

**CABINET - SUBJECTS FOR CONSIDERATION, 19 DECEMBER 2002 8:30 AM**

**1     New Initiatives/Policy Matters**

**101     MSIE10/02CS     Australian Centre for Plant Functional Genomics  
APPROVED**

*All Ministers*

**Not Relevant**

**CABINET COVER SHEET**

1. **TITLE:** AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL GENOMICS
2. **MINISTER:** MINISTER FOR SCIENCE AND INFORMATION ECONOMY
3. **PURPOSE:** To seek Cabinet approval for:
  - 3.1. the State Government to take equity in the company along with the University of Adelaide, the Grains Research and Development Corporation (GRDC), the University of Melbourne, the University of Queensland, Agriculture Victoria Services Pty Ltd as agent on behalf of the State of Victoria through its Department of Natural Resources and Environment (DNRE).
  - 3.2. the Minister for Science and Information Economy to sign the Shareholders Agreement to establish the Australian Centre for Plant Functional Genomics Pty Ltd.
  - 3.3. the Minister for Science and Information Economy to sign the Deed of Agreement (Research Funding Agreement) on terms acceptable to the Minister and the Crown Solicitor's Office.
  - 3.4. the Minister for Science and Information Economy will review the equity holding of the Australian Centre for Plant Functional Genomics and will report to Cabinet by December 2003 on options for ongoing equity holding.
4. **RELATIONSHIP TO GOVERNMENT POLICY:** The project is consistent with the Government's strategy for the development of the biotechnology industry.
5. **RESOURCES REQUIRED FOR IMPLEMENTATION:**

Cabinet has already approved the funding required. No additional budget appropriation is being sought for this project. \$12.0m in State Government funds over 5 years has previously been approved: \$5.0m for building works at The Waite and \$7.0m for the ACPFG operations. (Cabinet Approval is dated 6/5/2002)

The total project cost is \$61.0m, of which \$18.6m will be contributed by the University of Adelaide, \$10.0m will be contributed by the ARC, \$10.0m will be contributed by GRDC and \$12.0m will be contributed by the State Government. The balance will be contributed by the University of Melbourne, the University of Queensland and DNRE.

**6. COMMUNITY AND  
ENVIRONMENTAL IMPACT:**

This proposal will position 'The Waite' as a leading international centre for plant research. It will build the depth in South Australia's agricultural biotechnology research base and will create new highly skilled jobs. The proposal supports the State Government's Biotechnology Strategy. There is no adverse environmental impact.

**7. RISKS:**

The following risks were identified and assessed as low risks in the short term: 1) risk of exposure of State Government to litigation 2) risk of insolvency of the incorporated entity 3) risk of Government "Implied Guarantee" being applied 4) risks associated with the incorporated entity licensing intellectual property 5) risk to the State Government if this research and commercialisation does not occur in South Australia 6) risk of adverse media exposure 7) market acceptance risk of the technology for the incorporated entity. The risk of the research program not being commercially successful was considered a low to medium risk.

**8. CONSULTATION:**

The Consultation has occurred between Bio Innovation SA and representatives from the following organisations:

- University of Adelaide
- Crown Solicitor's Office/ Attorney General's Department
- ARC
- GRDC
- University of Melbourne
- University of Queensland
- DNRE
- Office of Innovation
- Prudential Management Group
- Department of Treasury and Finance
- Office of Economic Development (Small Business and Regional Affairs)
- SARDI
- PIRSA
- Department of Environment and Heritage
- Department of Water, Land and Biodiversity Conservation
- Department of the Premier and Cabinet
- Department of Human Services

**9. COMMUNICATION  
STRATEGY:**

After Cabinet has given approval; construction of the building at The Waite will be able to commence. This will be an opportunity for the Premier or the Minister to be involved in a ceremony of "turning the first sod" and announcing the commencement of the ACPFG. Once the building has been completed (scheduled early

2004) there will be an opportunity for the Premier or the Minister to open the building.

**10. URGENCY:**

ARC has approved appropriation of \$2.0m to be paid this calendar year. If the Shareholders' Agreement and Research Funding Agreement are not approved and signed by the end of December 2002, the funds will go back into consolidated revenue.

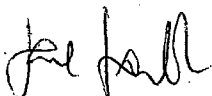
Cabinet approval is required by 9 December 2002 (allowing deferral to 16 December at the latest).

**11. RECOMMENDATIONS:**

For Cabinet to:

- 11.1. Approve the State Government to take equity in the company along with the University of Adelaide, the Grains Research and Development Corporation (GRDC), the University of Melbourne, the University of Queensland, Agriculture Victoria Services Pty Ltd as agent on behalf of the Department of Natural Resources and Environment of the State of Victoria (DNRE).
- 11.2. Approve the Minister for Science and Information Economy to sign the Shareholders Agreement to establish the Australian Centre for Plant Functional Genomics Pty Ltd.
- 11.3. Approve the Minister for Science and Information Economy to sign the Deed of Agreement (Research Funding Agreement) on terms acceptable to the Minister and the Crown Solicitor's Office.
- 11.4. Approve the Minister for Science and Information Economy to review the equity holding of the Australian Centre for Plant Functional Genomics and report to Cabinet by December 2003 on options for ongoing equity holding.

I declare that I have no actual or potential conflict of interest in relation to the proposal contained in this submission.



Jane Lomax-Smith

**MINISTER FOR SCIENCE AND INFORMATION ECONOMY**

16 / 12 / 2002

**TO: PREMIER FOR CABINET**

**RE: AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL GENOMICS**

**1. PROPOSAL**

For Cabinet to:

- 1.1 Approve the State Government to take equity in the company along with the University of Adelaide, the Grains Research and Development Corporation (GRDC), the University of Melbourne, the University of Queensland, Agriculture Victoria Services Pty Ltd as agent on behalf of the State of Victoria through its Department of Natural Resources and Environment (DNRE).
- 1.2 Approve the Minister for Science and Information Economy to sign the Shareholders Agreement to establish the Australian Centre for Plant Functional Genomics Pty Ltd.
- 1.3 Approve the Minister for Science and Information Economy to sign the Deed of Agreement (Research Funding Agreement) on terms acceptable to the Minister and the Crown Solicitor's Office.
- 1.4 Approve the Minister for Science and Information Economy to review the equity holding of the Australian Centre for Plant Functional Genomics and report to Cabinet by December 2003 on options for ongoing equity holding.

**2. BACKGROUND**

- 2.1 On 6 May 2002, Cabinet approved State Government funding for the Australian Centre for Plant Functional Genomics (ACPFG) of \$12.0m over 5 years, subject to the South Australian led proposal winning the bid and securing \$20.0m from the Australian Research Council (ARC) and the Grains Research and Development Corporation (GRDC).
- 2.2 The State Government funding of \$12m is split into \$5m for building works at The Waite and \$7m for the ACPFG operations.
- 2.3 On 10 May 2002, the ARC/GRDC and Premier of South Australia announced the success of the bid, led by the University of Adelaide. The \$63.0m (in cash and in-kind contributed by a number of parties) ACPFG will be located at the University campus at The Waite.

The following relate to the formal establishment of the ACPFG as a company, the funding arrangements and the construction of the building.

- 2.4 On 28 June 2002, the Minister for Science and Information Economy signed the Assistance Deed and provided an initial payment of \$3.68 million in the form of a grant to the University of Adelaide, as agreed with the Treasurer, to enable the building works to commence.

- 2.5 On 27 July 2002, the Minister for Science and Information Economy signed the Participants' Agreement.
- 2.6 On 5 August 2002, Cabinet noted that the Minister for Science and Information Economy had signed the Participants' Agreement prior to 30 July 2002 to enable continued negotiations to establish the ACPFG, including the option for the State Government to take equity in the ACPFG. Cabinet also noted that the Shareholders' Agreement and a Research Funding Agreement were to be negotiated and the Minister would seek Cabinet approval once the terms had been finalised.
- 2.7 On 28 October 2002, Cabinet approved the construction of the purpose-built plant biotechnology research and office facility, which will accommodate the ACPFG at The Waite. A report on the facility was considered by the Public Works Committee on 13 November 2002 and the Committee's approval to commence construction was tabled in Parliament on 20 November 2002.
- 2.8 In-principle agreement has been reached on the Shareholders' Agreement (see attached). It should be noted that minor amendments may be made to the Shareholders' Agreement as the respective parties process the agreement for approval through their systems. The Research Funding Agreement has been drafted taking into account the State Government either taking equity in the company or not. Depending upon the decision by Cabinet, the Research Funding Agreement will require further amendments prior to finalising and signing. Crown Solicitor's Office will be directly involved in reviewing and negotiating these amendments prior to the Minister signing both these agreements.
- 2.9 It should be noted that there are a number of other agreements (defined in the Shareholders' Agreement as "Completion Agreements") that the other parties must enter into by 31 December 2002. Failure to enter all these agreements will result in the termination of the Shareholders' Agreement, unless the parties agree in writing to an extension.

### 3 DISCUSSION

#### Negotiating Committee and Preparation of Agreements

- 3.1 A Negotiating Committee was formed with one representative from each participant involved in discussions to establish the ACPFG. Bio Innovation SA is the lead agency for the SA Government, supported by the Crown Solicitor's Office. At the onset, it was agreed with the Minister to pursue the option of the Minister holding equity in the company.
- 3.2 There has been a significant delay in finalising agreements due to the universities discovering that they are not eligible for Research Infrastructure Block Grant (RIBG) funding from the Commonwealth Department of Education Science and Technology (DEST) if ARC, GRDC and the State Government (collectively "the Funders") provide funding directly to the incorporated entity. The universities were not in a position to proceed with the ACPFG unless this could be resolved.

- 3.3 The Funders have agreed that funding will be provided to the University of Adelaide directly under Research Funding Agreements until such time as the DEST changes its rules to allow the universities to be eligible for RIBG funding. The timing of this change is unknown, but is likely to take over 1 year. Once the rules change the Funders will fund the incorporated entity directly.

#### Equity Participation

The ACPFG will be an incorporated entity under the Corporations Act 2001 as required by the ARC/GRDC funding. The vehicle will be a company limited by shares called the Australian Centre for Plant Functional Genomics Pty Ltd.

- 3.4 It is proposed that initially the shareholders will be allocated a number of shares, at one dollar per share, based upon their agreed contribution to the ACPFG under the Research Funding Agreements. The SA Government will receive 19 shares at a cost of \$19.00. After the first year, shares will be allocated based upon actual contributions by each shareholder.
- 3.5 It is proposed that once the DEST rules have changed, funding under the Research Funding Agreement will still be provided by the SA Government, however in consideration for the funding, shares will be issued from that date onwards. Each shareholder (including the Funders) will subscribe for shares at the cost of \$10,000 per share. This will not alter the amount or the timetable of payments that have been agreed in the Research Funding Agreement or the overall amount payable by the SA Government. The percentage equity will remain the same as the proposed initial equity unless a party varies its contributions.
- 3.6 Tax advice was sought from KPMG on behalf of the participants and the main reason for subscribing for shares is that there is a tax benefit for the incorporated entity. Research funds, by way of a grant, which is not repayable, are treated as income and are therefore taxable, whereas subscribing for shares is capital and not taxed. In addition, the incorporated entity's research and development spending is an expense and the incorporated entity will accrue tax losses, which can be offset against future income.
- 3.7 The proposed initial equity participation is based upon the expected contributions of the parties and is set out below:

	Cash \$000s	In-kind \$000s	Total \$000s	Equity %
SA Govt.	7,000	*2,000	9,000	18.9
GRDC	10,000	0	10,000	21.0
University of Adelaide	2,650	15,989	18,639	39.1
University of Melbourne	700	3,206	3,906	8.2
DNRE	0	4,570	4,570	9.6
University of Queensland	250	1,322	1,572	3.2
<b>TOTAL</b>	<b>20,600</b>	<b>27,087</b>	<b>**47,687</b>	<b>100</b>

\*this is the rental value assigned to the building for the first term of the ACPFG, calculated as \$500k per year and commencing in the 2<sup>nd</sup> year of the ACPFG.

\*\*the ARC funding of \$10.0m and the balance of the SA Govt. building funding of \$3.0m have not been included in the total contributions figure used to calculate equity. Should the ACPFG be re-funded with Commonwealth grants, the remaining \$3.0m funding already paid by the SA Government will be counted towards equity in the ACPFG.

### Board Representation

- 3.8 Under the Shareholders' Agreement, the participants have agreed to appoint a skills-based Board, which includes the CEO. The Directors so appointed must have the necessary business and financial acumen and/or knowledge of the grains industry and/or scientific expertise relevant to the grains industry. The first Board will consist of 5 Directors, who are named in the Shareholders' Agreement. At any one time, the Board must consist of a minimum of 3 Directors.
- 3.9 Because ARC is not a shareholder, the participants agreed that ARC will have the right to nominate their own Director to the Board, provided the shareholders approve the nomination. No single shareholder will have the right to nominate a Director to the Board in its own right, but will require Special Shareholder Approval.
- 3.10 The participants have in principle agreed to Mr. Nick Begakis as Chairman, Professor Peter Landgridge as CEO and Professor Alan Robson as ARC's nominee on the Board. The Minister and the University of Adelaide will be jointly nominating suitable candidates for Director of the incorporated entity. These candidates will not be representing the SA Government. GRDC has asked the other shareholders to consider a Director with experience in the grains industry. The other parties have not yet nominated Directors. T

### Outcomes and Returns

- 3.11 The ACPFG will be Australia's largest facility dedicated to plant genomics and builds upon the existing GRDC Functional Genomics Program and related genomics programs, the National Molecular Marker Programs, and the CRC for Molecular Plant Breeding. The ACPFG is strategically vital for South Australia in maintaining its national leadership position in plant biotechnology and building an international capability at The Waite.
- 3.12 The ACPFG will focus on multiple approaches to the genomic-based analyses of stress tolerance in cereal crops. This information will be applied to develop new strategies for enhancing stress tolerance and to develop plants tolerant to multiple stresses such as low water availability, high salt and mineral deficiencies, which currently severely diminish productivity of cereal crops particularly in South Australia. In addition, there is a significant national and global demand for improved plant tolerance in harsh agricultural environments and substantial commercial opportunities exist.
- 3.13 The Australian grains industry is an important part of the Australian economy and farm sector. Total production of grains in 1999/2000 was 41 million tonnes, worth an estimated \$8 billion. Wheat is the single most valuable agricultural product for South Australia, producing 4.4 million tonnes in 2000/01 at a farm gate value of around \$760 million. South Australia is the nation's largest producer of barley and Australia is a major global producer accounting for approximately 18% of world barley trade. In 2000/01 the farm gate value of

barley to South Australia was around \$490 million based on total sales of 2.65 million tonnes (ABARE).

- 3.14 Major benefits are expected from the generation of a range of improved wheat and barley varieties with enhanced ability to tolerate drought, mineral deficiencies and toxicities, salinity and frost. For example, more than 50% of cereal cropping areas in southern Australia suffer regularly from transient salt stress, which is usually linked with moisture stress. Productivity gains of 10-20% are considered to be achievable if varieties with tolerance to multiple stresses are generated. This could translate to an annual increase of between \$800 million and \$1.2 billion in value for the Australian grains industry.
- 3.15 The ACPFG could benefit from directly licensing and receiving royalties or selling the technologies developed from the research or by entering into alliances with third parties to use the technologies in further research to develop new improved varieties. The ACPFG may also spin-off new companies to further develop and commercialise the technologies, which have been developed. The ACPFG's strengths lie in research and development and it will not commercialise new plant varieties in its own right.
- 3.16 It is unlikely that any significant revenues would flow into the incorporated entity within the first 5 year funding period and the incorporated entity will not be profitable within the first 5 years. However there is no commitment on any of the shareholders including the SA Government to make contributions towards the ACPFG beyond the first 5 years of operation.

#### **Options for Government**

##### **A. Need for an Incorporated Entity**

- 3.17 The need for an incorporated entity to operate the ACPFG and to commercialise the outcomes of the research was a core criterion of the ARC and GRDC for funding. Pursuant to its objectives, Bio Innovation SA also advocated the need for an incorporated entity. The reasons from the Funders include:
  - a) To ensure commercially driven research and intellectual property management;
  - b) To provide flexibility for the incorporated entity in managing the operations, including the direct employment of staff;
  - c) To establish an experienced Board with scientific and business acumen and have the incorporated entity enter into commercial arrangements; and
  - d) To be attractive to investors or other third parties interested in investing in the outcomes or collaborating to develop new outcomes.

##### **B. Need for Government to take Equity in the Incorporated Entity**

- 3.18 There is a \$12.0 million commitment by the SA Government to fund the ACPFG, however the question is how is this to be provided? The SA Government can provide a grant (either a gift or conditional) as a research funder, a loan or it can take equity in the incorporated entity. The option of a conditional grant has not been considered as an alternative, because it would give rise to a contingent liability for the company, which will have an initial capitalisation of \$100.00. The option of a loan has not been considered as an

alternative, for the same reasons as a conditional grant and the SA Government would be required to forgive the loan. The alternatives which have been considered are the SA Government providing a grant or taking equity:

- a) Under the grant scenario, the SA Government provides the funding and leverages a \$61.0 million new research centre for South Australia, boosts employment, attracts "star" scientists, and maintains its national leadership position in plant biotechnology and builds an international capability at The Waite;
- b) As an equity holder, the SA Government achieves the same outcomes as in a), but could also potentially benefit in the future from the sale of shares and/or from returns in the form of dividends. Thus, the SA Government may recover some, all or potentially more than it will have invested in the ACPFG;
- c) A further argument for holding equity is that the SA Government can ensure that the incorporated entity remains in SA after the first 5 year funding period;
- d) Whilst ordinarily the risk to the equity holder is limited to the amount of the initial investment and any amount owing on unpaid shares (all shares issued under the Shareholders' Agreement will be fully paid), there is an additional perceived risk for Government of "implied guarantee". The risk of the "implied guarantee" applying is considered low and is dealt with under risk analysis, but even if it does apply it will be shared with the Commonwealth, via its statutory body the GRDC and the Victorian Government via its agent, Agriculture Victoria Services Pty Ltd.

As such the preferred option is to take equity in the incorporated entity.

- 3.19 It is proposed that the Minister for Science and Information Economy would be the shareholder and hold the equity on behalf of the SA Government.
- 3.20 The reason for incorporating within a Corporations Act 2001 company rather than a Public Corporations Act company is that five of the six shareholders are not SA Government entities.
- 3.21 There are few apparent negatives for Government to enter into the Shareholding Agreement with GRDC, the University of Adelaide, the University of Melbourne, the University of Queensland and the DNRE. The level of financial contribution is capped at the current level of support for the ACPFG for a period of 5 years. It is however unlikely that the incorporated entity will be commercially viable after year 5, although at that stage the success of the research program will be clear.
- 3.22 There is no expectation and no commitment that the shareholders would have to contribute further to the incorporated entity. If the ACPFG is successful, it is possible that the ARC and GRDC will continue to provide funding for the research for another term (as stated on page 6 of the Guidelines for Applicants).

### Economic, Financial And Budget Implications

3.23 Cabinet has already approved the funding required. No additional budget appropriation is being sought for this project and under no circumstances should the level of funding required exceed the existing level. The funding amounts and timetable have been varied as agreed with Treasury and are set out below:

	2001-02 \$000s	2002-03 \$000s	2003-04 \$000s	2004-05 \$000s	2005-06 \$000s	2006-07 \$000s
Cash flow as presented to Cabinet on 06/05/02	-	3,000	3,000	3,000	1,500	1,500
Updated State Government Funding Requirement	3,687*	2,000	1,313	2,000	1,500	1,500

\*Paid to University of Adelaide on 28/06/02 from Bio Innovation SA and IEPO funds.

### Staffing Implications

3.24 This submission has no impact on the staffing levels of any agency.

### Impact on the Community and the Environment

The key benefits of the new facility are to:

#### 3.25 Develop 'The Waite' As A Leading International Centre For Plant Technology

The vision for The Waite is to establish it as one of the three top plant science research centres in the world by growing its R&D activities from the current level of \$50.0m to over \$100.0m over the next five years, and increasing employment from 1,500 to 3,000 science and technical personnel and 1,000 students on the site. Research funding in the range of \$75m to \$100m will establish Adelaide as one of the three top plant research Centres in the world after the John Innes Centre in Norwich and the Max Planck Institute in Cologne.

#### 3.26 Build Depth In SA's Agricultural Biotechnology Research Base

It has been established that economies with high levels of knowledge-based industries also have high economic wealth. South Australia is nationally and internationally competitive in a number of areas of scientific excellence, but lacks depth, ie: large groups of researchers delivering scientific excellence in areas of competitive advantage, like those emerging in Victoria and already present in advanced biotechnology clusters internationally. The area of plant functional genomics, with applications to human health and nutrition, is the key area in which this depth can be achieved.

#### 3.27 Support the State Government Biotechnology Strategy

The State's bioscience strategy is to create 50 new bioscience companies and 2500 new bioscience jobs by 2010. Bio Innovation SA's key role is to create the commercial, financial, scientific and policy environment for bioscience industry development in South Australia. In particular, it is responsible for ensuring a

high level of world-class bioscience research is maintained in the State and for facilitating the commercialisation of this research. The proposal is consistent with the State strategy.

**3.28 Regulatory Impact**

There will be no regulatory impacts from this submission.

**3.29 Impact on Families**

There will be no adverse impacts on families from this submission.

**3.30 Regional Impact**

The regions where wheat, barley and other cereal crops are grown may benefit from the application of the technologies developed by the ACPFG. There will be no adverse impacts on regions from this submission.

**3.31 Impact on Small Business**

There will be no adverse impacts on small business from this submission, but rather indirect benefits from the initial design, construction and fitout of the new building and then ongoing purchases of goods and services for 5 years.

**3.32 Environmental Impact**

There will be no adverse impacts on the environment from this submission.

**3.33 Social Inclusion Impact**

There will be no impacts on social inclusion policy from this submission.

**3.34 Risk Management Strategy**

The following risks were identified and assessed as follows. The risk of the research program not being commercially successful was considered a low to medium risk, while the other risks were considered as low risks.

**3.34.1** Research risk – the fact that the scientists are ranked the best in the Australia by ARC and GRDC and all have excellent international reputations should reduce the risk of the research program not being commercially successful. The other is the establishment of a Commercial Unit within the incorporated entity and that there is an initial business plan for the ACPFG.

**3.34.2** Risk of exposure of State Government to litigation – the incorporated entity provides separation of activity and liability (company limited by shares) from State Government. The incorporated entity has an independent Board with strong business and scientific experience and expertise and under the Shareholders' Agreement, there are extensive reporting requirements and provisions requiring shareholder approval to keep shareholders informed of the activities. In addition, the incorporated entity will be required by the Shareholders' Agreement to take out adequate indemnity insurance.

**3.34.3** Risk of insolvency – the ACPFG is fully funded for the research, operational and commercial activities it is to undertake. The Shareholder Agreement includes the initial Business and Research Plans. The ACPFG must provide quarterly financial reports to the Shareholders and must seek Special Shareholder Approval to change

the Business Plan and/or the Research Plan if there is a variation of more than 5% in the contributions of any Shareholder.

- 3.34.4 Risk of Government "Implied Guarantee" being applied – Brad Selway has written an article in the Australian Journal of Public Administration entitled "Managerialism and the Implied Guarantee". In the paper Selway refers to 3 circumstances where an implied guarantee may apply:

- a) where markets (particularly financial markets) have acted in reliance upon the guarantee and have the capacity to cause financial harm to the government if the government does not support the entity
- b) where the failure of government to support the entity may have a political backlash
- c) where the activity of the entity is a "governmental activity."

Further, all of the examples in the article cite where the "implied guarantee" has been applied are either government owned entities or statutory authorities. Nevertheless, there is always going to be a risk, that as a shareholder, the State Government is vulnerable to the political pressure brought to bear by disgruntled claimants, to make good any losses suffered by such parties, where the company is unable to do so.

- 3.34.5 Research Commercialisation risk- if South Australia does not maintain a position at the forefront of the revolution in plant genetic technologies, it will lose opportunities to generate commercial products of benefit to the local and international farming communities. Australia will become reliant on buying in technology at greater cost to primary producers.
- 3.34.6 Adverse Media risk - the research program of the ACPFG is not aimed at producing genetically modified crops for field trials or commercial sales. It relates primarily to the discovery end of this science and how plants respond to stress. The ACPFG's work will look to better understand cereal crop genes and how to improve non-genetically modified breeding processes to develop improved varieties. In the future, the knowledge gained and the technologies developed, may also be used to develop genetically modified varieties of plants but only when the community is comfortable with the use of this technology. As such, adverse media coverage is unlikely.
- 3.34.7 Market Acceptance risk - the breadth of genetic technologies being undertaken in the ACPFG provides scope for plant breeders to develop, via traditional methods, a range of plant varieties of commercial value. The full commercial potential of the ACPFG may not be realised if, in the future, consumer preferences limit the marketability of genetically modified varieties of plants.
- 3.34.8 Licensing risk – licensing intellectual property is a low risk activity, however if the product or service which incorporates the intellectual property causes harm and/or damage to a third party, that third party can seek compensation from all parties including the licensor of the

intellectual property (in this case the incorporated entity). This risk to the incorporated entity will be minimised by requiring an indemnity from its licensees and an obligation to pass on this requirement to sub-licensees.

### 3.35 Consultation

Consultation has occurred between Bio Innovation SA and representatives from the following organisations:

- University of Adelaide
- Crown Solicitor's Office/ Attorney General's Department
- ARC
- GRDC
- University of Melbourne
- University of Queensland
- DNRE
- Office of Innovation, Department of Further Education Employment Science and Technology
- Prudential Management Group
- Department of Treasury and Finance
- Office of Economic Development (Small Business and Regional Affairs)
- SARDI
- PIRSA
- Department of Environment and Heritage
- Department of Water, Land and Biodiversity Conservation
- Department of the Premier and Cabinet
- Department of Human Services

Prudential Management Group (PMG) raised the following issues:

- 3.35.1 What commercial activities is the incorporated entity going to undertake?

This is answered in section 3.15.

- 3.35.2 What mechanisms are in place to ensure the entity remains within those bounds?

