**Subscription Agreement**

[ ] Pty Ltd

ACN [ ]

***[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.]***

**Table of Contents**

1. Definitions 1

2. Interpretation 8

2.1 General interpretation 8

2.2 Knowledge 8

3. Subscription 9

4. Completion 9

4.1 Time and place for Completion 9

4.2 Completion obligations of Investors 9

4.3 Completion obligations of Company 10

4.4 Simultaneous Completion Obligations 11

4.5 Failure to Complete 11

4.6 Post-Completion matters 11

5. Warranties 12

5.1 Warranties by the Company and Founders 12

5.2 Disclosures 12

5.3 Time limitation 12

5.4 Maximum aggregate liability for Claims 13

5.5 Other limitations 13

5.6 No limits on liability 13

5.7 Investor Warranties 13

6. Default and termination 14

6.1 Termination 14

6.2 Effect of termination 14

7. Confidentiality 14

7.1 No announcements 14

7.2 Confidentiality 14

7.3 Permitted disclosure 15

8. GST 15

8.1 Recovery of GST 15

8.2 Liability net of GST 15

8.3 Adjustment events 15

8.4 Definitions 16

9. General 16

9.1 Notices 16

9.2 Costs and expenses 16

9.3 Stamp duty 17

9.4 Cumulative Rights 17

9.5 No waiver 17

9.6 Severability 17

9.7 Assignment 17

9.8 Variation 17

9.9 Survival and merger 17

9.10 Entire agreement 18

9.11 Further assurances 18

9.12 Counterparts and electronic execution 18

9.13 Governing law and jurisdiction 18

Schedule 1 Subscription Details 19

Schedule 2 Post Completion Capital Structure 20

Schedule 3 Warranties 21

Schedule 4 Investor Warranties 28

Schedule 5 Founder Warranties 29

**Subscription Agreement**

**Date**

**Parties**

1. **[Company Name] Pty Ltd** ACN [insert] of [address] (**Company**)
2. The parties set out in Part A of Schedule 1(together the **Investors** and each an **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) [[3]](#footnote-3)

**Background**

1. Each Investor wishes to subscribe for, and the Company wishes to issue to each Investor, its Subscription Shares for its 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 as at the Accounts Date and the profit and loss statement and cash flow statement of the Group for the period ended on the Accounts Date.[[4]](#footnote-4)

**Accounts Date** means [insert].

**Authorisation** means:

### an authorisation, consent, right, certificate, licence, permit, declaration, exemption, notarisation or waiver, however described (including any renewal or partial renewal); and

### any authorisation or consent regarded as given by a Government Agency where, in relation to something that can be prohibited or restricted by law if the Government Agency takes action within a specified period, that period expires without that action being taken.

**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 [Adelaide/Brisbane/Hobart/Melbourne/Perth/Sydney], excluding Saturdays, Sundays and public holidays.

**Business IPR** means all Intellectual Property Rights used by the Group in relation to the Business.

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

**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.

**Company Product** has the meaning given in Schedule 3, paragraph 5.14.

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

**Completion Date** means [insert], or such other date as is agreed in writing by the Company and the Investors.[[5]](#footnote-5) [[6]](#footnote-6)

**Confidential Information** means the terms and existence of this agreement, and all 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 or 7.2;

### 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.

**Consequential Loss** means any loss or damage that:

### is not fairly and reasonably considered as arising naturally, according to the usual course of things, from a failure to fulfil an obligation or duty; or

### is not reasonably supposed to have been in the contemplation of both parties, at the time the agreement was entered into, as a probable result of a failure to fulfil an obligation or duty.

**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.

**Disclosure Materials** means:

### the letter (if any) in the agreed form from the Company to the Investors dated on or before the date of this agreement disclosing matters in relation to the Warranties, including all of its schedules and annexures (if any)[; and

### the written materials made available to the Investors by the Company in the data room hosted at [insert URL] as at the close of business on the date that is 2 Business Days prior to the date of this document.][[7]](#footnote-7)

**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.

**Equity Interests** has the meaning given in Schedule 3, paragraph 3.2.

**Founder Warranties** means the representations and warranties set out in Schedule 5.[[8]](#footnote-8)

**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 and includes any self-regulatory organisation established under statute.

