

TESTING & EVALUATION AGREEMENT

[Nursery / Owner Entity]
(ABN)

[Address]

[Phone]

[Facsimile]

[Email]

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Important Note: This Summary Index is provided in addition to the standard Contents Index that follows solely as a ‘summary guide’ only to this Agreement and is inserted for convenience only. Any person entering into this Agreement must review the complete agreement and seek their own legal advice on the enclosed full terms and conditions contained in this Agreement. For clarity, the details contained in the Summary Index do not form part of the terms and conditions of this Agreement.

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SAMPLE

TESTING & EVALUATION AGREEMENT

Between:

[Nursery / Owner Entity] (ABN) (the “**Licensor**”), of [Address];

and

The party referred to in Item 1 of the Schedule (the “**Licensee**”).

RECITALS:

1. The Licensor has testing rights for certain proprietary cultivars in Australia.
2. The Licensee wishes to obtain a license to test and evaluate some of the Licensor’s proprietary cultivars and the Licensor has agreed to grant a license to enable the Licensee to test and evaluate selected proprietary cultivars subject to and on the terms of this Agreement.

It is agreed:

1. INTERPRETATION:

Unless the context otherwise requires, the following definitions apply:

“**Confidential Information**” means any intellectual property, information, statement, contract, report, or knowledge which relates to the Variety and / or to the research, business or affairs of the Licensor, including but not limited to:

- (i) any information memorandum, reports, marketing or integrated supply chain management strategies;
- (ii) any cultivation intelligence, horticultural / harvest / packing / storage or transport practices, procedures and techniques; or
- (iii) any financial information or planning, contractual obligations and / or documentation or intellectual property management strategies;

and which is disclosed to the Licensee by or on behalf of the Licensor or any representative of the Variety owner, or is generated by the Licensee or its representatives during the course of its contractual relationship with the Licensor relative to any aspect of the Variety and its testing and evaluation pursuant to this Agreement, whether the information is in oral, visual or written form or is recorded in any other medium except to the extent that such information:

- (a) is in or comes into the public domain; or
- (b) is proven by the Licensee to have been in their possession prior to it being provided to the Licensee by or on behalf of the Licensor and / or the representative of the Variety owner;

other than through a breach of this Agreement.

“**Cultivar**” means a cultivated variety of plant produced from the natural species and maintained by cultivation.

“**Fruit**” means all fruit grown from the Licensed Plant Material.

“**Insolvency Event**” means any of these events:

- (a) an order is made that the Licensee be wound up;

- (b) an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of the Licensee, or one of them is appointed, whether or not under an order;
- (c) the Licensee dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing its own affairs for any reason;
- (d) the Licensee becoming bankrupt;
- (e) a meeting being convened or a resolution being passed to appoint an administrator in respect of the Licensee;
- (f) the Licensee resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate whilst solvent on terms approved by the Licensor or is otherwise wound up or dissolved;
- (g) the Licensee is or states that it is unable to settle its debts when they fall due;
- (h) the Licensee enters into, or resolves to enter into, a deed of company arrangement, a scheme of arrangement or composition with, or assignment of the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium, or other administration process involving any of them without the prior written approval of the Licensor;
- (i) any of the events described in sub-sections 459C(2)(a) to (f) of the Corporations Act occurs in relation to the Licensee or the Licensee makes a statement from which it may be reasonably deduced by the Licensee that it is the subject of such an event;
- (j) the Licensee, or any of the persons comprising the Licensee, becomes insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event;
- (k) the Licensee takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation; or
- (l) anything analogous or having a substantially similar effect to any events specified above occurs under the law of any applicable jurisdiction.

“Land” means the land at the Licensed Site upon which any of the Licensed Plant Material is intended to be and / or is planted or stored and any adjoining land required for the purpose of planting, growing, storing or attending to any of the Licensed Plant Material.

