forming part of the Deliverables or brought or required to be brought into existence as part of or for the purposes of the performing the Activities.

**“Deliverables”** means those deliverables as laid out in Schedule A.

**“Delivery Date”** means the date for delivery of the Deliverables as laid out in Schedule A.

**“Department”** means the Commonwealth of Australia as represented by the Department of Innovation, Industry, Science and Research.

**“DIISR Agreement”** means the agreements between CSIRO and the Department dated 20 June 2007 and 3 December 2009 for the Atlas of Living Australia.

**“Environment”** means the required hardware and systems software environment required for the Product as laid out in Schedule C.

**“Head Licence”** means the licence agreement between BioAware and CSIRO dated 15 April 2011, as amended and or modified from time to time, pursuant to which CSIRO is granted a licence to use the Product on certain conditions.

**“Product”** means the computer programs set out in Schedule A and any further computer programs which become Product components and therefore, part of the Product.

**“Project”** means the Atlas of Living Australia (“ALA”).

**“Seats”** means concurrent user accesses to the Product that CSIRO grants to the Registered User as laid out in Schedule A.

**“User Documentation”** means any manuals, instructions, reports or other documentation provided by BioAware, whether in print or electronic format, which assists the Registered User with installation or use of the Product.

## 1.2 Interpretation

### 1.2.1 Headings

The headings used in this Agreement are for convenience only and shall not be deemed to affect the meaning or interpretation of this Agreement.

### 1.2.2 Clause Precedence

If there is found to be any inconsistency between the provisions of the Clauses of this Agreement and the Schedules to this Agreement, then the provisions of the Schedules will prevail.

## 2 SUB-LICENCE

### 2.1 Grant

In accordance with and subject to the terms and conditions contained in this Agreement, CSIRO grants to the Registered User a non-exclusive, non-transferable sub-licence to use the Product known by and bearing the trademarks listed in Schedule B.

### 2.2 Use

The Registered User shall not sub-sub-licence the Product and will not permit any third party to use the Product for any purpose whatsoever.

### 2.3 Supply and Installation of the Product

CSIRO will install the Product on behalf of the Registered User and will supply the User Documentation (if any) to the Registered User. The Registered User acknowledges that successful installation of the Product shall be conditional on the Environment.

### 2.4 Licence Seats

CSIRO grants to the Registered User a non-exclusive, non-transferable sub-licence to use the number of concurrent user accesses as per the number of Seats. The Registered User shall be obliged to pay to CSIRO such fees as may be determined by BioAware if any use by the Registered User has exceeded the maximum number of Seats provided. The cost of additional Seats shall be the then current fee charged by BioAware at the time it receives a purchase order from CSIRO for such additional item(s).

## 2.5 Copies

The Registered User shall have the right to copy and distribute to the Registered User's employees the Product in machine readable form in whole or in part as necessary for the Registered User's own business use up to the maximum number of Seats sub-licensed for the Product. In order to protect BioAware's rights in the Product the Registered User shall reproduce and incorporate BioAware's trade secret and copyright notice and any trademark notice (if applicable) in any copy or partial copy of the Product. The Registered User shall effect and maintain adequate security measures to safeguard the Product from unauthorised access, use or copying.

## 2.6 Limitations on Licence

Unless otherwise agreed or permitted under the User Documentation,

- (a) The Registered User shall not:
  - (i) modify or adapt the Product or any part thereof in any way nor merge it into any other software programme for any purpose;
  - (ii) translate, reverse engineer, de-compile, disassemble, nor create derivative works based on the Product; nor
  - (iii) change or remove from the Product any insignia, indicia of ownership or trademark which indicates the origin or ownership of the Product, except as entitled by law.
- (b) The Registered User shall not have the right to, and shall not, transfer, assign, rent, sell, licence or make any other disposition of the Product, or part thereof, whether for a fee or otherwise.
- (c) The Registered User acknowledges that it has no title or interest in the Product (other than the right to use the Product pursuant to this sub-licence) and that the title to and copyright and all other proprietary rights in the Product and any User Documentation supplied in relation to the Product are retained by and are the exclusive property of BioAware.