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

**GST Amount** has the meaning given in clause 8.1.

**Insolvency Event** means, in respect of a party, the occurrence of any one or more of the following events or circumstances:

### its winding up, liquidation or provisional liquidation;

### the appointment of an administrator under the Corporations Act;

### the appointment of a Controller (as defined in the Corporations Act) or analogous person to it or any of its property;

### being deregistered as a company or other body corporate or otherwise dissolved;

### being unable to pay any of its debts as and when due and payable or being deemed to be insolvent under any Law;

### seeking protection from its creditors under any Law or entering into a compromise, moratorium, assignment, composition or arrangement with, or for the benefit of, any of its members or creditors;

### otherwise becoming a Chapter 5 body corporate, as defined in the Corporations Act;

### in the case of a party that enters into this agreement as the trustee of a trust (whether disclosed or not):

#### the beneficiaries of the trust resolve to wind up the trust, the trustee is required to wind up the trust under the terms of the trust or any applicable Law, or the winding up or termination of the trust commences or occurs for any reason;

#### an external administrator is appointed to the trust or the assets of the trust; or

#### for any reason the trustee is not or ceases to be entitled to be indemnified out of, or to have a lien over, the assets of the trust for all of its obligations and liabilities, or that right of indemnity is reduced, restricted, or does not have priority over the rights of the beneficiaries of the trust;

### an analogous event or circumstance to any listed above in any jurisdiction;

### suspending or threatening to suspend payment of all or substantially all of its debts as and when they become due;

### ceasing or threatening to cease to carry on business; or

### taking any step or being the subject of any action that is preparatory to, or reasonably likely to result in, any of the above.

**Intellectual Property Rights** means all present and future intellectual and industrial property rights conferred by statute, at common law or in equity and wherever existing, including:

### trade marks, trade names, domain names, logos, get-up, patents, inventions, design rights, copyrights, circuit layout rights, plant breeder's rights, know how, trade secrets and any other rights subsisting in the results of intellectual effort in any field, whether or not capable of registration;

### 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; and

### all renewals, divisions and extensions of these rights.

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

**IP Licence** means a licence granted by a third party to a Group Company in respect of Intellectual Property Rights.

**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.

**Licensed IPR** means the Intellectual Property Rights licensed to any Group Company pursuant to an IP Licence.

**Loss** means losses, liabilities, damages, costs, charges and expenses and includes Taxes and any diminution in the value of the Shares.

**Management Accounts** means the balance sheet of the Group as at the Management Accounts Date and the profit and loss statement and cash flow statement of the Group for the period ended on the Management Accounts Date.

**Management Accounts Date** means [insert].

**Material Contract** means each contract, agreement, or arrangement to which a Group Company is a party or by which a Group Company is bound (whether written or oral):

### that generates (or that the Company reasonably anticipates will generate) revenue for the Group of at least $[ ] per annum; or

### that if terminated or allowed to expire would have a material adverse effect on the Business or the Group.

**New Constitution** means the new constitution of the Company in the form agreed by the Company and the Investors which will be adopted by the Company on or before Completion.[[9]](#footnote-9)

**Notice** has the meaning given in 9.1.

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

**Open Source Code** means any software code that is distributed as "free software" or "open source software" or is otherwise distributed publicly in source code form under terms that permit modification and redistribution of such software, and includes software code that is licensed under the GNU General Public License, GNU Lesser General Public License, Mozilla License, Common Public License, Apache License, BSD License, Artistic License, or Sun Community Source License.

**Owned IPR** means the Intellectual Property Rights legally and beneficially owned by a Group Company.

**Personal Information** has the meaning given to that term in the *Privacy Act 1988* (Cth).

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

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

**Relevant Proceedings** has the meaning given in Schedule 3, paragraph 6.1.

**Relevant Process** has the meaning given in Schedule 3, paragraph 6.2.

**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 prendre), 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 seed preference shares having the rights set out in the New Constitution.

**Share** means a share in the capital of the Company and includes the ordinary shares and the Seed Preference Shares.

**Shareholders Deed** means the shareholders deed between the Company and its shareholders which will be entered into at Completion, in the form agreed by the Company and the Investors.

**Subscription Moneys** means, in respect of an Investor, that sum of money for its 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.

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

**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.

**Tax Authority** means any federal, state, territory or local Government Agency for Tax.

**Warranties** means the Business Warranties and the Founder Warranties.

# Interpretation

## General interpretation

In this agreement, unless the context indicates a contrary intention:

### (**documents**) a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;

### (**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 [Adelaide/Brisbane/Hobart/Melbourne/Perth/Sydney], 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 Company's or a Founder's awareness, knowledge, information or belief is a reference to the actual awareness, knowledge or belief of each Founder (or the relevant Founder (as applicable)) and the awareness, knowledge or belief they would have had after making due and careful enquiry.[[10]](#footnote-10)

# Subscription

* + 1. On Completion, the Company must issue and each Investor must subscribe for its Subscription Shares at the Subscription Price.[[11]](#footnote-11)
		2. This agreement serves as an application by each Investor for the allotment and issue of the Subscription Shares which it has agreed to subscribe for pursuant to clause 3(a) and no separate application for the Subscription Shares will be required.
		3. Each Investor agrees to become a member of the Company and to be bound by the Company's constitution on and from Completion.

