**Subscription Agreement**

***[Disclaimer: This document is intended to serve as a starting point only. It should be carefully considered and tailored to meet your specific commercial requirements and circumstances. This document, and any guidance note within this document, must not be relied on as legal advice and we recommend that you seek professional legal advice to ensure that this document is suitable for your specific situation]***

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**Subscription Agreement**

**Date**

**Parties**

1. **Company name** ACN ACN of address, state (**Company**)
2. The party set out in Part A of Schedule 1 (**Investor**)[[1]](#footnote-1)
3. The parties set out in Part B of Schedule 1(together the **Founders** and each a **Founder**)[[2]](#footnote-2)

**Background**

1. The Investor wishes to subscribe for, and the Company wishes to issue, the Subscription Shares for the Subscription Moneys, on the terms set out in this agreement.

**Operative part**

In this agreement:

# Definitions

In this agreement:

**Accounting Standards** means:

### accounting standards approved under the Corporations Act and its requirements about the preparation and contents of accounts; and

### in respect of the annual audited financial accounts, the Australian Accounting Standards issued and updated from time to time by the Australian Accounting Standards Board.

**Accounts** means the balance sheet of the Group and the profit and loss statement and cash flow statement of the Group at the Accounts Date.

**Accounts Date** means [insert].[[3]](#footnote-3)

**Business** means the business of the Group as at the date of this agreement being [insert description of business] and as modified from time to time.

**Business Day** means a day on which banks are open for general banking business in [Sydney], excluding Saturdays, Sundays and public holidays.

**Claim** means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at Law, in equity, under statute or otherwise.

**Completion** means completion of the issue and allotment of the Subscription Shares in accordance with this agreement.

**Completion Date** means [insert], or such later date as is agreed by the Company and the Investor.[[4]](#footnote-4)

**Confidential Information** means information disclosed by or on behalf of one party to another party in connection with this agreement which has been designated as confidential by the party disclosing the information, or information which by its nature should reasonably be considered to be confidential, but does not include:

### any information which is in the public domain at the time of its disclosure or subsequently becomes part of the public domain other than as a result of a breach by the person receiving the Confidential Information of clause 7.1;

### any information that was known to the party receiving the Confidential Information at the time of disclosure of the confidential information except as a result of a prior confidential disclosure by the party disclosing the Confidential Information; or

### any information that is disclosed to the party receiving the Confidential Information by any third party who is not known to the party receiving the Confidential Information to be acting in breach of a confidentiality obligation owed to the party disclosing the Confidential Information.

**Continuing Clauses** means this clause 1 and clauses 2 (Interpretation), 7 (Confidentiality), 8 (GST) and 9 (General).

**Corporations Act** means the *Corporations Act 2001* (Cth), as amended.

**Duty** means any stamp, transaction or registration duty or similar charge imposed by any Government Agency and includes any interest, fine, penalty, charge or other amount imposed in respect of them.

**Employee** means each employee of a Group Company.

**Government Agency** means any government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether foreign, federal, state, territorial or local.

**Group** means the Company and its Subsidiaries and **Group Company** means any one of them.

**Intellectual Property Rights** means all present and future rights to:

### trade marks, trade names, domain names, logos, get-up, patents, inventions, registered and unregistered design rights, copyrights, circuit layout rights, and all similar rights in any part of the world (including know-how); and

### where the rights referred to in paragraph (a) are obtained or enhanced by registration, any registration of such rights and applications and rights to apply for such applications.

**Investor Warranties** means the representations and warranties set out in Schedule 4.

**Law** includes:

### any statute, regulation, rule, by-law, ordinance, proclamation, judgement, treaty, decree, convention, rule or principle of common law or equity, rule of any applicable stock exchange, or requirement or approval (including any Government Agency);

### any regulation, rule, by-law, ordinance, proclamation or judgement made under that law; and

### that law as amended, consolidated, supplemented, re-enacted or replaced.

**Officer** means, in relation to a body corporate, a director or secretary of that body corporate.

**PPSA** means the *Personal Property Securities Act 2009* (Cth).

**Related Body Corporate** has the meaning as set out in the Corporations Act.

**Representative** in respect of a person means an Officer, employee, auditor, banker or professional adviser of that person.

**Security Interest** means:

### a 'security interest' as defined in the PPSA;

### any third party rights or interests including a mortgage, lien, charge, pledge, assignment by way of security, security interest, encumbrance, title retention, preferential right or trust arrangement, Claim, covenant, easement or any other security arrangement or any other arrangement having the same effect;

### a right, interest or arrangement which has the effect of giving another person priority over creditors including any right of set-off;

### a right that a person (other than the owner) has to remove something from land (known as a profit à pendre), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or

### an agreement to create any of them or allow them to exist.

**Seed Preference Shares** means [insert number] convertible preference shares on the terms set out in the Seed Preference Share Terms.

**Seed Preference Share Terms** means the terms set out in Schedule 5.

**Share** means a fully paid ordinary or Seed Preference Share in the capital of the Company[[5]](#footnote-5).

**Shareholders Agreement** means the shareholders agreement between the Company and its shareholders which will be entered into at Completion.

**Subscription Shares** means, in respect of the Investor, the Seed Preference Shares which that Investor is subscribing for, as set out in Schedule 1.

**Subscription Moneys** means that sum of money for the Subscription Shares calculated by multiplying the number of Subscription Shares by the Subscription Price, as set out in Schedule 1.

**Subscription Price** means the Subscription Price for each Subscription Share as set out in Schedule 1.

**Subsidiary** means a subsidiary as defined by section 9 of the Corporations Act.

**Tax** means any tax, Duty, levy, charge, impost, fee, deduction, GST or withholding tax that is assessed, levied, imposed or collected by any Government Agency and includes any interest, fine, penalty, charge, fee or any other amount imposed on, or in respect of, any of the above.