"Licensed Plant Material" means the plant material of the Variety supplied to the Licensee by the Licensor or the Licensor's authorised agent pursuant to this Agreement including but not limited to trees, buds, scions, tissues, fruit, seeds, roots, leaves, or any propagative material or any parts thereof and any plant or part that is derived from said material, including any material resulting from mutation, sport, asexual propagation or sexual propagation together with any budwood, trees or fruit produced from it.

"Licensed Site" means a particular site consented to and / or authorised by the Licensor for the testing of Licensed Plant Material by the Licensee, as listed in Items 4 and 5 of the Schedule and the Site Plan provided in Annexure 1, and such other sites as the parties may subsequently add to this Agreement in writing.

"PBR" means the grant of certain plant breeder's rights pursuant to the *Plant Breeder's Rights Act 1994* in Australia.

“PBR Act” means the *Plant Breeder's Rights Act 1994* in Australia.

“representatives” means the owners, shareholders, directors, officers, employees, advisors, consultants, affiliates, bankers (investment and commercial), lawyers and accountants of a party to this Agreement.

“right” includes a legal, equitable, contractual, statutory or other right, power, authority, benefit, privilege, remedy, discretion or cause of action.

“Right of Entry” means an acknowledgement conferring rights upon the Licensor to enable it or its authorised agents to have continuous access to any Licensed Site or other associated property to enable the Licensor or its authorised agents to exercise any of its rights pursuant to this Agreement.

“Variety” means the plant cultivar(s) described in Item 3 of the Schedule including any cultivars that may be added to this Agreement from time to time and confirmed with the signed Addendum provided in the Additional Schedule to this Agreement.

“Variety owner” means the breeder or legal owner of the rights in the Variety.

2. REFERENCES

References in this Agreement to the singular and plural include the vice versa and references to any treaty or statutory provision shall include a reference to that treaty or provision as amended or re-enacted. A reference to a person shall include reference to any company as well as any legal or natural person. This Agreement shall be read and construed without reference to the headings of clauses or the recitals or to the Summary Index to this Agreement which are inserted for convenience only.

3. EVALUATION RIGHTS GRANTED

3.1 The Licensor grants to the Licensee a non-exclusive and non-transferable license to field test solely for evaluative purposes the Variety at the Licensed Site using the Licensed Plant Material supplied by the Licensor or the Licensor’s authorised agent to the Licensee. Such testing is intended to evaluate the growing characteristics of the Licensed Plant Material in relevant growing environs, conditions and growing styles and / or to assess the fruit quality, harvesting, and storage attributes.

3.2 The Licensee is prohibited from dealing with the Licensed Plant Material in any way whatsoever other than as expressly permitted by the terms and conditions of this Agreement without the prior written consent of the Licensor including but not limited to the use of any of the Licensed Plant Material for the breeding, creation or development of different varieties.

4. SUPPLY OF LICENSED PLANT MATERIAL TO LICENSEE

4.1 Subject to availability, the Licensor or their authorised agent shall supply the Licensed Plant Material to the Licensee strictly for field testing and evaluation purposes subject to the terms and conditions of this Agreement. Cultivars may be added to this Agreement by both parties signing an Addendum to this Agreement in the format provided in the Additional Schedule to this Agreement.

4.2 The Licensee acknowledges and agrees that the Licensed Plant Material shall be supplied by the Licensor or their authorised agent subject to the terms and conditions of this Agreement and with only a confidential reference to the identification of the Licensed Plant Material. The Licensee shall retain the identification details of the Variety in strict confidence and shall not divulge the identification of the Variety to any party at any time without the prior written consent of the Licensor.

4.3 The Licensee acknowledges and accepts that the Licensor will at all times retain legal and beneficial ownership of the Licensed Plant Material, including but not limited to any such rights that the Licensor may exercise for and on behalf of the Variety owner,

notwithstanding that the Licensed Plant Material may be affixed to the Land as part of the planting of same by the Licensee. The Licensee must sign any documentation which acknowledges, or more satisfactorily perfects, the Licensor's ownership as and when requested from time to time by the Licensor.

