

DEED

between

THE COMMONWEALTH OF AUSTRALIA

and

certain proposed directors of Dairy Australia Limited
for the purposes of the *Dairy Produce Act 1986*

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DEED dated

2003

BETWEEN The **COMMONWEALTH OF AUSTRALIA** acting through the Department of Agriculture, Fisheries and Forestry ABN 24113085695, of Edmund Barton Building, Barton, ACT, 2601 (*Commonwealth*)

AND **PATRICK DESMOND ROWLEY** of Mount Pleasant Road, via Dayboro, Queensland 4521

JOHN CLARENCE MASSEY of 22A Henry Street, Ascot, Queensland 4007

JOHN DOYLE of 13 Earl Street, North Carlton Melbourne Victoria 3054 (each a *Proposed Director*).

RECITALS

- A. The Proposed Directors are proposed directors of Dairy Australia Limited, a company to be registered as a company limited by guarantee, as contemplated by the *Dairy Industry Service Reform Act 2003*.
- B. The Company is intended to be the Industry Services Body for the Australian dairy industry, providing industry, and research and development, services to the Australian dairy industry.
- C. The Dairy Produce Act, as amended by the *Dairy Industry Service Reform Act 2003* (Cth), contemplates that the Industry Services Body will be entitled to receive from the Commonwealth certain levy amounts and Matching Payments.
- D. The Dairy Produce Act, as amended by the *Dairy Industry Service Reform Act 2003* (Cth), also contemplates that the Industry Services Body will hold and administer the Dairy Structural Adjustment Fund as trustee.
- E. The Dairy Produce Act, as amended by the *Dairy Industry Service Reform Act 2003* (Cth), provides, amongst other things, for the Minister, on behalf of the Commonwealth, to enter into a contract with the Proposed Directors that provides for the Commonwealth to make Dairy Service Payments and Matching Payments to Dairy Australia, and for such a contract to bind Dairy Australia, as set out in the Reform Act.
- F. This deed sets out, among other things, the arrangements for the payment of Dairy Service Levy Payments and Matching Payments, and accountability and other requirements for the expenditure of amounts so paid.

1. DEFINITIONS

- 1.1 In this deed, unless the contrary intention appears:

Agri-Political Activity means an activity that is, or supports, directly or indirectly, financially or otherwise, political campaigning or political funding;

APS Employee has the same meaning as in the *Public Service Act 1999* (Cth);

Australian Bank means:

- (a) an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959* (Cth); or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51 (xiii) of the Constitution;

Business Day means a day that is not a Saturday, Sunday or public holiday in Melbourne;

Business Hours means the hours between 9.00 am and 5.00 pm on a Business Day;

Change of Policy means a change in government policy relating to the raising or spending of Dairy Service Levy or to Matching Payments;

Confidential Information means information for which the all following requirements are satisfied:

- (a) the information is given by one party (the **disclosing party**) to the other (the **receiving party**) for or in connection with this deed;
- (b) the information is by its nature confidential;
- (c) before or when the disclosing party gives the information to the receiving party, the disclosing party informs the receiving party that the information is confidential (which may be by marking a document including the information that is given by the disclosing party to the receiving party as mentioned in paragraph (a) of this definition to the effect that the information is confidential);

but does not include information that:

- (d) is or becomes public knowledge other than by breach of this deed or by any other unlawful means; or
- (e) is in the possession of the receiving party without restriction in relation to disclosure before being given by the disclosing party; or
- (f) has been independently developed or acquired by the receiving party;

Commercialise, in relation to Intellectual Property, means manufacture, sell, hire or otherwise exploit a product or process, or provide a service, incorporating the Intellectual Property, or license a third party to do any of those things;

Company means the company proposed to be registered by the name Dairy Australia Limited as provided in the *Dairy Industry Service Reform Act 2003* (Cth) section 9.

Dairy Produce Act means the *Dairy Produce Act 1986* (Cth);

Dairy Service Levy means:

- (a) levy imposed by or under the *Primary Industries (Excise) Levies Act 1999* (Cth) as dairy service levy, Corporation levy, promotion levy or research levy; and
- (b) amounts of penalty (if any) payable under the Levy Collection Act in relation to any of those levies

Dairy Service Levy Account means an account required by clause 5.1 and any account of the Company at the Conversion Time with a financial institution;

Dairy Service Payment means a payment mentioned in clause 3.1;

Dairy Levy Poll means a poll mentioned in the Dairy Produce Act section 9;

Default Event means any of the following:

- (a) there are reasonable grounds to believe the Company is in breach of an obligation under this deed or the Dairy Produce Act;
- (b) there are reasonable grounds to believe that the Company is in breach of its duties as trustee of the DSAF;
- (c) there are reasonable grounds to believe that the Company has failed to comply with its constitution in a material respect;
- (d) the Company ceases to be a company limited by guarantee;
- (e) the Minister is not satisfied that the Company will comply with its obligations under this deed and the Dairy Produce Act;

Department means the Department of Agriculture, Fisheries and Forestry or, if the name of the Department is changed, the department of state of the Commonwealth that deals with the subject matter of this deed;

Director means a person who is for the time being a member of the board of directors of the Company;

DRDC means the Dairy Research and Development Corporation;

DSAF means the Dairy Structural Adjustment Fund referred to in the Dairy Produce Act Schedule 2 Part 3;

DSAF Account means an account required by clause 9.2;

Financial Year means a period of 12 months starting on 1 July;

Fraud Control Plan means a plan specifying policies and procedures to minimise the risk of fraud in relation to the Company;

GST means:

- (a) the same as in the GST Law; and
- (b) any other goods and services tax, or any Tax applying in a similar way;

but does not include an additional tax, penalty tax, fine, interest or other charge under a law for GST as so defined;

GST Law means the same as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Guidelines means each of the following:

- (a) the government's broad priorities for R&D as communicated to the Company from time to time by letter from the Minister;
- (b) the Commonwealth's levy principles and guidelines, as communicated to the Company from time to time by letter from the Minister, and including any amended version of those Guidelines notified to the Company by the Minister;
- (c) Australia's obligations under any international agreement or arrangement, so far as these are relevant to the expenditure of amounts in the Dairy Service Levy Account, as notified to the Company by the Minister;
- (d) any other guidelines relating to amounts in the Dairy Service Levy Account agreed between the parties;

Industry means industry in Australia that is concerned with the production, processing, manufacture, distribution and sale (whether for export or otherwise) of dairy produce;

Industry Services Body has the same meaning as in the Dairy Produce Act;

Industry Services Activity means an activity (other than an R&D Activity) that is undertaken:

- (a) to promote the development of Australian dairy resources; or
- (b) to contribute to the promotion and development of the Australian dairy industry and Australian dairy produce by:
 - (i) carrying out research, development and extension activities for the benefit of the Australian dairy industry and the Australian community generally; or
 - (ii) carrying out activities to develop the Australian national market for, and international trade in, Australian dairy produce; or
 - (iii) providing information and other services; or
 - (iv) carrying out other activities for the benefit of the Australian dairy industry;

Insolvency Event means any of the following:

- (a) that the Company has disposed of or terminated the whole or a significant part of its assets, operations or business other than in the ordinary course of business, to meet a change in the strategic direction or activities previously communicated to its members or otherwise agreed by the Minister;

- (b) that the Company has ceased to carry on business;
- (c) that the Company has ceased to be able to pay its debts as they become due;
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or part of the Company's assets, operations or business;
- (e) any step is taken to enter into any arrangement between the Company and its creditors;
- (f) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, a liquidator, an administrator or other like person of the whole or part of the Company's assets, operations or business;

Intellectual Property means all copyright and neighbouring rights, and all rights in relation to inventions (including patents), plant varieties, registered and unregistered trade marks, registered designs, confidential information (including trade secrets and know how) and circuit layout rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields;

Intellectual Property Management Plan means a plan specifying policies and procedures for management, adoption, Commercialisation and protection of Intellectual Property in which the Company has an interest;

Matching Payments means payments referred to in clause 3.2;