## 3 ACTIVITIES

3.1 The Registered User acknowledges that CSIRO requires the Activities to be performed by the Registered User to enable CSIRO to complete aspects of the Project.

3.2 The Registered User will perform the Activities with due care and skill. The Registered User must not subcontract any part of the Activities without first obtaining the written permission of CSIRO.

3.3 The Registered User must deliver the Deliverables (including the Contract Material) to CSIRO by the Delivery Date. If the Registered User is unable to meet the Delivery Date then the Registered User must notify CSIRO of the delay, the reason for the delay and of the revised Delivery Date.

3.4 The Registered User must liaise with and report to CSIRO on the progress of the Activities as reasonably required by CSIRO during the term of this Agreement. If required by the Department, the Registered User will liaise with CSIRO and/or the Department for a period of two years from the date of this Agreement in any review or evaluation of the Project.

3.6 CSIRO must, at reasonable times, be given access to the premises where the Activities are being undertaken and permitted to inspect the performance of the Activities and any material in connection with the Activities. The Registered User must also allow access to the premises where the Activities are being undertaken to the Department or the Department's representative for purposes required under the DIISR Agreement.

3.7 The Registered User warrants that its provision of the Activities is not contrary to any obligation owed by the Registered User to any other person and any Contract Material the Registered User produces for CSIRO will not infringe upon any third party's IP.

3.8 The Registered User, in carrying out the Activities, must comply with all relevant legislation of the Commonwealth, or of any State, Territory or local authority, and in particular:

- (a) the Criminal Code and Crimes Act 1914 (Cth);
- (b) the Competition and Consumer Act 2010 (Cth); and
- (c) the Equal Opportunity for Women in the Workplace Act 1999 (Cth).

3.9 The Registered User undertakes, that as at the date of this Agreement, to the best of its knowledge, no conflict of interest exists or is likely to arise in the provision of the Activities.

3.10 If, during the term of this Agreement a conflict arises or appears likely to arise, the Registered User must:

- (a) notify CSIRO immediately;
- (b) make full disclosure of all relevant information relating to the conflict; and
- (c) take any steps CSIRO reasonably requires to resolve or otherwise deal with the conflict.

3.11 The Registered User must not do anything that would place CSIRO in breach of its obligations under the DIISR Agreement.

3.12 All new IP in the Contract Material will belong to the Registered User from the time such IP is created. The Registered User grants to each of CSIRO and the Department an irrevocable perpetual non-exclusive royalty-free licence (including a right of sub-licence) to use, reproduce and adapt the Contract Material for any non-commercial purpose associated with the Project.

3.13 If the Contract Material makes use of pre-existing IP not belonging to the Registered User then: (i) the Registered User must identify such pre-existing IP to CSIRO before embodying that IP into the Contract Material; and (ii) the Registered User must procure an irrevocable perpetual non-exclusive royalty-free licence to the extent necessary for each of CSIRO and the Department to use, reproduce and adapt that pre-existing IP to the extent necessary for each of CSIRO and the Department to use the Contract Material.

## **4 THE BioAware SUPPORT PROGRAM**

### **4.1 The Offer**

4.1.1 If so requested by the Registered User, BioAware shall perform the maintenance services and related functions under the BSP specified under this Clause and in the BSP Guidelines from the date of this Agreement until 15 April 2012.

4.1.2 Under the BSP BioAware shall provide to the Registered User:

(a) All upgrades, modifications, improvements, enhancements, extensions and other changes to the Product which do not constitute a new product or which are generally made available to other customers of BioAware.

(b) Commercially reasonable assistance in connection with the use, installation or any problems with the Product in accordance with the BSP Guidelines. This "hotline" assistance only applies to the then current release of the Product and the most recent prior release.

4.1.3 BioAware is solely responsible for providing appropriate Product support, maintenance of the Product and fixing bugs in the Product. CSIRO has no obligation to provide such services to the Registered User.