The Shareholders' Agreement contains scientific, commercial and community objectives for the incorporated entity and against which the entity will be reviewed and judged. The Shareholders' Agreement contains the original Application for funding, the Guidelines for Applicants, the Research Plan, the Contributions (budget) and the Initial Business Plan. The incorporated entity cannot make a substantial variation in any of the Research Plan, the Contributions or the Business Plan without Special Shareholders Approval.

- 3.35.3 What if a conflict arises between the commercial interests of the incorporated entity and the best interests of the farmers and the community?

As well as having community objectives enshrined in the Shareholders' Agreement, the Board will have representatives who are knowledgeable of the grains industry and who understand the interests of the farming community.

3.35.4 Do the shareholders have pre-emptive rights?

This is dealt with under the Constitution, which provides that any shareholder wishing to exit must offer its shares at a transfer price to the remaining shareholders in proportion to their percentage equity. If no price is nominated or the remaining shareholders disagree with the transfer price, a valuer will be contracted to provide the value for the shares.

3.35.5 Whilst low, there is a potential for the incorporated entity to become insolvent and this should be included in the risk analysis.

This is dealt with in section 3.28.3.

3.36 Communication Strategy

Commencement of construction at The Waite will provide an opportunity for the Premier or the Minister to be involved in a ceremony of "turning the first sod". Once the building has been completed (scheduled early 2004) there will be an opportunity for the Premier or the Minister to open the building.

3.37 Executive Council

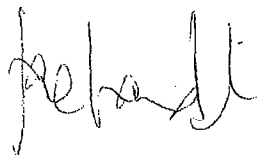
This submission does not require the approval of Executive Council.

4. RECOMMENDATIONS

It is recommended that Cabinet:

- 4.1 Approve the State Government to take equity in the company along with the University of Adelaide, the Grains Research and Development Corporation (GRDC), the University of Melbourne, the University of Queensland, Agriculture Victoria Services Pty Ltd on behalf of the Department of Natural Resources and Environment of the State of Victoria (DNRE).
- 4.2 Approve the Minister for Science and Information Economy to sign the Shareholders Agreement to establish the Australian Centre for Plant Functional Genomics Pty Ltd.
- 4.3 Approve the Minister for Science and Information Economy to sign the Deed of Agreement (Research Funding Agreement) on terms acceptable to the Minister and the Crown Solicitor's Office.

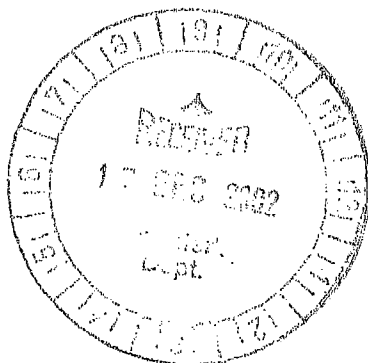
- 4.4 Approve the Minister for Science and Information Economy to review the equity holding of the Australian Centre for Plant Functional Genomics and report to Cabinet by December 2003 on options for ongoing equity holding.



Jane Lomax-Smith

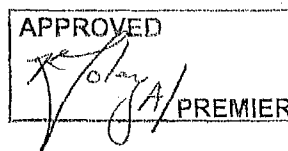
**MINISTER FOR SCIENCE AND INFORMATION ECONOMY**

16 / 12 / 2002



***In Cabinet***

19 DEC 2002



# **SHAREHOLDERS' AGREEMENT**

**Australian Centre for Plant Functional Genomics Pty Ltd  
and**

**Agriculture Victoria Services Pty Ltd (which enters into this  
Agreement as agent on behalf of the State of Victoria  
through its Department of Natural Resources and  
Environment)**

**and**

**The State of Victoria through its Department of Natural  
Resources and Environment**

**and**

**Grains Research and Development Corporation  
and**

**The Minister for Science and Information Economy (South  
Australia)**

**and**

**The University of Adelaide**

**and**

**The University of Melbourne**

**and**

**The University of Queensland**

# ACPFPG SHAREHOLDERS' AGREEMENT

## Table of Contents

<b>1.</b>	<b>Preliminary</b>	<b>2</b>
1.1	Definitions	2
1.2	Interpretation	7
1.3	Headings	8
1.4	Schedules and annexures	8
1.5	Reading down	8
1.6	Provisions severable	8
1.7	Court may sever	8
1.8	Effect of severance	8
<b>2.</b>	<b>Completion</b>	<b>8</b>
2.1	Date of Completion	8
2.2	Agreement effect	9
2.3	Termination of Participants' Agreement	9
<b>3.</b>	<b>Term</b>	<b>9</b>
<b>4.</b>	<b>Objectives</b>	<b>9</b>
<b>5.</b>	<b>Relation with Constitution and Completion Agreements</b>	<b>11</b>
5.1	Priority of documents	11
5.2	Exercise of rights under Constitution	11
5.3	Observance of obligations	11
5.4	Shareholders to ensure compliance by Company	11
5.5	Amendment of Constitution	11
5.6	Compliance by Company	11
5.7	No fiduciary relationship	11
<b>6.</b>	<b>Establishment</b>	<b>12</b>
6.1	Steps in establishment	12
6.2	Compliance with laws for establishment	12
6.3	Financial Year	12

## ACPFG SHAREHOLDERS' AGREEMENT

<b>7.</b>	<b>Business Plans, Budgets and Research Plans</b>	<b>12</b>
7.1	Initial Business Plan	12
7.2	Review of Business Plan	12
7.3	Initial Research Plan	12
7.4	Review of Research Plan	12
7.5	General review	13
<b>8.</b>	<b>Contributions</b>	<b>13</b>
	DNRE, UA, UM and UQ Contributions	13
8.2	Changes to investment of DNRE, UA, UM and UQ Contributions	13
8.3	Paid Contributions to be auditable	14
<b>9.</b>	<b>Interests</b>	<b>14</b>
9.1	Capitalisation	14
9.2	Share price and payment	14
9.3	Issue of Additional Shares	15
9.4	Encumbrances	16
9.5	Disposal of Shares	16
9.6	Property	16
9.7	Liabilities	16
<b>10.</b>	<b>Operation</b>	<b>16</b>
10.1	Conduct of ACPFG Business	16
10.2	Compliance with laws	16
10.3	Compliance with Business Plans and Research Plans	16
10.4	Manner of operation	16
10.5	Contracts register	16
10.6	Recording of details	17
10.7	IP Register	17
10.8	Inspection of Contracts Register	17
10.9	Day for inspection	17
10.10	Insurance	17
10.11	Property insurance	17
10.12	Insurer	17
10.13	No vitiation of insurance	17

## ACPFG SHAREHOLDERS' AGREEMENT

<b>11.</b>	<b>Board</b>	<b>18</b>
11.1	Composition of the Board	18
11.2	Management and operation	18
11.3	Chief Executive Officer	18
11.4	Chairman of Directors	19
11.5	Executive Management Committee	19
11.6	Board meetings	19
11.7	Quorum	20
11.8	Voting	20
11.9	Remuneration	20
<b>12.</b>	<b>Restrictions</b>	<b>20</b>
12.1	Special Board Resolutions	20
12.2	Offers to Shareholders	21
12.3	No other offers	21
12.4	Third party offers	21
12.5	Options	21
12.6	Partly paid shares	21
<b>13.</b>	<b>Shareholder approvals</b>	<b>21</b>
13.1	Special Shareholder Approvals	21
13.2	Form of Special Shareholder Approval	22
13.3	Shareholder to approve increase in Contribution	22
<b>14.</b>	<b>Research Management and Research Agreements</b>	<b>22</b>
<b>15.</b>	<b>ACPFG buildings</b>	<b>23</b>
15.1	Building to be made available in accordance with Assistance Deed	23
15.2	Interim Building and Facility Access Agreement	23
<b>16.</b>	<b>Information</b>	<b>23</b>
16.1	Records	23
16.2	Inspection	23
16.3	Time for inspection	24
16.4	Copying	24
16.5	Confidentiality	24

## ACPPFG SHAREHOLDERS' AGREEMENT

16.6	Quarterly reports to Shareholders and ARC	24
16.7	Annual report	24
16.8	Contents of Annual Reports	24
16.9	Form of Annual Reports	25
16.10	Use of Confidential Information	25
16.11	Announcements	26
16.12	Use of name, trade mark or logo	26
<b>17.</b>	<b>Goods and services</b>	<b>26</b>
<b>18.</b>	<b>Intellectual Property</b>	<b>27</b>
18.1	Ownership of IP developed using the Contributions	27
18.2	Use of Company IP by Parties	27
18.3	Background IP Licence	27
18.4	Commercial Unit	27
<b>19.</b>	<b>Termination</b>	<b>28</b>
19.1	Termination if Completion does not take place before Completion Date	28
19.2	Termination events	28
19.3	Failure to resolve or remedy	28
19.4	Share transfer	29
19.5	Without prejudice to rights	29
<b>20.</b>	<b>Dispute Resolution</b>	<b>29</b>
20.1	Clause applies	29
20.2	Avoidance	29
20.3	Notification	29
20.4	Meeting	29
20.5	Mediation	29
20.6	Expert	30
20.7	Capacity of Expert	30
20.8	Expert's Determination	30
20.9	Determination costs	30
20.10	Expert's Fees	30
<b>21.</b>	<b>Indemnities</b>	<b>30</b>

## ACPPFG SHAREHOLDERS' AGREEMENT

<b>22.</b>	<b>Notices</b>	<b>31</b>
22.1	Manner of giving	31
22.2	Manner of delivery	31
22.3	When delivered	31
<b>23.</b>	<b>GST</b>	<b>31</b>
23.1	Interpretation	31
23.2	Application of GST	32
<b>24.</b>	<b>General Provisions</b>	<b>32</b>
24.1	Entire Agreement	32
24.2	Amendments to be in writing	32
24.3	Disposal	32
24.4	Encumbrance	32
24.5	Relationship	32
24.6	Costs and stamp duty	33
24.7	Failure to exercise not a waiver	33
24.8	Single/partial exercise of rights	33
24.9	Waivers to be in writing	33
24.10	Further assurances	33
24.11	No merger	33
24.12	Governing law and jurisdiction	33
24.13	Counterparts	33
24.14	Execution	33

## ACPFG SHAREHOLDERS' AGREEMENT

Date	
Parties	
1.	AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL GENOMICS PTY LTD ABN 98 102 769 808 of [ ] (Company)
2.	AGRICULTURE VICTORIA SERVICES PTY LTD ABN 23 006 598 198, of 475 Mickleham Road, Attwood, Victoria, (which enters into this Agreement as agent on behalf of the State of Victoria through its Department of Natural Resources and Environment) (AVS)
3.	THE STATE OF VICTORIA through its Department of Natural Resources and Environment of (DNRE)
4.	GRAINS RESEARCH AND DEVELOPMENT CORPORATION, a body corporate established pursuant to the Primary Industries and Energy Research and Development Act 1989, ABN 55 611 223 291, of Level 1, 40 Blackall Street, Barton, Australian Capital Territory 2604 (GRDC).
5.	MINISTER FOR SCIENCE AND INFORMATION ECONOMY of Level 1, 31 Flinders Street, Adelaide, South Australia 5000 (SA State)
6.	THE UNIVERSITY OF ADELAIDE, a body corporate established pursuant to the provisions of the <i>University of Adelaide Act 1971</i> (SA), ABN 61 249 878 937, of North Terrace, Adelaide, South Australia 5000 (UA).
7.	THE UNIVERSITY OF MELBOURNE, a body corporate and politic established pursuant to the provisions of the <i>Melbourne University Act 1958</i> (Vic), ABN 84 002 705 224, of Melbourne, Victoria 3010 (UM).
8.	THE UNIVERSITY OF QUEENSLAND, a body corporate established pursuant to the <i>University of Queensland Act 1998</i> (Qld), ABN 63 942 912 684 of Brisbane, Queensland 4072 (UQ).
Recitals	
A	ARC and GRDC agreed to establish and invest in the Australian Centre for Plant Functional Genomics (ACPFG), as a major research centre in the area of plant functional genomics research, and called for applications for other entities to participate in ACPFG.
B	UA submitted the Application to ARC and GRDC, providing for

## ACPFG SHAREHOLDERS' AGREEMENT

	DNRE, SA State, UA, UM and UQ to contribute to the establishment, funding and ongoing operation of ACPFG.
C	ARC and GRDC have accepted the Application submitted by UA referred to in Recital B, for the purpose of negotiating the terms on which ACPFG is to be established and carried out.
D	The Shareholders have established the Company to conduct and co-ordinate ACPFG.
E	The Shareholders have agreed that their respective rights and obligations will be established on the terms set out in this Agreement.

It is agreed as follows.

### 1. Preliminary

#### 1.1 Definitions

In this Agreement:

**ACPFG Business** means the business of the Australian Centre for Plant Functional Genomics conducted by the Company from time to time, in accordance with the provisions of this Agreement, the Business Plan and the Research Plan;

**Application** means the application lodged by UA to ARC and GRDC, entitled "Abiotic Stress and Productivity in Cereals", which is attached at Schedule 3;

**ARC** means the Commonwealth of Australia as represented by and acting through the Australian Research Council, established pursuant to the provisions of the *Australian Research Council Act 2001*;

**ARC Funding Deed** means the deed to be entered into between ARC and UA setting out the terms under which ARC agrees to provide its Contribution;

**Assistance Deed** means the deed dated 28 June 2002 between SA State and UA, under which SA State provided part of its Contribution directly to UA;

**Background IP Licence** means the agreement or agreements to be entered into between the Company and each of DNRE, UA, UM, UQ and GRDC, pursuant to which each of DNRE, UA, UM, UQ and GRDC will make available:

- (a) the Intellectual Property it has committed to make available to ACPFG in the Application; and
- (b) other Intellectual Property it has committed to make available to ACPFG in correspondence amongst the Parties;

## ACPFPG SHAREHOLDERS' AGREEMENT

**Board** means the Directors for the time being of the Company or such number of them as have authority to act for the Company,

**Business Day** means a day other than a Saturday, Sunday or public holiday in South Australia;

**Business Plan** means the Initial Business Plan and/or each subsequent business plan, as the context requires, as amended from time to time pursuant to clause 7.5;

**CEO** means the Chief Executive Officer of the Company from time to time;

**Claim** means any claim, action, proceeding, demand, cost, damage, loss, expense or liability incurred or suffered by, or brought or made or recovered against, the person and however arising (whether or not presently ascertained, immediate, future or contingent);

**Commercialise** in relation to Intellectual Property, means to manufacture, sell, hire or otherwise exploit a product, process or information or to provide a service, incorporating that Intellectual Property, or to license or grant a right to any other party to do any of those things;

**Completion Agreements** means the agreements listed in clause 2.1(b);

**Confidential Information** means all know-how, financial information, and other commercially valuable information in whatever form including inventions, trade secrets, formulae, graphs, drawing, designs, biological materials, samples, and other materials of whatever description which a Party states is confidential or which, by its nature is confidential and includes all such information that may be in the possession of a Party's employees or officers.

The following are exceptions to such information:

- (a) information which is already in the public domain;
- (b) information which becomes part of the public domain otherwise than as a result of an unauthorised disclosure;
- (c) information which is or becomes available to the recipient Party from a third party lawfully in possession of the information and who has the lawful power to disclose such information to the recipient Party on a non-confidential basis; and
- (d) information which is rightfully known by the recipient Party prior to the date of disclosure to it by the disclosing Party,

**Constitution** means the constitution of the Company, set out in Schedule 1, as amended from time to time;

**Contribution** means, in relation to a Shareholder (other than AVS), DNRE or the ARC, the total contribution made, or undertaken to be made, by that Shareholder, DNRE or the ARC for use for ACPFG Business purposes, set out in Schedule 4 or otherwise approved pursuant to clause 13.1(e):

- (a) whether cash or in-kind or otherwise; and

## ACPPG SHAREHOLDERS' AGREEMENT

- (b) whether directly to the Company or not,  
but does not include Intellectual Property;

*Director* includes a person acting in the position of a director of the Company;

*Dispose* means assign, transfer, otherwise dispose of or grant or permit or suffer the grant of any legal or equitable interest (either in whole or in part) whether by sale, lease, declaration or creation of a trust or otherwise;

*Document* means any contract, arrangement or understanding between the Company and a Shareholder and includes this Agreement, the Constitution, the Completion Agreements, the Background IP Licences, the Interim Building & Facility Access Agreement, the Research Agreements and the Research Management Agreement;

*Encumbrance* means any interest or power:

- (a) reserved in, or over any interest in, any asset including, without limitation, any retention of title; or  
(b) created or otherwise arising in, or over any interest in, any asset under a bill of sale, mortgage, charge, lien, pledge, trust or power,

by way of security for the payment of any debt or other monetary obligation, or the performance of any other obligations and whether existing or agreed to be granted or created;

*Expert* means the person appointed either:

- (a) by agreement between the Parties within 5 Business Days of any dispute not being resolved in accordance with the provisions of clause 20; or  
(b) failing such agreement, at the request of any party by the President for the time being of the Law Society of South Australia Inc. (or the President's nominee);

*Financial Year* means the financial year of the Company from time to time;

*Funding Documents* means the ARC Funding Deed, GRDC Funding and Share Subscription Agreement and SA Funding Deed;

*GRDC Funding and Share Subscription Agreement* means the agreement to be entered into between GRDC, UA and the Company setting out the terms under which GRDC agrees to provide its Contribution;

*Guidelines* means the Australian Centre for Plant Functional Genomics Guidelines for Applicants, issued by ARC and GRDC, attached at Schedule 2;

*Initial Shares* means the Shares referred to in clause 9.1;

*Intellectual Property* or *IP* means:

- (a) any patents or rights concerning any discovery, invention, process, process improvement, procedure, manufacturing method, technique

## ACPPFG SHAREHOLDERS' AGREEMENT

or information regarding the chemical or genetic composition of materials (whether patentable or not);

- (b) trade marks, business names or trading styles (whether registered or not);
- (c) copyright material and similar [or neighbouring] rights;
- (d) registered or registrable designs;
- (e) plant breeder rights or other proprietary information concerning genetic or biological material or engineering processes; and
- (f) eligible layouts or protectable computer programs,

as well as any right to seek registration of any intellectual property;

**Interim Building & Facility Access Agreement** means the agreement to be entered into between UA and the Company, for the Company to obtain interim access to UA buildings and facilities, in accordance with clause 15.2;

**IP Agency Deed** means the deed or deeds to be entered into between the Company and each of DNRE, UA, UM and UQ, in relation to DNRE, UA, UM or UQ (as the case may be) acting as the Company's agent for the development of IP which is developed from:

- (a) the cash and in-kind Contributions of DNRE, UA, UM and UQ; and
- (b) the cash Contributions of ARC, GRDC and SA State provided to UA under the Funding Deeds and by UA to each of UM, UQ and DNRE under the On-Funding Deed;

**On-Funding Deed** means the deed or deeds to be entered into between UA and each of DNRE, UM and UQ setting out the terms upon which UA agrees to provide to each of DNRE, UM and UQ a proportion of the Contributions provided to UA under the Funding Deeds;

**Other Commonwealth Funding** means funding provided under Commonwealth Government research funding schemes such as the Research Training Scheme, Institutional Grants Scheme, Research Infrastructure Block Grants Scheme, or any similar scheme but does not include funding provided under the *Australian Research Council Act 2001*;

**Paid Contribution** means, in respect of a Shareholder (other than AVS) and DNRE, that part of its Contribution which it has already made, from time to time;

**Participants' Agreement** means the agreement between the Shareholders (except AVS and UQ), DNRE and ARC, dated on or about [ ] June 2002, to regulate the process of establishing ACPFG;

**Party** means a party to this Agreement;

**Quarter** means a period of 3 months commencing on each 1 January, 1 April, 1 July and 1 October;

**Research Agreement** means the agreement or agreements between the Company and each of DNRE, UA, UM and UQ in relation to DNRE, UA,

## ACPPFG SHAREHOLDERS' AGREEMENT

UM or UQ (as the case may be) acting as the Company's agent for the undertaking of research (including the development of IP) which is undertaken with:

- (a) the cash and in-kind Contributions of DNRE, UA, UM and UQ;
- (b) the cash Contributions of GRDC and SA State provided to the Company under the GRDC Funding and Share Subscription Agreement and SA Funding Deed, respectively; and
- (c) the cash Contributions of ARC provided either to UA or to the Company under the ARC Funding Deed;

*Research Management Agreement* means the agreement to be entered into between the Parties (other than AVS) and ARC, under which the Company agrees to manage the performance by each of DNRE, UA, UM and UQ of their respective obligations under the Funding Documents and On-Funding Deed as an independent contractor of ARC, GRDC and SA State;

*Research Plan* means the Initial Research Plan and/or each subsequent Research Plan, as the context requires; as amended from time to time pursuant to clause 7.5;

*SA Funding Deed* means the deed to be entered into between SA State, UA and the Company setting out the terms under which SA State agrees to provide the part of its Contribution that is not to be provided to UA under the Assistance Deed;

*Shares* means shares in the capital of the Company;

*Shareholders* means:

- (a) each of the following persons for so long as it holds Shares:
  - (i) AVS
  - (ii) GRDC
  - (iii) SA State
  - (iv) UA;
  - (v) UM;
  - (vi) UQ; and
- (b) any other person that at any time holds Shares and has agreed to be become bound by the provisions of this Agreement;

*Special Board Resolution* means a resolution that has been passed by at least 75% of the votes cast by Directors present at a duly convened Directors' meeting; and

*Special Shareholder Approval* means an approval that has been given, in accordance with clause 13.2, by

- (a) at least 75% of the Shareholders; and
- (b) either:

## ACPFSG SHAREHOLDERS' AGREEMENT

- (i) Shareholders holding 75% or more of the Shares; or
  - (ii) all but one Shareholder if the dissenting Shareholder holds at least 25%, but no more than 50% of the Shares,
- but for the purposes of clause 13.1(h), the vote(s) of the Defaulting Shareholder must not be taken into account.

### 1.2 Interpretation

In this Agreement, unless it is stated to the contrary;

- (a) the singular includes the plural and conversely;
- (b) a gender includes all genders;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) a reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
- (e) a reference to a clause, schedule or annexure is a reference to a clause of, or a schedule or annexure to, this Agreement;
- (f) a reference to an agreement or document (including this Agreement) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by this Agreement or that other agreement or document;
- (g) a reference to *writing* includes any method of representing or reproducing words, figures, drawings, or symbols in a visible form but excludes any communication using electronic mail;
- (h) a reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives);
- (i) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;
- (j) a reference to conduct includes, an omission, statement or undertaking, whether or not in writing;
- (k) a reference to an *agreement* includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing;
- (l) a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind;
- (m) a reference to *dollars* and \$ is to Australian currency;
- (n) a reference to a right or obligation of any two or more persons confers that right, or imposes that obligation, as the case may be, jointly and severally;

## ACCFG SHAREHOLDERS' AGREEMENT

- (o) the meaning of general words is not limited by specific examples introduced by *including*, or *for example*, or similar expressions;
- (p) references to *agree*, *approve* or *consent* are references to agreement, approval or consent (as the case may be) in writing; and
- (q) nothing in this Agreement is to be interpreted against a party solely on the ground that the party put forward this Agreement or any part of it.

### 1.3 Headings

Any heading or table of contents used in this Agreement is for convenience only and does not affect the interpretation of this Agreement.

### 1.4 Schedules and annexures

The Schedules to this Agreement form part of this Agreement.

### 1.5 Reading down

Where a word, phrase, sentence, sub-clause, clause or other provision of this Agreement (*provision*) would otherwise be unenforceable, illegal or void, the effect of that provision will, so far as is possible, be limited and read down such that it is not unenforceable, illegal or void.

### 1.6 Provisions severable

Each provision is severable.

### 1.7 Court may sever

If a court determines that a provision is unenforceable, illegal or invalid, the court may sever that provision.

### 1.8 Effect of severance

A severed provision becomes inoperative and does not affect the other provisions of this Agreement.

## 2. Completion

---

### 2.1 Date of Completion

*Completion* is the date on which the last of the following occurs:

- (a) the Company has been registered and the Constitution adopted;
- (b) the following agreements have been entered into:
  - (i) the ARC Funding Deed;
  - (ii) the GRDC Funding and Share Subscription Agreement;
  - (iii) the SA Funding Deed; and

## ACPPFG SHAREHOLDERS' AGREEMENT

- (iv) IP Agency Deeds between the Company and each of DNRE, UA, UM and UQ; and
- (c) the Shareholders hold the Initial Shares.

### 2.2 Agreement effect

This Agreement takes effect on the date of its signature by the last party, not the date of Completion.

### 2.3 Termination of Participants' Agreement

The Parties agree that on Completion, the Participants' Agreement will terminate, in accordance with its terms.

## 3. Term

---

Subject to earlier termination by operation of law or pursuant to this Agreement, this Agreement operates for an indefinite period commencing on the date of this Agreement.

## 4. Objectives

---

Without limiting the objects and powers of the Company, the objectives of the Shareholders in establishing the Company and entering into this Agreement are:

- (a) *scientific* objectives, within the field of plant functional genomics, to:
  - (i) establish programs of research that deliver a mix of economic, environmental and social benefits relevant to Australia in the short, medium- and long-term;
  - (ii) make discoveries and prove concepts that are in the forefront of developments internationally,
  - (iii) establish a training program that will develop for Australia the next generation of researchers;
  - (iv) build relationships nationally and internationally;
  - (v) build on existing research programs undertaken by the Shareholders, DNRE and the ARC individually or by any two or more of the Shareholders, DNRE and the ARC (whether alone or with third parties);
  - (vi) use key platform technologies;
  - (vii) enable access to world class facilities and equipment; and
  - (viii) attract from within Australia, and from abroad, researchers of international standing, and the most promising research students;
- (b) *commercial* objectives, to:

## ACPPFG SHAREHOLDERS' AGREEMENT

- (i) ensure that the key aspects of the research programs undertaken by, or under the auspices of, the Company are clearly focussed on delivering demonstrable industry outcomes;
  - (ii) develop a creditable business plan for the Company;
  - (iii) establish key performance indicators for monitoring the performance of the Company;
  - (iv) proactively and seamlessly ensure that key outputs from the research programs undertaken by, or under the auspices of, the Company are incorporated in commercially available products or services sold or otherwise exploited in Australia (at least) and that such products and services are commercialised for the benefit of Australia;
  - (v) attract the participation of Australian and international companies in collaborative research programs undertaken by, or under the auspices of, the Company and in the commercialisation of the outcomes of research undertaken by, or under the auspices of, the Company; and
  - (vi) identify, protect and commercially exploit the intellectual property arising out of the research undertaken by, or under the auspices of, the Company for the benefit of Australian researchers and industry;
- (c) *community* objectives, to:
- (i) provide opportunities for world class researchers in plant functional genomics to work in Australia and to enable world class Australian scientists to remain in, or return to, Australia;
  - (ii) provide an effective, transparent and balanced understanding of the scientific impacts of applied gene plant technology within the wider Australian community;
  - (iii) raise awareness within the wider Australian community of the role of science in Australia, and particularly its contribution to industrial innovation and maintaining international competitiveness; and
  - (iv) raise awareness within the wider Australian community about innovation in agriculture and its role in the "new economy"; and
- (d) to do all other lawful things as may be incidental or conducive to the attainment of the objectives set out in clauses 4(a) to (c).