Minister means the Commonwealth Minister of State for the time being administering the Dairy Produce Act, or another Commonwealth Minister of State acting for or on behalf of that Minister and includes any delegate of the Minister;

Nominated Body means:

- (a) a body (other than the Company) that the Minister has declared or proposes to declare to be the Industry Services Body; or
- (b) a body (other than the Company) that has the objective of furthering the Industry's interests in promoting dairy produce and in R&D;

Performance Review means a review of the Company's performance against its strategic, operational, Risk Management, Fraud Control and Intellectual Property Management plans that takes into account at least the following:

- (a) the performance of the Company in meeting its obligations under this deed, its constitution and the Dairy Produce Act;
- (b) the Company's development and implementation of its strategic, operating, Risk Management, Fraud Control and Intellectual Property Management plans, and the Company's effectiveness in meeting the priorities, targets and budgets set out in those plans;
- (c) the efficiency with which the Company carried out those plans;

- (d) the delivery of benefits to the Industry foreshadowed by the Company’s strategic and operating plans;

Performance Review Report means a report referred to in clause 13.4(b);

Qualifying R&D Expenditure means actual expenditure of the Company made in accordance with the requirements of Schedule 3;

R&D means systematic experimentation and analysis in any field of science, technology, economics or business carried out with the object of:

- (a) acquiring knowledge that may be of use in achieving or furthering an objective of the Industry, including knowledge that may be used for the purpose of improving any aspect of the production, processing, storage, transport or promotion of dairy produce; or
- (b) applying such knowledge for the purpose of achieving or furthering such an objective;

R&D Activity means an activity that:

- (a) is carried out by the Company or with its support for the purposes of R&D; and
- (b) relates to the Industry and is for the benefit of the Industry and/or the Australian community generally;

but only if the expenditure of the Company in relation to the activity is Qualifying R&D Expenditure or the Minister approves in writing the Company's carrying out or participating in the activity.

- Note* *Examples of the kinds of activities that could be R&D Activities under this definition include:*
- *training people to carry out R&D Activities;*
 - *disseminating , adopting and Commercialising the results of R&D or of practices or technological developments that have been designed or adapted to improve the operation or efficiency of the Industry;*
 - *disseminating information related to any aspect of Industry R&D, whether electronically, by print or by any other means;*
 - *improving accountability for expenditure upon R&D Activities in relation to the Industry;*
 - *developing an awareness in the Industry of the contribution that R&D can make to improving its efficiency and competitiveness;*
 - *engaging directors, employees, consultants and agents of the Company and in meeting administration, operating or capital expenses (including, but not limited to, lease costs and legal and other professional expenses) reasonably necessary or appropriate to be incurred by the Company to support its activities in relation to other R&D Activities;*
 - *an activity incidental to an R&D Activity.*

Risk Management Plan means the plan specifying the measures to manage the Company's material, commercial, legal and administrative risks;

Termination Event means any of the following:

- (a) a Default Event;
- (b) an Insolvency Event;
- (c) a Change of Policy;

Transferred Assets and **Transferred Liabilities** means assets of the DRDC transferred to the Company under the *Dairy Industry Service Reform Act 2003* (Cth) and liabilities of the DRDC transferred to the Company under that Act, but does not include assets in the form of money or an immediate right to receive money;

Transferred Funds means each of the following:

- (a) an asset in the form of money or an immediate right to receive money transferred to the Company under the *Dairy Industry Service Reform Act 2003* (Cth);
- (b) money received by the Company from the use or disposal of Transferred Assets and Liabilities.

1.2 In this deed, unless the contrary intention appears, words or phrases that have a defined meaning in the Dairy Produce Act have the same meaning.

2. OPERATION OF THIS DEED

2.1 Subject to this deed, this deed expires 6 months after the day declared by the Minister, by notice in the *Commonwealth of Australia Gazette*, to be the levy termination day for the purposes of the Dairy Produce Act Schedule 2 clause 94.

Note This is the day that the dairy adjustment levy ceases.

2.2 The Commonwealth and the Company must, within 6 months before this deed expires under clause 2.1, negotiate in good faith the renewal of this deed (whether or not with the same provisions), and in doing so must take into account (among other things) the most recent Performance Review Report.

2.3 The Proposed Directors and the Company acknowledge that the Minister and the Commonwealth:

- (a) are under no obligation arising from this deed, the Dairy Produce Act or the *Dairy Industry Service Reform Act 2003* (Cth) to declare the Company to be the Industry Services Body; and
- (b) apart from clause 2.6, are under no obligation arising from this deed or the Dairy Produce Act to refrain from revoking any declaration of the Company as the Industry Services Body.

- 2.4 Without limiting any other provision of this deed, the Company agrees that this deed (including any amendments to it) does not constitute Confidential Information.
- 2.5 If the Company is declared to be the Industry Services Body, it acknowledges and consents to its trusteeship of the DSAF under the Dairy Produce Act Schedule 2 Part 3.
- 2.6 The Commonwealth undertakes that:
- (a) the Minister will not revoke the declaration of the Company as the Industry Services Body unless arrangements satisfactory to the Minister have been made for the discharge or satisfaction of the Company’s obligations in relation to the DSAF, whether to the Commonwealth or a third party (including obligations in respect of financial arrangements for the DSAF); or
 - (b) the Commonwealth will, within a reasonable period after the revocation takes effect, ensure that arrangements satisfactory to the Minister have been made for the discharge or satisfaction of the Company’s obligations in relation to the DSAF, whether to the Commonwealth or a third party (including obligations in respect of financial arrangements for the DSAF).

This clause 2.6 survives the termination of this agreement.

- 2.7 The Company acknowledges that, except as mentioned in clause 2.6, the Commonwealth may revoke the declaration of the Company as the Industry Services Body at any time and taking into account any considerations that the Commonwealth properly considers relevant.

3. PAYMENT OF DAIRY SERVICE PAYMENTS AND MATCHING PAYMENTS

- 3.1 Subject to this deed, the Company is entitled to be paid, as Dairy Service Payments, an amount equal to the total amount received by the Commonwealth as Dairy Service Levy. The payments are to be made as provided in Schedule 2.
- 3.2 Subject to this deed, for each Financial Year the Company is entitled to be paid, as Matching Payments, an amount equal to the amount appropriated by the Dairy Produce Act for Matching Payments for the Financial Year. The payments are to be made as provided in Schedule 2.

Note *The amount appropriated is the lesser of:*

- *0.5% of the amount determined by the Minister in accordance with the Dairy Produce Regulations 1986 (Cth) to be the gross value of whole milk produced in Australia in the relevant Financial Year; and*
- *50% of the amount that, for the relevant Financial Year, is spent by the Company on activities that qualify under this deed as research and development activities (see clause 3.3)*

Under the Dairy Produce Act sections 6 (6) and (7), any unmatched Research and Development excess for a Financial Year can be “carried over” into the next Financial Year.

- 3.3 For the purposes of the Dairy Produce Act section 6, activities qualify as research and development activities if a director or secretary of the Company certifies to the Commonwealth that:
- (a) the activities have been carried out; and
 - (b) they are R&D Activities; and
 - (c) the Company complied with the requirements of Schedule 3 in relation to expenditure for the activities.
- 3.4 Notwithstanding any other provision of this deed:
- (a) the Commonwealth may either invoice the Company for, or deduct from Dairy Service Payments to be paid to the Company, amounts equal to:
 - (i) the costs incurred by the Commonwealth in relation to collecting, recovering, administering provisions relating to or making refunds of Dairy Service Levy;
 - (ii) the costs incurred by the Commonwealth in relation to the administration of this deed (except so far as it relates to the DSAF or the conduct of a performance review under clause 13.7);
 - (iii) amounts due and payable by the Company to the Commonwealth under this deed or on any other account (except amounts due and payable in respect of the DSAF);
 - (iv) the costs incurred by the Commonwealth in relation to the implementation of the *Dairy Industry Service Reform Act 2003* (Cth);
 - (v) amounts payable by the Commonwealth by way of refund of levy; and
 - (b) the Company must pay any amount so invoiced to the Commonwealth within 30 days after receipt of the invoice.
- Note The Australian National Audit Office conducts regular audits of the Department's use of its resources. There is an obligation under the Financial Management and Accountability Act 1998 (Cth), Finance Minister's Orders, Special Instructions and other laws to use those resources properly and efficiently.*
- 3.5 The Commonwealth must give the Company, at least 2 months before the start of each Financial Year, an indicative estimate of the amount of the costs and amounts referred to in clause 3.4 for the Financial Year.
- 3.6 If the Commonwealth deducts amounts from Dairy Service Payments under clause 3.4:
- (a) the Commonwealth must give the Company a statement of the amount deducted and the reason for the deduction; and

- (b) the deduction (except a deduction for refund of levy—see clause 3.4(a)(v)) must be consistent with an agreement between the Company and the Commonwealth in respect of deductions.