### **4.2 Availability**

BioAware shall offer BSP for the Product to the Registered User for no cost until 15 April 2012. After this time, the provision by BioAware of maintenance services and related functions under the BSP will be at the Registered User's cost. The provision of such services and the related cost is at the discretion of BioAware.

### **4.3 Other Training and Consulting**

The Registered User may from time to time request training, consultancy services or other services in connection with programme usage not provided for above or in the BSP Guidelines and BioAware may provide such services at the Registered User's cost at BioAware's then current time and material rates for such services.

## **5 WARRANTIES AND LIABILITY**

### **5.1 Warranties and liability**

(a) Each party represents and warrants to the other party that:

(i) it has full power and authority to enter into, and to perform its obligations under this Agreement;

(ii) it has taken all necessary action to authorise the execution, delivery and performance of this Agreement; and

(iii) this Agreement constitutes its legal, valid and binding obligations.

(b) The Registered User acknowledges and agrees that:

- (i) except as expressly provided in this Agreement, CSIRO has not made, and does not by entering into this Agreement make, any representation or warranty, express or implied, that the Product does not infringe any third party's intellectual property rights;
- (ii) the Registered User uses the Product at its own risk and will make its own inquiries to determine that its use of the Product will not infringe any third party's intellectual property right;
- (iii) CSIRO does not warrant that the Product will meet the Registered User's requirements;
- (iv) the Registered User assumes full responsibility for the overall effectiveness and efficiency of the operating environment in which the Product is to function, and for adequately protecting the Registered User's data against loss;
- (v) to the full extent permitted by law, CSIRO has not made and excludes all warranties, terms, conditions or undertakings, whether express or implied, written or oral, statutory or otherwise (including any implied warranty of merchantability or of fitness for a particular purpose) for the Product or any other matter, including, without limitation, as to suitability or safety of the Product;
- (vi) to the full extent lawfully permitted CSIRO will not be liable for any special, indirect or consequential damages, loss of anticipated profits or loss of revenue, arising under or pursuant to this Agreement however caused whether in tort (including negligence), contract, statute, equity or otherwise; and
- (vii) each party's liability under this Agreement is reduced to the extent that any damages, liability, loss or costs arises from, or is attributable to, any negligent or unlawful act or omission of the other party or its officers, employees, agents or contractors.

## **5.2 Release and Indemnity**

The Registered User releases CSIRO from and indemnifies CSIRO against all losses, damages, costs and expenses (including legal costs on a solicitor and own client basis) that CSIRO may sustain or incur as a result of any claim, demand, action or proceeding by any third party arising out of the Registered User's use of the Product or the exercise by the Registered User of its rights under this Agreement.

## **5.3 Exceptions**

The release and indemnity in clause 5.2 does not apply to the extent that the indemnified liability is caused by the negligence of CSIRO.

# **6 CONFIDENTIALITY**

## **6.1 Obligation**

(a) Each party will keep confidential all Confidential Information of the other party and only use that Confidential Information to the extent necessary to perform obligations or exercise rights under this Agreement.

(b) Each party's obligations with respect to Confidential Information shall extend for a period of five (5) years commencing on the date this Agreement is signed, notwithstanding any termination of this Agreement.

## **6.2 Permitted use and disclosure**

Each party in relation to the Confidential Information of the other party must:

- (a) not disclose it to a third party without the other party's written consent;
- (b) implement security practices against unauthorized copying, use and disclosure (whether that disclosure is oral, in writing or in any other form); and
- (c) immediately notify the other party if the first party becomes aware of any unauthorized copying, use or disclosure in any form, or disclosure required by law.

## **7. PERSONAL INFORMATION**

7.1 The Registered User acknowledges that CSIRO is subject to the provisions of the Privacy Act 1988. The Registered User must ensure that its collection, retention, access to, correction, use and security of any Personal Information as defined under the Privacy Act, will be made, as the case may be:

- (a) only for the purposes of fulfilling its obligations under the this Agreement; and
- (b) in accordance with the procedures from time to time requested by CSIRO, but otherwise at least in accordance with the Information Privacy Principles as set out in the Privacy Act, to the extent that the content of those Principles apply to the Activities, as if it is a record keeper as defined in the Privacy Act.