## ACPFG SHAREHOLDERS' AGREEMENT

### **5. Relation with Constitution and Completion Agreements**

---

#### **5.1 Priority of documents**

- (a) Where there is an inconsistency between the following documents, the following descending order of priority will apply (the first-named document will prevail to the extent of any inconsistency):
- (i) this Agreement;
  - (ii) the Completion Agreements;
  - (iii) the Constitution;
  - (iv) the Application; and
  - (v) the Guidelines.
- (b) The Parties agree to take all steps reasonably necessary to amend the above documents as required to remove inconsistencies.

#### **5.2 Exercise of rights under Constitution**

The Company and the Shareholders will exercise their rights or refrain from exercising their rights under the Constitution (as the case requires) so as to give effect to this Agreement.

#### **5.3 Observance of obligations**

Subject to clauses 5.1 and 5.2, the Parties will comply with the Constitution with the intent that the provisions of the Constitution will be enforceable between the Company and the Shareholders and the Shareholders as between themselves.

#### **5.4 Shareholders to ensure compliance by Company**

The Shareholders will exercise their rights in relation to the Company so as to ensure that the Company observes and performs its obligations under the Documents.

#### **5.5 Amendment of Constitution**

The Shareholders agree that the Constitution may only be modified or repealed by agreement in writing of all of the Shareholders.

#### **5.6 Compliance by Company**

The Company will do everything necessary or desirable to give effect to, and must comply with, the provisions of this Agreement and the Constitution.

#### **5.7 No fiduciary relationship**

Notwithstanding any other provision of this Agreement or the Constitution the Shareholders are not in a fiduciary relationship to each other or to the Company, in their capacities as Shareholders.

## ACPFG SHAREHOLDERS' AGREEMENT

### 6. Establishment

---

#### 6.1 Steps in establishment

The Parties will take all reasonable steps necessary to establish the ACPFG Business.

#### 6.2 Compliance with laws for establishment

The Parties will ensure that the ACPFG Business is established in compliance with all applicable laws and standards.

#### 6.3 Financial Year

The Financial Year will be 1 January to 31 December each year, unless otherwise agreed by Special Board Resolution.

### 7. Business Plans, Budgets and Research Plans

---

#### 7.1 Initial Business Plan

The Parties must ensure that the Company adopts a business plan (*Initial Business Plan*) for the ACPFG Business, which contains a detailed budget and is substantially in the same form as the business plan set out in Schedule 5, within 60 days of Completion.

#### 7.2 Review of Business Plan

The Parties must ensure that the Board:

- (a) reviews the Initial Business Plan, and any subsequent Business Plan; and
- (b) adopts an updated Business Plan;

at least 30 Business Days before the commencement of each Financial Year (other than for the 2002 and 2003 Financial Years).

#### 7.3 Initial Research Plan

The Initial Research Plan for the ACPFG Business will be that set out in Schedule 6.

#### 7.4 Review of Research Plan

The Parties must ensure that, at least 30 Business Days before the commencement of each Financial Year (other than the 2002 and 2003 Financial Years):

- (a) the Executive Management Committee reviews the Research Plan and recommends to the Board whether, and in what respect, to amend it; and
- (b) the Board decides whether, and in what respect, to amend the Research Plan.

## ACPFG SHAREHOLDERS' AGREEMENT

### 7.5 General review

In accordance with paragraph 8.4 of the Guidelines, the performance of ACPFG is to be reviewed during the fourth year of operation of the Company. The review:

- (a) must include examination of:
  - (i) the extent to which ACPFG has met the objectives listed at clause 4 (both as at the date of signing this Agreement and as at the date of that review);
  - (ii) the progress against the Business Plan and Research Plan, as amended from time to time;
  - (iii) the quality of outcomes to date; and
  - (iv) the management of the ACPFG Business; and
- (b) must be undertaken by or on behalf of the Company and at its cost.

## 8. Contributions

---

### 8.1 DNRE, UA, UM and UQ Contributions

Subject to:

- (a) ARC, GRDC, SA State and UA entering into the Funding Document; and
- (b) UA and DNRE, UM and UQ entering into the On-Funding Deed, DNRE, UA, UM and UQ each agree to make available to the ACPFG Business their cash and in-kind Contributions, in the amount and at the times listed in Schedule 4.

### 8.2 Changes to investment of DNRE, UA, UM and UQ Contributions

- (a) The Parties agree that, in order to best achieve the objectives in clause 4, each Business Plan and/or Research Plan must reflect:
  - (i) the research to be carried out; and
  - (ii) the Contributions to be invested,with each of DNRE, UA, UM and UQ (*Change of Focus*).
- (b) The Parties agree that the requirements of clause 8.2(a) must be implemented in accordance with:
  - (i) the requirements of the Funding Documents; and
  - (ii) the provisions of clause 7.
- (c) If a Change of Focus means that:
  - (i) Other Commonwealth Funding of UA, UM or UQ is reduced, its Contribution will be reduced by a commensurate amount; and

## ACPFG SHAREHOLDERS' AGREEMENT

- (ii) Other Commonwealth Funding of UA, UM or UQ is increased, its Contribution will, subject to clauses 13.1(e) and 13.3, be increased by a commensurate amount.

### 8.3 Paid Contributions to be auditable

- (a) Each Shareholder agrees to maintain separate records of its Paid Contributions, in a way that enables its Paid Contributions to be verifiable by audit.
- (b) Each Shareholder must, within 20 Business Days of a request from the Company, make its records of its Paid Contributions available to the Company and its representatives for inspection, copying and auditing.
- (c) Each Shareholder must give access during normal business hours to the Company and its representatives to the place(s) where its records of Paid Contributions are kept, for the purposes set out in clause 8.3(b).

## 9. Interests

---

### 9.1 Capitalisation

Within 10 Business Days of the date of this Agreement the company must ensure that the Shareholders hold the following shares in the capital of the Company

- (a) AVS 10 Initial Shares;
- (b) GRDC 21 Initial Shares;
- (c) SA State 19 Initial Shares;
- (d) UA 39 Initial Shares;
- (e) UM 8 Initial Shares; and
- (f) UQ 3 Initial Shares.

### 9.2 Share price and payment

The amount payable for each Initial Share:

- (a) is \$1.00; and
- (b) must be paid:
  - (i) in respect of any Initial Share transferred to a Shareholder, to the transferor of that Initial Share; and
  - (ii) in respect of any Initial Share issued to a Shareholder, to the Company,

in either case if payment has not already been made, within 10 Business Days of the date of this Agreement.

## ACPFG SHAREHOLDERS' AGREEMENT

### 9.3 Issue of Additional Shares

- (a) The Parties intend that the number of Shares that each Shareholder will be issued pursuant to this clause 9.3 is 1 Share for each whole \$10,000 of the Paid Contribution of that Shareholder (other than AVS) and in the case of AVS, the Paid Contribution of DNRE.
- (b) The Company must calculate and determine each Shareholder's Share entitlement pursuant to clause 9.3(a):
  - (i) annually, as of the date of expiry of the relevant Financial Year by reference to the Paid Contribution of each Shareholder (other than AVS) and, in the case of AVS, of DNRE, and the Shares previously issued pursuant to this clause 9.3 to that Shareholder as at that date; and
  - (ii) as soon as possible after the date of expiry of that Financial Year.
- (c) The Company must issue, to all or some of the Shareholders (as the case requires), their respective Share entitlement (*Additional Shares*) within 20 Business Days of those Share entitlements being calculated and determined.
- (d) Any determination by the Company pursuant to clause 9.3(b) is final and binding on the Parties and is not subject to the provisions of clause 20.
- (e) For the purposes of this clause 9.3, the amount of in-kind Paid Contributions will be calculated and determined on the same basis as adopted in the Initial Business Plan.
- (f) The parties record that Shares issued to the Shareholders pursuant to this clause 9.3 are issued:
  - (i) in consideration for the Shareholders (other than AVS) and DNRE making cash Contributions to the Company for ACPFG research purposes; and
  - (ii) in consideration for the Shareholders (other than AVS) and DNRE making cash and in-kind Contributions otherwise than to the Company, for ACPFG research purposes, on the basis that IP developed in undertaking that research belongs to the Company pursuant to the IP Agency Deed(s) and Research Agreement(s).
- (g) DNRE acknowledges and agrees that:
  - (i) all Shares to be issued pursuant to this clause 9.3 in relation to its Paid Contribution are to be issued to AVS; and
  - (ii) it has no Claim against the Company for the issue of Shares to it pursuant to this clause 9.3.

## ACPFG SHAREHOLDERS' AGREEMENT

### 9.4 Encumbrances

A Shareholder must not grant an Encumbrance or permit an Encumbrance to exist in respect of its Shares.

### 9.5 Disposal of Shares

- (a) A Shareholder must not Dispose of any of its Shares other than in accordance with the Constitution and this Agreement.
- (b) The Company must only register any Disposal of Shares to any person other than a Shareholder where that person enters into a deed satisfactory to the Company in terms of which that person covenants to be bound by this Agreement.

### 9.6 Property

Subject to the Constitution, the Shareholders have no interest in the property of the Company.

### 9.7 Liabilities

The Shareholders are not responsible for the liabilities of the Company.

## 10. Operation

---

### 10.1 Conduct of ACPFG Business

The Company will conduct the ACPFG Business, itself or through agreements with other persons.

### 10.2 Compliance with laws

The Company will operate the ACPFG Business in compliance with all applicable laws and standards.

### 10.3 Compliance with Business Plans and Research Plans

The Company will implement each Business Plan and Research Plan in a timely, effective and efficient way.

### 10.4 Manner of operation

The Company will ensure the ACPFG Business is operated in a proper and efficient manner and in accordance with sound business practice.

### 10.5 Contracts register

The Company must maintain a list of all contracts, arrangements and understandings to which the Company is a party (*Contracts Register*), which are from time to time determined by the Directors or CEO to be material to the ACPFG Business (*Material Contracts*).

## ACPPFG SHAREHOLDERS' AGREEMENT

### 10.6 Recording of details

The Company must record the details of a Material Contract in the Contracts Register promptly after that Material Contract is entered into by the Company.

### 10.7 IP Register

The Company must establish and maintain a register (*IP Register*) which the Company must separately record all details of all Intellectual Property:

- (a) owned by the Company;
- (b) licensed to the Company;
- (c) licensed out by the Company; and
- (d) Commercialised by the Company.

### 10.8 Inspection of Contracts Register

Any Director or Shareholder may inspect the Contracts Register and the IP Register.

### 10.9 Day for inspection

The inspection of the Contracts Register or the IP Register may take place on any Business Day without any requirement for prior notice to the Company.

### 10.10 Insurance

The Company and its property (other than Intellectual Property) must be insured against all risks usually insured against by companies carrying on the same or similar business as the Company.

### 10.11 Property insurance

The Company's property (other than Intellectual Property) must be insured for its full replacement and reinstatement value.

### 10.12 Insurer

Any insurer of the Company or its property must be reputable.

### 10.13 No vitiation of insurance

The Company must not, and each Shareholder must not, knowingly do or permit any act or omission, which could result in:

- (a) any insurance policy held by the Company being rendered voidable;
- (b) indemnity being refused in respect of any claim under an insurance policy held by the Company; or
- (c) the premiums under an insurance policy held by the Company being increased (other than as a result of claim made in good faith).

## ACPFG SHAREHOLDERS' AGREEMENT

### 11. Board

---

#### 11.1 Composition of the Board

- (a) The Board must consist of a minimum of 3 Directors.
- (b) The CEO is a Director by reason of his or her office, unless the Shareholders agree otherwise, by Special Shareholder Approval.
- (c) The ARC may appoint, remove and replace one Director to the Board, but only:
  - (i) for so long as ARC makes its Contribution under the ARC Funding Deed;
  - (ii) if ARC has consulted with the Shareholders about its nominee, prior to appointment as a Director; and
  - (iii) if the Shareholders have consented in writing to that nominee being appointed as a Director (and the Shareholders must not unreasonably withhold their consent).
- (d) All Directors, other than the Director nominated by the ARC under clause 11.1(c), must be appointed by the Shareholders, upon such terms and for such period, as agreed by Special Shareholder Approval.
- (e) Any Director, including the Director nominated by ARC, may be removed by a Special Shareholder Approval.

#### 11.2 Management and operation

- (a) The Board will be responsible for the overall management and operation of the Company.
- (b) Each Shareholder agrees that it will only approve, by Special Shareholder Approval, the appointment of a person as a Director or alternate Director, who:
  - (i) has the necessary business and financial acumen; or
  - (ii) has the necessary knowledge of the Australian grains industry or the necessary experience at a senior technical or research level in the Australian grains industry,to enable that person to act and perform that person's duties as a Director or alternate Director, respectively.

#### 11.3 Chief Executive Officer

- (a) The CEO is the person appointed by the Board, with prior approval of a Special Shareholders Approval.
- (b) The CEO is responsible to the Board for the day-to-day operation of the ACPFG Business.
- (c) The CEO is an employee of the Company.

## ACPFG SHAREHOLDERS' AGREEMENT

- (d) The first CEO is Professor Peter Langridge, who will continue in the position until he resigns, or is dismissed by the Board by a Special Board Resolution.

### 11.4 Chairman of Directors

- (a) The Chairman is the Director appointed by the Shareholders as chairman, upon such terms and for such period, as agreed by Special Shareholder Approval.
- (b) Other than for a Special Board Resolution, the Chairman has a casting vote in meetings of Directors, in addition to his or her deliberative vote.
- (c) The first Chairman is [Nick Begakis], who is appointed for a term of [...] years.
- (d) The Chairman ceases to hold office at the end of his or her term, on retiring or resigning, or upon the Shareholders agreeing to that effect by Special Shareholders Approval.

### 11.5 Executive Management Committee

- (a) Prior to the establishment of the Company, the Shareholders had established an Executive Management Committee to carry out the functions referred to at page 42 of the Application (*Executive Management Committee*).
- (b) Subject to clause 11.5(c), the Executive Management Committee comprises 5 members appointed by the Board.
- (c) The members of the Executive Management Committee are:
  - (i) the CEO of the Company by reason of his or her office; and
  - (ii) the Program Leaders of research projects undertaken by or on behalf of the Company, as reflected in the Research Plan from time to time.
- (d) The CEO is the chairman of the Executive Management Committee.
- (e) The Board will determine the responsibilities of the Executive Management Committee.
- (f) The Executive Management Committee may meet and adjourn and otherwise regulate its proceedings as it thinks fit.

### 11.6 Board meetings

- (a) The Board will meet regularly but not less than once each Quarter.
- (b) Unless otherwise agreed by the Directors, not less than 10 Business Days notice must be given of any Board meeting.

## ACPFPG SHAREHOLDERS' AGREEMENT

### 11.7 Quorum

At a meeting of the Directors, the number of Directors (or their alternates) whose presence is necessary to constitute a quorum is not less than 50% of the Directors.

### 11.8 Voting

- (a) In relation to any question arising at a meeting of Directors, each Director has one vote.
- (b) Any resolution of the Board requires a vote in favour by a simple majority of votes exercised in relation to the resolution, except where a different majority is specified in this Agreement.

### 11.9 Remuneration

- (a) The Directors will be paid such remuneration as is from time to time approved by Special Shareholders Approval.
- (b) That remuneration will be deemed to accrue from day to day.

## 12. Restrictions

---

### 12.1 Special Board Resolutions

The Company must only take action in relation to the following matters if the Board has approved the relevant matter by Special Board Resolution:

- (a) the repayment of any debt by the Company or any subsidiary or of any Shareholder's loans, other than in accordance with the terms of agreements binding on the Company or any subsidiary,
- (b) any borrowings of an amount in excess of \$50,000;
- (c) the creation of any committee of the Board or the delegation of any powers of the Board to any person other than as provided for in this Agreement;
- (d) a change to the Financial Year;
- (e) the entering into, amending or terminating of any contract with a term of five years or more, or contract with a value (taking into account of gross payments or receipts over the life of the contract) of \$100,000 or more;
- (f) incurring any liability which would or could result, over the term the Company is required to meet the liability, in the Company being obliged to pay an amount not provided for in a Business Plan or Budget and which exceeds \$50,000;
- (g) the appointment or removal of an auditor under clause 6.3;
- (h) indemnifying any person for any claim suffered or incurred by, or brought, made or recovered by any person against, that person other than for any indemnity pursuant to an insurance policy (including a

## ACPFG SHAREHOLDERS' AGREEMENT

directors and officers insurance policy) entered into by the Company in the ordinary course of the Business; and

- (i) the dismissal of Peter Langridge as the first CEO.

### 12.2 Offers to Shareholders

Except as provided for in clause 9.3, the Company must ensure that offers to issue Shares are made to each Shareholder, as far as practicable, in proportion to each Shareholder's shareholding at that time.

### 12.3 No other offers

The Company must not issue or offer Shares to any person other than the Shareholders, unless agreed by Special Shareholder Approval.

### 12.4 Third party offers

The Company must ensure that no Shares are issued to any person other than the Shareholders unless that person enters into a deed satisfactory to the Directors in terms of which that person covenants to be bound by this Agreement.

### 12.5 Options

The Company must not grant any options over its unissued Shares, unless agreed by Special Shareholder Approval.

### 12.6 Partly paid shares

The Company must not issue any partly paid Shares, unless agreed by Special Shareholder Approval.

## 13. Shareholder approvals

---

### 13.1 Special Shareholder Approvals

The Company must only take action in relation to the following matters if the Shareholders have approved the relevant matter by a Special Shareholder Approval:

- (a) appointment or removal of any Director, including the CEO, to or from the Board, other than:
  - (i) upon expiry of the Director's term;
  - (ii) upon retirement or resignation of the Director;
  - (iii) for the appointment or removal by ARC of the Director nominated by it, pursuant to clause 11.1(c);
  - (iv) for the removal of the first CEO in accordance with clause 11.3(d); or
  - (v) pursuant to clauses 11.8(a) to (f) of the Constitution;
- (b) the remuneration of the Directors;

## ACPPFG SHAREHOLDERS' AGREEMENT

- (c) the appointment of any alternate Director;
- (d) the dismissal of the CEO (other than the first CEO) as an employee of the Company;
- (e) the adoption of, or amendment to, any Business Plan or Research Plan, reflecting an increase or decrease in the Contributions of any Shareholder or ARC; of more than 5% from that previously reflected in the Business Plan or Research Plan; or
- (f) the entering into or amending of any agreement or arrangement between the Company and:
  - (i) any of the Shareholders or their related bodies corporate (as defined in the Corporations Act);
  - (ii) DNRE; or
  - (iii) ARC;
- (g) the entering into of any arrangement to give any guarantee, mortgage, charge or other security over the assets of the Company; and
- (h) giving any notice under clause 19.2(a) or 19.3(b).

### 13.2 Form of Special Shareholder Approval

- (a) A meeting of Shareholders is not required for a Special Shareholder Approval.
- (b) The Shareholders may give a Special Shareholder Approval:
  - (i) by resolution carried by the required majority at a meeting of Shareholders; or
  - (ii) by signing a document, reflecting that the required majority of Shareholders are in favour of the relevant approval.

### 13.3 Shareholder to approve increase in Contribution

Despite clauses 8.2(c)(ii) and 13.1(e), a Shareholder cannot be required to increase its Contribution unless it has approved the increase.

## 14. Research Management and Research Agreements

---

The Parties agree to use reasonable endeavours to ensure that, by no later than 31 March 2003, both the Research Management Agreement and the Research Agreements are entered into between the respective Parties to them.

## ACPFG SHAREHOLDERS' AGREEMENT

### 15. ACPFG buildings

---

#### 15.1 Building to be made available in accordance with Assistance Deed

- (a) UA and SA State agree and acknowledge that part of the SA State Contribution is being provided to UA under the Assistance Deed, to, among other things, be used for the construction and provision of part of a new building, for use by ACPFG.
- (b) Each of UA and the Company agrees to use its reasonable endeavours to enter into a lease or licence agreement:
  - (i) in accordance with the terms in clause 11 of the Assistance Deed; and
  - (ii) pursuant to which UA will provide ACPFG access to and use of part of the building (and possible associated equipment) provided as part of the SA State Contribution, once it is completed.

#### 15.2 Interim Building and Facility Access Agreement

- (a) UA will use its reasonable endeavours to:
  - (i) provide interim access to UA buildings and facilities, on reasonable terms, until immediately prior to the date of commencement of the lease or licence of the building referred to in clause 15.1; and
  - (ii) enter into the Interim Building & Facility Access Agreement, by no later than 31 March 2003, to formalise the terms of such interim access to those buildings and facilities.
- (b) The reasonable cost of providing access under clause 15.2(a) is part of UA's in-kind Contribution.

### 16. Information

---

#### 16.1 Records

The Company must keep complete and accurate records of the affairs of the Company and the operations of the ACPFG Business (*Records*).

#### 16.2 Inspection

- (a) Subject to clause 16.2(b), officers, employees and agents of the Shareholders authorised by the relevant Shareholder in writing (*Authorised Persons*) may inspect the Records.
- (b) In the case of Records being papers or minutes of meetings of the Board, those Records may only be inspected with the prior written approval of the Chairman of the Board, which approval must not be unreasonably withheld.

## ACPFG SHAREHOLDERS' AGREEMENT

### 16.3 Time for inspection

Inspection of the Records may take place on any Business Day on not less than 5 Business Days' prior notice.

### 16.4 Copying

Authorised Persons may copy the Records.

### 16.5 Confidentiality

All information obtained as a result of the exercise of the inspection and copying rights must be kept confidential except in accordance with clause 16.10.

### 16.6 Quarterly reports to Shareholders and ARC

The Company must provide to the Shareholders and ARC within 30 Business Days after the end of each Quarter, a report which comprises:

- (a) an unaudited profit and loss statement, balance sheet and cashflow statement (with projections for the balance of the current Financial Year) for that Quarter and for the current Financial Year to date, which are prepared in reasonable detail applying generally accepted Australian accounting principles consistently used;
- (b) anticipated abnormal expenses in the next Quarter;
- (c) proposed capital expenditure during the next Quarter; and
- (d) a summary of significant events, including:
  - (i) changes of key personnel; and
  - (ii) key actions, achievements, legal actions, and obstacles or threats identified.

### 16.7 Annual report

Within 90 Business Days after the expiration of each Financial Year, the Company must provide the Shareholders and ARC with a report on the affairs of the Company and the operation of the ACPFG Business during the immediately preceding Financial Year (*Annual Report*).

### 16.8 Contents of Annual Reports

Each Annual Report must contain details of:

- (a) the ACPFG Business's operations since the date of the last Annual Report (if any);
- (b) a profit and loss statement and cash flow statement for the immediately preceding financial year and balance sheet as at the end of that financial year, audited by the Company's auditors;
- (c) the performance of the Company and each other party to each contract to which the Company is a party including the Documents;

## ACPPFG SHAREHOLDERS' AGREEMENT

- (d) the ACPFG Business's performance by reference to criteria set out in the Business Plan and Research Plan;
- (e) recommendations for changes to the Business Plan, Research Plan and any Document;
- (f) the Company's expected capital requirements in the succeeding Financial Year; and
- (g) any other matter relevant to the Shareholders' and ARC's continued investment in the Company.

### 16.9 Form of Annual Reports

Each Annual Report must be:

- (a) in writing;
- (b) approved by the Board; and
- (c) signed by the Chairman and the CEO.

### 16.10 Use of Confidential Information

Each Party agrees not to disclose Confidential Information provided by any other Party, except:

- (a) in accordance with the policy (if any) on confidentiality agreed between the Parties;
- (b) to officers, employees, legal and other advisers and auditors of any Party who are:
  - (i) under an existing duty of confidentiality in respect of the Party, or
  - (ii) have first undertaken in writing to keep it confidential and to use it only as permitted under this Agreement;
- (c) to any Party, or any related body corporate of any Party, provided the recipient agrees to be bound by the provisions of this clause (in a form and content reasonably required by each Party, whose information is likely to be disclosed);
- (d) with the consent of the Party who provided the information (such consent not to be unreasonably withheld);
- (e) for SA State, GRDC, DNRE and AVS, to their respective:
  - (i) Parliament;
  - (ii) Cabinet; or
  - (iii) Parliamentary or Cabinet committee or subcommittee,but only where the discloser has marked the information as confidential, and explained to the recipient the obligation to maintain confidentiality,
- (f) for SA State, GRDC, DNRE and AVS, to any agency, authority, Minister or Officer of their respective Governments to whom it is

## ACPPFG SHAREHOLDERS' AGREEMENT

customary for that Party to disclose the information (whether or not that Party is legally obliged to do so), but only where the discloser has marked the information as confidential, and explained to the recipient the obligation to maintain confidentiality, or

- (g) as required by any law, constitutional duty or stock exchange, provided the discloser has made all reasonable efforts to resist disclosure.

Each Party consents to disclosures made in accordance with this clause.

### 16.11 Announcements

No Party may make any announcement to any person (other than the officers and employees of a Party) concerning this Agreement, the Company, the ACPFG Business and/or the Documents without the approval of the other Parties, which approval must not be unreasonably withheld.

