

**Deed of Indemnity, Insurance and Access**

**Kyeema Support Services Inc**

**(KYEEMA)**

**[Insert Board member’s Name]**

**(Board member)**

Date: [insert]

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**THIS DEED OF INDEMNITY, INSURANCE AND ACCESS** is made on the

[insert date] day of [month] [year].

**PARTIES:**

**Kyeema Support Services Inc (ABN: 28 553 192 702)** of 50 Lalor Street, Portland, VIC 3305

(“**Kyeema**”)

and

[**INSERT BOARD MEMBER NAME**] of [insert address]

(**the Board member**)

**BACKGROUND:**

1. The parties have agreed to enter this deed to regulate certain matters between them both during the time the Board member holds office and after the Board member ceases to be a Board member of Kyeema.
2. This deed is not intended to replace or diminish any third party’s obligations to the Board member, including any insurer’s obligation to indemnify the Board member against any liability.
3. **Interpretation**
   1. Definitions

The following definitions apply in this document.

**“ACNC”** means the Australian Charities and Not-for-profits Commission.

“**Act**” means the *Associations Incorporation Reform Act 2012* (Vic)).

“**Board Papers**” means all existing and future documents (including Privileged Documents, Board papers, budget papers, strategy plans, submissions, minutes, memoranda, sub-committee papers and documents referred to in any of those documents) provided by or on behalf of Kyeema to the Board member.

"**Claim**" means any liability, claim, suit, cost, expense, payment, legal fees, consultant’s or adviser’s fees, action or demand in relation to liability incurred as a Board member or officer of Kyeema, whether actual or contingent and whether fixed or unascertained.

"**Confidential Information**" means all information:

* + - 1. concerning the past, present or future business, operations or affairs of Kyeema; or
      2. contained in Board Papers or this document,

whether or not that information is described as confidential.

"**D&O Policy**" (Directors & Officers) means an insurance policy against liability incurred as an officer of Kyeema Support Services inc.

"**Government Agency**" means:

* + - 1. a government or government department or other body;
      2. a governmental, semi-governmental or judicial person; or
      3. a person (whether autonomous or not) who is charged with the administration of a law; or
      4. a Royal Commission; or
      5. the Independent Commission Against Corruption (ICAC); or
      6. any other type of governmental, semi-governmental or judicial enquiry or proceeding.

"**Permitted Purposes**" means:

* + - 1. use in relation to a Claim:

to which the Board member is subject or a party;

that the Board member proposes in good faith to bring; or

that the Board member has reason to believe will be brought against the Board member; or

* + - 1. use by the Board member in relation to a subpoena or requirement to produce, or any valid demand to produce, documents by a Government Agency; or
      2. such other purpose determined by the Board of Kyeema in their discretion as being in the best interests of Kyeema.

**“Privileged Documents”** means documents over which Kyeema claims or is entitled to claim Kyeema legal privilege.

* 1. Rules for interpreting this document

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

* + - 1. A reference to:

legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;

a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;

a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and

anything (including a right, obligation or concept) includes each part of it.

* + - 1. A singular word includes the plural, and vice versa.
      2. A word which suggests one gender includes the other genders.
      3. If a word is defined, another part of speech has a corresponding meaning.
      4. If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
      5. The word "**agreement**" includes an undertaking or other binding arrangement or understanding, whether or not in writing.
      6. The words and expressions defined in the Act have the same meanings in this document.

1. **Indemnity**
   1. Indemnity by Kyeema

Subject to the terms of this document, and to clause 2.3, Kyeema indemnifies and shall keep indemnified the Board member, to the fullest extent permitted by the Act, against:

* + - 1. any liability incurred as an officer of Kyeema; and
      2. any liability for legal costs incurred by the Board member in defending an action for liability incurred as an officer of Kyeema.
  1. Continuing indemnity

The indemnity in favour of the Board member under clause 2.1 is a continuing indemnity. It applies in respect of all acts done by the Board member in their capacity as an officer of Kyeema even if the Board member is not an officer at the time the claim is made.

* 1. Interpretation of indemnity

The indemnity given in this deed shall be read down to the extent required by Kyeema’s D&O Policy, so as to ensure that neither this deed, nor any action permitted by it, breaches or voids any aspect of the D&O Policy.

* 1. Extent of indemnity
     + 1. The indemnity in favour of the Board member under clause 2.1 does not apply if the liability is in connection with an act which is fraudulent, criminal, dishonest or a wilful default of their duties as a Board member under the Act or the ACNC Governance Standards.
       2. The indemnities in clause 2.1 will apply net of any insurance proceeds or advance costs or expenses received by a Board member under a D&O Policy. The indemnities in clause 2.1 shall not prejudice Kyeema’s rights to pursue and recover insurance under a D&O Policy. If Kyeema pays or causes to be paid on behalf of a Board member, for any reason, any amounts otherwise payable or indemnifiable under a D&O Policy, then Kyeema will be fully subrogated to all rights of the Board member with respect to such payment.