3.7 If:

- (a) the amount of a particular expenditure (a **relevant amount**) was used to work out the amount of Matching Payments on the basis that it was expenditure on activities that were R&D Activities and the requirements of Schedule 3 were complied with in relation to expenditure but the Minister determines that the activities were not R&D Activities or the requirements of Schedule 3 were not complied with in relation to expenditure; or
- (b) the Minister determines that the Company has expended an amount (also a **relevant amount**) from the Dairy Service Levy Account otherwise than in accordance with this deed or the Dairy Produce Act;

the Commonwealth may adjust Dairy Service Payments and Matching Payments to recoup the relevant amount. The Commonwealth must, after such consultation with the Industry as the Minister considers appropriate, pay the relevant amount to another body that is declared under the Dairy Produce Act to be the Industry Services Body or otherwise apply it for purposes that, in the opinion of the Minister, are for the benefit of the Industry. This clause 3.7 does not limit the operation of clause 17.

3.8 The Minister must not make a determination under clause 3.7 unless the Minister has given the Company:

- (a) notice of his or her intention to make the determination, and the reasons why; and
- (b) a reasonable period within which to make submissions to the Minister about the matter.

The Commonwealth must make any adjustments of Dairy Service Payments or Matching Payments under clause 3.7 over a reasonable period, so as not to prejudice unduly the operations of the Company.

3.9 The Commonwealth undertakes that, if a recommendation is made under the Dairy Produce Act section 9 after a Dairy Levy Poll, the Minister will not recommend that the *Primary Industries (Excise) Levies Regulations 1999* (Cth) be amended so as to reduce the total rate of Dairy Service Levy unless the Minister has:

- (a) given the Company a reasonable period within which to make submissions to the Minister about the matter (including submissions in relation to transitional matters and the timing of any reduction in the rate of Dairy Service Levy); and
- (b) taken into account any such submissions.

3.10 If the payment to the Company of Dairy Service Payments or Matching Payments represent consideration for a taxable supply by the Company to the Commonwealth:

- (a) the Company must give the Commonwealth a tax invoice in accordance with the GST Law in relation to the supply; and

- (b) the Commonwealth must then pay to the Company an amount equal to the consideration payable (excluding the application of this clause 3.10) multiplied by the rate of GST.

In this clause 3.10, words and expressions mean what they mean in the GST Law.

4. APPLICATION OF AMOUNTS IN THE DAIRY SERVICE LEVY ACCOUNT

4.1 The Company must spend amounts in the Dairy Service Levy Account only as required or permitted by this deed and only as permitted by clause 4.2. The expenditure must be consistent with the Company's strategic plan and the Company's operating plan.

4.2 Amounts in the Dairy Service Levy Account may be spent as follows:

- (a) on or in relation to Industry Service Activities or R&D Activities;
- (b) on investigating and evaluating the need for Industry Service Activities or R&D Activities;
- (c) on the basis of investigations and evaluations under clause 4.2(b)—preparing, reviewing and revising plans for Industry Service Activities or R&D Activities;
- (d) on carrying out, and co-ordinating and funding the carrying out of, Industry Service Activities or R&D Activities;
- (e) on monitoring, evaluating and reporting to the Commonwealth and the Industry on Industry Service Activities or R&D Activities undertaken by the Company.
- (f) on maintaining a membership register and holding general meetings of the Company;
- (g) on conducting Dairy Levy Polls;
- (h) on complying with obligations imposed on it under this deed or the Act;
- (i) in making a payment the Company is authorised or required to make by law in accordance with this deed;
- (j) in paying remuneration and allowances to directors, employees, consultants and agents of the Company and in meeting administrative, operating and capital expenses (including but not limited to lease costs and legal and other professional expenses) reasonably necessary or appropriate to be incurred by the Company to support Industry Service Activities or R&D Activities;
- (k) in the repayment of money borrowed by the Company and the payment of interest and other financing costs incurred by the Company for purposes related to Industry Service Activities or R&D Activities;
- (l) in the repayment of money borrowed by the Company or in the satisfaction of a liability of the Company or of a subsidiary of the Company;
- (m) managing risks related to the Company's operations, funding and expenditure;

- (n) any activity incidental but important to an activity referred to in another provision of this clause 4.2;
- (o) in making any other payment with the prior written agreement of the Minister.

Note See clause 9.11.

- 4.3 In determining whether and how much to spend from the Dairy Service Levy Account on R&D Activities, the Company must ensure that it meets the requirements in Schedule 3.
- 4.4 Amounts in the Dairy Service Levy Account not immediately required for expenditure as mentioned in clause 4.2 may be invested:
- (a) on deposit with an Australian Bank; or
 - (b) in securities of the Commonwealth or of a State or Territory; or
 - (c) in securities guaranteed by the Commonwealth, a State or a Territory; or
 - (d) in any other manner that is consistent with sound commercial practice.
- 4.5 The Company may apply Transferred Funds or Transferred Assets and Liabilities in the same manner as amounts in the Dairy Service Levy Account may be used or applied.
- 4.6 The Company must not spend any of the amounts in the Dairy Service Levy Account on Agri-Political Activity by the Company or by any other person. This does not preclude payments on an arm's-length value for money basis to acquire goods or services or fund R&D Activities or Industry Service Activities.
- 4.7 If:
- (a) the Company proposes to spend any of the amounts in the Dairy Service Levy Account on, or to undertake, an activity (whether by the Company or by another person); and
 - (b) any Director of the Company is of the opinion that the activity constitutes Agri-Political Activity;

the Company must ensure that the Chairperson of the Company consults with the Minister, or his or her nominated representative, and that the Directors of the Company consider the outcome of the consultation, before the Company spends the amount or undertakes the activity.

- 4.8 Subject this deed, the Company must not spend amounts in the Dairy Service Levy Account in discharging obligations of the Company arising under the *Dairy Structural Adjustment Scheme 2000* (Cth) or the *Supplementary Dairy Assistance Scheme 2001* (Cth).

5. DAIRY SERVICE LEVY ACCOUNT

- 5.1 The Company must deposit and hold in 1 or more Australian Bank accounts controlled solely by the Company (each a *Dairy Service Levy Account*) all the following:

- (a) Dairy Service Payments;
- (b) Matching Payments;
- (c) amounts received from DRDC in consequence of the *Dairy Industry Service Reform Act 2003* (Cth);
- (d) all receipts derived from the Commercialisation of R&D Activities, to the extent that they are attributable to the investment or application of amounts in a Dairy Service Levy Account;
- (e) all proceeds from the sale, Commercialisation or other exploitation of Transferred Assets, to the extent that they are attributable to the investment or application of Transferred Assets;
- (f) all refunds or repayments of amounts paid out of the Dairy Service Levy Account;
- (g) interest earned on amounts in the relevant Account.

5.2 No amounts other than those mentioned in clause 5.1 must be paid into or held in a Dairy Service Levy Account.

5.3 The Company must:

- (a) give written notice to the Australian Bank specifying the purposes for which amounts may be withdrawn from the Dairy Service Levy Account under this deed; and
- (b) give the Commonwealth a copy of each such notice as soon as practicable.

Note This provision is to ensure that the Bank is put on notice of the purposes for which amounts in the Dairy Service Levy Account can be spent, thereby limiting the Bank's rights to apply the Account to satisfy the Company's liabilities to it in the event of the Company's insolvency.