**Warranties** mean the representations and warranties set out in Schedule 3.

**Warrantors** means each Founder and the Company.[[6]](#footnote-6)

# Interpretation

## General interpretation

In this agreement, unless context indicates a contrary intention:

### (**headings**) clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement.

### (**party**) a reference to a party to a document includes that party’s personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns.

### (**including**) including and includes (and any other similar expressions) are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind.

### (**corresponding meanings**) a word that is derived from a defined word has a corresponding meaning.

### (**singular**) the singular includes the plural and vice-versa.

### (**gender**) words importing one gender include all other genders.

### (**rules of construction**) neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

### (**legislation**) a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it.

### (**time and date**) a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in [insert city], Australia, even if the obligation is to be performed elsewhere.

### (**writing**) a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement.

### (**Australian currency**) a reference to dollars or $ is to Australian currency.

## Knowledge

A reference in this agreement to the Warrantors’ awareness, knowledge, information or belief is a reference to the actual awareness, knowledge or belief of each Warrantor and each Group Company and the awareness, knowledge or belief they would have had after making due and careful enquiry.[[7]](#footnote-7)

# Subscription

On Completion, the Company must issue and the Investor must subscribe for the Subscription Shares at the Subscription Price.[[8]](#footnote-8)

# Completion[[9]](#footnote-9)[[10]](#footnote-10)

## Time and place for Completion

Completion must take place on the Completion Date or at another time and date agreed between the parties, at [insert place], unless otherwise agreed in writing between the parties.

## Completion obligations of Investor

On the Completion Date, the Investor must:[[11]](#footnote-11)

### pay the Subscription Moneys to the Company; and

### deliver to the Company the Shareholders Agreement duly executed by it.

## Completion obligations of Company

On the Completion Date, the Company must:[[12]](#footnote-12)

### procure that a meeting of its directors is held at which it is resolved that, subject to receipt by the Company of the Subscription Moneys for the Subscription Shares:

#### the Company issues to the Investor the Subscription Shares free from any Security Interests, by entering the name of the Investor in the Company’s register of members as the holder of the Subscription Shares; and

#### the Company issues a share certificate to the Investor for the Subscription Shares;

### amend its constitution to adopt the Seed Preference Share Terms, in a form acceptable to the Investor;

### procure that its Shareholders waive all pre-emptive rights that apply to the issue of the Subscription Shares;

### issue the Subscription Shares and a share certificate for the Subscription Shares to the Investor;

### enter the Investor in its register of members as the holder of the Subscription Shares;

### deliver to the Investor the Shareholders Agreement duly executed by all parties to it (other than the Investor);

### deliver to the Investor a copy of an employment agreement between the Company and each Founder, in a form acceptable to the Investor; and

### deliver to the Investor a copy of an assignment deed between the Company and each Founder pursuant to which each Founder assigns to the Company all of the Intellectual Property Rights related to the Business that he or she owns, in a form acceptable to the Investor.

## Simultaneous Completion Obligations

All actions required to be performed by the parties on the Completion Date are interdependent and are taken to have occurred simultaneously on the Completion Date.

## Failure to Complete

Completion will not occur unless all of the obligations of the Company and the Investor at Completion are satisfied. If Completion does not occur, then either party may elect to terminate this agreement.[[13]](#footnote-13)

# Warranties

## Warranties by the Warrantors[[14]](#footnote-14)[[15]](#footnote-15)

### Each Warrantor jointly and severally[[16]](#footnote-16) represents and warrants to the Investor that each Warranty is true and correct and not misleading on the date of this agreement and at the Completion Date.

### Each Warrantor acknowledges that the Investor has entered into this agreement in reliance on the Warranties.

### Each Warranty must be construed independently and is not limited by reference to another Warranty.

## Disclosures

The Warrantors are not liable to pay for any breach of any Warranty if the breach is based on any fact, matter or circumstance that is fairly disclosed in writing to the Investor.[[17]](#footnote-17)

## Time limitation

The Warrantors have no liability relating to or arising out of a breach of a Warranty unless the Investor has given written notice of the Claim relating to or arising out of the breach to each Warrantor within 24 months after the Completion Date.[[18]](#footnote-18)

## Maximum aggregate liability for Claims[[19]](#footnote-19)[[20]](#footnote-20)[[21]](#footnote-21)

The maximum aggregate liability of the Warrantors as a result of all Claims made by the Investor in relation to a breach of a Warranty under this agreement or otherwise, is an amount equal to the Subscription Moneys plus the Investor’s total legal fees.

## Investor warranties

### The Investor severally represents and warrants to the Company that the Investor Warranties are true on the date of this agreement and at the Completion Date.

### The Investor acknowledges that the Company has entered into this agreement in reliance on the Investor Warranties.

### The Investor Warranties must be construed independently and are not limited by reference to another Investor Warranty.[[22]](#footnote-22)

# Default and termination

## Termination

If a party has a right to terminate this agreement, that right may be exercised by that party delivering a notice in writing to the other parties stating that it terminates this agreement.[[23]](#footnote-23)

## Effect of termination

Termination of this agreement will not affect:

### any other rights the parties have against one another at Law or in equity;

### the Continuing Clauses, which survive termination or expiry of this agreement; or

### a right or claim which arises before termination.[[24]](#footnote-24)

# Confidentiality

## Confidentiality

Subject to clause 7.2, no party may:

### disclose any Confidential Information to any person;

### use any Confidential Information in any manner which may cause loss to the Company or the other parties; or

### make any public announcement or issue any press release regarding this agreement or a party’s involvement with the Company.