5. OWNERSHIP OF INTELLECTUAL PROPERTY

5.1 This Agreement is subject to the rights of the Variety owner. The Licensee acknowledges and accepts that all intellectual property rights in the Variety including but not limited to any of the following:

- (a) the Licensed Plant Material;
- (b) all existing and future proprietary rights including but not limited to patents or plant breeder's rights pertaining to the Licensed Plant Material;
- (c) all proprietary rights to designs, copyrights, logos, business marks, service marks, trade marks and trade names owned by the Licensor and / or the Variety owner, now and in the future;
- (d) all other property in, without limitation, any sports or mutations of the Licensed Plant Material;
- (e) all trade secrets of the Licensor; and
- (f) all know how in the horticultural practices, procedures and techniques now or hereafter developed by the Licensor or its affiliates (or any person acting by, under or through the same by way of assignment, contract or otherwise) in relation to the propagation, cultivation, harvesting, or postharvest handling of the Licensed Plant Material including but not limited to fruit produced from the Licensed Plant Material;

are owned by the Licensor and / or the Variety owner respectively and that this Agreement in no way implies any rights to such intellectual property on the part of the Licensee.

5.2 Further, the Licensee agrees not to contest or challenge in any way:

- (i) the ownership of the Confidential Information;
- (ii) any application for PBR or other plant protection rights and / or other intellectual property rights relative to the Variety by the Licensor or the Variety owner; or
- (iii) the ownership and / or licensed rights of the Variety by either the Licensor and / or the Variety owner.

5.3 The Licensee undertakes and warrants that it will not at any time grant to any person including but not limited to any mortgagee, financier, landlord, creditor or any other person any rights in respect of the Confidential Information or the Licensed Plant Material which may prejudice, supercede or take priority over the respective rights and interests of the Licensor pursuant to this Agreement and the Licensee indemnifies the Licensor accordingly.

6. LICENSED SITE

The Licensed Plant Material may only be grown and retained by the Licensee at the Licensed Site. The Licensee shall complete the details of the test site where the Licensed Plant Material will be planted and retained for the duration of the testing of that material

pursuant to this Agreement in Items 4 and 5 of the Schedule including attaching a map of the Licensed Site to this Agreement as Annexure 1 indicating the location of all Licensed Plant Material and the test site.

The Licensee must ensure that the Licensed Plant Material remains at all times on land that is either owned by and / or under the effective legal control of the Licensee at all times. In the event of any proposed or potential change to that ownership and / or control status the Licensee must fully and immediately comply with the provisions of clause 19.

7. OBLIGATIONS TO MAINTAIN

The Licensee shall plant and grow the Licensed Plant Material and maintain facilities and methods of cultivation so as to ensure that the Licensed Plant Material remains stable, healthy and homogenous and in compliance with any granted PBR and will grow the trees of the Licensed Plant Material supplied by the Licensor pursuant to this Agreement in an appropriate manner in accordance with the standard prevailing for such trees in the industry and shall exercise reasonable skill and care.

8. INFORMATION RETENTION AND RECORDS

The Licensee shall keep clear and full records of the numbers and location of the Licensed Plant Material and shall allow the Licensor or its agents to have access to the records upon receiving written notice from the Licensor to do so.