7.2 The Registered User must:

- (a) not disclose any Personal Information obtained in connection with the Activities without the written authority of CSIRO and must immediately notify CSIRO where it becomes aware or ought reasonably to have become aware that a disclosure of personal information may be required by law; and
- (b) co-operate and comply with any reasonable requests or directions of CSIRO arising directly from or in connection with the exercise or the functions of the Privacy Commissioner under the Privacy Act or otherwise.

## **8 COPYRIGHT**

8.1 The Registered User acknowledges that it owns no copyright or other intellectual property rights in the Product and User Documentation whether in eye-readable or in machine-readable form.

8.2 The Registered User will not delete proprietary notices or trademark notices appearing on any documentation supplied to it by BioAware at any time.

## **9. DISPUTE RESOLUTION**

9.1 If there is a dispute between CSIRO and the Registered User that cannot be resolved then the matter must be referred to the Australian Commercial Disputes Centre for arbitration in accordance

with the Centre's Guidelines on Arbitration. The decision of the arbitrator (including any award as to costs) will be final and binding. Nothing in this clause prevents CSIRO or the Registered User from seeking interlocutory relief through courts of appropriate jurisdiction.

## **10 TERMINATION; TRANSACTIONS AFTER TERMINATION**

### **10.1 Termination by CSIRO**

CSIRO may terminate this Agreement immediately by notice in writing to the Registered User if:

- (a) either the Head Licence or the DIISR Agreement is terminated for any reason; or
- (b) the Registered User becomes insolvent or is subject to winding up or liquidation proceedings, the appointment of a mortgagee, a receiver, a manager or an inspector to investigate its affairs, enters into any arrangement or composition with its creditors generally, or is unable to pay its debts as and when they fall due or cease to carry on a business relevant to the performance of the Agreement.

### **10.2 Termination for Breach**

In the event of a breach by either party of any of the terms or conditions of this Agreement, the non-breaching party may give the offending party written notice specifying the breach and the offending party shall have 30 business days to cure such breach. Upon the failure of the offending party to cure such breach within such 30-day period, this Agreement shall, upon notice to the offending party, forthwith terminate without prejudice to the non-breaching party's right to avail itself of all remedies that are available to such party as a result of such breach.

### **10.3 Consequences of termination**

On termination of this Agreement:

- (a) all licences granted under this Agreement will cease and the Registered User will immediately cease any further use of the Product; and
- (b) if required by the disclosing party, the receiving party must return to the disclosing party or destroy all Confidential Information provided by the disclosing party no later than 14 days after receiving the request from the disclosing party.

## **11 MISCELLANEOUS**

### **11.1 Entire Agreement**

This Agreement contains the entire understanding between the parties to this Agreement regarding the subject matter of this Agreement, and supersedes the terms and conditions contained in any other document. For the avoidance of doubt notwithstanding any provision in the Registered User's purchase order or any other business form used by the Registered User, the terms and conditions of this Agreement shall govern the relationship of the parties.

### **11.2 Publicity and Disclosure**

- (a) Disclosure

Neither party hereto shall provide a copy of this Agreement, or otherwise disclose the terms of this Agreement, to any third party without the prior written consent of the other party.

(b) Use of Names and promotions

(i) The Registered User must not use the ALA's or CSIRO's name or trademarks in a manner that suggests that CSIRO or ALA endorses, or is associated with, the Registered User's business, products or services.

(ii) The Registered User must not engage in promotional or media activities regarding the Agreement without CSIRO's and the Department's prior consent.

(iii) In any relevant publications, promotional materials, activities, statements, websites you must acknowledge that the Registered User's use of the Product was supported by the ALA and an initiative of the Australian Government being conducted as part of the Super Science Initiative and financed under the Education Investment Fund.