## Permitted disclosure

A party may disclose, and may permit its Representatives to disclose, any Confidential Information (and the other restrictions in clause 7.1 do not apply in such cases):

### with the prior written consent of the party to whom the information relates;

### to the extent it is required to do so by Law, any order or request of any Government Agency or by any recognised stock exchange on which its shares (or those of any of its Related Bodies Corporate) are listed;

### to the party’s Representatives;

### to the party’s affiliates (which, in the case of the Investor, includes any fund or other vehicle managed or advised by the Investor);

### in the case of the Investor, to its investors; or

### to a prospective purchaser of any Subscription Shares and their Representatives.[[25]](#footnote-25)

# GST

## Recovery of GST

If GST is payable, or notionally payable, on a supply made under or in connection with this agreement, the party providing the consideration for that supply must pay as additional consideration an amount equal to the amount of GST payable, or notionally payable, on that supply (the **GST Amount**). Subject to the prior receipt of a tax invoice, the GST Amount is payable at the same time that the other consideration for the supply is provided. If a tax invoice is not received prior to the provision of that other consideration, the GST Amount is payable within 10 days of the receipt of a tax invoice. This clause does not apply to the extent that the consideration for the supply is expressly stated to be GST inclusive or the supply is subject to reverse charge.

## Liability net of GST

Where any indemnity, reimbursement or similar payment under this agreement is based on any cost, expense or other liability, it will be reduced by any input tax credit entitlement, or notional input tax credit entitlement, in relation to the relevant cost, expense or other liability.

## Adjustment events

If an adjustment event occurs in relation to a supply made under or in connection with this agreement, the GST Amount will be recalculated to reflect that adjustment and an appropriate payment will be made between the parties.

## Definitions

Unless the context requires otherwise, words and phrases used in this clause that have a specific meaning in the GST law (as defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth)) have the same meaning in this clause.

# General

## Notices

Any notice given under or in connection with this agreement (**Notice**):

### must be in writing and signed by a person duly authorised by the sender;

### must be addressed and delivered to the intended recipient by hand, by prepaid post or by email at the address or email address last notified by the intended recipient to the sender;

### is taken to be given and made:

#### in the case of hand delivery, when delivered;

#### in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and

#### in the case of an email, on the day and at the time that the recipient confirms the email is received.

This clause does not limit the way in which a notice can be deemed to be served under any Law.

## Costs and expenses

### Subject to clause 9.2(b), each party must bear its own costs in connection with the preparation, negotiation and execution of this agreement, the Shareholders Agreement and other ancillary documents.

### The Company must pay to the Investor on Completion an amount equal to the Investor’s legal costs incurred in connection with the preparation, negotiation and execution of this agreement, such amount calculated in accordance with clause 8.2 up to a maximum of $[insert] inclusive of any amount referable to GST.[[26]](#footnote-26)

## Stamp duty

All stamp duty which may be payable on or in connection with this agreement is payable by the Investor.

## Governing law

The laws of [insert state] govern this agreement.

## Jurisdiction

Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of [insert same state as governing law clause] or the courts of the Commonwealth of Australia.

## Cumulative rights

Except as expressly provided for in this agreement, the rights of a party under this agreement are in addition to and do not exclude or limit any other rights or remedies provided by Law.

## Severability

Any term of this agreement which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this agreement is not affected.

## Further assurances

Except as expressly provided in this agreement, each party must, at its own expense, do all things reasonably necessary (including executing documents) to give full effect to this agreement and the matters contemplated by it.

## Assignment

### A party may not assign, transfer or in any other manner deal with its rights under this agreement without the prior written agreement of each other party.

### Any purported assignment, transfer or dealing in contravention of clause 9.9(a) is ineffective.

## Survival and merger

No term of this agreement merges on Completion of any transaction contemplated by this agreement.

## Entire agreement

This agreement and the Shareholders Agreement is the entire agreement between the parties about its subject matter and replaces all previous agreements, understandings, representations and warranties about that subject matter.

Schedule 1 Subscription Details

**Part A - Investor**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Investor Name | Address for Service | Subscription Shares | Subscription Price | Subscription Moneys |
| [insert] | **Address**  [insert]  **Email Address**  [insert]  **Contact**  [insert] | [insert] | $[insert] | $[insert] |

**Part B - Founders**

|  |  |
| --- | --- |
| Founder Name | Address for Service |
| [insert] | **Address**  [insert]  **Email Address**  [insert] |
| [insert] | **Address**  [insert]  **Email Address**  [insert] |

Schedule 2 Post Completion Capital Structure

|  |  |  |  |
| --- | --- | --- | --- |
| Column 1 | Column 2 | | Column 3 |
| **Shareholder** | **Shares** | | **Fully Diluted Percentage** |
| [Founder] | [Ordinary Shares] | [insert number] | [ ]% |
| [Founder] | [Ordinary Shares] | [insert number] | [ ]% |
| [Any other shareholders] | [Ordinary Shares] | [insert number] | [ ]% |
| [Investor] | Seed Preference Shares | [insert number] | [ ]% |
| ESOP allocation (unissued) | Ordinary Shares | [insert number] | [ ]%[[27]](#footnote-27) |
| TOTAL |  | [insert number] | 100% |