1. **Insurance**
   1. D&O Policy

Subject to the terms of this document and to the Act, Kyeema must insure the Board member under a D&O Policy issued by a reputable and solvent underwriter of policies of that kind:

* + - 1. during the Board member's term of office as; and
      2. for seven years after the Board member ceases to be,

a Board member of Kyeema.

* 1. Terms of policy

Kyeema must ensure that the D&O Policy has an indemnity limit that is not lower than and is otherwise on terms which, taken as a whole, are not materially less favourable to the Board member than:

* + - 1. the D&O Policy in force when the Board member ceases to be a Board member of Kyeema; or
      2. if in the reasonable opinion of Kyeema, (a) is not possible, then the D&O Policy in force in respect of Board members of Kyeema from time to time.
  1. Kyeema’s obligations in relation to the D&O Policy

Kyeema must:

* + - 1. pay the premiums in respect of the D&O Policy except to the extent prohibited by the law;
      2. provide the Board member with a copy of the D&O Policy on request and any certificates of insurance connected with it; and
      3. notify the Board member promptly, if for any reason, the D&O Policy is cancelled or replaced.
  1. Contribution to premium by Board member

If Kyeema is prohibited by law from paying a portion of the premium in respect of the D&O Policy, Kyeema must offer the Board member the opportunity to, and the Board member may (at the Board member’s option), contribute that portion of the premium.

* 1. Board member’s undertaking in connection with the D&O Policy

To the extent permitted by law, the Board member agrees:

* + - 1. to do anything Kyeema reasonably requires to enable Kyeema to take out and maintain the D&O Policy; and
      2. to comply at all times with all their obligations under the D&O Policy, including reporting claims, and circumstances which could give rise to a claim.
  1. Board member’s acknowledgement in connection with the D&O Policy

The Board member acknowledges that the negotiation of the terms of the D&O Policy in any given year may:

* + - 1. involve the insurer varying the terms of the D&O Policy offered which, if accepted by the Kyeema, may provide less coverage or less favourable coverage for the Board member;
      2. involve a decision by Kyeema, acting reasonably, to balance the proposed level of premiums against the terms offered; or
      3. result in a decision by Kyeema to accept varied terms or to change Insurers,

but only in a manner consistent with Kyeema’s overriding obligations under clause 3.1.

1. **Board papers**
   1. Retention of documents

Subject to clause 4.2, Kyeema must maintain a complete file of all Board Papers.

* 1. Secure disposal

Subject to the Act, Kyeema may dispose of Board Papers held if it has no reasonable grounds to believe that the document may be relevant to any present or contemplated legal proceedings or valid inquiry by a Government Agency, but must do so in a secure and confidential manner.

* 1. Access
     + 1. Subject to clause 5, Kyeema will allow the Board member access to Board papers, provided the Board member has notified Kyeema, specifying:

the reason for access; and

the Board Papers they want access to.

* + - 1. During the Retention Period Kyeema must, at no cost to the Board, allow the Board member to inspect and if necessary copy Board Papers held by it:

during the Board member's period of office as a Board member of Kyeema; and

at any time after the Board member ceases to hold that office,

for any of the Permitted Purposes.

* 1. Make or receive copies

The Board member shall be entitled, at the cost of Kyeema, to make or receive copies and/or extracts of the Board Papers to which the Board member is entitled to access under clause 4.3(a).

1. **Privileged documents**
   1. Access to Privileged Documents

Kyeema shall give the Board member access to Board Papers that contain Privileged Documents in accordance with clause 4.3(a), but subject to this clause 5.

* 1. Non-Waiver of Privilege

Kyeema and the Board member acknowledge that the granting of access to the Board member by Kyeema to Privileged Documents does not amount to an express or implied waiver by Kyeema of its claim to Kyeema legal privilege.

* 1. Joint Privilege

Where the Board Papers consist of documents that entitle the Board member and Kyeema to claim joint Kyeema legal privilege, the Board member shall not waive, either by express or implied conduct, the joint Kyeema legal privilege, except in proceedings to which Kyeema is not a party.

* 1. Restriction on access to Privileged Documents

Except to the extent required by law, Kyeema shall not be required to give the Board member access to Privileged Documents that relate to legal proceedings brought by:

* + - 1. Kyeema against the Board member; or
      2. the Board member against Kyeema.

1. **Settlement of claims**
   1. Undertaking by Kyeema

Kyeema undertakes to the Board member that Kyeema will not settle or compromise any litigation or other Claim involving the Board member (whether as a party or by way of any allegation against the Board member) in his/her capacity as a Board member of Kyeema without first consulting the Board member.

* 1. Undertaking by Board member

The Board member undertakes to Kyeema that it will not settle or compromise any litigation or other Claim involving Kyeema (whether as a party or by way of any allegation against Kyeema) without first consulting with Kyeema.

* 1. Exclusion

The undertakings in clauses 6.1 and 6.2 do not apply to any litigation or other Claim by Kyeema against the Board member or by the Board member against Kyeema.