# Completion[[12]](#footnote-12)[[13]](#footnote-13)

## Time and place for Completion

Completion must take place on the Completion Date or at another time and date agreed between the parties, remotely by electronic exchange of documents and electronic transfer of funds, unless otherwise agreed in writing between the parties.

## Completion obligations of Investors

On the Completion Date, each Investor must:[[14]](#footnote-14)[[15]](#footnote-15)

### pay its Subscription Moneys to the Company by way of direct transfer to the following bank account:

### Account Name: [insert]

### BSB: [insert]

### Account Number: [insert]

### Bank Name: [insert]; and

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

## Completion obligations of Company

On the Completion Date, the Company must:[[16]](#footnote-16)

### deliver to the Investors evidence that its directors have resolved (whether at a duly convened and quorate board meeting or by way of circulating resolution) that, subject to receipt by the Company of the Subscription Moneys for the Subscription Shares:

#### the Company issues to each Investor its Subscription Shares fully paid and free from any Security Interests;

#### the Company enter the name of each Investor in the Company’s register of members as the holder of its Subscription Shares; and

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

### deliver to the Investors evidence that its shareholders have passed all necessary resolutions and given all necessary consents or waivers to give effect to this agreement including:

#### approving the adoption of the New Constitution (and the repeal of the Company's existing constitution (if there is one in place));

#### approving any variation of the rights of any existing class of shares resulting from the adoption of the New Constitution or the issue of the Subscription Shares; and

#### waiving any pre-emptive rights that apply to the issue of the Subscription Shares;

### issue the Subscription Shares fully paid and free from any Security Interests;

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

### deliver to each Investor a share certificate in respect of its Subscription Shares;

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

### [deliver to each Investor a copy of an employment agreement between the Company and each Founder, in a form acceptable to the Investors; and][[17]](#footnote-17)

### [deliver to each 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 Investors][[18]](#footnote-18).

## 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 Investors at Completion are satisfied. If Completion does not occur, then any party not in breach of its obligations under this clause 4 may elect to terminate this agreement.

### If a party fails to fully comply with its obligations under this clause 4 and another party elects to terminate this agreement in accordance with clause 4.5(a), then each party must:

#### return to the other all documents delivered to it under this clause 4;

#### repay to the other all payments received by it under this clause 4; and

#### do everything reasonably required by another party to reverse any action taken under this clause 4,

### without prejudice to any other rights any party may have as a result of that failure.

## Post-Completion matters

Within a reasonable amount of time after the Completion Date, the Company must lodge notice with the Australian Securities and Investments Commission in respect of the issue of the Subscription Shares to the Investors (and any other changes) as a result of the transactions contemplated under this agreement.

# Warranties[[19]](#footnote-19) [[20]](#footnote-20) [[21]](#footnote-21)

## Warranties by the Company and Founders

### The Company[[22]](#footnote-22) represents and warrants to the Investors that each Business Warranty is true and correct and not misleading on the date of this agreement and at the Completion Date.

### Each Founder severally represents and warrants to the Investors that each Founder Warranty is true and correct and not misleading in respect of such Founder on the date of this agreement and at the Completion Date.

### The Company and each Founder acknowledges that the Investors have 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 Company and the Founders are not liable to pay for any breach of any Warranty if the breach is based on any fact, matter or circumstance that is fully and fairly disclosed to the Investors in the Disclosure Materials prior to the date of this agreement.

## Time limitation

The Company or a Founder has no liability to an Investor 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 the Company or the relevant Founder within 24 months after the Completion Date.[[23]](#footnote-23)

## Maximum aggregate liability for Claims[[24]](#footnote-24)

### The maximum aggregate liability of the Company as a result of all Claims made by an Investor in relation to a breach of a Warranty under this agreement or otherwise, is an amount equal to the Investor's Subscription Moneys.

### The maximum aggregate liability of each Founder in respect of all Claims made by the Investors in relation to a breach of Warranty under this agreement or otherwise is an amount equal to $[ ].