Schedule 3 Warranties

1. **Shares**
   1. There is no restriction on the ability of the Company to issue the Subscription Shares [that has not been validly waived][[28]](#footnote-28).
   2. No Group Company is obliged to issue or allot any Shares or other securities, and no Group Company has granted any person the right to call for the issue or allotment of any Shares or other securities.
   3. The Investor will acquire at Completion:
      1. the full legal and beneficial ownership of the Subscription Shares free and clear of all Security Interests;
      2. the Subscription Shares free of competing rights, including pre-emptive rights or rights of first refusal, other than under the Shareholders Agreement and the constitution of the Company; and
      3. fully paid Shares that have no money owing in respect of them.
   4. On Completion, there will be no Shares in the Company or other securities (including options) of the Company on issue apart from the Shares and options over Shares set out in the table in Schedule 2.
   5. Immediately after Completion, the issued capital of the Company will be as set out in Schedule 2.
   6. The Company does not legally or beneficially hold or own shares or other securities in another company or entity, other than the Subsidiaries.
2. **Authority of Company**
   1. The Company and the directors of the Company have taken all necessary action to authorise the signing, delivery and performance of this agreement and the documents required under this agreement in accordance with their respective terms.
   2. The Company has power to enter into this agreement and perform its obligations under it and can do so without the consent of any other person and free of any pre- emptive rights or rights of first refusal that have not otherwise been waived in accordance with this agreement.
   3. The Company’s obligations under this agreement are valid and binding and enforceable against it in accordance with their terms.
   4. All Group Companies have the power and capacity to own its assets and to carry on its Business as it is now being conducted.
3. **Status of the Group**
   1. Each Group Company is a proprietary company limited by shares and is registered and validly existing under the Corporations Act.
   2. The Company or another Group Company owns all of the shares, capital stock, equity interests, securities, and warrants and options to acquire, or other interests or rights convertible, exchangeable or exercisable into, the foregoing (**Equity Interests**) of each Subsidiary.
   3. There is no option to acquire any Equity Interests in any Subsidiary.
   4. The shares in each Subsidiary have been validly issued and are fully paid up and free of further capital contribution obligations.
   5. No person is entitled or has claimed to be entitled to require any Subsidiary to issue any Equity Interests either now or at any future date and whether contingently or not.
   6. There is no Security Interest, and no commitment to give or create any Security Interest, on, over or affecting any of the Equity Interests of any Subsidiary, and no person has claimed to be entitled to any such Security Interest.
   7. No Group Company has granted any power of attorney or similar authority which remains in force.

**[Alternative 1 – short form warranties]**

1. **Accuracy of information[[29]](#footnote-29)**
   1. All written information (including all electronic documents and email correspondence) given by or on behalf of a Group Company or their Officers, Employees, consultants or advisers to the Investor in respect of a Group Company, the Subscription Shares and the Business are:
      1. accurate in all material respects; and
      2. complete and not misleading whether by omission, failure to particularise or otherwise.
2. **Financial position**
   1. The Accounts:
      1. have been prepared in accordance with applicable Accounting Standards and the Corporations Act applied on a consistent basis;
      2. fully reflect the assets and liabilities of the Company and Group;
      3. show a true and accurate view of the financial position of the Company and Group as at the Accounts Date and the financial performance of the Company and Group for the financial period ending on the Accounts Date; and
      4. are not affected by any unusual or non-recurring items.[[30]](#footnote-30)
3. **Intellectual Property Rights**
   1. All Intellectual Property Rights used in the Business are legally and beneficially owned by a Group Company or a Group Company otherwise has valid and enforceable rights to use those Intellectual Property Rights.[[31]](#footnote-31)