5.4 The Company must:

- (a) notify the Commonwealth of the identifying details of the account referred to in clause 5.1; and
- (b) establish and maintain accounting systems, procedures and controls and do all things necessary to ensure that an auditor is able to readily verify that amounts in the Dairy Service Levy Account have been used only in accordance with this deed and the Dairy Produce Act and that all dealings with those amounts are properly authorised, conducted and accounted for; and
- (c) notify the Commonwealth on request of the details of the systems, procedures and controls established in accordance with clause 5.4(b); and

- (d) keep complete and detailed accounts and records of receipt, use and expenditure of amounts in the Dairy Service Levy Account in accordance with good accounting practice including all applicable Australian accounting standards; and
- (e) keep accounts and records in relation to the Dairy Service Levy Account identifiably separate from other accounts and records of the Company.

6. MANAGEMENT OF TRANSFERRED ASSETS AND LIABILITIES

The Company must establish such accounting systems, procedures and controls as are necessary to ensure:

- (a) the Transferred Assets and Liabilities are used only in accordance with this deed and the Dairy Produce Act; and
- (b) all dealings with the Transferred Assets and Liabilities are properly authorised, conducted and accounted for; and
- (c) an auditor is able to readily verify that the Transferred Assets and Liabilities have been used only in accordance with this deed and the Dairy Produce Act.

7. USE OF TRANSFERRED ASSETS AND LIABILITIES

7.1 The Company must use the Transferred Assets and Liabilities only:

- (a) as specified in clause 4.5; and
- (b) in a manner that is consistent with the Company's strategic plan and the Company's operating plan.

7.2 The Company must not use the Transferred Assets and Liabilities for Agri-Political Activity by the Company or by any other person. This does not preclude payments on an arm's-length value for money basis to acquire goods or services or fund R&D Activities or Industry Service Activities for the promotion of dairy produce.

7.3 If:

- (a) the Company proposes to use the Transferred Assets and Liabilities for an activity (whether by the Company or by another person); and
- (b) any Director of the Company is of the opinion that the activity constitutes Agri-Political Activity;

the Company must ensure that the Chairperson of the Company consults with the Minister, or his or her nominated representative, and that the outcome of the consultation is considered by the Directors of the Company, before the Company uses the Transferred Assets and Liabilities for, or in connection with, the activity.

7.4 The Company must not destroy or otherwise dispose of records that are Commonwealth records for the purposes of the *Archives Act 1983* (Cth) and are Transferred Assets without the prior written approval of the Commonwealth under this deed.

- 7.5 If the Minister determines that the Company has used Transferred Assets otherwise than in accordance with this deed or the Dairy Produce Act:
- (a) the Commonwealth may, by notice to the Company, direct the Company, by a time specified in the notice, to transfer the relevant Transferred Assets to the Commonwealth or a Nominated Body specified in the notice; and
 - (b) if the direction requires the Company to transfer Transferred Assets to the Commonwealth—the Commonwealth must, after such consultation with the Industry as the Minister considers appropriate, transfer the Transferred Assets to another body that is declared under the Dairy Produce Act to be the Industry Services Body or otherwise apply them for purposes that, in the opinion of the Minister, are for the benefit of the Industry.

This clause 7.5 does not limit the operation of clause 17.

- 7.6 The Minister must not make a determination under clause 7.5 unless the Minister has given the Company:
- (a) notice of his or her intention to make the determination, and the reasons why; and
 - (b) a reasonable period within which to make submissions to the Minister about the matter.

A direction under clause 7.5 must require compliance over a reasonable period, so as not to prejudice unduly the operations of the Company.

8. EXPENDITURE OF AMOUNTS IN THE DAIRY SERVICE LEVY ACCOUNT

The Company must not withdraw amounts from the Dairy Service Levy Account except:

- (a) for expenditure in accordance with clause 4; or
- (b) for payment to the Commonwealth as required by this deed (except payments that relate to the DSAF); or
- (c) amounts paid in error.

9. DAIRY STRUCTURAL ADJUSTMENT FUND

- 9.1 The Commonwealth must make Dairy Adjustment Levy Payments to the Company as provided in Schedule 2.

Note The Dairy Produce Act Schedule 2 clause 78 requires Dairy Adjustment Levy Payments to be paid into the DSAF.

- 9.2 The Company must maintain in its name 1 or more accounts (each a **DSAF Account**) with an Australian Bank or Australian Banks. Unless the Commonwealth otherwise agrees in a particular case, a DSAF Account must be with a different Australian Bank to the bank that any other of the Company's accounts (other than another DSAF Account) is with.

9.3 The Company must:

- (a) give written notice to each Australian Bank holding a DSAF Account that the amounts credited to the DSAF Accounts are to be spent only as specified in the Dairy Produce Act Schedule 2 Part 3; and
- (b) give the Commonwealth a copy of each such notice as soon as practicable.

Note This provision is to ensure that the Bank is put on notice of the purposes for which amounts in the DSAF Account can be spent, thereby limiting the Bank's rights to apply the Account to satisfy the Company's liabilities to it in the event of the Company's insolvency.

9.4 The Company must notify the Commonwealth of the details of each DSAF Account, including the authorised signatories to the Account, no later than the conversion time. If those details are changed, the Company must immediately notify the Commonwealth of the change.

9.5 The Company must pay into a DSAF Account all the amounts that the Dairy Produce Act requires to be credited to the DSAF. The amounts must be paid in as soon as the Company receives them.

Note The Dairy Produce Act Schedule 2 clause 78 sets out what must be credited to the DSAF.

9.6 No amounts other than those mentioned in clause 9.5 must be paid into or held in a DSAF Account.

9.7 The Company must not withdraw amounts from a DSAF Account except:

- (a) for expenditure authorised by the Dairy Produce Act Schedule 2 clause 79; or
- (b) for investment as authorised by the Dairy Produce Act Schedule 2 clause 79B;
- (c) amounts paid in in error.

Note The Dairy Produce Act Schedule 2 clause 79B allows surplus DSAF funds to be invested in any investment a trustee may lawfully invest trust funds in.

9.8 Subject to the provisions of the Dairy Produce Act, the Company agrees to pay the Commonwealth, on demand, out of the DSAF, the following:

- (a) the expenses of the Commonwealth incurred in relation to the development and implementation of the measures that from time to time form part of the Dairy Industry Adjustment Package;
- (b) the expenses of the Commonwealth incurred in relation to:
 - (i) the collection and recovery of amounts referred to in the Dairy Produce Act Schedule 2 clause 83 (which deals with dairy adjustment levy); or

- (ii) the administration of the Dairy Produce Act Schedule 2 clause 83;
- (c) the amount of remuneration and allowances of ordinary Dairy Adjustment Authority members;
- (d) the expenses incurred by the Commonwealth in relation to the engagement of persons under the Dairy Produce Act Schedule 2 clause 71 (which deals with consultants to the DAA);
- (e) any other expenses incurred by the Commonwealth in relation to:
 - (i) the administration of the Dairy Produce Act Schedule 2, the DSAP scheme or the SDA scheme; or
 - (ii) the performance of the functions, or the exercise of the powers, of the DAA;
- (f) the expenses incurred by the Commonwealth in relation to:
 - (i) the administration of the DEP scheme; or
 - (ii) the administration of the provisions of the *Farm Household Support Act 1992* (Cth) in so far as those provisions relate to the DEP scheme;
- (g) the expenses incurred by the Commonwealth in relation to the administration of dairy-type grants;
- (h) amounts that are refunded under the Dairy Produce Act Schedule 2 clause 124 (which deals with dairy adjustment levy);
- (i) amounts that are refunded under regulations made for the purposes of the Dairy Produce Act Schedule 2 clause 125 (which deals with dairy adjustment levy);
- (j) the expenses of the Commonwealth incurred in relation to the administration of the Dairy Regional Assistance Programme;
- (k) If the Minister has made a declaration under the Dairy Produce Act section 94 (1) and subject to the Dairy Produce Act and the Company's obligations as trustee of the DSAF—the net amount as at that date standing to the credit of the DSAF Account on the date of the declaration having regard to the amounts that are to be paid, but have not at that date been paid, out of the DSAF.