## Other limitations

### The Company and Founders are not liable to the Investors for any Claim for breach of a Warranty to the extent that the Claim:

### arises or is increased as a result of:

#### any legislation not in force at the date of this agreement (including legislation which takes effect retrospectively);

#### a change after the date of this agreement in the rates, method of calculation or scope prescribed by any Tax Law; or

#### a change after the date of this agreement in the Accounting Standards;

### arises out of or in relation to the accuracy or reasonableness of any forward looking statement in respect of the Company or its Business, including any forecasts or projections; or

### is for any Consequential Loss.

## No limits on liability

### The limitations and qualifications in this agreement do not apply to limit the liability of the Company or a Founder to an Investor for any Loss that relates to or arises out of a wilful misconduct by, or fraud of, the Company or a Founder (as applicable).

## Investor Warranties

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

### Each 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.

# Default and termination[[25]](#footnote-25)

## 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.

## 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,

### unless the parties expressly agree otherwise.[[26]](#footnote-26)

# Confidentiality

## No announcements

No party will make or authorise a press release or public announcement regarding the transactions contemplated by this agreement without the prior written consent of the other parties.

## Confidentiality

Subject to clause 7.3, no party may (and each party must procure that its Representatives do not):

### disclose any Confidential Information to any person; or

### use any Confidential Information in any manner which may cause loss to the other party.

## Permitted disclosure

A party may disclose, and may permit its Representatives to disclose, any Confidential Information (and the other restrictions in clause 7.2 do not apply in such cases):

### with the prior written consent of each 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 an Investor, includes any fund or other vehicle managed or advised by the Investor) and such affiliates' Representatives;

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

### to a prospective purchaser of any Subscription Shares and their Representatives; or

### following Completion, as permitted by the confidentiality provisions in the Shareholders Deed.

# 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 legible writing, in English 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, 2 hours after the time the email is sent, unless the sender receives, within that time period, an automatic notification (other than an out of office message) indicating that the email has not been delivered,

#### provided that where a Notice is delivered (or deemed delivered) after 5.00pm or on a day that is not a Business Day, the Notice will be deemed to have been delivered at 9.00am on the next Business Day.

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 its due diligence and the preparation, negotiation and execution of this agreement, the Shareholders Deed and other ancillary documents.

### The Company must pay to [ ] on Completion an amount equal to the legal costs incurred by such Investor in connection with its due diligence and 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.[[27]](#footnote-27)

## Stamp duty

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

## Cumulative Rights

The rights and remedies in this agreement are in addition to other rights and remedies given by Law independently of this agreement.

## No waiver

### A failure, delay, relaxation or indulgence by a party in exercising any power or right conferred on the party by this agreement does not operate as a waiver of the power or right.

### A single or partial exercise of the power or right does not preclude a further exercise of it or the exercise of any other power or right under this agreement.

### A waiver of a breach does not operate as a waiver of any other breach.

## 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.

## 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 9.7(a) is ineffective.

## Variation

This agreement can only be varied by a later written document executed by or on behalf of the parties.

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

## 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.

## Counterparts and electronic execution

### This agreement may be executed in counterparts, which taken together constitute one and the same agreement, and any party (including any authorised representative of a party) may enter into this agreement by executing a counterpart. This agreement takes effect when the separately executed documents are exchanged between the parties.

### To the extent permitted by law, a counterpart may be executed electronically, including by using software or a platform for the electronic execution of contracts.

### A print out of the executed agreement once all parties signing electronically have done so, will be an executed original counterpart of this agreement, irrespective of which party prints it.

### Each party that signs this agreement electronically represents and warrants that it or anyone signing on its behalf:

#### has been duly authorised to enter into and execute this agreement electronically and to create obligations that are valid and binding obligations on the party;

#### has affixed their own electronic signature; and

#### holds the position or title indicated under their electronic signature.

## Governing law and jurisdiction

### This agreement is governed by and must be construed in accordance with the Laws of [insert state]. To the extent permitted by law, such governing law governs all matters arising out of or relating to this agreement or its performance or subject matter, including its execution and formation.

### The parties submit to the exclusive jurisdiction of the courts of [insert same state as previous clause] and the Commonwealth of Australia in respect of all matters arising out of or relating to this agreement, its performance or subject matter.