**[Alternative 2 – longer form warranties]**

1. **Business Intellectual Property Rights**
   1. The Business Intellectual Property Rights[[32]](#footnote-32) are legally and beneficially owned by the Group and are free from any Security Interests.
   2. A complete and accurate list of all patents, patent applications, trade marks, business names, trade names, domain names and designs owned or registered in the name of a Group Company has been disclosed in writing to the Investor.[[33]](#footnote-33)
   3. The Business Intellectual Property Rights are valid, subsisting and enforceable in each of the jurisdictions in which it is registered or situated.
   4. No person other than a Group Company has a right to any Business Intellectual Property Rights, or may benefit from them.
   5. The Business Intellectual Property Rights and the conduct of the Business do not infringe against any Intellectual Property Rights or other property right of any other person and the Company has not received any notice of any claim or threat of infringement by a third party.
   6. To the best of the Company’s knowledge, there has been no infringement or alleged infringement by any person of the Business Intellectual Property Rights.
   7. The Group has taken all necessary steps (including the payment of any fees which are due) to register, maintain, protect and defend the Business Intellectual Property Rights.
   8. To the best of the Company’s knowledge, there has been no information, act or omission that would:
      1. prevent or adversely affect the registration of any Business Intellectual Property Rights which are the subject of an application for registration; or
      2. permit another person to seek cancellation of, rectification of or other amendment to the registration of any Business Intellectual Property Rights.
   9. To the best of the Company’s knowledge, there are no Claims, challenges, disputes or proceedings, pending or threatened, in relation to or affecting the Business Intellectual Property Rights.
2. **Information technology**
   1. Excluding any Licensed IP[[34]](#footnote-34), the Technology IP[[35]](#footnote-35) is legally and beneficially owned by the Group and is free and clear from any Security Interests.
   2. No Group Company has assigned, transferred, licensed, encumbered to or for the benefit of any person any right in or to any of the Technology IP.
   3. The Group has taken all necessary steps (including the payment of any fees which are due) to maintain, protect and defend the Technology IP.
   4. To the best of the Company’s knowledge, there are no claims, challenges, disputes or proceedings, pending or threatened, that may adversely affect the Technology IP and the Group has not received any notice challenging its complete and exclusive ownership of, or suggesting that any other person has any legal or beneficial claim in, the Technology IP.
   5. To the best of the Company’s knowledge, there has been no infringement or alleged infringement by any person of the Technology IP.
   6. The use of and any sub-licence of the Technology IP by the Group does not:
      1. infringe the Intellectual Property Rights of any third party; or
      2. breach the terms of any IP Licences[[36]](#footnote-36) or any other agreement.
   7. Each Group Company has complied with the terms of each IP Licence.
   8. No Group Company has received any notice of early termination of any of the IP Licences. To the best of the Company’s knowledge, there are no facts or circumstances that would lead to early termination of any of the IP Licences.
   9. Each Group Company has the right to use the Licensed IP under each IP Licence for the term of that IP Licence.
   10. The computer systems used by the Group:
       1. comprise all of the systems, hardware and software necessary to the operation of the Group’s information technology functions; and
       2. operate at a level sufficient to meet the needs of the Business.
   11. No Group Company has used any open source software which comes with it an obligation to communicate any modification to that software to the originator of that open source software or to the open source community.
3. **Litigation**
   1. No Group Company is engaged in any litigation, arbitration or alternative dispute resolution proceedings.
   2. To the best of the Company’s knowledge, no Group Company is the subject of any investigation, inquiry or enforcement proceedings or process by any Government Agency.
4. **Employment**
   1. Each Group Company has complied with all obligations to its Employees and former employees under contracts, state and federal legislation, awards, orders, enterprise or workplace agreements and with all applicable codes of conduct and policies.
5. **Compliance with Laws and industry codes**
   1. Each Group Company has conducted its Business in compliance with all applicable Laws and with all required authorisations.
6. **Tax**
   1. All Taxes[[37]](#footnote-37) which the Group is liable to pay or is required to withhold from any payment made to another person, which are due and payable on or before the Completion Date, have been paid to the appropriate authorities by the due date for payment.
   2. Each Group Company:
      1. has properly made out and lodged all Tax returns, elections, notices and information as and when required by Law;
      2. has made to all Tax Authorities[[38]](#footnote-38) a full and true disclosure of all material matters required for the proper assessment of Tax payable by the Group Company; and
      3. has complied with all rulings, consents, notices and clearances of any Tax Authority.
   3. To the extent a Group Company has previously claimed an R&D tax offset under the R&D tax incentive scheme or has included in the Business Plan an amount to be claimed an R&D tax offset under the R&D tax incentive scheme, the Group Company has undertaken all steps necessary to ensure that it is eligible to claim these amounts, including establishing that it is an eligible R&D entity, determining that the R&D activities and expenditure meet the requirements of the R&D tax incentive scheme and registering its R&D activities with AusIndustry.
   4. There is not a current, pending or threatened Tax audit or investigation.
   5. There are no disputes between the Group and a Government Agency about Tax.
   6. The Group Companies are registered for GST and have complied with their obligations in relation to GST required under the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and are not in default of any obligation to make any payment or Tax Return (including any Business Activity Statement) relating to GST.
7. **Financial position**
   1. The Accounts[[39]](#footnote-39):
      1. have been prepared in accordance with applicable Accounting Standards[[40]](#footnote-40) applied on a consistent basis;
      2. fully reflect the assets and liabilities of the Group;
      3. show a true and accurate view of the financial position of the Group as at the Accounts Date and the financial performance of the Group for the financial period ending on the Accounts Date; and
      4. are not affected by any unusual or non recurring items.
   2. Since the Accounts Date:
      1. each Group Company has conducted its Business properly, efficiently and in the ordinary course of ordinary business;
      2. there has been no material change to the liabilities of any Group Company as disclosed in the Accounts;
      3. the Group has paid its creditors within the times agreed with them; and
      4. the Group has not borrowed money.

Schedule 4 Investor Warranties

1. It is a body corporate validly existing under the Laws of its place of incorporation.
2. It has the power and capacity to enter into and perform its obligations under this agreement and to own its assets and to carry on its business as it is now being conducted.
3. It has taken all necessary action to authorise the signing, delivery and performance of this agreement and the documents required under this agreement in accordance with their respective terms.
4. This agreement constitutes valid and binding obligations upon it enforceable in accordance with its terms.[[41]](#footnote-41)

Schedule 5 Seed Preference Share Terms[[42]](#footnote-42)

1. **Seed Preference Shares**
   1. These terms set out the terms of the Seed Preference Shares which may be issued by the Company.
   2. Despite any other clause of these terms the Company is not required to comply with these Seed Preference Share Terms to the extent that to do so would contravene the Corporations Act.
2. **General rights attaching to Seed Preference Shares**
   1. Subject to paragraphs 3 through 8, each Seed Preference Share confers on the holders of that Seed Preference Share all of the rights attaching to one fully paid ordinary share in the capital of the Company.
3. **Dividends**
   1. Each Seed Preference Share is entitled to any dividend declared on ordinary shares equal to the dividend that would be payable on the number of ordinary shares into which such Seed Preference Share would convert into if it were to be so converted pursuant to paragraph 4 on the relevant dividend record date.[[43]](#footnote-43)
4. **Conversion**
   1. Each Seed Preference Share will be convertible into ordinary shares. The initial conversion price is equal to the issue price of the relevant Seed Preference Share, with the conversion price adjusted pursuant to the operation of the terms of these Seed Preference Shares (**Conversion Price**).
   2. Each holder of Seed Preference Shares is entitled to convert some or all of its Seed Preference Shares into ordinary shares at any time on 10 Business Days written notice to the Company (**Conversion Notice**).[[44]](#footnote-44)
   3. A notice given by a holder of Seed Preference Shares pursuant to paragraph 4.2 must state:
      1. the number of Seed Preference Shares to be converted into ordinary shares; and
      2. the date on which such conversion is to occur (which must be no less than 10 Business Days after the date of such Conversion Notice) (**Conversion Date**).
   4. On the Conversion Date:
      1. the relevant Seed Preference Shares will be converted (by way of variation of rights, and not by way of redemption, cancellation or a new issue or allotment) into a number of ordinary shares determined by dividing the relevant purchase price paid per Seed Preference Share by the Conversion Price and multiplying that figure by the number of Seed Preference Shares to be converted and rounded to the nearest whole share; and
      2. the Company will issue new share certificates to the relevant holder or holders of Seed Preference Shares relating to the new holding of Seed Preference Shares and ordinary shares.
5. **Anti-dilution[[45]](#footnote-45)**
   1. If, prior to the conversion of any Seed Preference Shares, the Company:
      1. reconstructs its share capital, the number of shares into which a Seed Preference Share may be converted must be reconstructed in the same manner; or
      2. issues Shares at a price less than that paid by the holder of Seed Preference Shares, the Conversion Price will be amended as follows (calculated to the nearest tenth of a cent):

CP2 = CP1 \* (A + B) ÷ (A + C).