Note Under the Dairy Produce Act Schedule 2 clause 79, these amounts are payable out of the DSAF.

- 9.9 In administering the DSAF as required by the Dairy Produce Act, the Company must strive to manage in a prudent fashion risks associated with the DSAF, including risks (such as interest rate risks) associated with borrowings of money for the purpose of making payments for which money of the DSAF may be expended
- 9.10 The Commonwealth acknowledges that the Dairy Produce Act Schedule 2 clause 79 (l) and (n) authorises and requires money standing to the credit of DSAF to be expended on contracts to manage risks referred to in clause 9.9.

9.11 If the Minister determines that the Company has expended an amount (a *relevant amount*) from a DSAF Account otherwise than in accordance with this deed or the Dairy Produce Act, the Company must, if the Minister so requires, pay the relevant amount from a Dairy Service Levy Account into a DSAF Account. This clause 9.11 does not limit the operation of clause 17.

9.12 The Minister must not make a determination under clause 9.11 unless:

- (a) the Minister has given notice to the Company of his or her intention to make the determination, and the reasons why; and
- (b) given the Company a reasonable period within which to make submissions to the Minister about the matter.

9.13 If the Minister revokes the declaration of the Company as Industry Services Body, the Company must do whatever is necessary to vest the DSAF Accounts, and all amounts held by the Company that are to be credited to the DSAF, in the body declared by the Minister to be the Industry Services Body.

9.14 The Company must do the following in relation to the DSAF and the DSAF Accounts:

- (a) ensure that all the following are properly authorised, conducted and accounted for to the satisfaction of the Commonwealth:
 - (i) all its dealings with Dairy Adjustment Levy Payments; and
 - (ii) all its dealings with amounts that are or are to be credited to a DSAF Account; and
 - (iii) all expenditures of amounts from the DSAF Accounts;

which requirement includes, without limitation, the obligation to do the following:

- (iv) maintain accounting systems, procedures and controls to the satisfaction of the Commonwealth and in accordance with generally accepted accounting standards and practices;
- (v) notify the Commonwealth on request of the details of those systems, procedures and controls, and any material change to them; and
- (b) keep complete and detailed accounts and records, to the satisfaction of the Commonwealth and in accordance with generally accepted accounting standards and practice including all applicable Australian accounting standards, of:
 - (i) all its dealings with amounts that are or are to be credited to the DSAF; and
 - (ii) the receipt, use and application Dairy Adjustment Levy Payments; and
 - (iii) expenditures of amounts from the DSAF Accounts;

and keep those accounts and records separate from other accounts and records of the Company.

The accounts and records are to be kept at a place in Australia, and may be kept in electronic form.

9.15 The Company must:

- (a) within 4 months after the end of a Financial Year—give the Minister a report (*annual report*) containing all the following:
 - (i) financial statements for the DSAF, and notes to the financial statements, for the Financial Year;
 - (ii) an auditor’s report on the financial statements and notes;
 - (iii) a directors’ declaration about the financial statement and notes;
 - (iv) relevant commentary on the operations, developments, issues and financial position of the DSAF in the Financial Year;
 - (v) the estimated completion time for the Dairy Adjustment Levy;
- (b) within 45 days after the end of each March, June, September and December—give the Minister a report (*quarterly report*) containing:
 - (i) financial statements for the DSAF for the Financial Year up to the end of the quarter;
 - (ii) relevant commentary on the operations, developments, issues and financial position of the DSAF in the Financial Year up to the end of the relevant quarter;
 - (iii) the estimated completion time for the Dairy Adjustment Levy;
- (c) no later than 30 days before the start of a Financial Year—give the Minister an annual budget showing the following:
 - (i) the projected expenditure, income and borrowings of the DSAF for the Financial Year;
 - (ii) the forecast financial position of the DSAF at the end of the Financial Year;
 - (iii) the estimated completion time for the Dairy Adjustment Levy as at the start of the Financial Year;
 - (iv) a cash flow model supporting the estimate in clause 9.15(c)(iii).

9.16 Financial statements, notes, auditor’s reports and directors’ declarations referred to in clause 9.15 must be prepared in the same way as financial statements, notes, auditor’s reports and directors’ declarations must be prepared for the Company under the *Corporations Act 2001* (Cth) Part 2M.

9.17 The Company must comply with any directions given to it by the Commonwealth in relation to this clause 9.

- 9.18 If the payment to the Company of Dairy Adjustment Levy Payments represent consideration for a taxable supply by the Company to the Commonwealth:
- (a) the Company must give the Commonwealth a tax invoice in accordance with the GST Law in relation to the supply; and
 - (b) the Commonwealth must then pay to the Company an amount equal, but for the application of this clause 9.18, to the consideration payable multiplied by the rate of GST.

In this clause 9.18, words and expressions mean what they mean in the GST Law.

- 9.19 The Company's obligations under this clause 9 survive the termination of this deed.

10. STRATEGIC AND OPERATIONAL PLANS

- 10.1 The Company must:

- (a) within 6 months after the Conversion Time, develop and adopt a written strategic plan; and
- (b) incorporate in the Plan the strategic vision and objectives for the Company, the strategies the Company intends to adopt to achieve its objectives and the key performance indicators; and
- (c) review and update that strategic plan at least once every year.

- 10.2 Examples of other matters that a Strategic Plan may cover include the following:

- (a) the objectives and priorities of the Company for the period the plan covers;
- (b) an assessment of the Company's operating environment including its strengths, weaknesses, threats and opportunities, and including current and future trends and implications;
- (c) the views of the Company's key stakeholders and clients, so far as the Company is aware of them, on matters relevant to the Company's objectives and priorities for the period the plan covers;
- (d) a corporate governance statement outlining the directors' responsibilities;
- (e) proposed corporate outcomes and outputs, aligned with the Company's strategies, including those sought in relation to broad industry and community benefit;
- (f) the Government's R&D funding policy, direction and priorities; and
- (g) broad resource allocation for the life of the plan, including differentiation of proposed R&D and Industry Service Activities;
- (h) any other matters the Directors consider should be set out in the plan.

- 10.3 In developing the strategic plan, the Company must:
- (a) use reasonable efforts to consult the Industry; and
 - (b) take into account the Commonwealth Government’s broad R&D priorities; and
 - (c) adopt best business practice including any relevant Australian Standards.
- 10.4 The Company must, before 1 July each year, develop and adopt a written operating plan setting out:
- (a) the intended operations of the Company for the next Financial Year;
 - (b) the R&D Activities and Industry Service Activities programs of the Company;
 - (c) a statement of how those programs align with, and to what extent they will give effect to, the objectives described in the Company’s strategic plan and the Commonwealth Government’s broad R&D priorities;
 - (d) relevant performance indicators and timetables;
 - (e) estimates of income and expenditure, which are to include:
 - (i) the amounts to be received by the Company as Dairy Service Payments and Matching Payments and any other form of income; and
 - (ii) expenditure by the Company in respect of each broad grouping of activities within the areas of R&D Activities and Industry Service Activities that the Company proposes to undertake during the Financial Year; and
 - (iii) the amount of the Company’s expenditure on activities that will qualify as R&D activities for the purposes of clause 3.3 and the Dairy Produce Act section 6; and
 - (iv) 3 year forward estimates; and
 - (f) any other matters the Directors consider should be set out in the plan.
- 10.5 The Company must, before 1 July each year, give the Minister a copy of the operating plan adopted under clause 10.4.
- 10.6 A plan may be both a strategic plan for the purposes of this clause 10.1 and an operational plan for the purposes of clause 10.4.
- 10.7 In preparing plans under this clause 10, the Company must take into account its reporting obligations under clause 12.
- 10.8 In addition to clause 10.5, the Company must give a copy of each plan developed in accordance with this clause 10 and clause 11, and all material variations or updates of such plans, to the Minister within 7 days after the plan or variation is adopted by the Company.
- 10.9 The Minister must treat any strategic or operational plan submitted by the Company as commercial in confidence.