### 16.12 Use of name, trade mark or logo

Except to the extent required by law, the Company may only use the name, trade mark or logo of a Shareholder if it has first obtained written consent of that Shareholder.

## 17. Goods and services

---

Each Party acknowledges and agrees that in carrying on the affairs of the Company, if the Company requires goods and/or services that can be provided by a Party the following rules will apply

- (a) the Party will be given a fair and equal opportunity to bid to provide such goods and /or services;
- (b) if the Party's proposal is at least of equal benefit to the Company to the best proposal received by the Company from a third party, that Party will be given preference in the allocation of that business;
- (c) if the Company receives proposals from more than one Party, which are equal, and both are at least equal to the best proposal received by the Company from a third party, the Company will perform a ballot to determine which of the Parties is to be allocated the business; and
- (d) for the avoidance of doubt, the Company is under no obligation to use the services of UA, UM, UQ, DNRE or AVS to carry out research and development, other than as expressly agreed in any Document.

## ACPFG SHAREHOLDERS' AGREEMENT

### 18. Intellectual Property

---

#### 18.1 Ownership of IP developed using the Contributions

The Parties agree that the Company will own all IP developed using Contributions, including IP developed by third parties.

#### 18.2 Use of Company IP by Parties

- (a) In consideration for the payment by each of DNRE, UA, UM and UQ of \$1.00 (if demanded), the Company grants each of DNRE, UA, UM and UQ a non-exclusive royalty-free licence, for a term expiring upon AVS (in the case of the licence to DNRE), UA, UM or UQ (as the case requires) ceasing for any reason to be a Shareholder, to use IP owned by the Company, for the purposes of, and to the extent necessary, to carry out its research obligations under the Research Plan.
- (b) Each Party acknowledges and agrees that, subject to clause 18.2(c), any IP owned by the Company should be made available to each Party for use (other than in relation to the ACPFG Business), for research, teaching and scholastic purposes only, but not for commercial purposes. Accordingly each Party agrees to use its reasonable endeavours to ensure that the Company grants to any Party, on request by the Party:
  - (i) a non-exclusive, royalty-free licence to use the IP that is owned by the Company, for research, teaching and scholastic purposes only,
  - (ii) provided that the Party agrees in writing to use the IP in accordance with any reasonable conditions specified by the Board. Any reasonable conditions specified by the Board must be consistently applied to all Shareholders obtaining a licence under this clause.
- (c) The Parties acknowledge that any licence granted under clause 18.2(b) must not reduce the Company's ability to Commercialise IP owned by the Company.

#### 18.3 Background IP Licence

Each of DNRE, UA, UM, UQ and GRDC and the Company agrees to use reasonable endeavours to ensure that, by no later than 31 March 2003, they enter into the Background IP Licence.

#### 18.4 Commercial Unit

- (a) The Parties acknowledge and agree that commercialisation is critical to the success of the Company. Accordingly the Parties will use their respective best endeavours to ensure that a properly resourced commercial unit is established, as a priority for the Company.

## ACPFG SHAREHOLDERS' AGREEMENT

- (b) The commercial unit is to carry out the activities listed on page 41 of the Application. It will also be required to:
  - (i) manage access to IP provided under the Background IP Licence and IP from third parties; and
  - (ii) carry out audits of IP developed using Contributions, to ensure that the Company is able to exploit the IP it uses or owns, without infringing the IP or other rights of any Party or third party.

### 19. Termination

---

#### 19.1 Termination if Completion does not take place before Completion Date

This Agreement will automatically terminate if Completion has not taken place by the later of:

- (a) 31 December 2002; or
- (b) any later date agreed in writing between the Parties.

#### 19.2 Termination events

Each of the following events constitutes a *Termination Event*, in relation to a Shareholder (*Defaulting Shareholder*), if the Defaulting Shareholder

- (a) breaches the provisions of any Document and fails to remedy that breach within 20 Business Days of notice by the Company requiring the Defaulting Shareholder to do so;
- (b) ceases to carry on business;
- (c) becomes subject to administration by a third party including a receiver or liquidator; or
- (d) brings the Company into disrepute or otherwise causes significant loss or damage to the Company's goodwill or reputation.

#### 19.3 Failure to resolve or remedy

An *Exit Event* occurs:

- (a) if a Termination Event is not capable of being remedied, when the Company gives the Defaulting Shareholder notice declaring that an Exit Event has occurred; or
- (b) if a Termination Event is capable of being remedied:
  - (i) within 20 Business Days of the occurrence of a Termination Event the Termination Event is not remedied; and
  - (ii) within a further 20 Business Days the Company gives the Defaulting Shareholder notice declaring that an Exit Event has occurred.

## ACCFG SHAREHOLDERS' AGREEMENT

### 19.4 Share transfer

Where there is an Exit Event, the Defaulting Shareholder is deemed on the date of the Exit Event to have given each other Shareholder (*Remaining Shareholders*) a transfer notice in accordance with the Constitution.

### 19.5 Without prejudice to rights

The provisions of clauses 19.2, 19.3 and 19.4 are without prejudice to the rights of the Parties by reason of the breach of this Agreement by the Defaulting Shareholder.

## 20. Dispute Resolution

---

### 20.1 Clause applies

All disputes or differences between any of the Parties in connection with the interpretation, effect or any other matter in any way relating to this Agreement (*Dispute*) will be dealt with in accordance with this clause whether the Dispute is first raised before, during or after the term of this Agreement.

### 20.2 Avoidance

The Parties agree that every effort should be made to ensure that Disputes do not arise and that, if a Dispute does occur, they should make every reasonable effort to resolve the Dispute without recourse to court proceedings.

### 20.3 Notification

A Party (*Notifying Party*) will, within 20 Business Days after the Dispute arises, give a notice to the other Party or Parties with which it has the Dispute (*Notified Party*) and a copy of that notice to the other Parties setting out details of the Dispute and any other matter that may, in the reasonable opinion of the Notifying Party be relevant to the resolution of the Dispute.

### 20.4 Meeting

Within 5 Business Days of the date of the notice the Notifying Party and Notified Party (*Dispute Parties*) will use their respective best endeavours to meet and resolve the Dispute within a further period of 10 Business Days.

### 20.5 Mediation

If the Dispute is not resolved in accordance with the provisions of clause 20.4:

- (a) any Dispute Party may request the President of the Law Society of South Australia (or the President's nominee) to appoint a mediator to mediate the dispute;

## ACPFSG SHAREHOLDERS' AGREEMENT

- (b) within 5 Business Days of a mediator being appointed, the mediator will convene an initial meeting of the Dispute Parties in an attempt to resolve the Dispute; and
- (c) if the Dispute is not resolved at that initial meeting, the mediator will convene such further meetings of the Dispute Parties during the subsequent 10 Business Days as the mediator reasonably considers necessary for the purpose of resolving the Dispute.

### 20.6 Expert

If the Dispute is not resolved in accordance with the provisions of clause 20.5 either Dispute Party may refer the determination of the Dispute (*Determination*) to the Expert.

### 20.7 Capacity of Expert

The Expert is an expert and not an arbitrator.

### 20.8 Expert's Determination

The Determination is final and binding on the Dispute Parties.

### 20.9 Determination costs

- (a) The Expert may determine that either Dispute Party must pay the whole or a specified portion of the costs and expenses of the other Dispute Party in relation to the Determination.
- (b) Unless clause 20.9(a) applies, each Dispute Party will bear its own costs and expenses in relation to the Determination.

### 20.10 Expert's Fees

- (a) The Expert may determine that either Dispute Party must pay all, or that the Dispute Parties must pay in specified portions, the Expert's fees and expenses and the cost of the Determination.
- (b) Unless clause 20.10(a) applies, the Dispute Parties will pay in equal shares the Expert's fees and expenses and the cost of the Determination.

## 21. Indemnities

---

Each Party ("Indemnifying Party") hereby indemnifies each of the other Parties and their officers, employees and agents ("the Indemnified Party") from and against any Claim to the extent arising directly from or in connection with:

- (a) any intentional, reckless or negligent act or omission by the Indemnifying Party in connection with this Agreement; or
- (b) breach of this Agreement by the Indemnifying Party,

## ACPFG SHAREHOLDERS' AGREEMENT

provided that no Party will be required to indemnify another Party under this clause for any special, indirect or consequential damages.

### 22. Notices

---

#### 22.1 Manner of giving

Any notice given under this Agreement must be in writing and signed by or for the sender.

#### 22.2 Manner of delivery

Notices must be delivered by post, hand or fax to the relevant address in Schedule 7.

#### 22.3 When delivered

- (a) Notices will be taken to be duly given:
  - (i) in the case of delivery in person, when delivered;
  - (ii) in the case of delivery by post, 2 Business Days after the date of posting (if posted to an address in the same country) or 7 Business Days after the date of posting (if posted to an address in another country); and
  - (iii) in the case of fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number or name of recipient and indicating that the transmission has been made without error.
- (b) If the result under clause 22.3(a) is that a notice would be taken to be given on a day that is not a Business Day in the place to which the notice is sent, then it will be taken to have been given on the next Business Day in that place.

### 23. GST

---

#### 23.1 Interpretation

In this clause:

- (a) "Act" includes an amendment to that Act and subordinate legislation in force under it;
- (b) "Adjustment" has the same meaning as in the GST Act;
- (c) "Adjustment note" has the same meaning as in the GST Act;
- (d) "GST" means goods and services tax and has the same meaning as in the GST Act;
- (e) "GST Act" means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

## ACPFPG SHAREHOLDERS' AGREEMENT

- (f) "Input tax credit" has the same meaning as in the GST Act;
- (g) "Supply" has the same meaning as in the GST Act; and
- (h) "Tax invoice" has the same meaning as in the GST Act.

### 23.2 Application of GST

- (a) All consideration for any supply under this Agreement is exclusive of GST, unless stated to be otherwise.
- (b) If GST applies to any Supply under this Agreement the consideration provided for that Supply will be increased by an amount equal to the GST liability properly incurred by the Party making the Supply.
- (c) The recipient of any Supply made under this Agreement may withhold any amounts of GST payable on that Supply until such time as the supplier issues an invoice for the supply. Any invoice rendered by a Party in connection with a Supply made under this Agreement which seeks to recover GST must conform to the requirements for a Tax invoice.

## 24. General Provisions

---

### 24.1 Entire Agreement

This Agreement constitutes the entire agreement between the Parties as to its subject matter and supersedes all prior agreements and understandings.

### 24.2 Amendments to be in writing

No amendment of, or addition to, the provisions of this Agreement is binding unless made it is in writing and signed by the Parties to this Agreement.

### 24.3 Disposal

No Party may, without the prior written consent of all other Parties, Dispose of its right, title and interest in this Agreement.

### 24.4 Encumbrance

Except with the prior written consent of all other Parties, a Party must not cause or permit an Encumbrance to be created, allowed to exist or enforced in respect of this Agreement.

### 24.5 Relationship

Nothing in this Agreement creates the relationship of employer and employee, principal and agent or partners between the Parties.

## ACPPFG SHAREHOLDERS' AGREEMENT

### 24.6 Costs and stamp duty

- (a) Each Party must bear its own costs arising out of the negotiation, preparation and execution of this Agreement.
- (b) All stamp duty (including fines, penalties and interest) that may be payable on or in connection with this Agreement and any instrument executed under this Agreement must be borne by the Company.
- (c) The Company must indemnify each of the Shareholders on demand against any liability for that stamp duty.

### 24.7 Failure to exercise not a waiver

No failure to exercise nor any delay in exercising any right, power or remedy by a Party operates as a waiver.

### 24.8 Single/partial exercise of rights

A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

### 24.9 Waivers to be in writing

A waiver is not valid or binding on the Party granting that waiver unless made in writing.

### 24.10 Further assurances

Each Party will, at its own expense, do all things and execute all such documents as may be necessary or desirable to give full effect to the provisions of this Agreement and the transactions contemplated by it.

### 24.11 No merger

The provisions of this Agreement do not merge on termination, settlement or completion of this Agreement and are not affected by the execution or delivery of any other instrument.

### 24.12 Governing law and jurisdiction

- (a) This Agreement is governed by the laws of South Australia.
- (b) Each Party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Agreement.

### 24.13 Counterparts

- (a) This Agreement may be executed in any number of counterparts.
- (b) All counterparts when exchanged will be taken to constitute one document.

### 24.14 Execution

The Parties execute this Agreement unconditionally.

## ACPFG SHAREHOLDERS' AGREEMENT

ACPPFG SHAREHOLDERS' AGREEMENT

**Executed** as an agreement

**Dated:**

SIGNED for and on behalf of )  
AUSTRALIAN CENTRE FOR )  
PLANT FUNCTIONAL GENOMICS )  
PTY LTD: )

.....  
Signature of director

.....  
Signature of director/secretary

.....  
[Print name]

.....  
[Print Name]

SIGNED for and on behalf of )  
AGRICULTURE SERVICES )  
VICTORIA PTY LTD )

.....  
Signature of director

.....  
Signature of director/secretary

.....  
[Print name]

.....  
[Print name]

ACPPFG SHAREHOLDERS' AGREEMENT

SIGNED for and on behalf of THE )  
STATE OF VICTORIA by its duly )  
authorised officer Chloe Munro, Secretary )  
of the Department of Natural Resources )  
and Environment:

.....  
Print name

.....  
Signature of authorised officer

.....  
Title

in the presence of:

.....  
Signature of witness

.....  
Print name

.....  
Title

SIGNED for and on behalf of the )  
GRAINS RESEARCH & )  
DEVELOPMENT CORPORATION )  
by authority of its directors in the presence )  
of: )

.....  
Signature of witness

.....  
Signature of authorised person

.....  
Name of witness

.....  
Office held

.....  
Name of authorised person (block  
letters)

ACPPFG SHAREHOLDERS' AGREEMENT

SIGNED by  
Jane Lomax Smith  
MINISTER FOR SCIENCE AND  
INFORMATION ECONOMY  
in the presence of

.....  
[Print name]

.....  
[Title]

.....  
[Signature]

.....  
[Signature]

SIGNED for and on behalf of  
THE UNIVERSITY OF ADELAIDE  
by its duly authorised officer

.....  
Print name

.....  
Title

in the presence of

.....  
Print name

.....  
Title

.....  
Signature of authorised officer

.....  
Signature of witness

SIGNED on behalf of THE  
UNIVERSITY OF MELBOURNE by  
an authorised officer in the presence of:

.....  
Signature of witness

.....  
Name of witness

.....  
Signature of authorised officer

.....  
Office held

.....  
Name of authorised officer (block  
letters)

ACPPFG SHAREHOLDERS' AGREEMENT

SIGNED on behalf of THE )  
UNIVERSITY OF QUEENSLAND by )  
an authorised officer in the presence of: )

.....  
Signature of witness

.....  
Name of witness

.....  
Signature of authorised officer

.....  
Office held

.....  
Name of authorised officer (block  
letters)

**Constitution of Australian  
Centre for Plant Functional  
Genomics Pty Ltd**

---

Finlaysons  
81 Flinders Street  
Adelaide 5000 Australia  
Telephone +618 8235 7400  
Facsimile +618 8232 2944  
Our Ref GCM:100271/323

**ACPFG SHAREHOLDERS' AGREEMENT**

**SCHEDULE 1  
CONSTITUTION**

## Table of Contents

<b>1. Preliminary</b>	<b>1</b>
1.1 Definitions	1
1.2 Interpretation	3
1.3 Headings	3
1.4 Inconsistency	4
<b>2. Name, Limited Liability, Objects and Powers</b>	<b>4</b>
2.1 Name	4
2.2 Limited Liability	4
2.3 Objects	4
2.4 Powers	5
<b>3. Replaceable Rules</b>	<b>5</b>
<b>4. Proprietary company</b>	<b>6</b>
<b>5. Shares</b>	<b>6</b>
5.1 Initial Capitalisation	6
5.2 Issue of Additional Shares	6
5.3 General Rules	7
5.4 No other offers	8
5.5 Third party offers	8
5.6 Options	8
5.7 Partly paid shares	8
<b>6. Membership</b>	<b>8</b>
<b>7. Transfer and Transmission of Shares</b>	<b>9</b>
<b>8. Conditions of Share Transfer</b>	<b>10</b>
8.1 Share Transfers Generally	10
8.2 Notice	10
8.3 Exceptions	10

8.4	Method of Transfer	11
<b>9.</b>	<b>Meetings of Company's Members</b>	<b>12</b>
9.1	Calling	12
9.2	Proceedings at Meetings	13
9.3	Quorum	13
9.4	Chairman of Meetings	13
9.5	Adjournment of Meetings	14
9.6	Voting at Meetings	14
9.7	Required Majority	15
9.8	Joint Holders	15
9.9	Objections	15
9.10	Proxies	15
<b>10.</b>	<b>Special Members Approvals</b>	<b>16</b>
10.1	Where required	16
10.2	Form	17
10.3	Member to approve increase in contribution	17
<b>11.</b>	<b>Directors</b>	<b>18</b>
11.1	Qualifications	18
11.2	Number and Identity of Directors	18
11.3	Management and operation	18
11.4	Chief Executive Officer	18
11.5	Board meetings	19
11.6	Interests	19
11.7	Remuneration	20
11.8	Vacancy	20
11.9	Powers	21
11.10	Proceedings	21
11.11	Chairman	21
11.12	Majority Vote	22
11.13	Defects	22
11.14	Resolutions	23
11.15	Quorum	24

11.16	Committees of Directors	24
11.17	Alternate Directors	24
11.18	Secretary	25
11.19	Seal	25
11.20	Records	25
11.21	Inspection	25
11.22	Time for inspection	25
11.23	Copying	26
11.24	Confidentiality	26
<b>12.</b>	<b>Notices</b>	<b>26</b>
<b>13.</b>	<b>Indemnity</b>	<b>27</b>

## 1. Preliminary

---

### 1.1 Definitions

In this Constitution unless the context otherwise requires:

**Act** means the Corporations Act 2001 (Cth);

**ARC** means the Commonwealth of Australia as represented by and acting through the Australian Research Council, established pursuant to the provisions of the Australian Research Council Act 2001;

**ARC funding deed** means the deed to be entered into between ARC and The University of Adelaide setting the terms under which ARC agrees to provide its contribution;

**AVS** means Agriculture Victoria Services Pty Ltd ABN 23 006 598 198;

**budget** means a budget contained within any business plan;

**business day** means a day other than a Saturday, Sunday or public holiday in South Australia;

**business plan** means the initial business plan and/or each subsequent business plan, as the context requires as referred to in, and amended from time to time pursuant to, clause 7 of the shareholders' agreement;

**CEO** means the chief executive officer of the company from time to time;

**company** means Australian Centre for Plant Functional Genomics Pty Limited ABN 98 102 769 808;

**confidential information** means all know-how, financial information, and other commercially valuable information in whatever form including inventions, trade secrets, formulae, graphs, drawing, designs, biological materials, samples, and other materials of whatever description which a member, the company or any other party to the shareholders' agreement states is confidential or which, by its nature is confidential and includes all such information that may be in the possession of the employees or officers of a member, the company or any other party to the shareholders' agreement, but does not include:

- (a) information which is already in the public domain;
- (b) information which becomes part of the public domain otherwise than as a result of an unauthorised disclosure;
- (c) information which is or becomes available to the recipient member or other party to the shareholders' agreement or the company from a third party lawfully in possession of the information and who has the lawful power to disclose such information to the recipient member or other party to the shareholders' agreement or the company on a non-confidential basis; or
- (d) information which is rightfully known by the recipient member or other party to the shareholders' agreement or the company prior to

the date of disclosure to it by the disclosing member, other party or the company;

**contribution** means, in relation to a member, DNRE or the ARC, the total contribution made, or undertaken to be made, by that member, DNRE or the ARC for use for company purposes, set out in schedule 4 to the shareholders' agreement or otherwise approved pursuant to clause 13.1(e) of the shareholders' agreement:

- (a) whether cash or in-kind or otherwise; and
- (b) whether directly to the company or not,

but does not include intellectual property;

**DNRE** means the State of Victoria through its Department of Natural Resources and Environment;

**director** includes a person acting in the position of a director of the company;

**directors** or **board** means the directors for the time being of the company or such number of them as have authority to act for the company;

**intellectual property** means any patent, invention or discovery whether patentable or not, trade mark, copyright, trade secret, registered design, plant breeder's right, electronic layout or other exclusive right in relation to any integrated circuit, trade secret, know-how or confidential information whether in Australia or the rest of the world and includes any right to registration of any of the foregoing;

**members' register** means the register of members referred to in Chapter 2C of the Act;

**objects** means the objects of the company set out in clause 2.3;

**officer** has the meaning assigned to it by the Act;

**paid contribution** means, in respect of a member (other than AVS) and DNRE, that part of its contribution which it has already made, from time to time;

**quarter** means a period of 3 months commencing on each of 1 January, 1 April, 1 July and 1 October;

**research plan** means the initial research plan and/or each subsequent Research Plan, as the context requires, as referred to in, and amended from time to time pursuant to, clause 7 of the shareholders' agreement;

**secretary** includes any person appointed to perform the duties of secretary temporarily;

**shareholders' agreement** means the agreement made between the company, its members and DNRE on [ ] 2002 and includes any other agreement between the company and its members from time to time and those members inter se setting out, among other things, the rights and obligations of those members as members of the company;

**shares** means shares of the company;

**State** means South Australia;

**special board resolution** means a resolution that has been passed by at least 75% of the votes cast by directors present at a duly convened director's meeting;

**special members approval** means an approval that has been given in writing by:

- (a) at least 75% of the members; and
- (b) either:
  - (i) members holding 75% or more of the shares; or
  - (ii) all but one member if the dissenting member holds 25% or more, but 50% or less, of the shares;

but for the purposes of clause 13.1(h) of the shareholders' agreement the vote(s) of the Defaulting Shareholder (as defined in the shareholders' agreement) shall not be taken into account; and

**subsidiary** means a subsidiary of the company as referred to in Division 6 of Part 1.2 of the Act.

## 1.2 Interpretation

In this Constitution, unless it is stated to the contrary:

- (a) the singular includes the plural and conversely;
- (b) where a word or phrase is given a defined meaning in this Constitution, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (c) a reference to any legislation includes any amendment or replacement and all subordinate legislation;
- (d) words following the word **include** are not limited by anything preceding that word;
- (e) references to **agree**, **approve** or **consent** are references to agreement, approval or consent (as the case may be) in writing;
- (f) references to **in writing** or **written** include any means of representing or reproducing words in a visible form;
- (g) unless otherwise defined in this Constitution, a word or expression that is defined in the Act has the same meaning in this Constitution; and
- (h) an expression used in a particular part or division of the Act that is given by that part or division a special meaning for the purposes of that part or division has, in any clause of this Constitution that deals with a matter dealt with by that part or division, the same meaning as in that part or division.

## 1.3 Headings

Headings in this Constitution do not affect interpretation.

#### **1.4 Inconsistency**

The provisions of any shareholders' agreement override the provisions of this Constitution to the extent of any inconsistency.

### **2. Name, Limited Liability, Objects and Powers**

---

#### **2.1 Name**

The name of the company is Australian Centre for Plant Functional Genomics Pty Ltd.

#### **2.2 Limited Liability**

The liability of the members is limited.

#### **2.3 Objects**

The objects of the company are:

- (a) within the field of plant functional genomics, to:
  - (i) establish programs of research that deliver a mix of economic, environmental and social benefits relevant to Australia in the short, medium and long-term;
  - (ii) make discoveries and prove concepts that are in the forefront of developments internationally;
  - (iii) establish a training program that will develop for Australia the next generation of researchers;
  - (iv) build relationships nationally and internationally;
  - (v) build on existing research programs undertaken by the members, DNRE and the ARC individually or by any two or more of the members, DNRE and the ARC (whether alone or with third parties);
  - (vi) use key platform technologies;
  - (vii) enable access to world class facilities and equipment; and
  - (viii) attract from within Australia, and from abroad, researchers of international standing, and the most promising research students;
- (b) to:
  - (i) ensure that the key aspects of the research programs undertaken by, or under the auspices of, the company are clearly focussed on delivering demonstrable industry outcomes;
  - (ii) develop a creditable business plan for the company
  - (iii) establish key performance indicators for monitoring the performance of the company;

- (iv) proactively and seamlessly ensure that key outputs from the research programs undertaken by, or under the auspices of, the company are incorporated in commercially available products or services sold or otherwise exploited in Australia (at least) and that such products and services are commercialised for the benefit of Australia;
  - (v) attract the participation of Australian and international companies in collaborative research programs undertaken by, or under the auspices of, the company and in the commercialisation of the outcomes of research undertaken by, or under the auspices of, the company; and
  - (vi) identify, protect and commercially exploit the intellectual property arising out of the research undertaken by, or under the auspices of, the company for the benefit of Australian researchers and industry;
- (c) to:
- (i) provide opportunities for world class researchers in plant functional genomics to work in Australia and to enable world class Australian scientists to remain in, or return to, Australia;
  - (ii) provide an effective, transparent and balanced understanding of the scientific impacts of applied gene plant technology within the wider Australian community;
  - (iii) raise awareness within the wider Australian community of the role of science in Australia, and particularly its contribution to industrial innovation and maintaining international competitiveness; and
  - (iv) raise awareness within the wider Australian community about innovation in agriculture and its role in the "new economy"; and
- (d) to do all other lawful things as may be incidental or conducive to the attainment of the objects set out in clauses 2.3(a) to (c).

## 2.4 Powers

- (a) Subject to the Act, the company has the rights, powers and privileges of a natural person.
- (b) Without limiting clause 2.4(a), the company has power to:
  - (i) issue debentures and securities;
  - (ii) grant a floating charge on its property; and
  - (iii) do anything which it can do by law.

## 3. Replaceable Rules

---

The replaceable rules in the Act do not apply to the company.

#### 4. Proprietary company

---

- (a) The company is a proprietary company limited by shares.
- (b) As a proprietary company the number of members of the company is limited to not more than 50.
- (c) For the purposes of clause 4(b):
  - (i) joint holders of shares are counted as one person; and
  - (ii) any person in the employment of the company or any subsidiary and any person who, while previously in the employment of the company or any subsidiary, was, and has continued to be, a member, is not counted.
- (d) As a proprietary company the company must also not do anything that would require disclosure to investors under Chapter 6D of the Act, but this Constitution does not preclude the company from offering shares to members of the company.