9. INFORMATION AND SAMPLES

- (i) The Licensee will forward to the Licensor, within 14 days after receiving a written request from the Licensor to do so, a report detailing the status and performance of the Variety and identifying any trees of the Licensed Plant Material by their respective reference number with location details by row number and position in row together with location of such trees in the Licensed Site (including GPS location data if requested by the Licensor).
- (ii) The Licensee shall supply to the Licensor such technical information that the Licensee reasonably considers could be beneficial to the Licensor. Subject to clause 9 (iii) below, the Licensee must also supply to the Licensor upon request from the Licensor any information concerning the Licensed Plant Material the Licensor reasonably considers relevant.
- (iii) The Licensor may from time to time in writing to the Licensee add and / or modify any specific required report format, information content and / or report timing schedule as an attachment to Annexure 2 of this Agreement as and when such a format or information content and report timing or amendment to same is reasonably required by the Licensor and the Licensee undertakes to comply with such reporting requests from the Licensor in such requested report format, content and / or report timing.
- (iv) Upon request from the Licensor, the Licensee shall provide to the Licensor, at no cost to the Licensor, any samples from the Licensed Plant Material (including fruit) that the Licensor considers necessary. The Licensee grants the Licensor the right to enter on to the Land to collect any such samples directly from the Licensed Plant Material as and when deemed appropriate by the Licensor.
- (v) The Licensor shall supply to the Licensee technical information that the Licensor considers relevant from time to time.

10. NON-PROPAGATION

The Licensee may only grow the Licensed Plant Material for the purposes of testing and evaluating the Variety and only at the Licensed Site and only to the maximum quantities of trees specific to the Variety as nominated in Item 3 of the Schedule.

- 10.1 The Licensee agrees that it is expressly forbidden to undertake or attempt to use the Licensed Plant Material for any breeding purpose and / or to propagate any of the Licensed Plant Material including asexual propagation, mutigenetic alteration, hybridisation and including the growing of any seed produced, cutting, tissue culture, grafting, budding, top working of the Licensed Plant Material or any parts thereof nor permit any other third parties to do so, without the prior written consent of the Licensor.
- 10.2 Apart from the planting, growing and evaluating of the Licensed Plant Material pursuant to the terms and conditions of this Agreement, the Licensee must not do, or permit any other third parties to do, any of the following in relation to propagating material (with the same meaning as defined in the PBR Act) of any of the Licensed Plant Material:
- (a) produce or reproduce the material;
 - (b) condition the material for the purpose of propagation;
 - (c) offer the material for sale;
 - (d) supply the material, whether by sale, gift or otherwise;
 - (e) import the material;
 - (f) export the material; or
 - (g) stock the material for the purposes described in any of paragraphs (a), (b), (c), (d), (e) or (f) above.

The parties acknowledge and accept that the obligations contained in sub-clauses 10.1 and 10.2 above are contractual obligations and shall apply by reference to any of the Licensed Plant Material irrespective of whether or not the Licensed Plant Material is of a designated variety for which PBR has been granted.

11. INSPECTION

- 11.1 The Licensee acknowledges and agrees that the Licensor or its authorised agents shall have the right during normal business hours to enter any land owned, leased, managed or occupied by the Licensee to examine all cultivars growing on the those properties including but not limited to all of the Licensed Plant Material, and the Licensor or their authorised agents may take photographs or visual recordings and / or remove and take away for inspection any plant material including but not limited to any Licensed Plant Material and the failure or refusal by the Licensee to permit such entry, search, examination or removal shall constitute a breach of the terms and conditions of this Agreement by the Licensee.
- 11.2 Within seven (7) days of being requested in writing by the Licensor, the Licensee must provide the Licensor with full and complete details of all properties that are owned and / or used in any way by the Licensee or any of its associated entities including the full and complete details of all fruit cultivar plant material that is growing and / or held on all such properties and such details shall include the variety

name, the number of trees per cultivar and the location of such trees on all properties owned and / or used by the Licensee or any of its associated entities.

11.3 The Licensee irrevocably grants the Licensor and its authorised agents a full and free right of access to:

- (i) any Licensed Site;
- (ii) any other property that is owned and / or used in any way by the Licensee or any of its associated entities;

to the extent required to enable the Licensor and its authorised agents to verify the Licensee's compliance with its obligations, for the Licensor to exercise any of its rights under this Agreement and for the purposes of investigating any acts or conduct of the Licensee and its associated entities relative in any way to this Agreement.