11. OTHER PLANS

Within 12 months after the Conversion Time the Company must develop and implement the following plans:

- (a) a Risk Management Plan;
- (b) a Fraud Control Plan;
- (c) an Intellectual Property Management Plan.

12. REPORTS AND MEETINGS

12.1 The Company must comply with Schedule 4.

12.2 For each 12 month period ending on 30 June, the Company must give the Minister:

- (a) a statement of the Company's financial performance; and
- (b) a statement of the Company's financial position; and
- (c) an auditor's report on the financial statements and notes; and
- (d) a directors' declaration about the financial statement and notes;

as required by the *Corporations Act 2001* (Cth) Part 2M. The statements must be given before the Company's reports for the relevant period are lodged under the *Corporations Act 2001* (Cth) Part 2M.3 Division 1.

Note The *Corporations Act 2001* (Cth) Part 2M.3 Division 1 require annual financial reports and directors reports to be prepared and lodged with the Australian Securities and Investments Commission.

12.3 The financial information referred to in clause 12.2 must be certified as being complete and accurate by the Chairperson, or Managing Director, or equivalent officer of the Company.

12.4 For each 3 month period ending 31 March, 30 September or 31 December, the Company must give the Minister, within 45 days after the end of the period:

- (a) a statement of the Company's financial performance; and
- (b) a statement of the Company's financial position.

The statements need not be audited.

12.5 The Company must report to the Minister within 30 days after it comes to the Company's notice any matters that have come to its notice that will or may materially impact on the Company's ability to achieve the objectives stated in its operating plan or comply with its obligations under this deed or Dairy Produce Act the during the relevant financial year.

12.6 The Company must give the Minister, within such reasonable period as the Minister specifies, any other report that the Minister requires.

- 12.7 The Chairperson of the Company, or in his or her absence, the Managing Director of the Company, must meet the Minister or his or her authorised representative at not less than six-monthly intervals from the Conversion Time, or at any other time requested by the Minister on reasonable notice, to brief the Minister or representative on Company performance in performing the functions of the Industry Services Body and in delivery of the Government’s broad priorities for Industry R&D and such other matters as the Minister or his or her representative may reasonably require.
- 12.8 Without limitation to any other provision of this deed, the Company acknowledges that its annual reports referred to in clause 12.1, provided to the Minister, will be laid before or otherwise given to Commonwealth Parliament (including, without limitation, any committee, officer or member of Parliament).
- 12.9 Without limitation to any other provision of this deed, the Company agrees that the financial information referred to in 12.2 provided to the Minister, may be laid before or otherwise given to Commonwealth Parliament (including, without limitation, any committee, officer or member of Parliament).
- 12.10 The Company must do whatever is necessary to ensure that, if a Director considers that some act or proposed act of the Company constitutes or would constitute a contravention of the Company’s constitution, the Dairy Produce Act or this deed, the Director is authorised to disclose the matter to the Commonwealth.

13. REVIEW OF PERFORMANCE

- 13.1 The Company must provide all reasonable assistance requested by the Commonwealth in respect of any evaluation or inquiry into or concerning the Company’s performance of, or otherwise in relation to the Company’s obligations under this deed or the Dairy Produce Act.
- 13.2 Without limitation to the generality of clause 13.1:
- (a) the assistance to be provided by the Company must include, as appropriate, the provision of documents or information, and making available relevant personnel of the Company to provide information or answer questions on any matters concerning the Company’s performance of, or otherwise in relation to, the Company’s obligations under this deed or the Dairy Produce Act that might reasonably be expected to be within the knowledge of the Company;
 - (b) an evaluation or inquiry referred to in clause 13.1 must include any administrative or statutory review, audit or inquiry, any request for information directed to the Commonwealth, or any inquiry conducted by Parliament or any Parliamentary committee.
- 13.3 The Commonwealth is to endeavour to notify the Company as early as possible of any assistance required under clause 13.1.
- 13.4 The Company must, at its cost, engage an independent organisation to:
- (a) complete a Performance Review every 3 years after the Conversion Time; and

- (b) prepare a report on the Performance Review.
- 13.5 The organisation engaged to carry out the Performance Review must be an organisation having no relationship with any person or organisation that carries out audit functions in respect of the Company, and must be selected in consultation with the Department.
- 13.6 The Company must:
- (a) ensure that the Performance Review Report produced under clause 13.4 is completed within 3 months of the end of the 3 year period to which it relates and give a copy of the Performance Review Report to the Minister within 7 days of its completion; and
 - (b) make a summary of the Performance Review Report generally available to members of the Company at the next general meeting of the Company following finalisation of the Performance Review Report; and
 - (c) make a summary of the Performance Review Report publicly available.
- 13.7 The Commonwealth or its representative may, at any time and at its cost, conduct its own Performance Review, and the Company must give all reasonable assistance requested by the Commonwealth in relation to any such review, including:
- (a) permitting access to the Company's accounts and records in accordance with clause 14; and
 - (b) facilitating interviews with the Company's officers, staff and contractors.
- 14. ACCESS TO RECORDS AND USE OF INFORMATION**
- 14.1 The Company permits the Commonwealth or its representatives, for the purpose of monitoring compliance by the Company with this deed and the Dairy Produce Act:
- (a) to inspect any premises occupied by or under the control of the Company during Business Hours and on 48 hours notice at all other times; and
 - (b) to examine and copy the Company's accounts and records relating to this deed and the Dairy Produce Act.
- 14.2 The Company must produce all its accounts and records relating to this deed and the Dairy Produce Act and otherwise co-operate fully with the Commonwealth or its representatives to enable the Commonwealth or its representatives to exercise its rights under clause 14.1.
- 14.3 Without limiting clause 14.2, the assistance which the Company must provide includes, as appropriate:
- (a) providing documents or information; and
 - (b) making available relevant personnel of the Company to provide information or answer questions on any matter that relates to the Company's obligations under this deed or the Dairy Produce Act.

- 14.4 Each party must, in respect of Confidential Information given by the other party:
- (a) use that Confidential Information only for the purposes of administering or enforcing this deed, the Dairy Produce Act or the Levies Collection Act; and
 - (b) not disclose that Confidential Information to any person without the prior approval in writing from the other party and subject to any reasonable conditions or restrictions imposed by the other party in giving its approval;
 - (c) provided that a party must not be in breach of this clause 14 to the extent that it is legally obliged to make a particular use or disclosure of the Confidential Information.
- 14.5 The Commonwealth must not be in breach of clause 14.4 in respect of Confidential Information given by the Company and held by the Department where a request is made by Parliament (including a committee of Parliament) for that information to be given to Parliament, provided that the Department notifies Parliament of the confidential nature of the information and requests Parliament hold and deal with that information on an *in camera* basis.
- 14.6 The Commonwealth and the Company hereby agree, for the purposes of paragraph (c) of the definition of Confidential Information in clause 1.1, that the following classes of information are to be treated as confidential under this deed if the information otherwise complies with the definition of Confidential Information:
- (a) information which is subject to an obligation of confidence owed by the Company to a third party which has been entered into by the Company in good faith, where the Company has notified the Commonwealth of the third party obligation of confidence prior to or at the time of the giving of the information between the parties; and
 - (b) information which is commercially sensitive to the Company or a third party and which, if disclosed, would be likely to prejudice the commercial interests of the Company or that third party, where the Company has notified the Commonwealth of that commercial sensitivity prior to or at the time of the giving of the information between the parties.
- 14.7 The Company grants the Commonwealth a licence to use, subject to clauses 14.4 and 14.5, the copyright in any document provided to the Commonwealth under this deed in any way for any purpose of the Commonwealth. This clause 14.6 does not amount to an assignment of copyright.
15. **AUDIT**
- 15.1 The Company must ensure at its own cost that, as part of the annual audit of the Company required by the *Corporations Act 2001* (Cth), the Company's auditor audits and reports on the Company's compliance with its obligations under this deed or the Dairy Produce Act in relation to Dairy Service Payments and Matching Payments.
- 15.2 The Company must give the Minister a copy of the signed auditor's report within 28 days of receipt by the Company.