#### 5. Shares

---

##### 5.1 Initial Capitalisation

It is recorded that as at the date of the adoption of this Constitution the members hold the following shares (*initial shares*) issued at an issue price of \$1.00 per share:

- (a) Agriculture Victoria Services Pty Ltd – 10 initial shares;
- (b) Grain Research and Development Corporation – 21 initial shares;
- (c) The Minister for Science and Information Economy of South Australia – 19 initial shares;
- (d) The University of Adelaide – 39 initial shares;
- (e) The University of Melbourne – 8 initial shares; and
- (f) the University of Queensland – 3 initial shares.
- (g)

##### 5.2 Issue of Additional Shares

- (a) It is recorded that the members intend that the number of shares that each member will be issued pursuant to clause 5.2 is 1 share for each whole \$10,000 of the paid contribution of that member (other than AVS) and, in the case of AVS, the paid contribution of DNRE.
- (b) The company must calculate and determine each member's share entitlement pursuant to clause 5.2(a):
  - (i) annually, as of the date of expiry of the company's relevant financial year by reference to the paid contribution of each

member (other than AVS) and, in the case of AVS, of DNRE, and the shares previously issued pursuant to this clause 5.2 to that member as at that date; and

- (ii) as soon as possible after the date of expiry of that financial year.
- (c) The company must issue, to all or some of the members (as the case requires), their respective share entitlements (*additional shares*) within 20 business days of those share entitlements being calculated and determined.
- (d) Any determination by the company pursuant to clause 5.2(b) is final and binding on the members.
- (e) For the purposes of this clause 5.2, the amount of in-kind paid contributions will be calculated and determined on the same basis as adopted in the initial business plan.
- (f) The members record that shares issued to the members pursuant to this clause 5.2 are issued:
  - (i) in consideration for the members (other than AVS) and DNRE making cash contributions to the company for company research purposes; and
  - (ii) in consideration for the members (other than AVS) and DNRE making cash and in-kind contributions otherwise than to the company, for company research purposes, on the basis that IP developed in undertaking that research belongs to the company.
- (g) DNRE acknowledges and agrees that:
  - (i) all shares to be issued pursuant to this clause 5.2 in relation to its paid contribution are to be issued to AVS; and
  - (ii) it has no claim of whatever nature and however arising against the company for the issue of shares to it pursuant to this clause 5.2.

### 5.3 General Rules

- (a) Subject to the provisions of the Act and this Constitution, shares:
  - (i) are under the control of the directors; and
  - (ii) may be issued or otherwise disposed of to such persons, upon such terms, with such rights, and at such times as they may think fit.
- (b) Except as provided for in clause 5.2 the directors must offer to issue shares to the existing members, as far as practicable, in proportion to the number of shares they already hold.
- (c) Any offer made by the directors under clause 5.3(b) must:
  - (i) be in writing;

- (ii) be given to each member;
  - (iii) specify the number of shares offered; and
  - (iv) specify the period for which it will remain open.
- (d) The directors may issue any shares not taken up under any offer under clause 5.3(b) as they see fit.

#### **5.4 No other offers**

The company must not issue or offer shares to any person other than the members, unless approved by special members approval.

#### **5.5 Third party offers**

The company must ensure that no shares are issued to any person other than the members unless that person enters into a deed satisfactory to the directors in terms of which that person covenants to be bound by the shareholders' agreement.

#### **5.6 Options**

The company must not grant any options over its unissued shares, unless approved by special members approval.

#### **5.7 Partly paid shares**

The company must not issue any partly paid shares, unless approved by special members approval.

### **6. Membership**

---

- (a) Except as required by law, the company will not recognise a person as holding any share on any trust.
- (b) The company is not required to recognise:
  - (i) any equitable, contingent, future or partial interest in any share or unit of a share; or
  - (ii) except as otherwise provided by this Constitution or by law, any other right in respect of a share, except an absolute right of ownership in the registered holder,whether or not it has notice of the interest or right concerned.
- (c) A person whose name is entered as a member in the members' register is entitled, without payment, to receive a share certificate signed by the company in respect of the share or shares held by that person but, in respect of a share or shares held jointly by several persons, the company is not bound to issue more than one share certificate.
- (d) Delivery of a share certificate to any one of the persons registered as joint holders is sufficient delivery to all those holders.

- (e) If any share certificate is defaced, worn out or lost, it may upon proof to the satisfaction of the directors be renewed, but the directors may, if they think fit, refuse to renew a lost certificate unless a satisfactory indemnity is given to them.
- (f) No member is entitled to vote or to exercise any right or privilege as a member until the member has been registered in the members' register.

## 7. Transfer and Transmission of Shares

---

- (a) Subject to this Constitution, a member may transfer all or any of that member's shares by written instrument in any usual or common form or in any other form which the directors approve (*transfer*).
- (b) A transferor of shares remains the holder of those shares transferred until the transfer is registered and the name of the transferee is entered in the members' register in respect of those shares.
- (c) A transfer must be left for registration at the registered office of the company, accompanied by:
  - (i) the share certificate of the shares to which it relates; and/or
  - (ii) such other information as the directors properly require to show the right of the transferor to make the transfers

and the company will then, subject to the powers vested in the directors by this Constitution, register the transferee as the holder of the shares described in the transfer.

- (d) The registration of transfers may be suspended at any time and for any period as the directors may from time to time determine not exceeding 20 business days in any year.
- (e) The directors may refuse to register any transfer where they are of the opinion that it is not desirable to admit the proposed transferee to membership.
- (f) The directors must only register a transfer to any person other than a member where the transferee has entered into a deed satisfactory to the directors in terms of which that person covenants to be bound by the shareholders' agreement.
- (g) In the case of the death of a member the survivor or survivors, where the deceased was a joint holder, and the legal personal representatives of the deceased, where the deceased was a sole holder, will be the only persons recognised by the company as having any title to the deceased's shares.
- (h) Clause 7(f) does not release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by the deceased with other persons.
- (i) The directors have the same right and obligation to refuse to register a person entitled by transmission to any share or that person's

nominee as if that person were a transferee named in a transfer presented for registration.

- (j) The directors are not obliged to give any reasons for refusing to register any transfer or transmission of a share.

## 8. Conditions of Share Transfer

---

### 8.1 Share Transfers Generally

No share may be transferred by a member or other person entitled to transfer a share other than in accordance with this clause 8.

### 8.2 Notice

- (a) Any member proposing to dispose of any share (*transferor*) must give written notice (*transfer notice*) to the company specifying the shares to be disposed of (*transfer shares*) and, if the transferor desires, the price per transfer share which the transferor is willing to accept.
- (b) A transfer notice will constitute the company the transferor's agent, for a period of 2 months from the date of its receipt by the company, to sell the transfer shares in accordance with clause 8.4.
- (c) A transfer notice will, if it relates to more than one transfer share, operate as a separate notice in respect of each of those transfer shares.
- (d) If no price is specified in a transfer notice or, in the opinion of the directors, the price per transfer share specified by the transferor is not its fair value, the directors must request a valuer (*valuer*) being either:
  - (i) the auditor of the company; or
  - (ii) if there be no auditor, a member of the Institute of Chartered Accountants or of CPA Australia, selected by the directors,to determine the fair value per transfer share of the transfer shares.
- (e) The directors must promptly notify the transferor in writing of the fair value per transfer share determined by the valuer and the transferor is entitled to withdraw its transfer notice (by written notice given to the company), within 3 business days after receiving the directors' notification (but not later except with the written consent of the directors).
- (f) In determining a fair value per transfer share, the valuer acts as an expert and not as an arbitrator and the valuer's decision is final and binding.

### 8.3 Exceptions

- (a) Subject to the provisions of clause 7 any share may be transferred:

- (i) if the member is a body corporate, by the member to any body corporate that is related to it within the meaning of section 50 of the Act, but only if that transfer is given prior written approval by special members approval;
  - (ii) if the member is a natural person, by the member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, wife or husband of that member (*relative*);
  - (iii) if the member is deceased, by the member's executors or administrators to any relative of the deceased member; and
  - (iv) if the member is a trustee or the trustees of the will of any deceased member, to the trustees for the time being of that will or any change of trustees.
- (b) The provisions of clause 8.4 do not apply to a transfer authorised by clause 8.3(a).

#### 8.4 Method of Transfer

- (a) Within 20 business days of receipt of a transfer notice the directors must offer the transfer shares, the subject of that transfer notice, to all other members by written notice (*purchase offer*) setting out:
- (i) the number of transfer shares to which the purchase offer relates;
  - (ii) the price payable for each transfer share to which each purchase offer relates, being the price specified by the transferor or determined by the valuer, whichever is the lower;
  - (iii) the date being 2 months from the date of receipt by the company of that transfer notice, being the date until when the purchase offer may be accepted; and
  - (iv) that any member wishing to acquire transfer shares in excess of that member's proportion must, in responding to the purchase offer, state the number of excess transfer shares that member wishes to acquire.
- (b) The transfer shares must be offered to all the other members in proportion (as nearly as possible) as the existing number of shares held by those members, respectively.
- (c) Any transfer shares, which are not capable without fractions of being offered to the members entitled in proportion to their existing holdings, will be offered to the members entitled or some of them in a manner the directors think fit.
- (d) If all the entitled members do not accept the purchase offer as to their full entitlement, the unclaimed transfer shares will be used in satisfying requests for excess transfer shares but, if there are insufficient excess transfer shares available, they will be offered to the members requesting excess transfer shares in proportion to their

entitlement under clause 8.4(b) as if the excess transfer shares were all the transfer shares comprised in the transfer notice and those members requesting transfer shares were the other members referred to in that clause.

- (e) If, within 2 months from the date of receipt by the company of a transfer notice, the directors find a purchaser in terms of this clause 8.4 willing to purchase all or any of the transfer shares and give notice of that purchaser to the transferor, the transferor will be bound on payment of the price per transfer share specified in the transfer notice or as determined in accordance with clause 8.2(d) (whichever is appropriate) to transfer the relevant transfer share or shares to that purchaser.
- (f) If the transferor after having become bound under clause 8.4(e) defaults in transferring the relevant transfer shares:
  - (i) the company may receive the purchase money;
  - (ii) the transferor will be deemed to have appointed any director or secretary as the transferor's agent to execute a transfer of those transfer shares to the relevant purchaser;
  - (iii) on execution of that transfer, the company will hold the purchase money in trust for the transferor;
  - (iv) the receipt of the company for the purchase money will be a good discharge to the relevant purchaser; and
  - (v) after the relevant purchaser's name has been entered in the members' register, the validity of the proceedings will not be questioned by any person.
- (g) If, within 2 months from the date of receipt by the company of a transfer notice, the directors do not find a purchaser or purchasers in terms of this clause 8.4 willing to purchase all of the transfer shares, the transferor may, at any time within a further period of 3 months, subject to clause 7, sell and transfer the transfer shares not placed to any person at any price.

## 9. Meetings of Company's Members

---

### 9.1 Calling

- (a) A director may call a meeting of the members at any time by notice given in accordance with this Constitution (*notice of members' meeting*).
- (b) A notice of members' meeting must specify the place, date and time of meeting and state the general nature of the business to be transacted at the meeting.

## 9.2 Proceedings at Meetings

No business will be transacted at any meeting of the members unless a quorum of members is present at the time the meeting proceeds to business.

## 9.3 Quorum

- (a) The quorum for a meeting of the members is:
  - (i) for the purposes of an adjourned meeting, 50% of the members who together hold not less than 50% of the shares; and
  - (ii) otherwise, 75% of the members who together hold not less than 75% of the shares.
- (b) For the purpose of determining whether a quorum is present, a person attending as a proxy, as representing a body corporate that is a member or as an attorney will be deemed to be a member.
- (c) If a quorum is not present within half an hour from the time appointed for the meeting:
  - (i) where the meeting was convened on the request of members, the meeting will be dissolved; or
  - (ii) in any other case:
    - (A) the meeting stands adjourned to a day, time and place as the directors determine or, if no determination is made by the directors, to the same day in the next week at the same time and place; and
    - (B) if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the meeting will be dissolved.

## 9.4 Chairman of Meetings

- (a) If the directors have elected a director as chairman of their meetings, that director will preside as chairman at every meeting of the members during that director's time as chairman of the directors.
- (b) Where a meeting is held and:
  - (i) a chairman has not been elected as provided by clause 9.4(a); or
  - (ii) the chairman is not present within 30 minutes after the time appointed for the holding of the meeting or is unwilling to act,the members present in person or by proxy, representative or attorney and who are entitled to vote at the meeting will elect one of their number to be chairman of the meeting.

## 9.5 Adjournment of Meetings

- (a) The chairman may, with the consent of any meeting of the members at which a quorum is present, and will, if directed by the meeting, adjourn the meeting to another time and to another place.
- (b) At any adjourned meeting:
  - (i) the business left unfinished at the meeting from which the adjournment took place must be transacted; and
  - (ii) any other business of which prior notice has been given may also be transacted.
- (c) When a meeting is adjourned for 20 business days or more, notice of the adjourned meeting must be given as in the case of an original meeting.
- (d) Except as provided by clause 9.5(c), it is unnecessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

## 9.6 Voting at Meetings

- (a) At any meeting of the members a resolution put to the vote of the meeting will be decided on a show of hands unless, before or on the declaration of the result of the show of hands, a poll is demanded by:
  - (i) the chairman;
  - (ii) at least 2 members present in person or by proxy, representative or attorney, who are entitled to vote on the resolution;
  - (iii) a member or members present in person or by proxy, representative or attorney and representing not less than 10% of the total voting rights of all the members having the right to vote at the meeting; or
  - (iv) a member or members present in person or by proxy, representative or attorney holding shares conferring a right to vote at the meeting, being not less than 10% of the shares.
- (b) Unless a poll is demanded, a declaration by the chairman that a resolution has on a show of hands been carried or carried unanimously or by a particular majority or lost, and an entry to that effect in the book containing the minutes of the proceedings of the company, is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.
- (c) The demand for a poll may be withdrawn.
- (d) If a poll is duly demanded, it will be taken in the manner described in this Constitution and (subject to this clause 9.6) either immediately or after an interval or adjournment or as the chairman

directs and the result of the poll will be a resolution of the meeting at which the poll was demanded.

- (e) A poll demanded on the election of a chairman or on a motion to adjourn a meeting will be taken immediately.

#### 9.7 Required Majority

- (a) A resolution at any meeting of the members which relates to a matter which requires a special members approval must be carried by the majority of members required for a special members approval.
- (b) Other than in the instance referred to in clause 9.7(a), a resolution at any meeting of the members must be carried by a simple majority of:
  - (i) members present in person or by proxy, representative or attorney and entitled to vote, in the case of the resolution decided on a show of hands; or
  - (ii) the votes cast for that resolution by members present in person or by proxy, representative or attorney and entitled to vote, in the case of a resolution decided on a poll.
- (c) In the case of an equality of votes in relation to a resolution referred to in clause 9.7(b), whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, does not have a casting vote in addition to a deliberative vote.

#### 9.8 Joint Holders

In the case of joint holders, the vote of the holder first named in the members' register in respect of the share who tenders a vote, whether in person or by proxy, representative or attorney, will be accepted to the exclusion of the votes of the other joint holders.

#### 9.9 Objections

- (a) An objection may be raised to the qualification of a voter only at the meeting or adjourned meeting at which the vote objected to is given or tendered.
- (b) Any such objection will be referred to the chairman of the meeting, whose decision is final.
- (c) A vote not disallowed pursuant to such an objection is valid for all purposes.

#### 9.10 Proxies

- (a) An instrument appointing a proxy (*proxy instrument*) will be in writing and signed:
  - (i) by the appointer;
  - (ii) by the appointer's attorney duly authorised in writing; or

- (iii) if the appointer is a corporation, either under seal or by a duly authorised officer or attorney.
- (b) A proxy instrument may be in such form as the directors may from time to time prescribe or in a particular case accept.
- (c) A proxy instrument may specify the manner in which the proxy is to vote in respect of a particular resolution and, where it does so, the proxy is not entitled to vote on the resolution except as specified in the instrument.
- (d) A proxy instrument is deemed to confer authority to demand or join in demanding a poll.
- (e) Appointment of a proxy will only be effective for a meeting of the members if:
  - (i) the proxy instrument; and
  - (ii) the power of attorney or other authority (if any) under which it is signed (or a certified copy of that power or authority),are deposited at the registered office of the company or at such other place within the State as is specified for that purpose in the notice convening the meeting before the time for holding the meeting or an adjourned meeting at which the person named in the proxy instrument proposes to vote.
- (f) Unless the company has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
  - (i) the appointing member dies; or
  - (ii) the appointing member is mentally incapacitated; or
  - (iii) the appointing member revokes the proxy's appointment; or
  - (iv) the appointing member revokes the authority under which the proxy was appointed by a third party; or
  - (v) the appointing member transfers the share in respect of which the proxy was given.

## 10. Special Members Approvals

---

### 10.1 Where required

The following matters must be approved by a special members approval:

- (a) appointment or removal of any director, including the CEO, to or from the board, other than:
  - (i) upon expiry of the director's term;
  - (ii) upon retirement or resignation of the director;

- (iii) for the appointment or removal by ARC of the Director nominated by it, pursuant to clause 11.1(c) of the shareholders' agreement;
- (iv) for the removal of the first CEO in accordance with clause 11.3(d) of the shareholders' agreement; or
- (v) pursuant to clauses 11.8(a) to (f);
- (b) the remuneration of the directors;
- (c) the appointment of any alternate director;
- (d) the dismissal of the CEO (other than the first CEO) as an employee of the company;
- (e) the adoption of, or amendment to, any business plan or research plan, reflecting an increase or decrease in the contributions of any member or ARC, of more than 5% from that previously reflected in the business plan or research plan; or
- (f) the entering into or amending of any agreement or arrangement between the Company and:
  - (i) any of the members or their related bodies corporate (as defined in the Corporations Act);
  - (ii) DNRE; or
  - (iii) ARC;
- (g) the entering into of any arrangement to give any guarantee, mortgage, charge or other security over the assets of the Company; and
- (h) giving any notice under clause 19.2(a) or 19.3(b) of the shareholders' agreement.

## 10.2 Form

- (a) A meeting of members is not required for a special members approval.
- (b) The members may give a special members approval:
  - (i) by resolution carried by the required majority at a meeting of members; or
  - (ii) by signing a document, reflecting that the required majority of members are in favour of the relevant approval.

## 10.3 Member to approve increase in contribution

Despite clauses 5.2(c)(ii) and 10.1(e), a member cannot be required to increase its contribution unless it has approved the increase.

## **11. Directors**

---

### **11.1 Qualifications**

- (a) It is not necessary for a director to hold any shares in the company to qualify for the office of director.
- (b) A director must:
  - (i) have the necessary business and financial acumen; or
  - (ii) have the necessary knowledge of the Australian grains industry or the necessary experience at a senior technical or research level in the Australian grains industry,to enable that person to act and perform that person's duties as a director.

### **11.2 Number and Identity of Directors**

- (a) The board will consist of a minimum of 3 directors.
- (b) The CEO is a director by reason of his or her office, unless the members agree otherwise, by special members approval.
- (c) ARC may appoint, remove and replace one director but only:
  - (i) for so long as ARC makes its contribution under the ARC funding deed;
  - (ii) if ARC has consulted with the members about its nominee, prior to appointment as a director; and
  - (iii) if the members have consented to that nominee being appointed as a director (and the members must not unreasonably withhold their consent).
- (d) All directors, other than the director nominated by the ARC under clause 11.2(c), must be appointed by the members, upon such terms and for such period, as agreed by special members approval.
- (e) Any director (including the director appointed by ARC) may be removed by a special members approval.

### **11.3 Management and operation**

The board is responsible for the overall management and operation of the company.

### **11.4 Chief Executive Officer**

- (a) The CEO is the person appointed by the board with prior approval of a special members approval.
- (b) The CEO is responsible to the Board for the day-to-day operation of the ACPFG Business.
- (c) The CEO is an employee of the Company.

- (d) The first CEO is Professor Peter Langridge, who will continue in the position until he resigns, or is dismissed by the board by a special board resolution.

#### 11.5 Board meetings

- (a) The board will meet regularly but not less than once each quarter.
- (b) Unless otherwise agreed by the directors, not less than 10 business days notice must be given of any board meeting.

#### 11.6 Interests

- (a) If a director of the company has a material personal interest in a matter that relates to the affairs of the company and:
  - (i) under section 191 of the Act the director discloses the nature and extent of the interest and its relation to the affairs of the company at a meeting of the directors; or
  - (ii) the interest is one that does not need to be disclosed under section 191,  
then:
    - (iii) the director may be counted in determining whether or not a quorum is present at any meeting of directors considering the transaction or proposed transaction;
    - (iv) the director may vote on matters that relate to the interest;
    - (v) any transactions that relate to the interest may proceed;
    - (vi) the director may sign or countersign any document relating to the transaction or proposed transaction and whether the company's seal, if any, is affixed or not;
    - (vii) subject to clause 11.6(b), the director may retain benefits under the transaction even though the director has the interest; and
    - (viii) subject to clause 11.6(b) the company cannot avoid the transaction merely because of the existence of the interest.
- (b) If disclosure is required under section 191 of the Act, clauses 11.6(a)(vii) and (viii) apply only if the disclosure is made before the relevant transaction is entered into.
- (c) A director may hold any other office or place of profit (other than auditor) in the company or any related body corporate in conjunction with his or her directorship and may be appointed to that office or place upon such terms as to remuneration, tenure of office and otherwise as the directors think fit.
- (d) A director is not disqualified merely because of being a director from contracting with the company in any respect including:
  - (i) selling any property to, or purchasing any property from, the company;

- (ii) lending any money to, or borrowing any money from, the company with or without interest and with or without security;
- (iii) guaranteeing the repayment of any money borrowed by the company for a commission or profit;
- (iv) underwriting or guaranteeing the subscription for securities in the company or in any related body corporate or any other body corporate promoted by the company or in which the company may be interested as a shareholder or otherwise, for a commission or profit; or
- (v) being employed by the company or acting in any professional capacity (other than auditor) on behalf of the company.

#### 11.7 Remuneration

- (a) The directors will be paid such remuneration as is from time to time approved by special members approval.
- (b) That remuneration will be deemed to accrue from day to day.
- (c) The directors may also be paid all reasonable travelling and other expenses properly incurred by them:
  - (i) in attending and returning from meetings of the directors;
  - (ii) in attending and returning from meetings of any committee of the directors;
  - (iii) in attending and returning from meetings of the members; or
  - (iv) otherwise in connection with the business of the company.

#### 11.8 Vacancy

The office of a director becomes vacant if the director:

- (a) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;
- (b) resigns that office by written notice to the company;
- (c) ceases to be a director by virtue of the Act or is prohibited from being a director by any order made under the Act or any other law;
- (d) becomes bankrupt;
- (e) is absent from 3 consecutive meetings of directors without appointing an alternate director;
- (f) where appointed by a member or ARC, is removed from office by notice to the company by that member or ARC, respectively; or
- (g) is removed by special members approval.

### 11.9 Powers

- (a) The business of the company will be managed by or under the direction of the directors.
- (b) The directors may exercise all powers of the company which are not required by the Act or this Constitution to be exercised by a meeting of the members.
- (c) The directors may determine how negotiable instruments and receipts for money paid to the company, may be signed, drawn, accepted, endorsed or otherwise executed.

### 11.10 Proceedings

- (a) The directors may meet together either in person or (subject to clause 11.14) by telephone or any other form of instantaneous communication for the dispatch of business and adjourn and otherwise regulate meetings and proceedings of the directors as they think fit.
- (b) A director may at any time, and a secretary must on the requisition of a director, convene a meeting of the directors.

### 11.11 Chairman

- (a) The chairman of directors is the director appointed as such upon such terms and for such period, as agreed by special members approval.
- (b) Where a chairman has not been appointed as provided by clause 11.11(a), the directors may elect one of their number as chairman of their meetings and may determine the period for which the chairman is to hold office.
- (c) Where a meeting of the directors is held and:
  - (i) a chairman has not been appointed as provided by clause 11.11(a) nor elected as provided by clause 11.12(b); or
  - (ii) the chairman is not present within 30 minutes after the time appointed for the holding of the meeting or is unwilling to act,the directors present may elect one of their number to be chairman of the meeting.
- (d) A chairman appointed as provided by clause 11.11(a) or elected as provided by clause 11.11(b) ceases to hold office as chairman:
  - (i) in the case of a chairman appointed as provided by clause 11.11(a), upon the members agreeing to that effect by special members approval; and
  - (ii) in the case of a chairman elected as provided by clause 11.11(b), upon the directors making a decision to that effect.

#### 11.12 Majority Vote

- (a) Subject to this Constitution, questions arising at a meeting of directors will be decided by a majority of votes of directors present and voting and any such decision will for all purposes be deemed a decision of the directors.
- (b) Subject to the provisions of clause 11.12(c), in case of an equality of votes the chairman has a casting vote.
- (c) The chairman has neither a deliberative nor casting vote in relation to a decision to be made as provided by clause 11.11(d)(ii) or clause 11.12(d).
- (d) Questions arising at a meeting of directors in relation to each of the following matters will be decided by special board resolution:
  - (i) the repayment of any debt by the company or any subsidiary or of any member's loans, other than in accordance with the terms of agreements binding on the company or any subsidiary;
  - (ii) any borrowings of an amount in excess of \$50,000;
  - (iii) the creation of any committee of the board or the delegation of any powers of the board to any person other than as provided for in the shareholders' agreement; or
  - (iv) the entering into, amending or terminating of any contract with a term of five years or more, or contract with a value (taking into account of gross payments or receipts over the life of the contract) of \$100,000 or more;
  - (v) incurring any liability which would or could result, over the term the company is required to meet the liability, in the company being obliged to pay an amount not provided for in a business plan or budget and which exceeds \$50,000;
  - (vi) the appointment or removal of an auditor; and
  - (vii) indemnifying any person for any claim suffered or incurred by, or brought, made or recovered by any person against, that person other than for any indemnity pursuant to an insurance policy (including a directors and officers insurance policy) entered into by the company in the ordinary course of the company's business.