Schedule 1 Subscription Details

**Part A - Investors**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Investor Name | Address for Service | Subscription Shares | Subscription Price | Subscription Moneys |
| [insert] | **Address**[insert]**Email Address**[insert]**Contact**[insert] | [insert] | $[insert] | $[insert] |
| [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] | [ ]% |
| [Investor] | Seed Preference Shares | [insert number] | [ ]% |
| ESOP allocation  | Ordinary Shares | [insert number] | [ ]%[[28]](#footnote-28) |
| TOTAL |  | [insert number] | 100% |

Schedule 3 Warranties

1. **Shares**
	1. As at the Completion Date, there is no restriction on the ability of the Company to issue the Subscription Shares that has not been validly waived.[[29]](#footnote-29)
	2. Each Investor will acquire at Completion:
		1. the full legal and beneficial ownership of its Subscription Shares free and clear of all Security Interests;
		2. its Subscription Shares free of competing rights, including pre-emptive rights or rights of first refusal, other than under the Shareholders Deed and the New Constitution; and
		3. fully paid Shares that have no money owing in respect of them.
	3. Immediately after Completion:
		1. the issued capital of the Company will be as set out in Schedule 2; and
		2. 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.
	4. Save for the obligations set out in this agreement, the Company is not obliged to issue or allot any Shares or other securities, and the Company has not granted any person the right to call for the issue or allotment of any Shares or other securities.
	5. 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 the power to enter into this agreement and, subject to obtaining the shareholder resolutions, consents and waivers referred to in clause 4.3(b), 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 (or other similar rights) 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 the 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 laws of the jurisdiction of its incorporation.
	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. The shares in each Subsidiary have been validly issued and are fully paid up and free of further capital contribution obligations.
	4. 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.
	5. 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.
	6. No Group Company has granted any power of attorney or similar authority which remains in force.
	7. No Insolvency Event has occurred in respect of any Group Company and, so far as the Company is aware, there are no current circumstances which could cause an Insolvency Event to occur in respect of any Group Company.
4. **Accuracy of information[[30]](#footnote-30)**
	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) in any material respect.
5. **Intellectual Property Rights**
	1. The Business IPR are either:
		1. Owned IPR free from any Security Interests; or
		2. Licenced IPR.
	2. The Owned IPR are valid, subsisting and enforceable in each of the jurisdictions in which they are registered or situated.
	3. No person other than a Group Company has a right to any Owned IPR, or may benefit from them, other than pursuant to a licence granted by a Group Company in the ordinary course of business.
	4. 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 IPR 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 Owned IPR.
	5. The Owned IPR and the conduct of the Business do not infringe against any Intellectual Property Rights or other property right of any other person and no Group Company has received any notice or threat of any claim 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 Owned IPR.
	7. The Group has taken all necessary steps (including the payment of any fees which are due) to register, maintain, protect and defend the Owned IPR.
	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 Owned IPR 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 Owned IPR that is registered.
	9. To the best of the Company's knowledge, the contributions Employees and contractors engaged by the Group have made to the Owned IPR have been independently produced, developed or contributed to, by them without infringing the Intellectual Property Rights of any person and have not been involved any breach of obligations of confidence owed by a Group Company or any such Employee or contractor to a third party.
	10. Each Group Company has complied with the terms of each IP Licence.
	11. No Group Company has received any notice of early termination of any of the IP Licences and, 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.
	12. Each Group Company has the right to use the Licensed IPR under each IP Licence for the term of that IP Licence.
	13. 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.
	14. No product or service designed, developed, manufactured, marketed, distributed, provided, licensed, or sold at any time by the Group (**Company Product**) contains, is derived from, is distributed with, or is being or was developed using Open Source Code that is licensed under any terms that:
		1. impose or could reasonably be read as imposing a requirement or condition that any Company Product or part thereof:
			1. be disclosed or distributed in source code form;
			2. be licensed for the purpose of making modifications or derivative works; or
			3. be redistributable at no charge; or
		2. otherwise impose or could reasonably be read as imposing any other material limitation, restriction, or condition on the right or ability of the Group to use or distribute any Company Product or to enforce Intellectual Property Rights.
6. **Litigation**
	1. No Group Company is engaged whether as claimant, defendant or otherwise in any litigation, arbitration or alternative dispute resolution proceedings which is either in progress or threatened or, so far as the Company is aware, is pending (**Relevant 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 (**Relevant Process**).
	3. So far as the Company is aware, there are no circumstances likely to lead to any Relevant Proceedings or any Relevant Process.
7. **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.
	2. Each Group Company has complied with all obligations to make superannuation contributions which it is obliged at Law to make on behalf of Employees and former employees.
	3. No contractor is engaged to provide services to a Group Company as a contractor that is an employee of the Group Company at law.
8. **Compliance with Laws and Authorisations**
	1. Each Group Company has conducted its Business [materially] in compliance with all applicable Laws and no Group Company has received any notice of any allegation of any contravention of any applicable Law.
	2. Each Group Company holds all necessary Authorisations required for the conduct of the Business as it is carried on at Completion.
	3. No Group Company has received any notice that any Authorisation, licence, or third party consent required for the conduct of the Business, will be terminated, suspended, modified or, if applicable, will not be renewed.
	4. Each Group Company (and, so far as the Company is aware, each of its Officers and all other persons acting for or on behalf of the Group Company) has complied in all material respects with applicable anti-corruption and anti-bribery Laws in all relevant jurisdictions.
	5. No Group Company (nor, so far as the Company is aware, any of its Officers or any person acting for or on behalf of the Group Company) is being prosecuted for an offence, nor are they or have they been the subject of any investigation, or inquiry by, or on behalf of, any Government Agency, in respect of any offence or alleged offence, under applicable anti-corruption and anti-bribery Laws in any jurisdiction, and there are no circumstances known to the Company likely to give rise to any such prosecution, investigation or inquiry.
9. **Tax**
	1. All Taxes 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 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 as 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.
10. **Financial position**
	1. The Accounts[[31]](#footnote-31):
		1. have been prepared in accordance with applicable Accounting Standards 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.
	3. The Management Accounts:
		1. have been prepared with reasonable care and attention; and
		2. give a reasonable view of the state of affairs, liabilities, profit or loss, and balance sheet of the Group as at and for the period in respect of which they have been prepared.
11. **Material Contracts**
	1. True, complete and accurate copies of each Material Contract have been made available to the Investor by the Company and, to the best of the Company's knowledge, there are no unwritten agreements or arrangements which alter the terms of any Material Contract in any material respect.
	2. Each Material Contract was entered into in the ordinary course of business.
	3. So far as the Company is aware, there are no grounds for invalidity, termination, rescission, avoidance, or repudiation of any Material Contract.
	4. No Group Company is in default, nor would be in default but for the requirement of notice or lapse of time, under any Material Contract, in each case in any material respect.
	5. So far as the Company is aware, no other party to any Material Contract is in default, nor would be in default but for the requirement of notice or lapse of time, under any Material Contract, in each case in any material respect.
12. **Contracts with connected persons**
	1. There are no loans made by a Group Company to any of the Founders, Officers, shareholders or Employees of any Group Company and/or any of their respective affiliates and no debts or liabilities owing by a Group Company to any of the Officers, shareholders or Employees of any Group Company and/or any of their respective affiliates.
	2. There are no existing contracts or arrangements to which a Group Company is a party and in which any of its Founders, Officers or shareholders and/or any of their affiliates is interested.
	3. No Founder nor any affiliate of a Founder owns any property used by a Group Company.
13. **Data**
	1. Each Group Company has complied with all applicable Laws and contractual requirements regulating the collection, storage, use and disclosure of Personal Information including the *Privacy Act 1988* (Cth) and the *Spam Act 2003* (Cth).
	2. No Group Company has received, and no Group Company is aware of any circumstances which could give rise to, any privacy complaint or investigation in connection with any Personal Information collected, used, held or disclosed in the course of or in connection with the Business or any compliance with any applicable laws.
	3. The Company is not aware of any circumstance which has given, or could give, rise to a data breach in connection with any Personal Information collected, used, held or disclosed in the course of or in connection with the Business.