- 15.3 If, in the reasonable opinion of the Commonwealth, the Company is, or may be in breach of this deed or the Dairy Produce Act, the Commonwealth may request an audit report or opinion on any matter relevant to the Company's compliance with this deed or the Dairy Produce Act.
- 15.4 If the Commonwealth requests an audit report or opinion under clause 15.3, the Company must:
- (a) obtain the audit report or opinion from the Company's auditor; or
 - (b) if, in the opinion of the Minister, the audit report or opinion cannot be properly given by that auditor—engage another auditor to conduct an audit and give the audit report or opinion;
- and give a copy of the audit report or opinion to the Commonwealth within 14 days after the Company receives it.
- 15.5 The expenses incurred by the Company in respect of an audit conducted in accordance with clause 15.3 must be paid by:
- (a) the Company, if the audit establishes, or, together with other information, contributes to establishing, that the Company is in breach of this deed or the Dairy Produce Act; or
 - (b) the Commonwealth, if clause 15.5(a) does not apply.

16. INDEMNITY

- 16.1 The Company indemnifies the Commonwealth, its officers and agents against all expenses, losses, damages and costs (on a solicitor and own client basis and whether incurred by or awarded against the Commonwealth) that the Commonwealth may sustain or incur as a result, whether directly or indirectly, of any of the following:
- (a) any breach of this deed or the Dairy Produce Act by the Company including, but not limited to, a breach in respect of which the Commonwealth exercises an express right to terminate this deed; or
 - (b) any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Company or its officers and employees;
 - (c) a breach by the Company of its constitution; or
 - (d) the occurrence of an Insolvency Event.
- 16.2 If loss or damage arose wholly or partly because of the negligent or unlawful or omission of the Commonwealth or of its employees, the amount of the indemnity under clause 16.1 is to be reduced by the amount that fairly reflects the Commonwealth's responsibility for the loss or damage. It may be reduced to zero.
- 16.3 The Commonwealth may recover a payment under an indemnity in this deed before it makes the payment in respect of which the indemnity is given.

- 16.4 The indemnities in this deed:
- (a) are irrevocable; and
 - (b) survive the termination of this deed.
- 16.5 If a payment to satisfy a claim under or in connection with an indemnity under this clause 16 gives rise to a liability on the Commonwealth to pay GST, the Company must pay, and indemnify the Commonwealth on demand in respect of, the amount of that GST.
- 17. TERMINATION AND RECOVERY**
- 17.1 In this clause 17:
- clawback notice* means a notice under clause 17.4;
- termination date* means the date on which this deed terminates under a termination notice;
- termination notice* means a notice under clause 17.2.
- 17.2 If a Termination Event occurs, the Commonwealth may, by giving notice in writing to the Company, terminate this deed from:
- (a) if the Termination Event is an Insolvency Event—the day on which, or any specified day after, the notice is given to the Company;
 - (b) if the Termination Event is a Change of Policy—a day at least 12 months after the day on which the notice is given;
 - (c) otherwise—a day at least 6 months after the day on which the notice is given.
- 17.3 If the Termination Event concerned is a Default Event or a Change of Policy, the Commonwealth must not give a termination notice unless the Minister has given the Company:
- (a) notice of his or her intention to give the termination notice, and the reasons why; and
 - (b) a reasonable period within which to make submissions to the Minister about the matter.
- 17.4 Subject to this clause 17, if the Commonwealth gives the Company a termination notice, the Commonwealth may also, by giving written notice to the Company before the termination takes effect, require the Company to pay or transfer to the Commonwealth, or pay or transfer to a Nominated Body specified in the notice, either or both of the following:
- (a) some or all of the amounts in the Dairy Service Levy Account;
 - (b) the Transferred Assets.
- 17.5 If the Commonwealth gives the Company a clawback notice:

- (a) the Company must not thereafter incur any further liabilities otherwise than in the usual course of the Company's business as Industry Services Body or with the Commonwealth's prior written consent; and
- (b) the Company must use its best endeavours to discharge all its liabilities before the date when it must comply with the clawback notice; and
- (c) the Company must comply with the clawback notice:
 - (i) if the termination is on the ground that an Insolvency Event has occurred—on the day on which, or any specified day after, the clawback notice is given to the Company;
 - (ii) otherwise—on or before the termination date; and
- (d) the Commonwealth undertakes to the Company that, subject to the Company's compliance with the other provisions of this clause 17, the Commonwealth will ensure that the liabilities of the Company as at the termination date are satisfied.

17.6 The Company must do all things, and execute all documents, necessary to give effect to a clawback notice.

17.7 An amount of money required to be paid by the Company to the Commonwealth or to a Nominate Body under this clause 17 but not paid by the Company by the time required by this clause 17 may be recovered by the Commonwealth as a debt due to the Commonwealth.

18. **CONFLICT OF INTEREST**

18.1 The Company warrants that, at the date of this deed, no conflict of interest exists or is likely to arise in the performance of its obligations under this deed or the Dairy Produce Act.

18.2 If a conflict of interest or risk of a conflict of interest arises in the performance of the Company's obligations under this deed, the Company must notify the Minister or his or her authorised representative of that conflict or risk and take steps acceptable to the Minister or authorised representative to resolve or avoid the conflict.

19. **ACKNOWLEDGMENT OF FUNDING**

Unless otherwise agreed with the Commonwealth, the Company must, in all significant publications and publicity by the Company in relation to matters on which Matching Payments are expended, acknowledge the provision of the Matching Payments by the Commonwealth.

20. **AUTHORISATION OF PERSONS TO ACT**

The Minister may exercise any rights or powers under this deed through an APS Employee in the Department who is authorised by the Minister for the purpose.

21. **RELATIONSHIP**

This deed does not create a relationship of employment, agency or partnership between the parties.

22. **FURTHER ACTION**

Each party must use its best efforts to do all things necessary or desirable to give full effect to this deed, including the execution of any document requested by the Commonwealth.

23. **CONSENTS**

Where this deed contemplates that the Commonwealth or the Minister may agree or consent to something (however it is described), the Commonwealth or the Minister (as appropriate) may:

- (a) agree or consent, or not agree or consent, in its, his or her absolute discretion; and
- (b) agree or consent subject to conditions.

24. **RESOLUTION OF DISPUTES**

24.1 A party may not commence any legal action, suit or proceeding in relation to any dispute arising in relation to this deed unless the parties have first sought to resolve the dispute in accordance with the following procedure:

- (a) first, the party claiming that there is a dispute sends to the other a notice setting out the nature of the dispute;
- (b) secondly, the parties are to try to resolve the dispute by direct negotiation, including by referring the matter to persons who may have authority to intervene and direct some form of resolution;
- (c) thirdly, the parties have 10 Business Days from the sending of the notice to reach a resolution or to agree that the dispute is to be submitted to mediation or some other form of alternative dispute resolution procedure;
- (d) lastly, if:
 - (i) there is no resolution or agreement; or
 - (ii) there is a submission to mediation or some other form of alternative dispute resolution procedure, but there is no resolution within 15 business days of the submission, or such extended time as the parties may agree in writing before the expiration of the 15 Business Days;

either party may commence legal proceedings.

24.2 Despite the existence of a dispute, each party must (unless requested in writing by the other party not to do so) continue to perform their obligations under this deed.

24.3 This clause 24 does not apply to action by the Commonwealth under clause 17, nor does it preclude either party from seeking urgent interlocutory relief.

25. **ASSIGNMENT**

The Company must not assign the benefit of this deed or any right under this deed unless the Company obtains the prior written consent of the Commonwealth, which consent may be given by the Commonwealth subject to such conditions as the Commonwealth considers appropriate.

26. **ENTIRE AGREEMENT**

This deed:

- (a) constitutes the entire agreement between the parties as to its subject-matter; and
- (b) in relation to that subject-matter, supersedes any prior understanding or agreement between the parties and any prior condition, warranty, indemnity or representation imposed, given or made by a party.