11.4 Where, at any time during the term of this Agreement, the Licensee does not have freehold ownership of any Licensed Site or any of the other properties referred to in clause 11.2 the Licensee must procure, on request by the Licensor, the grant in favour of the Licensor, and its authorised agents, of a Right of Entry acknowledgement, to be signed by the applicable freehold owner and any third party having rights deemed by the Licensor to be relevant pursuant to this Agreement, to enable the Licensor, and its authorised agents, access to that Licensed Site or other property referred to in clause 11.2 for the purposes of this Agreement including, without limitation, for the purposes of clause 11.3.

12. FRUIT

All Fruit must be picked by the Licensee when ripe, unless otherwise directed by and / or agreed to by the Licensor. It is a strict obligation of this Agreement that Fruit must not be sold or otherwise provided to any third party without the express written consent of the Licensor. The Licensee must provide Fruit to the Licensor as and when requested by the Licensor and in the absence of any such request from the Licensor and / or any surplus Fruit being available from time to time after satisfying any such request from the Licensor such Fruit may be consumed by the Licensee or any of their officers and employees. Any Fruit not supplied to the Licensor and / or or alternatively consumed as defined herein, must be wholly destroyed and disposed of. For clarity, the Licensor reserves the priority right to access any available Fruit.

13. PLANT BREEDER'S RIGHTS

13.1 The Licensee acknowledges and accepts that the Licensed Plant Material is supplied to the Licensee by the Licensor under the terms and conditions of this Agreement with the intention that the evaluation undertaken by the Licensee pursuant to this Agreement shall comply at all times with the provisions of the PBR Act including but not limited to section 43 (7B) of the PBR Act.

13.2 The Licensee shall not take any action which would prejudice the validity of, or application for, any PBR by the Variety owner or the Licensor, nor make application for, nor permit a grant of, PBR for the Licensed Plant Material without the prior written approval of the Licensor and the Variety owner.

13.3 Any essentially derived variety (as defined in Article (5)(b) and (c) of the 1991 text of the UPOV Convention) and any developments (including any sport or mutation) arising from the Licensed Plant Material in the Licensee's possession shall remain at all times the property of the Variety owner of the Licensed Plant Material and, on

becoming aware of any essentially derived variety, the Licensee shall immediately notify the Licensor and assist with the transfer of all rights thereto to the Variety owner.

- 13.4 The Licensee shall take all reasonable precautions to protect the Licensor's right, title and interest in the intellectual property of the Licensed Plant Material (including, without limitation, as agent for the Variety owner) and shall take all reasonable precautions as may be directed by the Licensor, particularly in relation to security of the Licensed Plant Material, labelling or other protection. The Licensee acknowledges that it is acquainted with the provisions of the Plant Breeder's Rights Act 1994 and / or is seeking their own legal advice on same and will take all necessary steps to ensure that the provisions of that Act are complied with relative to the Licensed Plant Material and the testing and evaluation of same by the Licensee under this Agreement.

14. CONFIDENTIALITY

- 14.1 The Licensee shall maintain the confidentiality of this Agreement and of the Licensed Plant Material. The Licensee shall ensure that the identification of the Variety remains confidential to the parties to this Agreement, including but not limited to any Fruit produced by the Licensed Plant Material.
- 14.2 The Licensee agrees to keep all Confidential Information obtained as a result of growing or testing of the Licensed Plant Material together with all Confidential Information that is provided to the Licensee by the Licensor relative in any way to the Licensed Plant Material pursuant to this Agreement secret and confidential and shall not use, disseminate, transfer, assign or give such information to any other person without the prior written consent of the Licensor (provided that this clause shall not apply to any information which is or becomes part of the public domain other than as a result of any wrongful disclosure by the Licensee). This Clause shall survive the termination of this Agreement.
- 14.3 The Licensee undertakes to ensure that all of its representatives that are involved in any way with the testing of the Licensed Plant Material and / or require access to any Confidential Information in any way relative to this Agreement as part of the testing of the Licensed Plant Material by the Licensee fully understand the obligations on the part of the Licensee relative to confidentiality and the other obligations of the Licensee under this Agreement and that any such representatives fully comply with all of the obligations on the part of the Licensee pursuant to this Agreement. The Licensee shall be responsible for all of the acts and omissions of its representatives and any breach of any of the Licensee's obligations under this Agreement by any of the Licensee's representatives shall constitute a breach of this Agreement by the Licensee.