#### 11.13 Defects

All acts done by any meeting of the directors or a committee of directors or any person acting as a director are as valid as if the person had been duly appointed and was qualified to be a director or a member of the committee, notwithstanding that it is afterwards discovered that:

- (a) there was some defect in the appointment of that person to be, or to act as, a director or a member of the committee; or
- (b) the person so appointed was disqualified.

#### 11.14 Resolutions

- (a) A decision in which all of the directors concur is a resolution of the directors notwithstanding that it is not made at a meeting of the directors.
- (b) The directors will cause a record to be kept of any resolution made under clause 11.14(a).
- (c) If:
  - (i) the directors confer by radio, telephone, closed circuit television or other electronic means of audio or audio-visual communication;
  - (ii) all the directors, who for the time being are entitled to receive notice of a meeting of the directors, receive or waive notice of the conference and have access to the means by which the conference is to take place;
  - (iii) each of the directors taking part in the conference acknowledges they are able to hear each of the other directors taking part in the conference; and
  - (iv) the number of directors taking part in the conference is not less than a quorum, whether or not any one or more of those directors is out of Australia,then:
  - (v) all the provisions of this Constitution relating to meetings of the directors will apply to the conference, as if that conference were a meeting of the directors and the directors taking part in the conference were physically present together at a meeting; and
  - (vi) any resolution passed by such a conference will be deemed to have been passed at a meeting of the directors held on the day and at the time at which the conference was held.
- (d) The fact that a director is taking part in the conference will be made known to all the other directors taking part at the commencement of the conference and a director will be deemed to continue to be present and form part of the quorum until that director makes it known that he is ceasing to take part in that conference and obtains the express consent of the chairman of that conference to do so.
- (e) A minute of the proceedings at the conference will be sufficient evidence of those proceedings and observance of all necessary formalities, if certified as a correct record by the chairman of that conference.
- (f) References in this clause 11.14 to "resolution" include a special board resolution.

#### 11.15 Quorum

- (a) At a meeting of the directors, the number of directors (or their alternates) whose presence is necessary to constitute a quorum is not less than 50% of the directors.
- (b) If a vacancy or vacancies in the office of a director or offices of directors occurs, the remaining directors may act but, if the number of remaining directors is not sufficient to constitute a quorum for a meeting of the directors, they may act only for the purpose of convening a meeting of the members.

#### 11.16 Committees of Directors

- (a) Subject to clause 11.12(d)(iii), the directors may delegate any of their powers to a committee or committees consisting of a number of directors (*committee*) as they think fit.
- (b) A committee will exercise the powers delegated in accordance with any directions of the directors and a power so exercised will be deemed to have been exercised by the directors.
- (c) The members of a committee may elect one of their number as chairman of their meetings.
- (d) Where such a meeting is held and:
  - (i) a chairman has not been elected as provided by clause 11.16(c); or
  - (ii) the chairman is not present within 30 minutes after the time appointed for the holding of the meeting or is unwilling to act,the members of the committee present may elect one of their number to be chairman of the meeting.
- (e) A committee may meet and adjourn as it thinks fit.
- (f) Questions arising at a meeting of a committee of directors will be determined by a majority of votes of the members of the committee present and voting. In case of an equality of votes the chairman does not have a casting vote.

#### 11.17 Alternate Directors

- (a) A director may, with prior special members approval, appoint a person (whether a member or not) to be an alternate director in the appointer's place during such period as that appointer thinks fit.
- (b) An alternate director is entitled to notice of meetings of the directors and, if the appointer is not present at such a meeting, is entitled to attend and vote in the appointer's stead and to exercise all of the powers and rights of a director.
- (c) An alternate director is not required to have any share qualifications.
- (d) An alternate director must:

- (i) have the necessary business and financial acumen; or
  - (ii) have the necessary knowledge of the Australian grains industry or the necessary experience at a senior technical or research level in the Australian grains industry,
- to enable that person to act and perform that person's duties as an alternate director.
- (e) The appointment of an alternate director terminates:
  - (i) if the appointer is removed from or vacates office as a director; or
  - (ii) the appointer at any time gives notice of termination of the appointment to the company.

#### 11.18 Secretary

A secretary of the company holds office on such terms and conditions, as to remuneration or otherwise, as the directors determine.

#### 11.19 Seal

- (a) The company will have a seal if the directors so decide.
- (b) The directors will provide for the safe custody of any seal.
- (c) Any seal will be used only by the authority of the directors.
- (d) Every document to which any seal is affixed will be signed by a director and countersigned by another director, a secretary or another person appointed by the directors to countersign that document or a class of documents in which that document is included.

#### 11.20 Records

The company must keep complete and accurate records of the affairs of the company and the operations of the company's business (*records*).

#### 11.21 Inspection

- (a) Subject to clause 11.21(b), officers, employees and agents of the members authorised by the relevant member in writing (*authorised persons*) may inspect the records.
- (b) In the case of records being papers or minutes of meetings of the board, those records may only be inspected with the prior written approval of the chairman of the board, which approval must not be unreasonably withheld.

#### 11.22 Time for inspection

Inspection of the records may take place on any business day on not less than 5 business days' prior written notice.

### 11.23 Copying

Authorised persons may copy the records.

### 11.24 Confidentiality

All information obtained as a result of the exercise of the inspection and copying rights must be kept confidential except in accordance with clause 16.10 of the shareholders' agreement.

## 12. Notices

---

- (a) A notice may be given by the company to any member by:
  - (i) personal service; or
  - (ii) sending it by post to the address shown in the members' register or to the address supplied by that member to the company for delivery of notices.
- (b) Where a notice is sent by post, service of the notice will be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and to have been effected:
  - (i) in the case of a notice of a meeting, on the day after the date of its posting; and
  - (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.
- (c) A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the members' register in respect of the share.
- (d) A notice may be given by the company to a person entitled to a share in consequence of the death or bankruptcy of a member by:
  - (i) personal service; or
  - (ii) sending it by post addressed to that person by name, or by the title of the representative of the deceased or assignee of the bankrupt, or by any like description,  
at the address (if any) within the State supplied for the purpose by the person or, if such an address has not been supplied, at the address to which the notice might have been sent if the death or bankruptcy had not occurred.
- (e) Notice of every meeting of members must be given in the manner authorised by this Constitution to:
  - (i) every member; and
  - (ii) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for his/her death or bankruptcy, would be entitled to receive notice of the meeting.

- (f) No other person is entitled to receive notices of meetings of members.

### 13. Indemnity

---

- (a) The company is to indemnify each indemnified officer of the company out of the assets of the company to the relevant extent against any liability incurred by the indemnified officer in or arising out of:
  - (i) the conduct of the business of the company; or
  - (ii) the discharge of the duties of the indemnified officer.
- (b) Where the board considers it appropriate to do so, an indemnified officer of a subsidiary of the company may be indemnified to the relevant extent out of the assets of the company against any liability incurred by the indemnified officer in or arising out of:
  - (i) the conduct of the business of the subsidiary; or
  - (ii) the discharge of the duties of the indemnified officer.
- (c) In any case where the board considers it appropriate the company may execute a documentary indemnity in any form in favour of any indemnified officer of the company or a subsidiary.
- (d) Where the board considers it appropriate to do so, the company may, to the relevant extent, pay amounts by way of premium in respect of any contract effecting insurance on behalf or in respect of an indemnified officer of the company or a subsidiary against liability incurred by the indemnified officer in or arising out of:
  - (i) the conduct of the business of the company or of the subsidiary; or
  - (ii) the discharge of the duties of the indemnified officer.
- (e) In this clause 13:
  - (i) ***indemnified officer*** means:
    - (A) a director, secretary or executive officer;or
    - (B) a person appointed as a trustee by, or acting as a trustee at the request of, the company or, where applicable, the subsidiary of the company,and includes a former officer.
  - (ii) ***duties of the indemnified officer*** includes, in any particular case where the board considers it appropriate, duties arising by reason of the appointment, nomination or secondment in any capacity of an indemnified officer by the company or, where applicable, the subsidiary of the company to any other corporation.

- (iii) *to the relevant extent* means:
- (A) to the extent the company is not precluded by law from doing so;
  - (B) to the extent and for the amount that the indemnified officer is not otherwise entitled to be indemnified and is not actually indemnified by another person (including, in particular but without limitation, a subsidiary or an insurer under any insurance policy); and
  - (C) where the liability is incurred in or arising out of the conduct of the business of another corporation or in the discharge of the duties of the indemnified officer in relation to another corporation, to the extent and for the amount that the indemnified officer is not entitled to be indemnified and is not actually indemnified out of the assets of that corporation.
- (iv) *liability* means all costs, charges, losses, damages, expenses, penalties and liabilities of any kind including legal costs incurred in defending any proceedings (whether criminal, civil, administrative or judicial) or appearing before any court, tribunal, government authority or other body.

We, the persons who will be the initial members of the company, agree that the foregoing terms of this Constitution will be the Constitution of the company.

Executed in [ ].

[Note: Add execution clauses]

**ACPGF SHAREHOLDERS' AGREEMENT**

**SCHEDULE 2  
GUIDELINES**



**Grains Research &  
Development Corporation**

## **AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL GENOMICS**

**Australian Research Council  
and  
the Grains Research and Development Corporation**

**Guidelines for Applicants**

**for funding commencing**

**2002**

## Table of Contents

<b>1. Introduction .....</b>	<b>1</b>
1.1. BACKGROUND .....	1
1.2. OUTCOMES SOUGHT .....	2
1.3. THE INVESTORS .....	2
1.3.1. <i>The Australian Research Council</i> .....	2
1.3.2. <i>The Grains Research and Development Corporation</i> .....	3
<b>2. Objectives .....</b>	<b>3</b>
<b>3. Characteristics of the Centre .....</b>	<b>4</b>
3.1. SCIENTIFIC FOCUS .....	4
3.2. TRANSFER OF CENTRE OUTPUTS .....	5
3.3. FUNDING .....	6
3.4. APPOINTMENT AND RESPONSIBILITIES OF THE DIRECTOR .....	7
<b>4. Eligibility .....</b>	<b>7</b>
4.1. GENERAL .....	7
4.2. INSTITUTION ELIGIBILITY .....	7
4.3. CROSS-SCHEME ELIGIBILITY .....	7
<b>5. Application Process .....</b>	<b>8</b>
5.1. STAGE I .....	8
5.1.1. <i>Information Forum</i> .....	8
5.1.2. <i>Expression of Interest</i> .....	8
5.2. STAGE 2 .....	9
5.3. APPLICATION FORM .....	10
5.4. DEADLINES .....	10
5.5. SUBMISSION .....	10
5.6. APPLICATION FORMAT .....	10
5.7. COPIES OF APPLICATION .....	10
5.8. LIMIT ON THE NUMBER OF APPLICATIONS .....	10
5.9. TIMETABLE .....	11
<b>6. Selection Criteria .....</b>	<b>11</b>
6.1. GENERAL CRITERIA FOR EXPRESSION OF INTEREST .....	11
6.2. GENERAL CRITERIA FOR FULL APPLICATION .....	11
6.3. SPECIFIC REQUIREMENTS .....	13
6.3.1. <i>Budget</i> .....	13
6.3.2. <i>Corporate Governance and Legal Structure</i> .....	13
6.3.3. <i>Role of Board</i> .....	14
6.3.4. <i>Physical Structure and Location of the Proposed Centre</i> .....	14
6.3.5. <i>Commercial Aspects of Proposed Centre Operations</i> .....	14
<b>7. Selection Process .....</b>	<b>15</b>
7.1. STEERING COMMITTEE .....	15
7.2. EXPERT ADVISORY COMMITTEE .....	15
7.3. OFFER OF GRANT .....	15
7.4. NAMING THE CENTRE .....	15
7.5. LEADERSHIP OF THE CENTRE .....	15
<b>8. Additional Information .....</b>	<b>16</b>
8.1. CONDITIONS OF GRANT .....	16
8.2. REPORTING REQUIREMENTS .....	16
8.3. MONITORING AND EVALUATION .....	17
8.4. PRIVACY OF INDIVIDUALS .....	17

Centre of Excellence in Plant Functional Genomics  
Guidelines for Applicants

---

8.5.	CONFIDENTIALITY .....	17
8.6.	INCOMPLETE/MISLEADING INFORMATION .....	17
8.7.	CONTACTS .....	18
9.	References .....	18

## Acronyms

ARC	Australian Research Council
CRC	Cooperative Research Centre
GRDC	Grains Research and Development Corporation

## 1. INTRODUCTION

The Australian Research Council (ARC) and the Grains Research and Development Corporation (GRDC) have agreed to jointly establish a major research entity to be known as the Australian Centre for Plant Functional Genomics. The Centre will receive up to \$20M over five years to fund a critical mass of talented people in this exciting field of research. The Centre will contribute to ensuring that Australia maintains its international competitiveness in a crucial area of plant science research and that continuous innovation occurs in crop production and processing in the grains industry.

### 1.1. Background

The Stocker Report (*Priority Matters*) identified the need to set strategic research priorities as well as to encourage a research environment that allows innovative ideas to flourish and contribute to the national economy. The national biotechnology strategy (*Australian Biotechnology 2000 – a National Strategy*) and the report of Dr Batterham, the Chief Scientist (*The Chance to Change*, 2000), also emphasized the need to build critical research mass and to capitalize on Australia's strengths in biotechnology. *Backing Australia's Ability* gave substance to these sentiments by committing substantial new funding to research and development.

In accord with these policies, the ARC and GRDC sponsored workshops in 1999 to explore the development of research strategies in the area of plant and animal genomics. The workshops were attended by leading researchers and representatives of industry with expertise in genomics and gene technology. A recommendation of the report (*National Strategic Workshop on Genomics and Gene Technology*) published in March 2000 was that the ARC and GRDC examine the feasibility of initiating a research partnership in an area of core science and technology mutually identified as being of high priority. The establishment of the Australian Centre for Plant Functional Genomics is a result of these deliberations.

The establishment of the Australian Centre for Plant Functional Genomics is separate from, but complementary to, the establishment of a Centre of Excellence in Biotechnology as described in *Backing Australia's Ability*.

The production and processing of grains is important to the Australian economy. For the 22 year period from 1977/78 to 1998/99, total productivity on Australian grain farms is estimated to have increased by an average of 3.2% a year (Knopke et al 2000). However, this improvement has been offset by fierce competition for market share in international markets, particularly as a result of subsidized exports, with the result that farmers' terms of trade (the ratio of prices received relative to prices paid) have declined by just over 3% a year over the same period. Declining terms of trade are expected to continue as the phenomenon is principally attributable to technological advances enabling profitable production of larger quantities of a commodity at lower prices.

The productivity growth achieved in the Australian grains industry has been driven by research innovation and adoption on farm of new technologies. Some 40-50% of this productivity increase is attributable to better crop varieties with the balance attributable to

advances in agronomy and other disciplines. Declining terms of trade can at least be partially offset by capturing higher proportions of premium paying markets, with major advances being made by Australia over a number of decades by ensuring that grain quality meets specifications of those markets prepared to pay premiums for high quality grain.

Another critical issue facing Australian agriculture concerns preservation of the natural resource base. Soil and water quality have been compromised by unsustainable farming practices, which have caused erosion, salinity and nutrient deficiencies and toxicities and other production constraints. These effects have caused immediate economic loss and have compromised the long term sustainability of many farming enterprises.

It is against this background that the ARC and the GRDC will establish a major research centre in plant genomics in Australia focused on developing opportunities and solving problems for the grains industries. The Centre will develop a critical mass of activities in focused areas of research strength and commercial opportunity and will encourage the formation and maintenance of strong networks between research programmes and their associated commercial activities.

## **1.2. Outcomes Sought**

The Centre will achieve excellence in research and development (R&D) in the field of plant functional genomics, in the management of that R&D, in the management of the intellectual property that is generated by the research program and in commercialisation of intellectual property generated.

The Centre will have a critical mass of capability in plant science. The capability of the Centre in terms of infrastructure and management will be sufficient to attract world-class researchers and high quality students by providing access to advanced facilities and key platform technologies that will enable the Centre to become an important player in plant genomics globally.

The Centre will apply genomics research to critical problems and opportunities relevant to the Australian grains industry, and will commercialise those results through novel products that will contribute to the sustainable prosperity of the Australian grains industry.

## **1.3. The Investors**

### **1.3.1. The Australian Research Council**

The role of the Australian Research Council (ARC) is to advise the Government on research funding and policy and, through its management of the National Competitive Grants Programme, to promote the conduct of research and research training that is of the highest quality for the benefit of the Australian community. The Council's Mission is to *Advance Australia's capacity for quality research to the economic, social and cultural benefit of the community*. The Government's December 1999 White Paper, *Knowledge and Innovation: A Policy Statement on Research and Research Training*, identified an enhanced strategic role for the Council in contributing to national innovation, with a focus on:

- helping to form and maintain effective linkages between the research sector and the business community, government organisations and the international community;
- developing and improving public understanding and appreciation of the contribution that research makes to the community; and
- reporting on the comparative performance of Australia with other research active countries and assessments of the national return on investment in research.

### **1.3.2. The Grains Research and Development Corporation**

The Grains Research and Development Corporation (GRDC), is a statutory corporation established under the *Primary Industries and Energy Research and Development Act 1989*. It is funded by a levy on the production of grain by graingrowers, which is matched by a contribution from the Federal Government. There are, at present, 25 leviable crops spanning temperate and tropical cereals, oilseeds and pulses. The functions of the GRDC include:

- Investigating and evaluating the requirements for R&D in the grains industry;
- Co-ordinating or funding the carrying out of R&D activities; and
- Facilitating the dissemination, adoption and commercialisation of the results of R&D.

The GRDC invests approximately \$100 million per annum in grains research and development.

## **2. OBJECTIVES**

The *scientific* objectives of the Centre are to:

- establish programs of research that deliver a mix of economic, environmental and social benefits relevant to Australia in the short-, medium- and long-term.
- make discoveries and prove concepts in plant functional genomics that are in the forefront of developments internationally;
- establish a training program that will develop for Australia the next generation of researchers in the field;
- build relationships in the field of plant functional genomics nationally and internationally;
- build on existing research programs;
- use key platform technologies;
- access world class facilities and equipment; and
- attract from within Australia, and from abroad, researchers of international standing, and the most promising research students.

The *commercial* objectives of the Centre are to:

- ensure that all aspects of the research program are clearly focussed on delivering tangible industry outcomes;
- develop a creditable business plan;
- establish key results areas for monitoring the performance of the Centre;
- proactively and seamlessly ensure that outputs from the research program are incorporated in products and are commercialised for the benefit of Australia;

- attract the participation of Australian and international companies in collaborative research programs and in commercialisation; and
- identify, protect and commercially exploit the intellectual property for the benefit of Australian researchers and industry.

The *community* objectives of the Centre are to:

- provide opportunities for world class researchers to work in Australia and to enable world class Australian scientists to remain in, or return to, Australia;
- provide an effective, transparent and balanced view of the scientific impacts of applied gene plant technology;
- raise awareness of the role of science in Australia, and particularly its contribution to industrial innovation and maintaining international competitiveness; and
- raise awareness about innovation in agriculture and its role in the “new economy”.

### **3. CHARACTERISTICS OF THE CENTRE**

#### **3.1. Scientific Focus**

In broad terms, the ARC and GRDC invite submissions that will deliver benefits to Australia in ways that are consistent with the priorities identified in this paper. The submissions should deliver economic, environmental and social benefits to Australia, and the agricultural sector specifically.

While the ARC and GRDC do not wish to narrowly prescribe areas of research activity, areas of interest may include:

##### **1) General areas:**

- plant molecular biology;
- plant cellular processes;
- plant morphogenesis;
- plant adaptation and environment.

##### **2) Specific areas:**

- agronomic traits
  - input traits: insect resistance, herbicide tolerance;
  - output traits: yield;
  - abiotic stress
  - drought and water use efficiency;
  - heat/temperature;
  - nutrient deficiencies and toxicities;
  - salt tolerance.
- grain quality traits
  - ratios of major components (protein/oil/carbohydrates);

- novel proteins, oils and starches;
- baking quality;
- malting;
- traits related to human nutritional value
- biotic stress
  - rust diseases of cereals;
  - diseases of pulse and / or oilseed crops;
  - genetic systems for disease resistance.

### **3.2. Transfer of Centre Outputs**

The overall purpose of the Centre is to apply genomics research to critical problems and opportunities of interest to the Australian grains industry and wider plant industries. While initial scientific discoveries will occur in the first 3 to 5 years, it is recognized that delivery through to commercial programs may take a further 5-8 years.

In order to rapidly become an important global player in plant genomics research and delivery, the Centre must be designed to ensure that:

- its researchers gain access to appropriate existing biotechnologies, expertise, technical assistance and facilities;
- its researchers have freedom to operate when using third party or background intellectual property both for research and commercialisation purposes; and
- the research outcomes are actually applied for the benefit of grain growers and other plant industry participants through a proactive commercialisation program.

The Centre must draw on appropriate existing genomics technologies wherever possible to ensure that resources are not wasted 're-inventing the wheel' and to increase the speed with which the new technology it develops can be delivered.

Plant functional genomics is a highly competitive field and delivery into existing product pipelines and maintenance of a focus on delivering commercial outcomes is essential. It may be beneficial for the Centre to partner with a major international life science company/s for this purpose. Recent GRDC experience in discussions with a number of the major international plant life science companies that own significant genomics enabling technologies and facilities suggests that they are willing to collaborate with research entities provided that:

- the scale and scope of the proposed collaboration is sufficient to interest them; and
- the enabling technologies and other background intellectual property they may provide are protected from access by their competitors.

In order to maximise the opportunities for Australian industry arising from the Centre's research, the Centre must retain the right to commercialise its intellectual property in Australia, including the right to export grains, plant products or value added products that incorporate Centre intellectual property. In return for access to propriety and enabling technologies and facilities, commercial partner/s may be offered specific intellectual property rights, provided the rights granted allow for a royalty stream, or other benefits, back to the Centre.

The Centre will have a strong emphasis in the commercialisation of intellectual property, both in Australia and internationally. The Centre must have a commercialisation strategy that includes the following:

- commercialisation policies and access to commercialization services to support the commercial exploitation of research outputs for the benefit of Australia;
- policies and practices necessary to foster an entrepreneurial culture amongst its staff.

In addition to providing funding for the Centre, a major objective of the GRDC is to ensure that relevant research outputs are delivered to Australian growers. As an active participant in the Centre, the GRDC will assist the Centre in the development of commercial relationships.

### **3.3. Funding**

Funding will commence in 2002 and will be for five years. It is expected that the funding available from the ARC and GRDC will be of the order of \$20 million over five years. The level of funding is therefore higher than that provided for ARC Special Research Centres or Cooperative Research Centres. Funding will be provided jointly by ARC and GRDC in equal proportions.

Subject to normal budgetary conventions and an acceptable level of performance from the Centre, the ARC and the GRDC expect to provide ongoing funding for a second five year period.

Matching support, in cash or in kind, will be required from all partners involved in the establishment of this new Centre. It is likely that the successful applicants will bring significant financial and in-kind resources to the Centre.

Distributions of capital or profit by the Centre to its investors may only occur if the Commonwealth approves the distribution.

Funding will be directed through a lead tertiary institution that will also provide the infrastructure services for the Centre. It is expected that the physical headquarters of the new Centre will be located at one institution, be highly visible and provide accommodation for the majority of the Centre's staff. Nodes of the Centre may be located at a limited number of sites elsewhere. This arrangement is designed to ensure that the new Centre will have sufficient scale and be able to develop the critical mass required to make a real difference.

Prospective applicants may explore the possibility of bringing together strong complementary research teams by forming an active research consortium, perhaps involving a number of universities, CSIRO, or state government instrumentalities. The Centre may also undertake individual research projects with organisations that are not partners in the Centre provided that an appropriate contract is entered into between the Centre and the organisation concerned sufficient to protect the rights of all parties concerned.

Applicants should note that the ARC's financial contribution to the Centre is subject to the appropriation of moneys and the approval of expenditures under the *Australian Research Council Act 2001*. Approval of expenditures under the Act can only be considered in relation to years for which there is relevant appropriations, currently until 2003. The ARC's funding

agreement (Conditions of Grant) with the successful applicant will specify approved expenditures to be made through the ARC in relation to the years for which the relevant appropriations are in force.

### **3.4. Appointment and Responsibilities of the Director**

A Director or Interim Director will be appointed to lead the Centre. The Director or Interim Director will be placed in a unique position to attract outstanding researchers from within Australia and from overseas. National and international applicants with outstanding profiles will be sought for this position. The Director or Interim Director, in consultation with the Board, will be responsible for setting the research focus of the Centre, implementing the policies of the Board, and establishing the Centre. Where the Centre or its projects involves more than one organisation, the Director or Interim Director will be responsible for coordination of the research effort and the reporting structures across the organisations involved. The Director or Interim Director will also be responsible, in consultation with the Board, for the establishment and operation of the Centre's intellectual property management and commercialisation work.

It is expected that proposals for the Centre will be generated from within Australia under the leadership of an Interim Director. It is expected that the key positions of Director and research group leaders will be internationally advertised.

The Director is required to work on the activities of the Centre on a full time basis.

The Director or Interim Director will be named on the proposal for expenditure to be approved by the Minister according to Section 51(4) of the ARC Act.

## **4. ELIGIBILITY**

### **4.1. General**

The Australian Centre for Plant Functional Genomics may involve the participation and cooperation of universities, industry, state Governments and CSIRO.

The Centre must include a higher education institution as the lead agency. Government (ARC) funding will be directed through the Australian higher education institution.

Institutions are able to submit one application only as lead agency although they may be involved in more than one application.

### **4.2. Institution Eligibility**

Higher education institutions eligible to act as lead institutions are listed in Appendix 1.

### **4.3. Cross-Scheme Eligibility**

The principal work of the Centre will be carried out by full time researchers appointed or seconded to the Centre. Any researcher associated with the Centre including the Director will

be eligible to apply as a Principal or Partner Investigator for ARC Discovery-Project Grants and Linkage-Project Grants provided that the proposed research is outside the core business of the Centre (which has already been funded by the Commonwealth through the ARC). The ARC reserves the right to make the final decision on whether a proposal is outside the core business of the Centre.