27. **ALTERATION**

Except as expressly permitted under this deed, this deed may be altered only by a deed.

28. **WAIVER**

Waiver of any provision of or right under this deed:

- (a) must be in writing signed by the party entitled to the benefit of that provision or right; and
- (b) is effective only to the extent set out in any written waiver.

29. **SEVERABILITY**

Part or all of any provision of this deed that is illegal or unenforceable may be severed from this deed and the remaining provisions of this deed continue in force.

30. **GOODS AND SERVICES TAX**

If a supply by a party (the *supplier*) to the other party under this agreement is a taxable supply by the supplier:

- (a) the supplier must give the other party a tax invoice in accordance with the GST Law in relation to the supply; and
- (b) the other party must then pay to the supplier an amount equal to the consideration for the supply (excluding the application of this clause 30) multiplied by the rate of GST.

In this clause 30, words and expressions mean what they mean in the GST Law.

This clause 30 applies in addition to the other provisions of this agreement, but does not require a party to pay an amount twice.

31. GOVERNING LAW AND JURISDICTION

31.1 The law in force in Victoria governs this deed.

31.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria.

32. NOTICE

32.1 A party giving notice or notifying under this deed must do so in writing:

- (a) directed to the recipient's address specified in Schedule 1, as varied by any notice; and
- (b) hand delivered or sent by prepaid post or facsimile to that address.

32.2 A notice given in accordance with this clause 32 is taken to be received:

- (a) if hand delivered—on delivery;
- (b) if sent by prepaid post—3 days after the date of posting;
- (c) if sent by fax—when the sender's fax system generates a message confirming successful transmission of the total number of pages of the notice unless, within 8 Business Hours after that transmission, the recipient informs the sender that it has not received the entire notice.

33. INTERPRETATION

33.1 In this deed, unless the contrary intention appears, the following apply:

- (a) headings are for ease of reference only and do not affect the meaning of this deed;
- (b) the singular includes the plural and vice versa and words importing a gender include other genders;
- (c) other grammatical forms of defined words or expressions have corresponding meanings;
- (d) a reference to a clause, paragraph, schedule or annexure is a reference to a clause or paragraph of or schedule or annexure to this deed and a reference to this deed includes any schedules and annexures;
- (e) a reference to a document or agreement, including this deed, includes a reference to that document or agreement as novated, altered or replaced from time to time;

- (f) a reference to A\$, \$A, dollar or \$ is a reference to Australian currency;
 - (g) a reference to a specific time for the performance of an obligation is a reference to that time in the State, Territory or other place where that obligation is to be performed;
 - (h) a reference to a party includes its executors, administrators, successors and permitted assigns;
 - (i) words and expressions importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies;
 - (j) a reference to any legislation or statutory instrument or regulation is construed in accordance with the *Acts Interpretation Act 1901* (Cth);
 - (k) a reference to writing includes typewriting, printing, lithography, photography and any other method of representing or reproducing words, figures or symbols in a permanent and visible form.
- 33.2 A provision of this deed must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the deed or the inclusion of the provision in the deed.
- 33.3 Where a provision of this deed requires a thing to be done on a day which is a Saturday, Sunday or public holiday in the place at which the thing is to be done, the provision is taken to require the thing to be done on the next day that is not a Saturday, Sunday or public holiday at that place.

Schedule 1—Notice Details

Item number	Subject	Clause reference	Detail
1.	Address for notices— Commonwealth	32	The Secretary, Department of Agriculture, Fisheries and Forestry, Australia GPO Box 858 CANBERRA, ACT 2601 Edmund Barton Building BARTON, ACT 2600 Fax: (02) 6272 4246
2.	Address for notices—Company	32	The Chairman, Dairy Australia Limited Level 5, IBM Tower 60 City Road Southbank, Victoria 3006 Fax: (03) 9694 3733
3.	Proposed Directors	32	<i>(name of Proposed Director)</i> , Dairy Australia Limited Level 5, IBM Tower 60 City Road Southbank, Victoria 3006 Fax: (03) 9694 3733

Schedule 2—Payments

clause 3.1, 3.2, 9.1

1. Dairy Service Payments must be paid:
 - (a) by electronic transfer to a Dairy Service Levy Account; and
 - (b) in accordance with the current normal practice of the Department, or as agreed between the Company and the Commonwealth.
2. Matching Payments must be paid:
 - (a) by electronic transfer to a Dairy Service Levy Account; and
 - (b) monthly in arrears; and
 - (c) only on receipt of a valid claim for the payment, substantiating the claim in accordance with this deed; and
 - (d) in accordance with the normal practice of the Department, namely, Matching Payments in respect of a particular month are to be paid as soon as reasonably practicable after 28 days after the relevant claim is received.
3. Dairy Structural Adjustment Levy Payments must be made:
 - (a) by electronic transfer to the DSAF Account; and
 - (b) in accordance with the current normal practice of the Department, or as agreed between the Company and the Commonwealth.

Schedule 3—Qualifying R&D Expenditure requirements

clause 1.1, 3.3(c)

The requirements are:

1. *Policy principles to be applied*

In deciding on expenditure for R&D, the Company must take into account:

- (a) the Guidelines; and
- (b) the principle that Qualifying R&D Expenditure should be directed primarily at situations of market failure, being situations where a particular R&D project would not otherwise receive funds sufficient to achieve an Industry objective; and
- (c) whether there may be an identifiable benefit to the Industry broadly and/or the Australian community after taking into account all costs.

2. *Differentiation of expenditure*

In deciding on expenditure for R&D, the Company must ensure that there is a clear distinction between expenditure on R&D and expenditure on other activities.

3. *R&D expenditure management*

R&D expenditure must be made in accordance with a documented system and internal controls specifically aimed at ensuring:

- (a) that expenditure that the Company intends to be Qualifying R&D Expenditure will be Qualifying R&D Expenditure in accordance with this Schedule;
- (b) that R&D activities and expenditure which the Company intends to be Qualifying R&D activities and expenditure will be within the research and development component of the Company's strategic plan and operational plan; and
- (c) that clear and auditable lines of accountability for the expenditure are present and identifiable.

Schedule 4—Annual Report

clause 12.1

The Company must prepare an annual report complying with the *Corporations Act 2001* (Cth) Chapter 2M. Without limitation and for the purpose of meeting Commonwealth accountability requirements, the annual report is to include coverage of the following:

- (a) the receipt, use and expenditure of the amounts in the Dairy Service Levy Account and Transferred Assets and Liabilities and the conduct of the Company's functions as the Industry Services Body during the relevant year;
- (b) significant activities and transactions undertaken in the year;
- (c) report on the outcomes against objectives and key performance indicators specified in the strategic plan, including the reasons for any key performance indicators not being met to a material extent;
- (d) subsidiaries and joint ventures formed;
- (e) material changes to the membership of the Company;
- (f) funds spent on significant Industry Service Activities and significant R&D Activities;
- (g) identification of total expenditure of Matching Payments;
- (h) how the Company's R&D Activities contributed to the Commonwealth's broad priorities for research and development expenditure and the achievement of public benefits;
- (i) a list of parties with whom the Company undertook significant commercial or other R&D Activities during the relevant Financial Year;
- (j) Commercialisation;
- (k) any other material matter that the Commonwealth notifies the Company is to be covered in the report.

The Company must give 10 copies of each such report to the Commonwealth within 7 days of finalisation by the Company.

EXECUTED as a deed

SIGNED, SEALED and DELIVERED by the **Hon. Warren Truss MP**, Minister for Agriculture, Fisheries and Forestry, for and on behalf of the **COMMONWEALTH OF AUSTRALIA** in the presence of:

Signature

Signature of witness

Name

SIGNED, SEALED and DELIVERED by **PATRICK DESMOND ROWLEY** in the presence of:

Signature of party

Signature of witness

Name

SIGNED, SEALED and DELIVERED by **JOHN CLARENCE MASSEY** in the presence of:

Signature of party

Signature of witness

Name

SIGNED, SEALED and DELIVERED by
JOHN DOYLE in the presence of:

Signature of party

Signature of witness

Name