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.
5. If the Investor is a “sophisticated investor” (under section 708(8) of the Corporations Act) or a “professional investor” (under section 708(11) of the Corporations Act), it will promptly provide any information or certification requested by the Company to confirm this.[[32]](#footnote-32)

Schedule 5 Founder Warranties

1. **No conflicts**
	1. As at the Completion Date, the Founder:
		1. is not restricted in any manner from entering into the transactions contemplated by this agreement;
		2. is not a party to any contract or arrangement in connection with the Business which has not been fully disclosed in writing to the Investors prior to the date of this agreement;
		3. is not involved in any business which competes with the Business or with the business of any supplier or customer of the Business;
		4. has not been charged with any criminal offence and, to the best of the Founder's knowledge, there are no such charges pending as at the date of this agreement, which could affect the Founder's ability to act as a manager of the Business; and
		5. is not entitled to receive, and has not received, compensation amounts, bonuses or similar payments in respect of the transactions contemplated by this agreement, or to retention of his or her employment with the Business.
	2. So far as the Founder is aware, the Founder is not, as a result of the nature of the Business conducted or currently proposed to be conducted by the Company, in violation of, and the carrying on of the Company's business as a director, officer, consultant or employee of the Company does not conflict with:
		1. any fiduciary or confidential relationship;
		2. any term of any contract or covenant (either with the Company or with another entity) relating to employment, patents, assignment of inventions, confidentiality, proprietary information disclosure, non-competition or non-solicitation; or
		3. any other contract or agreement, or any judgment, decree or order of any court or administrative agency binding on the Founder and relating to or affecting the right of such Founder to be employed by or serve as a director of the Company.
	3. No such relationship, term, contract, agreement, judgment, decree or order conflicts with the Founder's obligations to use his or her best endeavours to promote the interests of the Company.
2. **No litigation**
	1. As at the date of this agreement, no prosecution, litigation, arbitration proceedings or investigation affecting the Founder:
		1. has occurred;
		2. is current;
		3. to the best of the Founder's knowledge, is pending or threatened; or
		4. to the best of the Founder's knowledge, might reasonably be expected to arise as a result of current circumstances,