15. COMMERCIALISATION

- 15.1 The Licensee acknowledges that the sole purpose of this Agreement is to test and evaluate the Licensed Plant Material including but not limited to determining its growing characteristics in relevant growing environs, conditions and growing styles and / or to assess the fruit quality, harvesting and storage attributes
- 15.2 Any commercialisation of the Variety by the Licensee will be subject to a further agreement being entered into, after the testing and evaluation of the Variety is deemed by the Licensor to have been completed. The Licensee acknowledges and

agrees that no Variety will be commercialised by the Licensee without the prior written consent of the Licensor and until the decision on any applicable intellectual property protection, including but not limited to PBR, has been made and the necessary action has been taken to ensure any such proposed protection is in place.

- 15.3 In the event that the Licensor elects to proceed with the commercialisation of the Variety and agrees to offer the Licensee the opportunity to commercially grow the Variety, either during or at the end of the Term of this Agreement, then a commercialisation agreement may be provided to the Licensee by the Licensor and the subject Variety must not be commercialised in any way by the Licensee until the commercialisation agreement, agreed between the parties, is signed by the Licensor and the Licensee.
- 15.4 The Licensee acknowledges and accepts that the Licensor is under no obligation to grant the Licensee any rights to commercialise the Variety and any decision relative to the commercialisation of the Variety or otherwise shall be at the sole and absolute discretion of the Licensor.
- 15.5 In the event that the Licensor does not agree to the commercialisation of the Variety, or does not agree to the Variety being commercially grown by the Licensee, or this Agreement expires or is terminated for any reason, then the Licensed Plant Material of the subject Variety must not be commercially grown by the Licensee in any way and the Licensee shall be required within seven (7) days of being notified by the Licensor to remove and destroy the Licensed Plant Material and confirm in writing to the Licensor that this has been attended to or to deal with the Licensed Plant Material as otherwise agreed to in writing by the Licensor.

16. ASSIGNMENT

The Licensor may assign its rights and obligations under this Agreement. All rights granted to the Licensee under this Agreement are personal to the Licensee and may not be assigned, transferred or sub-licensed except with the Licensor's prior written consent. Any change which alters the effective management and control of the Licensee, without the prior written consent of the Licensor, shall be deemed to be an assignment in breach of the Licensee's obligations under this Agreement.

17. TERM AND TERMINATION

- 17.1 This Agreement commences once both parties have signed the Agreement. It continues for the initial term of five (5) years from the date of the first supply of the Licensed Plant Material by the Licensor to the Licensee for testing and evaluation pursuant to this Agreement unless terminated by one party providing the other party with sixty (60) days prior written notice of their intention to terminate this Agreement. The initial term may be extended, at the sole discretion of the Licensor, upon request from the Licensee if a further evaluation period is deemed by the Licensor to be appropriate and any such agreed extension shall only be valid if confirmed by the Licensor to the Licensee in writing.
- 17.2 A party may also terminate this Agreement by notice in writing if:
 - (a) the other party fails to remedy any breach under this Agreement which is capable of remedy (other than breach of a type specified in clause 18 below) within 30 days of the notice from the first named party to remedy the same; or

- (b) the other party commits a breach of any of its obligations under this Agreement which is not capable of remedy and the compensation payable for that breach is agreed by the parties, and paid, within 30 days of the breach.