Where:

#### CP2 = the Conversion Price in effect immediately after such issue of equity securities;

#### CP1 = the Conversion Price in effect immediately prior to such issue of equity securities;

#### A = the number of ordinary shares of the Company issued or issuable upon exercise of options or securities convertible into ordinary shares immediately prior to such issue or upon conversion or exchange of all convertible preference shares outstanding (assuming exercise of all outstanding options or securities convertible into ordinary shares, immediately prior to such issue), but excluding any Seed Preference Shares that have not been converted;

#### B = the number of ordinary shares that would have been issued if such equity securities had been issued at a price per share equal to CP1 (determined by dividing the aggregate consideration received by the Company in respect of such issue by CP1); and

#### C = the number of such equity securities issued in such transaction.

* 1. The following issues will not trigger an anti-dilution adjustment:
     1. ordinary shares (or options to purchase such ordinary shares) issued under an employee incentive scheme approved in accordance with the Shareholder Agreement; or
     2. shares (or options to purchase such share) issued as consideration other than for cash pursuant to a merger, consolidation, acquisition or similar transaction or combination of transactions approved by the Board.

1. **Ranking**

With respect to amounts to be paid or repaid in respect of the Seed Preference Shares under these Seed Preference Share Terms, Seed Preference Shares will:

* + 1. rank equally among themselves; and
    2. rank senior to all other shares on issue in the capital of the Company.

1. **Preferential return of capital[[46]](#footnote-46)**
   1. In this clause “**Liquidation Event**”[[47]](#footnote-47) means:
      1. the liquidation, dissolution or winding up of the Company;
      2. the distribution of the Company’s capital to the Company’s shareholders (whether by return of capital, share buy-back, dividend or otherwise;
      3. a sale of all or substantially all of the shares in the Company for cash or liquid securities;
      4. a sale, lease, liquidation or other disposition of all material or substantially all material assets of the Company or the Business, for which it is resolved that the shareholders will receive the sale proceeds;
      5. the closing of the issue or sale of ordinary shares in the Company to the public in a firm commitment public offering and the quoting of the ordinary shares of the Company, and the listing of the Company, on an internationally recognised stock exchange; or
      6. an exit by way of granting an exclusive license of the Group's Intellectual Property Rights and milestone payments, for which it is resolved that the shareholders will receive the associated proceeds obtained by the Company.
   2. If any Liquidation Event occurs, the holders of the Seed Preference Shares will be entitled to receive out of the proceeds of that Liquidation Event, in preference to any payments to the holders of any other shares or securities in the capital of the Company, the greater of:
      1. an amount equal to the amount paid up on the Seed Preference Share plus any declared but unpaid dividends in respect of a Seed Preference Share (**Preference Amount**); or
      2. the amount that would be payable to the holder in respect of each Seed Preference Share if all Seed Preference Shares were converted to ordinary shares immediately prior to the Liquidation Event.[[48]](#footnote-48)
2. **Variation of class rights**
   1. The rights attached to the Seed Preference Shares may only be cancelled, varied or modified with the agreement (whether by resolution or written consent) of the holders of at least [75]%[[49]](#footnote-49) in aggregate of the Seed Preference Shares on issue.
   2. If shareholders holding at least [75]% in aggregate of the Seed Preference Shares on issue agree (whether by resolution or written consent) to the cancellation, variation or modification, it takes effect:
      1. if no later date is stated in the resolution or consent; on the date of the resolution or consent; or
      2. on a later date specified in the resolution or written consent.

Signing page

**Executed and delivered as an agreement**

|  |  |  |
| --- | --- | --- |
| **Executed** by  **Company Name** ACN ACN in accordance with section 127(1) of the *Corporations Act 2001 (Cth)[[50]](#footnote-50)*: |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| Signature of director |  | Signature of director or company secretary\* |
|  |  | \*delete whichever does not apply |
|  |  |  |
|  |  |  |
|  |  |  |
| Name (please print) |  | Name (please print) |

|  |  |  |
| --- | --- | --- |
| **Executed** by  **Company Name** ACN ACN in accordance with section 127(1) of the *Corporations Act 2001 (Cth)[[51]](#footnote-51)*: |  |  |
|  |  |  |
|  |  | Signature of sole director and sole company secretary |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  | Name (please print) |

|  |  |  |
| --- | --- | --- |
| **Signed** by  **Founder Name** in the presence of: |  |  |
|  |  |  |
|  |  | Signature |
|  |  |  |
| Signature of witness |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| Name of witness  (please print) |  |  |

|  |  |  |
| --- | --- | --- |
| **Signed** by  **Founder Name** in the presence of: |  |  |
|  |  |  |
|  |  | Signature |
|  |  |  |
| Signature of witness |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| Name of witness  (please print) |  |  |