which prosecution, litigation, arbitration proceedings or investigation would have a material adverse effect on the Business, assets (including intangible assets), liabilities, financial condition, property, prospects or results of operations of the Company.

1. **Agreements affecting share capital**
	1. Except as contemplated by this agreement or the Shareholders Deed, the Founder is not a party to and has no knowledge of any agreements, written or oral, relating to the acquisition, disposition, or voting of the securities of the Company.

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)[[33]](#footnote-33)*: |  |  |
|  |  |  |
|  |  |  |
|   |  |   |
| 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)[[34]](#footnote-34)*: |  |  |
|  |  |   |
|  |  | Signature of sole director and [sole company secretary] / [the company does not have a company secretary] |
|  |  |  |
|  |  |  |
|  |  |   |
|  |  | Name (please print) |

|  |  |  |
| --- | --- | --- |
| **Signed** by **[Founder Name]**:[[35]](#footnote-35) |  |  |
|  |  |   |
|  |  | Signature |
|  |  |  |

|  |  |  |
| --- | --- | --- |
| **Signed** by **[Founder Name]**: |  |  |
|  |  |   |
|  |  | Signature |

***[INSERT INVESTORS' EXECUTION BLOCK]***



1. This agreement is drafted on the basis that there is more than one Investor. Some changes will be required if there is only a single Investor under this agreement. [↑](#footnote-ref-1)
2. This agreement is drafted on the basis that there is more than one Founder. Again, some changes will be required if there is only a single Founder under this agreement. [↑](#footnote-ref-2)
3. If the parties agree that the Founders will not give any Warranties, the Founders do not need to be a party to the Agreement and all references to Founder Warranties and related provisions can be deleted. [↑](#footnote-ref-3)
4. Investors will typically require a company to warrant the accuracy of both a set of annual financial statements (often referred to as the Accounts) and a more recent set of management accounts (the Management Accounts). [↑](#footnote-ref-4)
5. The Completion Date may be the date of the agreement if the parties want to exchange this subscription agreement and complete the issuance of the shares simultaneously. [↑](#footnote-ref-5)
6. It may be helpful to introduce a concept of a 'lead investor' who can make decisions like this on behalf of the investors. [↑](#footnote-ref-6)
7. Investors will often require disclosure to be limited to matters disclosed in a disclosure letter and/or a data room. Some investors (particularly overseas-based venture funds) will push back on the idea of the data room being disclosed. Market practice in both the US and the UK is not to allow for a broad disclosure 'shield' and instead require relevant matters to be set out in a disclosure schedule or disclosure letter if they are to qualify the Warranties. In Australia, investors are often (but not always) willing to accept that the Warranties also be qualified by reference to documents contained in a data room (subject to the relevant matters being fully and fairly disclosed). Either approach will need to be negotiated between the parties. [↑](#footnote-ref-7)
8. The Founder Warranties are statements relating to the Founders personally and are a common request from Investors looking for confirmation that the Founders are fit and proper persons to operate the business and not subject to any restrictions (eg non-compete restraints) that might adversely affect the Business. If the parties agree that the Founders will not give the Founder Warranties, the Founders do not need to be a party to the Agreement and all references to Founder Warranties and related provisions can be deleted. [↑](#footnote-ref-8)
9. This Subscription Agreement is drafted on the basis that a New Constitution will be adopted on or before Completion and that that New Constitution includes the terms governing the Seed Preference Shares that are to be issued to the Investors at Completion. [↑](#footnote-ref-9)
10. This may be extended to specifically cover the knowledge of other employees 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, Investors generally require this to avoid a situation where the Founders can claim ignorance of a matter of which they should have been aware. A common middle ground is to limit the scope of the enquiries required (eg to enquiries of the Founder's direct reports or to a list of named individuals). [↑](#footnote-ref-10)
11. This agreement is drafted on the basis that all Subscription Shares will be subscribed for at a single Completion. [↑](#footnote-ref-11)
12. 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, or (3) the consummation of another business transaction. If conditions precedent are to be included, the parties should consider including a date by which the conditions precedent must be satisfied such that, if they are not satisfied by that date, a party should be able to terminate the transaction. [↑](#footnote-ref-12)