1. **Confidential information**
   1. Property of Kyeema

The Confidential Information is and remains the property of Kyeema.

* 1. Proper use

The Board member must not:

* + - 1. disclose to anyone else, or
      2. use for a purpose other than the performance of duties as an officer of Kyeema, any Confidential Information, deductions or inferences flowing from Confidential Information or opinions regarding Confidential Information.
  1. Return to Kyeema

The Board member must:

* + - 1. return to Kyeema all Confidential Information (including personal copies of Board Papers); and
      2. permanently delete any Confidential Information stored in a computer or electronic retrieval system so that it is incapable of retrieval,

within seven days after ceasing to be a Board member of Kyeema.

* 1. Permitted disclosure

Subject to clause 7.5, clause 7.2 does not forbid a disclosure of information:

* + - 1. available publicly otherwise than because the person disclosing it contravened this deed; or
      2. required by law; or
      3. reasonably necessary for the purpose of defending legal proceedings against the Board member.

Provided that, in the case of a disclosure under paragraph 7.4(b) or 7.4(c), to the extent practicable the Board member must give prior notice to, and consult with, Kyeema before making such disclosure.

* 1. Protection of information

If the Board member makes a disclosure described in clause 7.4(b) or 7.4(c), the Board member must:

* + - 1. disclose only the minimum amount of Confidential Information required; and
      2. make the disclosure on the basis that:

the information is confidential; and

the disclosure does not waive any legal professional privilege or exemption from freedom of information legislation which Kyeema could otherwise claim.

* 1. Injunctive relief

The Board member agrees that damages may be an inadequate compensation for a breach of clauses 7.2 or 7.3 and Kyeema may apply for injunctive relief restraining the Board member from committing a breach of this deed without proving actual damage sustained by it.

* 1. Additional rights

The rights of Kyeema and the obligations of the Board member under clause 7 are in addition to those arising in common law or equity.

1. **Notices**
   1. Effective notice

A notice, consent or other communication under this document:

* + - 1. is only effective if it is in writing, signed; and either:

left at the addressee's address or sent to the addressee by mail;

sent by fax; or

sent by email.

* + - 1. is deemed to be received:

if it is sent by mail - 3 working days after it is posted;

if it is sent by fax - when the addressee actually receives it in full and in legible form; and

if it is sent by email, on the earlier of receipt by the sender of a message confirming deliver or on the day after the email is sent, unless the sender receives an automated message that the email has not been delivered.

* 1. Address for notice

A person's address, fax number and email address are those set out above (Parties), or as the person notifies the sender. Notices to Kyeema must be addressed to the attention of “the Secretary”.

1. **Counterparts and Electronic Execution**
   * + 1. A party may electronically sign a soft copy of this deed and by doing so:

will bind itself to this deed: and

satisfy any statutory or other requirements for this deed to be in writing and signed by that party.

* + - 1. Each party warrants that immediately prior to entering into this deed, it has unconditionally consented to:

the requirement for a signature under any law being met; and

any other party to this deed executing it,

by any method of electronic signature that other party uses (at that other party's discretion), including signing on an electronic device or by digital signature.

* + - 1. A soft copy of this deed signed by all parties will constitute an executed original counterpart and if that document is printed with the parties’ electronic signatures appearing that print-out will also constitute an executed original counterpart.
      2. This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same agreement.
      3. Without limitation, the parties agree that this deed may be exchanged by hand, post, facsimile or any electronic method that evidences a party's execution of this deed, including by a party forwarding a copy of its executed counterpart by hand, post, facsimile or electronic means to the other party.

1. **General**
   1. Governing law

This document is governed by the law in force in Victoria.

* 1. Liability for expenses

Each party must pay its own expenses incurred in negotiating, executing and registering this document.

* 1. Giving effect to this document

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this document.

* 1. Waiver of rights

A right may only be waived in writing, signed by the party giving the waiver, and:

* + - 1. no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
      2. a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
      3. the exercise of a right does not prevent any further exercise of that right or of any other right.
  1. Operation of this document
     + 1. This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.
       2. Any right that a person may have under this document is in addition to, and does not replace or limit, any other right that the person has.
       3. Any provision of this document which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this document enforceable, unless this would materially change the intended effect of this document.
  2. Attorneys

Each person who executes this document on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

**EXECUTED AS A DEED**

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| --- | --- | --- |
| **EXECUTED** by **Kyeema Support Services Inc ABN 28 553 192 702**: | )  )  ) |  |
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|  |  |  |
| Signature of Board member |  | Name of Board member (Print) |
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|  |  |  |
| Signature of Board member/Secretary (Please delete as appropriate) |  | Name of Board member (Print) |
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| --- | --- | --- |
| **EXECUTED** by **[INSERT BOARD MEMBER NAME]** in the presence of: | )  )  ) |  |
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|  |  |  |
| Signature of Witness |  | Name of Witness (Print) |
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