1. This agreement assumes that there is only one Investor. Some changes will be required if there is more than one Investor under this agreement. [↑](#footnote-ref-1)
2. This agreement assumes that there is more than one Founder. [↑](#footnote-ref-2)
3. Insert the latest date on which the accounts have been prepared [↑](#footnote-ref-3)
4. The Completion Date may be the date of the agreement if the parties want to sign and complete simultaneously. [↑](#footnote-ref-4)
5. This agreement assumes that, prior to the Investor's subscription for Seed Preference Shares, there are only ordinary shares in the capital of the Company. [↑](#footnote-ref-5)
6. Consider whether Founders should be Warrantors or not. As the Founders do not receive payment under this agreement, they may be unwilling to be personally liable for breach of the warranties. However, the Investor may require the Founders to stand behind the warranties as they know the business the best and particularly if the Investor has not carried out detailed due diligence investigations or if there has been a lack of information provided by the Founders. Further, the Investor may not wish to sue the Company for breach of warranty, as the Investor will be a shareholder in the Company at the time. [↑](#footnote-ref-6)
7. This may be extended to specifically cover the knowledge of other executives who are not Founders. Certain Founders may request to remove the words "and the awareness, knowledge or belief they would have had after making due and careful enquiry" as this expands the breadth of their imputed knowledge. However, an Investor may consider this is reasonable, to avoid a situation where the Founders can claim ignorance of a matter of which they should have been aware. [↑](#footnote-ref-7)
8. This agreement assumes that all Subscription Shares will be subscribed for in one tranche. If there are multiple tranches, then some amendments will be required. [↑](#footnote-ref-8)
9. Consider whether any conditions precedent to Completion are required. For example, Completion could be conditional on (1) the renewal of a key contract, (2) finance being obtained by the Investor, (3) the consummation of another business transaction etc. If this is desired, the parties should consider the latest possible date by which the conditions precedent may be satisfied. If they are not satisfied by that date, then the parties should be able to terminate the transaction. In certain circumstances, a break fee may be payable. [↑](#footnote-ref-9)
10. Consider whether any pre-completion covenants are required for the period between signing and completion. These are intended to (1) require the business to be run in the ordinary course and (2) give the Investor a veto over key decisions of the business (similar to the veto that it will have post-completion). [↑](#footnote-ref-10)
11. If the Investor has the right to appoint a director to the Company, then it will be necessary to include an obligation on the Investor to deliver a consent to act as director to the Company. [↑](#footnote-ref-11)
12. Consider whether any further Completion deliverables are required. For example, (1) employment agreements with key personnel (other than Founders), (2) transfer of assets from the name of the Founder to the name of the Company etc. Note also that other internal approvals may be required (ie as set out in a pre-existing shareholders agreement and/or constitution). [↑](#footnote-ref-12)
13. Consider if this right should only apply to the non-defaulting party. [↑](#footnote-ref-13)
14. It is not uncommon for Investors to require that a supporting general indemnity is given by the Warrantors in favour of the Investor. This indemnity will still usually be subject to the same limitations of liability that apply to the warranties. [↑](#footnote-ref-14)
15. If a matter has been uncovered in the Investor's due diligence enquiries identifies a specific risk, or a matter that may result in a breach of a warranty, but such breach has not yet occurred, the Investor may require a specific indemnity for that matter. This is because the disclosure limitation may operate to prevent the Investor from bringing a claim for breach of warranty (or under the supporting general indemnity, if any). [↑](#footnote-ref-15)
16. Parties will need to agree whether liability of the Warrantors is several or joint and several. If there is only one warrantor, then remove the words "jointly and severally". [↑](#footnote-ref-16)
17. If there has been a data room or a disclosure letter prepared, this should instead be referenced in this clause. Note also US custom is not to allow for a broad disclosure 'shield' and instead rely only on a disclosure schedule to qualify the warranties. Either approach will need to be negotiated between the parties. [↑](#footnote-ref-17)
18. Consider whether 24 months is an appropriate length of time. In particular, title and tax warranties may require a longer claim period. [↑](#footnote-ref-18)
19. It is not uncommon to carve-out certain matters (such as title and capacity, and sometimes tax) from certain limitations. [↑](#footnote-ref-19)
20. Warrantors may request that there be certain minimum thresholds that have to be reached before the Investor is able to make a claim, to prevent the risk of small claims being made. This may apply in respect of each individual claim (eg the Warrantors have no liability for breach of warranty unless the amount of any claim arising out of the breach is $10,000 or more) or in respect of all claims (eg the Warrantors have no liability for breach of warranty unless the aggregate amount of all claims is $100,000 or more) or both. Typically, if these thresholds are included, the Investor will have the right to claim for the whole amount and not just the excess over the threshold. [↑](#footnote-ref-20)
21. In some instances it may be appropriate to allow for any claim to be settled through a new issue of shares to the investor. This is commonly dealt with through a gross-up mechanism (see comment below). [↑](#footnote-ref-21)
22. It is not uncommon to include a 'gross up' clause in relation to breaches of warranties by the Warrantors. This is to prevent the risk of a claim being made by the Investor against the Company, when the Investor is already a shareholder in the Company (and therefore the Investor effectively bears some of the burden of making good the claim). The gross up clause operates to gross up the amount of the claim, so that the Investor effectively does not bear the burden of making good the claim. [↑](#footnote-ref-22)
23. Consider whether to include a dispute resolution clause. [↑](#footnote-ref-23)
24. If the parties wish to have no rights against each other moving forward, they should release each other separately. [↑](#footnote-ref-24)
25. Consider whether an exception is required to permit one or more of the parties to make a public announcement in relation to the transaction. [↑](#footnote-ref-25)
26. It is quite common for the Company to pay the Investor's legal fees, when dealing with venture capital funds. The Investor will generally not be entitled to a full input tax credit in respect of the GST component of the legal costs, so the GST amount should be included in the amount to be reimbursed to the extent it is not fully creditable in accordance with clause 8.2 [↑](#footnote-ref-26)