13. Consider whether any pre-completion covenants are required for the period between signing and completion, particularly if there will be a lengthy period between signing and completion to allow for conditions precedent to be satisfied. These may include provisions that (1) require the business to be run in the ordinary course (2) give Investors consent rights over key decisions of the business (similar to any consent rights that they may have post-completion) and/or (3) ensure that the capital structure of the Company does not change during the period between signing and completion. [↑](#footnote-ref-13)
14. If an Investor has the right to appoint a director to the Company, then it will be necessary to include an obligation on the incoming director nominee of the Investor to deliver a consent to act as director to the Company. [↑](#footnote-ref-14)
15. If an investor will be appointing a Director (see footnote 14), then the investor may require entry by the Company and the Director into a Director's Deed of Access, Indemnity and Insurance. If so, the investor will need to deliver to the Company a Director's Deed of Access, Indemnity and Insurance. This will need to be an obligation of the Investor to procure the signature of the director on that document. [↑](#footnote-ref-15)
16. Consider whether any further completion deliverables are required. For example, (1) employment agreements with key personnel, (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 (eg if required under a pre-existing shareholders agreement and/or constitution). [↑](#footnote-ref-16)
17. If the Investors are satisfied with the existing employment agreements, then this can be deleted. [↑](#footnote-ref-17)
18. If the Investors are satisfied that the relevant IP is already held by a Group Company, then this can be deleted. [↑](#footnote-ref-18)
19. If the Founders are not giving any Warranties, then delete all references to the Founders in this clause 5 (and delete clauses 5.1(b) and 5.4(b) in full). [↑](#footnote-ref-19)
20. It may be appropriate to include provisions allowing for Claims for breach of Warranty to be settled, at the election of the Investor, through a new issue of shares to the Investor. [↑](#footnote-ref-20)
21. Some Investors expect to see a 'gross up' clause in relation to Claims for breach of Warranty which grosses up the amount of the Claim by reference to the Investor's shareholding in the Company. This is to prevent the Investor indirectly bearing part of the burden of making good the claim as a result of the Investor's shareholding in the Company. [↑](#footnote-ref-21)
22. Some Investors may require that the Founders give the general Business Warranties (relating to the Company and its Business) alongside the Company (in addition to the Founder Warranties that relate to the Founders themselves). If this is agreed between the parties, this clause should be amended to read "*The Company and each Founder jointly and severally represents and warrants…*" [↑](#footnote-ref-22)
23. Consider whether 24 months is an appropriate length of time. In particular, a longer claims period may be appropriate for title and tax warranties. [↑](#footnote-ref-23)
24. The Company and Founders may request that there be certain minimum thresholds that have to be reached before the Investor is able to make a claim, to avoid the costs inherent in dealing with small claims. This may apply in respect of each individual claim (e.g. the Company and Founders 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 (e.g. the Company and Founders 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-24)
25. Consider whether to include a dispute resolution clause. [↑](#footnote-ref-25)
26. If the parties wish to have no rights against each other moving forward, they should release each other separately. [↑](#footnote-ref-26)
27. It is quite common for the Company to pay one or more investors' legal fees, particular 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. [↑](#footnote-ref-27)
28. 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-28)
29. 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 prior to Completion. [↑](#footnote-ref-29)
30. 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-30)
31. The Accounts (and Management Accounts) warranties should be carefully tailored to reflect the nature of the financial statements that are being warranted. By way of example, a company may be more willing to give robust warranties regarding the accuracy of its annual financial statements (particular if these have been audited) than the accuracy of any management accounts. [↑](#footnote-ref-31)
32. Delete if not applicable, for example if the Company is relying on the '*small scale offerings*' exemption under s 708(1) of the Corporations Act. [↑](#footnote-ref-32)
33. Use this execution block where the Company has two or more directors; or one director and a company secretary. [↑](#footnote-ref-33)
34. Use this execution block where the Company has only 1 director and either than director is the sole company secretary or the Company has no company secretary. Please choose the appropriate wording underneath the signing line. [↑](#footnote-ref-34)
35. Founder execution blocks should be deleted if Founders are not a party to this agreement. [↑](#footnote-ref-35)