Any researcher associated with the Centre will be eligible to act as a Partner Investigator on ARC Discovery-Project applications in which the Chief Investigator is outside the Centre.

Applicants for funding of the Centre for which they are the proposed staff may also lodge concurrent applications for Discovery-Project Grants as a Chief or Partner Investigator, if eligible. Such proposals may be within the core business of the Centre, but if the Centre application is successful, the Discovery-Project Grant will not be awarded or will be relinquished.

The Centre will also have access to ARC Fellowship schemes, awards for postgraduate training, Linkage Infrastructure funds, and Linkage International funds, provided the eligibility requirements of the individual schemes are satisfied.

The Centre will not be eligible to receive funding under the *Backing Australia's Ability* Biotechnology Centre of Excellence programme.

Researchers of the Centre will be eligible to apply for research funding from sources other than those provided by the ARC and the GRDC.

Researchers associated with the Centre may apply for other GRDC research funds provided that the proposed research is outside the core business of the Centre.

## **5. APPLICATION PROCESS**

The application process will take place in two stages. The first stage will involve the submission of an expression of interest by potential applicants and the second will involve the submission of a full proposal by selected short listed applicants.

### **5.1. Stage I**

#### **5.1.1. Information Forum**

An Information Forum will be held in Canberra on Thursday 4<sup>th</sup> October, 2001, to provide background information to prospective applicants. This Forum is designed to consult with potential applicants, disseminate information about the Centre, answer questions and encourage collaborations. Details of the Forum will be widely advertised and will also be available on the ARC and GRDC web sites.

#### **5.1.2. Expression of Interest**

Lead institutions are asked to submit a four page expression of interest that includes the details and contact information of the lead and partner institutions and a summary of the proposal. Expressions of interest will be evaluated according to the following criteria:

- the description of the research focus of the Centre and the proposed research programme;
- the description of the structure of the Centre;
- the description of the education programme of the Centre;
- the notional budget for the first 5 years; and
- the procedures for the protection and commercialisation of intellectual property

The expressions of interest will be assessed by an Expert Advisory Committee who will recommend a short list of applicants to the ARC/GRDC Steering Committee. The short listed applicants will then be invited to submit a full application.

The ARC and the GRDC reserve the right to explore with applicants modification of their submission with respect to any matters including the participating institutions, the focus of the proposed research and the proposed intellectual property and commercialisation arrangements.

## **5.2. Stage 2**

Selected applicants will be invited to submit a detailed application. This application will be the prime source of information available to the Expert Advisory Committee, and applicants should submit their projects as mature research plans ready for implementation. The application should contain all the information necessary for assessment of the proposal without the need for further written or oral explanation, or for reference to additional documentation, unless requested by the Expert Advisory Committee. All details on the application, particularly those concerning existing funding and research grants, must be current.

Where an application involves more than one institution, the application must detail the administrative and reporting structure, including allocation of responsibility for coordination and reporting across the institutions involved.

The full applications will be reviewed by the Expert Advisory Committee to decide the ranking of applicants. Applicants may also be evaluated through interview and site visits to decide the successful application. The successful application will be announced early in 2002.

The ARC and the GRDC reserve the right to explore with applicants modification of their full applications with respect to any matters including the participating institutions, the focus of the proposed research and the proposed intellectual property and commercialisation arrangements.

### **5.3. Application Form**

Applicants must use the application forms available on the web sites of the ARC and GRDC ([www.arc.gov.au](http://www.arc.gov.au) and [www.grdc.com.au](http://www.grdc.com.au)) to submit both the expression of interest and full application.

Full applications will consist of three parts – application form, additional text, and curriculum vitae and supporting documentation.

### **5.4. Deadlines**

The deadline for expression of interest is **Friday 2<sup>nd</sup> November, 2001.**

The deadline for detailed applications is **Friday 25<sup>th</sup> January, 2002.**

Late applications will not be accepted.

Replacement pages will not be accepted after submission.

### **5.5. Submission**

Full applications must be submitted by the lead university, not by individual researchers. Applications should be despatched:

By mail to:

Executive Director (Biological Science  
and Biotechnology)  
Australian Research Council  
GPO Box 9880  
CANBERRA ACT 2601

By courier to:

Executive Director (Biological Sciences and  
Biotechnology)  
Australian Research Council  
AGSO Building  
Cr Hindmarsh Drive and Jerrabomberra Avenue  
SYMONSTON ACT 2609

### **5.6. Application Format**

Both the expression of interest and the full application should be in black type, size 12 font on white A4 paper, single-sided and unbound. Only the following font types should be used: Arial, Courier, Palantino, Times New Roman and Helvetica.

### **5.7. Copies of Application**

An original and ONE identical copy only are required. The application must be clipped with fold back clips - not stapled.

### **5.8. Limit on the Number of Applications**

Each eligible higher education lead institution is limited to submitting one full application. Participating organizations may be involved in more than one application.

## 5.9. Timetable

Date	Year	Event
Saturday 15th September	2001	Advertisement for Expressions of Interest. Guidelines made available on ARC and GRDC web sites
Thursday 4th October	2001	Information Forum (Canberra)
Friday 2 November	2001	Closing date for Expressions of Interest
November	2001	Assessment of Expressions of Interest by the Expert Advisory Committee and the Steering Committee. List of Expressions of Interest made available on the ARC and GRDC web sites
Friday 23 November	2001	Invitations to submit full applications sent
Friday 25 January	2002	Closing date for full applications
Friday 1 February	2002	Full applications sent to Expert Advisory Committee
Monday 25 February	2002	Expert Advisory Committee meeting to consider full applications
Monday 4 March	2002	Recommendations submitted to the ARC and GRDC for approval
Friday 29 March	2002	Successful applicants announced
Friday 21 June	2002	Conditions of Grant signed
Monday 1 July	2002	Funding commences

## 6. SELECTION CRITERIA

### 6.1. General Criteria for Expression of Interest

Expressions of interest will be assessed according to the criteria listed in Section 5.1.2.

### 6.2. General Criteria for Full Application

To ensure that the Centre objectives are met, full applications will be assessed against the following criteria. The descriptors following each criterion are not all-inclusive. Applicants submitting a full application need to address each of these selection criteria.

1. **Research Program**
  - excellence, focus and coherence;
  - creativity and innovation;
  - potential to lead to a significant advancement of knowledge;
  - potential to lead in an area of research with high economic, environmental and social impact;
  - extent to which social and ethical issues will be addressed.
2. **People**
  - achievements of participants (director and associated researchers);
  - plans to attract researchers of international standing and promising research students;
  - contribution to postgraduate education and postdoctoral training;
  - achievements of senior participants in managing intellectual property and commercialisation.
3. **Linkages/Networking**
  - existence of strong, effective links between all participants;
  - multidisciplinary, multisectorial approaches;
  - integration of existing research in the field;
  - sharing of equipment and research facilities;
  - links with researchers, and leading research centres, in other countries.
4. **Industry Linkages and Commercialisation Plans**
  - willingness to develop commercial linkages with local and international firms both in relation to licensing in existing enabling technologies and to licensing out new Centre intellectual property;
  - likelihood that new products, processes or services can be commercialised;
  - adequacy of plans for facilitation of technology transfer including commercialisation.
5. **Management**
  - cash and in-kind contributions from participants
  - adequacy of proposed management structure, including financial, operational and research management arrangements;
6. **Intellectual Property**
  - adequacy of intellectual property identification, protection and management(see Section 6.1.5);
  - adequacy of commercialisation planning and management;
7. **Communication**
  - ability to support informed debate about opportunities and risks associated with genetic research and the development of gene technologies.

## **6.3. Specific Requirements**

### **6.3.1. Budget**

Applicants must submit a notional budget for the first five years under the following headings:

#### Direct costs

- (a) Personnel
- (b) Teaching relief
- (c) Equipment
- (d) Services
- (e) Travel
- (f) Other

#### In-kind contributions

- (a) Personnel
- (b) Equipment
- (c) Infrastructure
- (d) Services
- (e) Other

The cost of large-scale capital items such as buildings will not be supported.

### **6.3.2. Corporate Governance and Legal Structure**

The legal structure under which the Centre operates will influence its success. The Centre should be a stand alone entity with a structure that will be effective in delivering the Centre's outcomes and flexible enough to accommodate organisational changes over time.

The application will need to detail the type of legal entity the Centre will be, such as a joint venture, a company limited by shares, company limited by guarantee etc. For example, one possibility is for the Centre to be a joint venture with the ARC and the GRDC with a separate incorporated company within the Centre responsible for the protection and commercialisation of the Centre's intellectual property and for the licensing in-background or third party intellectual property. It is the GRDC's preference that the Centre be incorporated or, at the very least, that the Centre forms an incorporated vehicle to; hold and manage intellectual property, enter into commercial arrangements, and be capable of employing staff in its own right. The GRDC and the lead institution may be shareholders of the company. The ARC is not seeking to benefit directly from the Centre's commercialisation activities. Applications must be supported by letters from all consortium partners confirming their agreement to these arrangements.

The organisational and corporate structure of the Centre must:

- be flexible enough to allow entry of new partners at any time and exit of partners (for example commercial firms) at defined points in time, such as at the conclusion of component research programmes or other activities;
- provide for rigorous intellectual property management of both background and developed intellectual property;
- ensure equality of access to resources for all participants; and
- provide clear linkages to potential commercialising partners.

### **6.3.3. Role of Board**

The Board of the Centre will be a skills-based Board of Governance with scientific and commercial skills and will have broad representation from the scientific, commercial and user communities and include a representative from each of the ARC and the GRDC.

The Board will be responsible for the scientific focus of the Centre, its structure and general operating principles, and intellectual property and commercialisation management. The Board may establish both a Scientific Advisory Committee and a Commercial Advisory Committee.

In consultation with the Director and the Scientific and Commercial Advisory Committees, the Board will set the research priorities of the Centre and be responsible for approving the entry and exit of additional participants.

### **6.3.4. Physical Structure and Location of the Proposed Centre**

The new Centre must have a clearly defined single physical location at one research institution although nodes of the Centre may also be located at a limited number of locations elsewhere.

### **6.3.5. Commercial Aspects of Proposed Centre Operations**

Key intellectual property and commercialisation activities of the Centre must include:

- ensuring that research objectives and outcomes are driven and delivered commercially;
- procuring access to existing key plant functional genomics tools, expertise and facilities world-wide to ensure that funds are not expended “re-inventing the wheel”, improving speed of delivery to the market place and providing commercialisation pathways;
- ensuring that any third party propriety intellectual property made available to the Centre remains confidential to the Centre;
- ensuring that Centre intellectual property is identified, protected and managed;
- proactively managing commercialisation of Centre research outcomes; and
- on-going management of commercial agreements (possibly beyond the research life of the Centre itself).

The Centre’s commercial operations are likely be enhanced by developing a commercial relationship with a major international commercial partner who:

- owns relevant enabling technologies, has relevant expertise and operates extensive plant genomics research facilities; and

- provides a commercialisation pathway to international markets.

To ensure that Australian growers and industry benefit from the Centre's research work, the Centre will retain all rights to commercialisation of all Centre intellectual property in Australia including the right to export any crops or other value added products produced in Australia.

Intellectual property management and commercialisation activities will require funding from the Centre's budget at least for the first few years. While Centre intellectual property will have the potential to generate future cash flow, the investors acknowledge that it will be a long time before any commercial revenue is received from sale of products in the market place.

The Centre must comply with the *National Principles of Intellectual Property Management for Publicly Funded Research* and with the intellectual property statute of the host institution.

## **7. SELECTION PROCESS**

### **7.1. Steering Committee**

A Steering Committee comprising representatives of the ARC and the GRDC will oversee the selection process.

### **7.2. Expert Advisory Committee**

An Expert Advisory Committee of international standing will be appointed by the ARC and the GRDC to evaluate the expressions of interest and the final applications according to the selection criteria. The Expert Advisory Committee will prepare recommendations which will be submitted to the Steering Committee and subsequently to the Boards of the ARC and GRDC for endorsement. The recommendations will then be submitted by the ARC to the Minister for Education, Training and Youth Affairs for approval.

### **7.3. Offer of Grant**

Following the Minister's approval, the ARC and the GRDC will inform the successful institution in a letter of offer that will indicate the funding to be provided and include the Conditions of Grant.

### **7.4. Naming the Centre**

The research Centre will be known as the Australian Centre for Plant Functional Genomics.

### **7.5. Leadership of the Centre**

The Director of the Centre is expected to work full-time on the activities of the Centre. It is a requirement of the ARC and the GRDC that they be informed of any changes in leadership of the Centre.

## **8. ADDITIONAL INFORMATION**

### **8.1. Conditions of Grant**

A condition of funding is the execution of a legally binding Conditions of Grant. Funds will not be provided unless this agreement has been finalised and commenced to have effect. The agreement will include specific performance milestones, the payment schedule, reporting and auditing requirements. Funding may be terminated or suspended where the terms of the agreement are breached. The ARC and GRDC will not begin payments before the Conditions of Grant is signed

In respect of funds provided under the *Australian Research Council Act 2001*, the Conditions of Grant will be subject to the requirements relating to funding approvals under that Act and the express conditions specified in that Act. The funding approval made under the ARC Act may be varied where any of the circumstances described in Section 55(3) of the Act occur, namely:

- the involvement of the approved organisation with the research program ends;
- the research program changes so that it is no longer consistent with the description in the funding approval; or
- the person named in the funding approval as the person leading the research program ceases to lead the program.

### **8.2. Reporting Requirements**

The Centre will be required to submit to the ARC and GRDC:

- an Annual Report on the use and expenditure of grant funds by 31 March in the year following the calendar year for which they were granted; and
- an Audited Financial Statement, independent of the lead institutions audited financial statement, by 30 June of the year following the year of the grant.

The Annual Report will be used to monitor the non-financial progress of the Centre against the objectives specified in Section 2 of the Guidelines. The ARC and GRDC reserve the right to suspend payment of further installments of any current grant until the appropriate reports have been received and assessed as satisfactory.

Approval of the Minister is required to carry over any unspent ARC funds from one year to another.

The audited financial statement must be prepared by a qualified auditor. Qualified auditor means:

- (a) the Auditor-General of a State, of the Australian Capital Territory or of the Northern Territory; or

- (b) a person registered as a company auditor or a public accountant under a law in force in a state, the Australian Capital Territory or the Northern Territory; or
- (c) a member of the institute of Chartered Accountants in Australia, or of the Australian Society of Certified Practising Accountants; or
- (d) a person approved by the Minister in writing as a qualified auditor for the purposes of the *Australian Research Council Act 2001*.

### **8.3. Monitoring and Evaluation**

The performance of the Centre will be reviewed in the fourth year of its operation. Subject to normal budgetary conventions and an acceptable level of performance from the Centre, The ARC and the GRDC expect to provide ongoing financial support for a second five year period.

Broadly, the fourth-year review examines the extent to which the Centre has met its previously stated aims and objectives, the progress against the Centre's performance targets, the quality of outcomes to date, the management of the Centre and the extent to which it has met its agreed objectives. Considerable progress towards these objectives must be achieved in order to receive further funding.

Ad hoc reviews may also be held in special circumstances, such as a change in the Director. Persons nominated by the ARC and the GRDC are to be given full access to all accounts, records, documents and premises relevant to the research being funded by the ARC and the GRDC.

### **8.4. Privacy of Individuals**

Documents containing personal information are handled and protected in accordance with the provisions of the *Privacy Act 1988* which sets standards for the collection, storage, use and disclosure of, and access to, personal information. Personal information is disclosed only with permission of the individual to whom it relates or where the Act allows.

### **8.5. Confidentiality**

Information contained in applications is regarded as confidential unless otherwise stated and will be received and treated as confidential by the ARC, GRDC, institutions and assessors.

### **8.6. Incomplete/misleading information**

If an application is incomplete or contains information which is considered misleading, it will be excluded from any further consideration for funding. If the ARC or GRDC believes that omissions of inclusion of misleading information are intentional, or if there is evidence of malpractice, the ARC will refer the matter to the National Investigations Unit of the Department of Education, Training and Youth Affairs. The Commonwealth Government is committed to protecting its revenue, expenditure and property from any attempt, either by members of the public, contractors, sub-contractors, agents, intermediaries or its own employees to gain financial or other benefits by deceit.

Examples of malpractice include, but are not restricted to:

- providing fictitious track records; and
- falsifying claims in publications records (eg. describing a paper as accepted for publication when it has only been submitted).

Applicants acknowledge that giving false or misleading information is a serious offence under the *Criminal Code*.

## **8.7. Contacts**

Enquiries about this Centre may be addressed to:

Professor Bill Sawyer  
Executive Director (Biological Science & Biotechnology)  
Australian Research Council  
GPO Box 2702  
CANBERRA ACT 2601  
Phone: (02) 6284 6685  
E-mail: bill.sawyer@arc.gov.au

Mr Vince Logan  
Grains Research and Development Corporation  
PO Box E6  
Kingston ACT 2604  
Phone: (02) 6272 5525  
E-mail: v.logan@grdc.com.au

## **9. REFERENCES**

Knopke, P, O'Donnell, V. and Shepherd, A. (2000). *Productivity Growth in the Australian Grains Industry*. ABARE Research Report 2000.1, Canberra

## **APPENDIX 1**

### **Eligible higher education institutions**

#### **Higher education institutions receiving Commonwealth funding on a triennial basis**

##### **New South Wales**

Charles Sturt University  
Macquarie University  
Southern Cross University  
The University of New England  
The University of New South Wales  
The University of Newcastle  
The University of Sydney  
University of Technology, Sydney  
University of Western Sydney  
University of Wollongong

##### **Victoria**

Deakin University  
La Trobe University  
Monash University  
RMIT University  
Swinburne University of Technology  
University of Ballarat  
The University of Melbourne  
Victoria University

##### **Queensland**

Central Queensland University  
Griffith University  
James Cook University  
Queensland University of Technology  
The University of the Sunshine Coast  
The University of Queensland  
University of Southern Queensland

##### **Western Australia**

Curtin University of Technology  
Edith Cowan University  
Murdoch University  
The University of Notre Dame Australia  
The University of Western Australia

##### **South Australia**

The Flinders University of South Australia  
The University of Adelaide  
University of South Australia

##### **Tasmania**

University of Tasmania  
Australian Maritime College

##### **Northern Territory**

Batchelor College  
Northern Territory University

##### **Australian Capital Territory**

The Australian National University  
University of Canberra

##### **Multi-State**

Australian Catholic University

**ACPFG SHAREHOLDERS' AGREEMENT**

**SCHEDULE 3  
APPLICATION**

**Exempt clause 6 – personal affairs**

17 pages removed

**Exempt clause 7 – business affairs**

127 pages removed

# ACPPFG SHAREHOLDERS' AGREEMENT

## SCHEDULE 7

### ADDRESSES FOR NOTICES (clause 22)

- (a) to the Company: [ ]  
Attention: [ ]  
Fax: [ ]
- (b) to AVS [ ]  
Attention: [ ]  
Fax: [ ]
- (c) to DNRE [ ]  
Attention: [ ]  
Fax: [ ]
- (d) to GRDC: Level 1, 40 Blackall Street, Barton ACT 2600  
Attention: Professor John Lovett,  
Managing Director  
Fax: 02 6271 6430
- (e) to SA State: [ ]  
Attention: [ ]  
Fax: [ ]
- (f) to UA: [ ]  
Attention: [ ]  
Fax: [ ]
- (g) to UM: [ ]  
Attention: [ ]  
Fax: [ ]
- (h) to UQ: [ ]  
Attention: [ ]  
Fax: [ ]

**DRAFT**

**DATED:** \_\_\_\_\_ **DAY OF** \_\_\_\_\_ **2002**

**DEED OF AGREEMENT**

**BETWEEN**

**MINISTER FOR SCIENCE AND INFORMATION ECONOMY**  
**("the Minister")**

**- AND -**

**THE UNIVERSITY OF ADELAIDE**  
**ABN 61 249 878 937**  
**("the University")**

**- AND -**

**AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL**  
**GENOMICS PTY LTD**  
**ABN 98 102 769 808**  
**("the Company")**

*[This agreement is a DRAFT provided only for the purposes of furthering negotiations between the Parties. MINISTER FOR SCIENCE AND INFORMATION ECONOMY will not be legally bound unless and until an agreement is executed by MINISTER FOR SCIENCE AND INFORMATION ECONOMY and any actions taken in anticipation of approval will be at the risk of the Party taking them.]*



**CROWN SOLICITOR'S OFFICE**

---

CONTENTS

1.	Definitions .....	2
2.	Interpretation .....	4
3.	Term .....	4
4.	Administration .....	5
5.	Funding .....	5
6.	ABN, GST Registration .....	6
7.	Projects .....	7
8.	Financial Management .....	8
9.	Reports .....	9
10.	Intellectual Property .....	9
11.	Conflict of Interest .....	11
12.	Repayment.....	12
13.	Termination and Breach.....	12
14.	Termination of Minister's Obligations.....	13
15.	University's Warranties and Undertakings .....	14
16.	Obligations of the University .....	15
17.	Plans .....	15
18.	Reporting.....	15
19.	Audit.....	16
20.	Review.....	16
21.	Publication.....	17
22.	Rectification of Defects in the Agreement.....	17
23.	Novation.....	17
24.	Public Disclosure.....	18
25.	Approvals and Consents.....	18
26.	General	
26.1	No Assignment by the University .....	19
26.2	No Mutual Liability .....	19
26.3	Costs .....	19
26.4	Entire Agreement .....	19

---

26.5	Governing Law .....	19
26.6	Notices .....	19
26.7	Waiver .....	20
26.8	Modification .....	20
26.9	Severability .....	20
26.10	Auditor-General.....	21
26.11	Survival .....	21
The Schedule – General Particulars .....		22
The Annexure –Shareholder’s Agreement .....		24

---

**THIS DEED OF AGREEMENT** is made the                      day of                      2002

**BETWEEN**

**MINISTER FOR SCIENCE AND INFORMATION ECONOMY** a body corporate pursuant to the Administrative Arrangements Act, 1994 (SA) and whose office is situated at Level 13, 33 King William Street, Adelaide 5000 in the State of South Australia ("Minister")

**AND**

**THE UNIVERSITY OF ADELAIDE** ABN 61 249 878 937 a body corporate established pursuant to the provisions of the *University of Adelaide Act, 1971* (SA), of North Terrace, Adelaide 5000 in the said State ("the University").

**AND**

**AUSTRALIAN CENTRE FOR PLANT FUNCTIONAL GENOMICS PTY LTD** ABN 98 102 769 808 whose registered office is situated at C/O Finlaysons, Level 8, 81 Flinders Street in the said State ("the Company")

**RECITALS**

- A. The Parties are parties to a Shareholders' Agreement dated the .....day of .....2002, the other parties to which are Agriculture Victoria Services Pty Ltd as agent on behalf of the State of Victoria through its Department of Natural Resources and Environment, Grains Research and Development Corporation, the University of Melbourne and the University of Queensland ("the Shareholders' Agreement")
  - B. Under the terms of the Shareholders' Agreement the Company has been established through which the Participants will conduct the ACPFG Business.
  - C. The Shareholders' Agreement provides that, amongst other things, the Minister will provide funding to the University of Adelaide from the Commencement Date and thereafter from the Switch Date to the Company, for ACPFG Business purposes.
  - D. This Agreement records the terms upon which the funding referred to in Recital 'C' is to
-

be provided.

1. **DEFINITIONS**

In this Agreement unless the contrary intention appears:

- 1.1 "ABN" has the meaning attributed in the A New Tax System (Australian Business Number) Act 1999;
  - 1.2 "ACPFPG Business" has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.3 "Agreement" means this Deed of Agreement and includes the Schedule and the Annexure attached hereto;
  - 1.4 "ANTS GST Act" means the A New Tax System (Goods and Services Tax) Act 1999;
  - 1.5 "Authorised Personnel" means personnel approved by the Company;
  - 1.6 "ARC" means the Commonwealth of Australia as represented by and acting through the Australian Research Council, a body established pursuant to the provisions of the *Australian Research Council Act 2001*;
  - 1.7 "Background Intellectual Property Licence Agreement" has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.8 "Business Day" means any day that is not a Saturday or Sunday or a public holiday in Adelaide under the Holidays Act, 1910;
  - 1.9 "Business Plan" has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.10 "Commencement Date" means the date specified in Item 1 of the Schedule;
  - 1.11 "Company" means ACPFG Pty Ltd;
  - 1.12 "Company's Representative" means the person named in Item 4 of the Schedule;
  - 1.13 "Document" has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.14 "DEST" means the Commonwealth Department of Education Science and Technology, and includes its successors and assigns;
  - 1.15 "Funding" means the amount specified in Item 7 of the Schedule;
  - 1.16 "GRDC" means Grains Research & Development Corporation a party to the Shareholders' Agreement;
  - 1.17 "GST" means the tax imposed by the ANTS GST Act;
-

- 1.18 **"Intellectual Property"** has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.19 **"Minister's Representative"** means the person named in Item 3 of the Schedule;
  - 1.20 **"Other Commonwealth Funding"** has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.21 **"Participants"** means parties to the Shareholders' Agreement;
  - 1.22 **"Parties"** means the Minister, the University and the Company and **"Party"** means any of them;
  - 1.23 **"Prescribed Rate"** means:
    - 1.23.1 the rate (expressed as a percentage per annum) which the Minister declares to be the cost to the Government of the State providing the Funding made under this Agreement as at the Termination Date; plus
    - 1.23.2 one percent per annum;
  - 1.24 **"Project"** means a research project/s specified in the Research Plan to be undertaken by the University;
  - 1.25 **"Purpose"** means the purpose specified in Item 5 of the Schedule;
  - 1.26 **"Research Plan"** has the meaning ascribed to it in the Shareholders' Agreement;
  - 1.27 **"Shareholders' Agreement"** means the agreement referred to in Recital A of this Agreement a copy of which is annexured to this Agreement;
  - 1.28 **"State"** means the State of South Australia;
  - 1.29 **"Supply"** means the obligations of the University to the Minister under this Agreement;
  - 1.30 **"Switch Date"** means the effective date on which the rules regarding eligibility for Other Commonwealth Funding change, enabling the Company to obtain Other Commonwealth Funding in relation to the State's Funding;
  - 1.31 **"Tax Invoice"** has the meaning attributed in the ANTS GST Act;
  - 1.32 **"Taxable Supply"** has the meaning attributed in the ANTS GST Act, and also means any component of a Taxable Supply that is treated as a separate supply under the ANTS GST Act;
  - 1.33 **"Term"** means the term defined in clause 3;
  - 1.34 **"Termination Date"** means the earlier of the following:
    - 1.34.1 the date specified in the Schedule; or
-

1.34.2 date on which the Minister terminates this Agreement pursuant to the provisions of this Agreement;

1.35 "Third Party Materials" means materials identified as such by the University in its audit of intellectual property under the Background Intellectual Property Licence Agreement;

1.36 "University's Representative" means the person named in Item 4 of the Schedule.