27. The cap table is presented on a 'fully diluted' basis, meaning that it includes an allocation for ESOP (and other securities that may be convertible into shares). Parties will need to agree the size of the ESOP pool. Note that it is common for the investor's holding percentage to be calculated on a fully diluted basis so that they are not diluted by any increase in the ESOP pool as part of the investment. [↑](#footnote-ref-27)
28. In the event that there is a shareholders agreement in place prior to the Investor's subscription for shares, it is likely that a waiver of pre-emption rights will be required from all existing shareholders in the Company. [↑](#footnote-ref-28)
29. In some instances, investors may expect a more robust information warranty, including words to the effect that the information has been provided in good faith and that the Group and its Representatives have disclosed and have not knowingly or recklessly withheld from the Investor any information that a subscriber for the Subscription Shares would reasonably require to make an informed assessment of the assets and liabilities, financial position and performance of the Group. The Company should consider whether it is inappropriate, in the circumstances, to give such a broad information warranty. [↑](#footnote-ref-29)
30. If there has been a period of time between the preparation of the Accounts and signing/completion, then the Investor may require certain warranties in relation to the operation of the business (and its liabilities) in that period. [↑](#footnote-ref-30)
31. Various other business warranties are commonly required by Investors. If the main asset of the business is its IP, then more substantial warranties in relation to IP and IT will be required. Investors may also require warranties in relation to litigation, properties, employees, compliance with laws and industry codes, tax etc. [↑](#footnote-ref-31)
32. **Business Intellectual Property Rights** means all Intellectual Property Rights generated, developed, created or used by the Group in relation to the Business, but not including the Technology IP and the Licensed IP. [↑](#footnote-ref-32)
33. Note, it is not uncommon for some investors to require that a list of all registered IP be included in a separate schedule to the subscription agreement (or in a separate side/disclosure letter). [↑](#footnote-ref-33)
34. **Licensed IP** means the Intellectual Property Rights licensed to any Group Company. [↑](#footnote-ref-34)
35. **Technology IP** means all Intellectual Property Rights subsisting in any software, hardware, services or service outputs, business processes, documentation, data storage devices, peripherals or data used, exercised, accessed or otherwise used that has been created, developed or used by the Group in relation to the Business, but excluding Licensed IP. [↑](#footnote-ref-35)
36. **IP Licence** means a licence granted by a third party to a Group Company in respect of Intellectual Property Rights owned by that third party. [↑](#footnote-ref-36)
37. **Tax**, as already defined in the definitions section, means any tax, levy, charge, impost, fee, deduction, GST or withholding tax that is assessed, levied, imposed or collected by any Government Agency and includes any interest, fine, penalty, charge, fee or any other amount imposed on, or in respect of, any of the above. [↑](#footnote-ref-37)
38. **Tax Authority** means any federal, state, territory or local Government Agency for Tax. [↑](#footnote-ref-38)
39. **Accounts** mean the balance sheet of the Group and the profit and loss statement and cash flow statement of the Group at the Accounts Date. Company to refine the definition and the suitability of these warranties having regard to the nature of the accounts being warranted, including whether they are audited or not. [↑](#footnote-ref-39)
40. **Accounting Standards** means: (a) accounting standards approved under the Corporations Act and its requirements about the preparation and contents of accounts; and (if relevant) (b) in respect of the annual audited financial accounts, the Australian Accounting Standards issued and updated from time to time by the Australian Accounting Standards Board. [↑](#footnote-ref-40)
41. Consider whether a warranty is required that the Investor is a sophisticated or professional investor. This may be necessary depending on the amount that the Investor is investing, how many other shares have been issued in the previous 12 months and the company's proposed fundraising efforts in the following 12 months. [↑](#footnote-ref-41)
42. These Seed Preference Share Terms must also be set out in the Company's Constitution. [↑](#footnote-ref-42)
43. Consider whether a preferred dividend right should apply. Such dividends could be cumulative or non-cumulative. [↑](#footnote-ref-43)
44. Conversion may also be mandatory if a majority of the Seed Preference Shareholders agree or if there is an IPO or such other exit that meets certain agreed thresholds (eg 3x the subscription price). [↑](#footnote-ref-44)
45. This agreement includes a broad-based, weighted-average anti-dilution right. Other anti-dilution rights may be appropriate, including full ratchet. The intention of the clause is to give the Investor a "top up" in the event that shares are issued at a price that is lower than what the Investor pays (which is called a 'down round'). In contrast to a full ratchet adjustment, a broad based adjustment takes into account money actually being raised by the company in the down round and as a result the net impact is not as severe as in a full ratchet adjustment. [↑](#footnote-ref-45)
46. This agreement includes a non-participating liquidation preference, which is the most common form of preference share. In some instances (particularly if the balance of power is with the Investor), Investors may require a participating liquidation preference (this would give them first rights to receive back their subscription price, then they would rank equally with ordinary shareholders in the distribution of the remaining assets of the company). [↑](#footnote-ref-46)
47. These events are commonly triggers for a Liquidation Event. However, the Company (and Founders) should carefully consider whether the events listed under Liquidation Event are appropriate triggers for the payment of the liquidation preference on the Seed Preference Shares. [↑](#footnote-ref-47)
48. Liquidation preferences in venture investments vary depending on the state of the market and the competitiveness of the deal.  A 1X liquidation preference is fairly standard (which is what has been provided here). This means that if the company is wound up or sold, the holders of the Seed Preference Shares will receive back 1X times the amount that they paid on their shares before any other shareholder receives any proceeds. Participating preferences, preferences with a >1x liquidation preference may also be applicable/suitable in the context of a transaction. [↑](#footnote-ref-48)
49. Relevant percentage to be agreed between the parties. [↑](#footnote-ref-49)
50. Use this execution block where the Company has two or more directors. [↑](#footnote-ref-50)
51. Use this execution block where the Company has a sole director and sole secretary. [↑](#footnote-ref-51)