### 11.3 Severance

If any provision of this Agreement shall be held by a court of competent jurisdiction to be invalid, unenforceable or void such provision shall be given no effect and shall be deemed to be excluded from this Agreement but without invalidating any of the remaining provisions of this Agreement.

### 11.4 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Australian Capital Territory. The parties submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

IN WITNESS WHEREOF the parties hereto have executed this Agreement:

Date:

**Signed for an on behalf of Commonwealth  
Scientific and Industrial Research Organisation**  
by:

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(Signature of authorised person)

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(Print name of authorised person)

in the presence of:

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(Signature of witness)

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(Print name of witness)

**Signed** for an on behalf of [Insert]by:

\_\_\_\_\_  
(Signature of authorised person)

\_\_\_\_\_  
(Print name of authorised person)

in the presence of:

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Print name of witness)

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## SCHEDULE A

**Product** BioloMICS™ Desktop version and Internet version [insert].

**Seats:** [insert the number of seats to be allocated to the Registered User]

### Activities:

The Registered User will undertake the delivery or performance of the Deliverables outlined below.

### Deliverables:

#	Description of Deliverable	Delivery Date
1	<p>Reporting – written report on use of the Product, including</p> <ul style="list-style-type: none"> <li>▪ Qualitative assessment of how the product was used, and what benefits were derived,</li> <li>▪ Qualitative assessment of equipment for purpose designed (eg shortcomings, improvements)</li> <li>▪ Statement that product is declared on a relevant asset register (including depreciation if applicable)</li> </ul>	<p>Items 1 and 2: by 31-Jan-2012</p> <p>Item 3: Annual – due 1<sup>st</sup> March</p>
2	Documentation – share information about product use (for example , workflows and local user guides) with ALA and/or CHACM member institutions	As agreed
3	Data – Images and data created by the Registered User using the Product should be stored in a secure environment with appropriate back up procedures. Ensure appropriate standards for data and metadata collection and management.	As soon as practical after generation
4	Data Sharing – Subject at all times to any restrictions under the Registered User’s local policy and agreements with third parties, make available data, images and metadata etc generated through use of the Product via the ALA portal – preferably through use of the ALA Data Sharing Agreement.	As soon as practical after generation and analysis of data and images
5	Attribution – Ensure ALA attributed in any publicity or publications related to the Product and its use. Include ALA branding on or near the Product.	As required
6	Training – facilitate training in use of the Product by users.	As required

## **SCHEDULE B**

### **TRADEMARKS**

The BioAware logo is a registered trademark of BioAware Sa

BioMICS, BioArchitech, BioGalaxi are trademarks of BioAware Sa.

All other products and trademarks are the property of their respective holders and should be noted as such.

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## SCHEDULE C

### ENVIRONMENT

#### Minimum requirements:

450 MHZ

128 MB ram

50 MB HD for the system & the data

Very good graphic card

Internet connection

#### Ideal requirements:

1.7 GHZ

256 MB ram

Between 200-300 MB HD for the system & the data

Very good graphic card

Internet connection

#### System:

Windows 2003, XP, VISTA or Windows 7

Microsoft Office (needed for the reporting option)

Internet version: Microsoft Internet Information Server (IIS) for the installation of the WEB version (if to be installed)

## SCHEDULE D

### BIOAWARE SUPPORT PROGRAM GUIDELINES:

The BioAware Support Program includes:

- Updates of BioloMICS software (desktop and Internet versions)
- Upgrades of BioloMICS software (desktop and Internet versions)
- Help on installation, usage and management of BioloMICS software (desktop and Internet versions) and databases
- Debugging and problem solving related to BioloMICS software (desktop and Internet versions) and databases
- Support will be done by email or using Skype and GoToMeeting (remote access software)
- For incident reports, Bio-Aware will:
  - Acknowledge receipt within 24 hours
  - Provide resolution within 48 hours if the resolution involves Product configuration or general help
  - Negotiate timeframe with the person who reported the incident if the resolution involves activity other than Product configuration or general help.