## **2 INTERPRETATION**

2.1 In this Agreement unless the contrary intention appears:

2.1.1 any word importing the plural includes the singular and vice versa;

2.1.2 any word importing a gender includes all other genders;

2.1.3 a reference to a person includes a corporation or a company;

2.1.4 headings do not affect the interpretation or construction; and

2.1.5 a reference to a clause, subclause, schedule or annexure is a reference to a clause, subclause, schedule or annexure of this Agreement.

2.2 In resolving inconsistencies in this Agreement:

2.2.1 this Agreement (excluding the Schedule and the Annexure);

2.2.2 the Schedule; and

2.2.3 the Annexure;

have priority in that order.

2.3 The recitals form part of this Agreement.

2.4 Subject to subclause 2.5 terms defined or used in the Shareholders' Agreement shall have the same meaning in this Agreement

2.5 If there is any inconsistency between any term of this Agreement and the Shareholders' Agreement then to the extent of the inconsistency that term of this Agreement shall prevail over that term of the Shareholders' Agreement.

## **3 TERM**

This Agreement shall commence on the Commencement Date and shall expire on the Termination Date ("Term") unless sooner determined in accordance with the provisions of this Agreement.

---

4 **ADMINISTRATION**

- 4.1 The Minister appoints the Minister's Representative, the University appoints the University's Representative and the Company appoints the Company's Representative as their respective representatives ("Representatives"). Each Representative has authority to:
- 4.1.1 exercise all of the powers and functions of his or her Party under this Agreement other than the power to amend this Agreement; and
  - 4.1.2 bind his or her Party in relation to any matter arising out of or in connection with this Agreement.
- 4.2 A notice served on a Representative is taken to be notice to that Representative's Party.

5 **FUNDING**

- 5.1 The Minister will make the Funding available to the University for the Purpose, in the manner specified in Item 8 of the Schedule.
- 5.2 The Minister's obligation to provide the Funding is subject to the provisions of this Agreement.
- 5.3 If and to the extent that GST is payable by the University in respect of a supply for which the Funding under this Agreement is consideration:
- 5.3.1 the Minister will increase the amount of the Funding relevant to that supply by multiplying it by one (1) plus the GST Rate;
  - 5.3.2 the University must provide to the Minister a tax invoice in respect of any payment for such supply before the Funding is paid; and
  - 5.3.3 the Minister will be relieved of any obligation to pay or to provide that Funding until such time as a tax invoice is provided by the University in accordance with sub clause 5.3.2
- 5.4 The Purpose
- 5.4.1 During the Term, the University must only use the Funding:
    - (a) for the Purpose;
    - (b) in accordance with this Agreement and, to the extent that it is relevant in accordance with the Shareholders' Agreement; and
-

(c) as directed by the Company, or with the approval of, the Minister from time to time in writing.

5.5 The Purpose, including the obligations of the Parties, may be reasonably varied from time to time and anytime by, or with the approval in writing of the Minister's Representative, following consultation with the University, the Company and the Participants.

5.6 **Company to Ensure Compliance**

The Company must ensure that the Funding is spent by the University only for the Purpose and in accordance with the Business Plan and Research Plan.

5.7 **Refusal of Payment**

The Minister may defer or refuse payment of the whole or part of the Funding if the Minister is of the opinion that the University has not complied, or will not comply, with the Agreement.

5.8 **General**

The Funding made available by the Minister must not be encumbered by any conditions other than those contained in the Agreement.

6 **ABN, GST REGISTRATION**

6.1 The University represents that:

6.1.1 it is registered under the A New Tax System (Australian Business Number) Act 1999, and that the ABN shown in Item 9 of the Schedule is the University's ABN;

6.1.2 it is registered under the ANTS GST Act; and

6.1.3 the Supply under this Agreement will be a Taxable Supply.

6.2 The University acknowledges that should these representations be or become incorrect;

6.2.1 the Minister may be obliged under the Taxation Administration Act 1953 to deduct a withholding from the Funding and will not be obliged to gross up the Funding or make any other compensation to the University;

---

6.2.2 if the Supply is not a Taxable Supply, the Minister is entitled to reduce the Funding by the amount which would have been attributable to GST had the Supply been a Taxable Supply.

6.3 The University must inform the Minister immediately if it ceases to be registered under the ANTS GST Act.

## **7 PROJECTS**

### **7.1 Authorised Personnel**

7.1.1 The University must ensure that Projects are carried out by Authorised Personnel.

7.1.2 The University must, and must ensure that the Authorised Personnel, comply with any special conditions specified by the Company from time to time.

7.1.3 A person or class of persons not specified in the Research Plan may not work on the Project without the prior written consent of the Company.

### **7.2 Publication of Project**

The results of a Project may be published, subject to the provisions of the Shareholders' Agreement and the Company being satisfied that the publication does not:

7.2.1 reveal the trade secrets of the Company; or

7.2.2 compromise the Company's right to exploit or register Intellectual Property.

### **7.3 Project Progress**

The University must ensure that each Project progresses so as to meet any deadlines specified in the Research Plan or agreed with the Company. In any event Projects must progress as promptly as practicable.

### **7.4 Information to the Company**

7.4.1 The University must keep the Company fully informed as to the progress of each Project.

7.4.2 The University must provide to the Company any information requested by the Company in respect of a Project as soon as is reasonably practicable.

---

**7.5 Changes to the Project**

No material change may be made to a Project without the Company's prior written consent.

**7.6 Reports**

The Company must provide the Minister with such reports as the Minister may reasonably require to determine whether there is compliance with the University's obligations under this Agreement

**8 FINANCIAL MANAGEMENT**

**8.1 Use of Funding**

The Funding must be used solely for Projects, or for such other purposes as the Minister may approve, in writing.

**8.2 Financial Records**

8.2.1 The University must keep proper and accurate financial records in relation to all aspects of a Project. The University must provide these records to the Company's Representative or the Minister's Representative within a reasonable time of a request from the Company or the Minister, as the case may be.

8.2.2 The University must facilitate an audit of the financial records by the Company's Representative or the Minister's Representative at such times as the Company or the Minister requests.

**8.3 Notification of Repayment of Unused Portion of Funds**

8.3.1 The University must forthwith notify the Minister of any unused portion of the Funding on completion or termination of any Project.

8.3.2 The Company may redirect these unused funds to allow the University to carry out other activities in accordance with the Purpose provided the Company notifies the Minister to that effect.

**8.4 Limitation of Liability**

8.4.1 The Minister's liability under the Agreement is limited to paying the Funding to the University.

8.4.2 The Minister is not liable to contribute to any expenditure by the University on any Project in excess of the Funding.

---

9     **REPORTS**

9.1     **Progress Reports**

9.1.1     The University, must if required by the Minister, provide to the Minister progress reports in relation to any Project on or before the dates notified to the University.

9.1.2     These Reports must include such information as the Minister may reasonably require.

9.2     **Final Report**

9.2.1     Within thirty (30) days of the completion of a Project (or such other date as agreed by the Minister) the University must provide to the Minister a final report on all aspects of the Project.

9.2.2     The final report must include a final statement of expenditure on the Project, including funds allocated to the Project other than the Funding, which is certified as accurate by a registered company auditor.

9.3     **Details in Reports**

All reports issued under the Agreement must comply with any guidelines for the preparation of reports notified to the University by the Minister from time to time.

10     **INTELLECTUAL PROPERTY**

10.1     The Parties acknowledge and agree that all Intellectual Property created in the performance of research and other services provided under the Research Plan or the Business Plan, or both, as the case may be, shall vest, upon its creation, in the Company regardless of whether it is created by the University's employees, agents, contractors or subcontractors.

10.2     To the extent to which it applies, section 197 of the *Copyright Act 1968* (Cwth) gives effect to the assignment of future copyright under subclause 10.1 of this Agreement. In all other things the University must procure intellectual property from third parties to ensure that it vests always in the Company upon creation. The University must prepare all documentation and do all such acts and things as are necessary to give effect to the provisions of sub clauses 10.1 and 10.2, or, as the case may be to give effect to any assignment.

10.3     Notwithstanding subclauses 10.1 and 10.2 the Minister and the Company

---

acknowledge that in respect of any pre-existing Intellectual Property of the University which is incorporated into or which may be used in the course of developing the Results from any Projects, there is no formal assignment of Intellectual Property in that material. The University grants the Company a non-exclusive licence in perpetuity to use such pre-existing material on terms to be agreed between those Parties.

10.4 The University must:

- (a) identify all Third Party Materials to be used or incorporated in any Project ("Identified Third Party Materials"); and
- (b) obtain all necessary permission, authorisations, licences and consents for and pay all royalties and licence fees associated with the use of Identified Third Party Materials, other than Third Party Materials provided by the University.

10.5 The University shall fully indemnify the Company against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party against the Company alleging that the Company's use of the:

10.5.1 Identified Third Party Materials (other than Third Party Materials provided by the University); or

10.5.2 Third Party Materials not identified in the Research Plan and used or incorporated in the Results of a Project by the Company, or both, infringes any such Intellectual Property rights of any person.

10.6 Subject to subclause 10.8 the indemnity referred to in subclause 10.5 shall be granted whether or not legal proceedings are instituted and, if such proceedings are instituted, irrespective of the means, manner or nature of any settlement, compromise or determination.

10.7 Without prejudice to the Company's right to defend a claim alleging an infringement as described in sub-clause 10.5, the University shall if requested by the Company but at the University's expense conduct the defence of a claim by a third party which alleges infringement of Intellectual Property rights in the Results. The University shall observe the Company's directions relating in any way to that defence, subject to sub-clause 10.8.

10.8 If the Company seeks to settle a claim alleging an infringement as described in sub-clause 10.5, the University shall observe the Company's directions relating

---

in any way to negotiations for the settlement of that claim, provided that at all times the Company shall allow the University to participate in any such negotiations. The Company shall not settle, compromise or otherwise determine such a claim without the agreement of the University, which agreement shall not be unreasonably withheld.

10.9 The Company shall, if requested by the University but at the University's expense, provide the University with reasonable assistance in conducting the defence of a claim pursuant to subclauses 10.7 and 10.8. The University shall reimburse the Company for all verified expenses incurred pursuant to this subclause within fourteen (14) days of receipt of the Company's written demand.

10.10 Without limiting the generality of the foregoing subclauses and in addition to any other remedies which the Company may have if it is determined by any independent tribunal of fact or law or, if it is agreed between the parties to the dispute that an infringement of Intellectual Property rights has occurred, the University shall at its sole expense procure for the Company the right to continue the use of the infringing Intellectual Property.

10.11 The provisions of sub-clause 10.5 survive the expiry or termination of this Agreement.

## **11 CONFLICT OF INTEREST**

11.1 The University must disclose to the Minister in writing, all actual and potential conflicts of interest that exist, arise or may arise (either for the University or the Authorised Personnel) in the course of undertaking the Project as soon as practical after it becomes aware of that conflict.

11.2 The Minister may decline to pay the whole or any instalment of the Funding if a conflict of interest arises.

---

***[CLAUSE 12 APPLIES IF SA GOVT A FUNDER ONLY]***

**12 REPAYMENT**

12.1 The University acknowledges:

12.1.1 that the Minister has concluded that it is in the interests of the public of the State that she should provide the Funding;

12.1.2 that it is essential to the purpose of the Funding that:

- (a) the University uses it for the Purpose; and
- (b) the University does not permit an event to occur giving rise to the Minister's right to terminate the Agreement pursuant to clause 13 ("Termination Event").

12.2 If a Termination Event occurs, the Minister may terminate this Agreement and the University must pay the Funding and any other amount to which the Minister is or becomes entitled to under this Agreement.

**13 TERMINATION AND BREACH**

13.1 **Right to Terminate**

If:

- 13.1.1 the University goes into receivership, external administration, voluntary administration, liquidation or any other form of insolvency administration during the Term of this Agreement;
  - 13.1.2 a mortgagee enters into possession of any of the University's assets or property or appoints an agent to enter into possession on its behalf during the Term of this Agreement;
  - 13.1.3 the University enters into a compromise, scheme or composition of any kind with any of its creditors during the Term of this Agreement;
  - 13.1.4 the University breaches:
    - (a) any of its warranties or undertakings under this Agreement; or
    - (b) any of its obligations under this Agreementand the University fails to make good such breach within thirty (30) days of receipt of written notice by the Minister to do so;
-

- 13.1.5 either of the GRDC or ARC Funding Deeds is terminated for any reason and that termination would materially adversely affect the Company's ability to carry out the ACPFG Business in accordance with the Business Plan and Research Plan;
- 13.1.6 the Minister forms the view that any Project is not being properly conducted; or
- 13.1.7 the University breaches the Agreement then the Minister may:
  - (a) terminate the Agreement in which case the Minister will be under no obligation to make any further payment of any instalment of the Funding; and/or
  - (c) continue any Project using the services of any person; and/or
  - (d) require the University to repay the Funding paid and spent, or any unspent portion of the Funding, at the Minister's discretion.

#### 13.2 Serious Breach

- 13.2.1 If the University breaches the Agreement and in the Minister's reasonable opinion the breach is a serious one, the University must forthwith repay the Funding (including any expended portion) upon demand by the Minister.
- 13.2.2 A serious breach means a breach involving negligence or misconduct, a material breach of this Agreement, a material breach of any provision of the Shareholders' Agreement including any Documents and which the University fails to rectify or remedy within a reasonable period of time after service of a notice requiring it to remedy or rectify the breach. A breach which prevents effective undertaking of a Project or effective monitoring of a Project by the Company or the Minister or a breach which deprives the Minister of a significant portion of the benefits that it expects to derive under this Agreement.

#### 14 **TERMINATION OF MINISTER'S OBLIGATIONS**

If a breach occurs under the provisions of clause 13 at any time before the Minister has paid the Funding to the University in full, the Minister's obligation under this Agreement to pay the University the unpaid part of the Funding will cease.

---

15 **UNIVERSITY'S WARRANTIES AND UNDERTAKINGS**

- 15.1 The University undertakes and warrants to the Minister:
- 15.1.1 that the Funding will be exclusively used for the Purpose;
  - 15.1.2 that at the date of this Agreement no conflict of interest has arisen or is likely to arise during the Term;
  - 15.1.3 that if a conflict of interest arises after the Commencement Date, the University will immediately inform the Minister of the fact and details of the conflict of interest;
  - 15.1.4 that at the Commencement Date no breach under clause 13 has occurred or is occurring;
  - 15.1.5 that it will inform the Minister in writing immediately on the happening of such a breach;
  - 15.1.6 that it will keep separate accounts and financial records in relation to the Funding to which this Agreement relates;
  - 15.1.7 that it will provide the Minister with such information as the Minister may reasonably require to enable her to monitor the University's performance of its undertakings and obligations under this Agreement;
  - 15.1.8 that all records and other documentation required to be kept by the University under this Agreement and under any other legislation or statutory instrument will upon the giving of fourteen (14) days notice be available to the Minister for inspection at Adelaide at all times during normal business hours; and
  - 15.1.9 that the University will procure an acknowledgment of the contribution and support of the State in every copy of each edition of any Project works, by printing a notice to that effect in a format and wording approved by the Minister.
- 15.2 The University acknowledges that the warranties and undertakings made in this clause 15 and given by the University have induced the Minister to agree to provide the Funding to which this Agreement relates.

16 **OBLIGATIONS OF THE UNIVERSITY**

Until the Termination Date:

---

- 16.1 the University must not, except with the prior written consent of the Minister, apply the Funding for purposes other than the Purpose;
- 16.2 the University must comply with the warranties and the obligations specified in this Agreement; and
- 16.3 the University must ensure that any activity carried out by it in connection with its use of the Funding complies with the laws from time to time in force in the State.

17 **PLANS**

- 17.1 By the first anniversary of the Commencement Date and every 12 months thereafter during the Term, the Company must prepare and adopt a Business Plan and Research Plan in respect of the forthcoming financial year, a copy of which must be provided to the Minister forthwith.
- 17.2 The University must adopt those relevant Projects within the Research Plan within sufficient time for it to be implemented in respect of the relevant financial year and must provide, within 20 Business Days of adoption by the University, a copy to the Minister.
- 17.3 The Research Plan must specify the actions to be taken by the University in relation to the Purpose.
- 17.4 The University must at least every 12 months review its performance in relation to the relevant Research Plan and the Purpose.

18 **REPORTING**

18.1 Periodic Reports

The University must provide such periodical reports on the performance of the University relative to its obligations under the Research Plan, to the Minister's Representative, as the Minister requires.

18.2 Access

Upon request, the University must provide access for the Minister's Representative to inspect the University's administrative material such as but not limited to books, records, accounts and computer systems.

19 **AUDIT**

- 19.1 The University must, at its cost, cause its annual financial statements to be
-

audited by a registered auditor who is appointed by the University, is independent of the University and whose authorised statement must be included in the Annual Report to be provided to the Minister.

19.2 The Minister may, at its cost, from time to time by written notice to the University, appoint an auditor to audit any accounts, accounting records or accounting systems or procedures of the University.

19.3 The University must comply with all reasonable requests of the auditor in the performance of the auditor's duties.

## 20 REVIEW

20.1 The Parties agree that an external review of either the Company's or the University's operations, or both, may be commissioned and paid for by the Minister, to ensure, to the satisfaction of the Minister that the University, and the Company:

20.1.1 are complying with the Agreement; and

20.1.2 have performed satisfactorily relative to the targets of the Business Plan and Research Plan and the objectives of the South Australian Government with respect to the Government's funding policies.

20.2 A report of a review commissioned under this Clause must be forwarded to either the Company or the University, as the case may be, on a confidential basis for its consideration.

20.3 Upon considering any report provided under Subclause 2 of this Clause, the Minister, after consultation with either Party, may take such action as the Minister thinks fit, including terminating the Agreement.

20.4 The University and the Company agree to comply with all reasonable requests or directions of the Minister arising from or in relation to any report commissioned under Subclause 2 of this Clause.

---

21 **PUBLICATION**

21.1 Subject to the provisions of clause 7.2 the University acknowledges that it is in the public interest to release the outcome of any Project ("Results") and will give reasonable consideration to any request by the Minister to publish the Results.

21.2 Any consent by the University to publish the Results may be subject to:

21.2.1 obtaining the consent of the author or owner of a work to publish its thesis; or

21.2.2 any alterations or modifications to that party's thesis to protect any commercial interest in the Results.

22 **RECTIFICATION OF DEFECTS IN THE AGREEMENT**

If any provision of this Agreement is, or becomes defective, and the Minister consequently is unable to enforce any of the University's or the Company's obligations under this Agreement, and the defect is capable of remedy, the University or the Company as the case may be must do all things and sign all documents which the Minister may reasonably require them to do or sign to remedy the defect.

23 **NOVATION**

23.1 It is agreed by the Parties that if the DEST rules change during the Term of this Agreement to the extent that they will allow for the Company to receive the Funding instead of the University, under this Agreement, without loss of the existing benefits under those rules, then the Minister may in her absolute discretion novate this Agreement, in whole or in part, to the Company in place of the University, and the University must not refuse to consent to such novation to the Company.

23.2 Upon such novation, the Parties shall be subject to the same rights and obligations as existed prior to the novation on the same terms and conditions of this Agreement in all respects except that the Agreement is varied by including the following clauses in the Agreement:

---

23.2.1 Agreement to provide funds – after Switch Date

23.2.1.1 Subject to this Agreement, from the Switch Date to the end of the Term, the Minister must use the unused portion of the Funding at the Switch Date, to subscribe for shares in the Company:

23.2.1.1.1 in accordance with the procedures set out in the Shareholders' Agreement and Constitution.

23.2.2 Use of Funding after Switch Date

The Company must only:

23.2.2.1 use any Funding received after the Switch Date as consideration for the issue of shares in the Company to the Minister; and

23.2.2.2 issue shares in the Company to the Minister, in accordance with the procedures set out in the Shareholders' Agreement and the Constitution.

24 **PUBLIC DISCLOSURE**

24.1 The University and the Company consent to:

24.1.1 the public disclosure of the Agreement;

24.1.2 the preparation by the Minister of a summary of the Agreement and the public disclosure of such summary.

24.2 For the purposes of this Clause disclosure may be in either printed or electronic form, either generally to the public, or to a particular person as a result of a specific request.

25 **APPROVALS AND CONSENTS**

The Minister may conditionally or unconditionally give or withhold her approval or consent in her absolute discretion unless this Agreement expressly provides otherwise.

26 **GENERAL**

26.1 No Assignment by the University or the Company

Neither the University's rights and obligations nor those of the Company under

---

this Agreement are assignable.

**26.2 No Mutual Liability**

Nothing in this Agreement constitutes a partnership, joint venture or association of any kind between the University, the Company and the Minister or renders them liable for the debts or liabilities incurred by each other.

**26.3 Costs**

26.3.1 The University (or the Company) must pay any stamp duty assessable on this Agreement.

26.3.2 Subject to paragraph (a), each Party will bear their own costs of and incidental to the negotiation, preparation and execution of this Agreement.

**26.4 Entire Agreement**

This Agreement contains the entire agreement between the Parties with respect to its subject matter and it supersedes any prior agreement or understanding of the Parties on the subject matter.

**26.5 Governing Law**

26.5.1 This Agreement is governed by the laws in the State.

26.5.2 The courts of the State have exclusive jurisdiction in connection with this Agreement.

**26.6 Notices**

26.6.1 A "notice" means:

26.6.1.1 a notice; or

26.6.1.2 a consent, approval or other communication required to be in writing under this Agreement.

26.6.2 A notice must be in writing and signed by or on behalf of the sender addressed to the recipient and:

26.6.2.1 delivered to the recipient's address;

26.6.2.2 sent by pre-paid mail to the recipient's address; or

26.6.2.3 transmitted by facsimile to the recipient's address.

26.6.3 A notice given to a Party in accordance with this clause is treated as having been given and received:

26.6.3.1 on the day of delivery if delivered before 5.00pm on a

---

Business Day, otherwise on the next Business Day;

26.6.3.2 if sent by pre-paid mail, on the third Business Day after posting; or

26.6.3.3 if transmitted by facsimile and a correct and complete transmission report is received on the day of transmission, on that day if the report states that transmission was completed before 5.00pm on a Business Day, otherwise on the next Business Day.

If the recipient receives by facsimile transmission a notice that is illegible, the recipient must notify the sender immediately and the sender must continue to retransmit the notice until the recipient confirms that it has received a legible notice. The rules in relation to transmission reports as stated above apply.

26.6.4 The address and facsimile number of a Party are those set out below that Party's name in Item 12 of the Schedule.

26.6.5 A Party may from time to time notify its address or facsimile number by written notice to the other Party.

## **26.7 Waiver**

The Minister waives a right under this Agreement only by written notice to that effect. Nothing else done or omitted to be done by the Minister in relation to the Minister's rights under this Agreement will have the effect of a waiver.

## **26.8 Modification**

26.8.1 It is acknowledged by the Parties that the terms and conditions of this Agreement may by agreement of the Parties be modified.

26.8.2 Any modification of this Agreement must be in writing and signed by each Party.

## **26.9 Severability**

If any part of this Agreement is or becomes void or unenforceable or if this Agreement would, if any part were not omitted, be or become void or unenforceable then:

26.9.1 that part will be severable without affecting the remainder of this Agreement and this Agreement will then be read as if that part were not

---

26.9.2 the Parties will attempt to renegotiate that part in good faith.

Nothing in the Agreement derogates from the powers of the Auditor-General under the *Public Finance and Audit Act 1987* (South Australia).

Clauses 10 and 15.9 survive termination of this Agreement.

**EXECUTED AS A DEED**

**SIGNED** for and on behalf of \_\_\_\_\_ )  
 \_\_\_\_\_ by \_\_\_\_\_ ) .....  
 \_\_\_\_\_, a person duly )  
 authorised in the presence of: )  
 .....  
 Witness  
 [Name: \_\_\_\_\_ ]

**THE SCHEDULE**  
**GENERAL PARTICULARS**

**Item 1**      **COMMENCEMENT DATE**

To be inserted upon signing

**Item 2**      **TERMINATION DATE**

5 years after the Commencement Date

**Item 3**      **MINISTER'S REPRESENTATIVE**

Bio Innovation SA

**Item 4**      **REPRESENTATIVES**

(a)      **University's Representatives**

(b)      **Company's Representatives**

**Item 5**      **PURPOSE**

ACPFG Business

**Item 7**      **FUNDING**

\$1,000,000 (excluding GST) payable prior to 30 June 2003  
\$1,000,000 (excluding GST) payable prior to 30 June 2004  
\$2,000,000 (excluding GST) payable prior to 30 June 2005  
\$1,500,000 (excluding GST) payable prior to 30 June 2006  
\$1,500,000 (excluding GST) payable prior to 30 June 2007

**Item 8**      **MANNER OF PAYMENT**

Funds payable by cheque

---

**Item 9      UNIVERSITY'S ABN**

61 249 878 937

**Item 12      NOTICES**

**Minister**

Bio Imovation SA  
Level 13, 33 King William St  
Adelaide SA 5000  
Ph. 08 8217 6465  
Fax. 08 8217 6416

**University**

University of Adelaide  
Room 132, Mitchell Building  
Adelaide SA 5005  
Ph. 08 8303 6300  
Fax. 08 8303 6011

**Company**

Australian Centre for Plant Functional Genomics Pty Ltd  
C/O Finlaysons Lawyers  
Level 8, 81 Flinders Street  
Adelaide SA 5000

---

**THE ANNEXURE**  
**SHAREHOLDERS' AGREEMENT**