17.3 If this Agreement expires or is terminated for any reason the Licensed Plant Material must be dealt with pursuant to clause 15.5 and all Confidential Information shall either, at the Licensor's election, be returned to the Licensor or destroyed, at the cost of the Licensee.

17.4 In addition to any and all rights or remedies that the Licensor may have under law, hereunder or otherwise, upon any termination event or upon failure of the Licensee to perform its obligations contained in this Agreement, the Licensor may seek to obtain and obtain from any government body or Court of competent jurisdiction a temporary restraining order and / or preliminary or permanent injunction to protect against any harm or damage that has been or may be caused to the Licensor or the Variety owner by any such breach or threatened breach. The Licensee acknowledges that:

- (a) the forgoing covenant is a material factor in the Licensor's execution of this Agreement and is necessary and required for the protection of the Licensor and the Variety owner, the Licensed Plant Material and / or all and any intellectual property or other Confidential Information relative to the Licensed Plant Material including but not limited to the testing and evaluation thereof as proposed under this Agreement; and
- (b) a breach of any such covenant or obligations will result in irreparable harm and damages to the Licensor and the Variety owner in an amount difficult to ascertain and which may not be adequately compensated by a monetary award. The Licensor's election to pursue injunctive relief shall not, however, constitute a waiver or any other limitation of its rights to pursue other or additional remedies including without limitation declaratory relief or damages.

17.5 Termination does not release the Licensee from the confidentiality obligations contained within this Agreement including but not limited to the provisions of clauses 12 and 14 relative to the confidentiality of the Variety identification and / or that of any harvested material of the Variety.

18. FURTHER TERMINATION

18.1 Notwithstanding clause 17, if the Licensee breaches clauses 10, 11, 12, 13, 15 or 16 the Licensor may by written notice to the Licensee immediately terminate this Agreement.

18.2 This Agreement may be terminated by the Licensor by providing the Licensee with immediate written notice of such termination where the Licensor no longer holds the appropriate rights from the Variety owner to continue to grant the Licensee testing and evaluation rights pursuant to this Agreement.

18.3 The Licensor shall be entitled to immediately terminate this Agreement by notice in writing to the Licensee if any Insolvency Event occurs in respect to the Licensee or if the Licensee ceases or threatens to cease to carry on its business.

18.4 The Licensor or the Licensee may elect to remove a Cultivar from this Agreement by providing the other party with at least twenty one (21) days prior written advice on same and the termination provisions of this Agreement shall immediately apply to any Cultivar(s) so confirmed in writing as being removed from this Agreement.

19. SECURITY OF LICENSED MATERIAL

- 19.1 The Licensee must use their best endeavours to take all steps necessary or that are reasonably required by the Licensor to ensure that no Licensed Plant Material is appropriated by any third party.
- 19.2 Subject to Clause 12 herein, the Licensee shall not transfer the effective control, ship, transport, exploit, give, sell hire, barter, assign or in any way part with or share possession of any of the Licensed Plant Material to any other person without the express prior written permission of the Licensor. This provision shall survive the termination or expiration of this Agreement.
- 19.3 The Licensee must ensure that, without the prior written consent of the Licensor, the Licensed Plant Material does not form part of any sale, lease or other disposition of the Land.
- 19.4 Prior to any such selling, leasing or other disposal of the Land, the Licensee must notify the Licensor in writing and the Licensor, in its sole discretion, shall either require that the Licensee remove the Licensed Plant Material from the Land or require the Licensee to destroy the Licensed Plant Material. If the Licensor requires the destruction of the Licensed Plant Material, the Licensee must destroy the Licensed Plant Material before relinquishing effective control and / or possession and confirm such destruction to the Licensor in writing.

20. LIMITATION OF LIABILITY

- 20.1 To the maximum extent permitted by law, the Licensor makes no express or implied warranty of fitness for purpose or otherwise in relation to the Licensed Plant Material, and shall have no liability to the Licensee on account of any defect or failure of or in relation to the Licensed Plant Material whatsoever for loss of profits or any other loss or damage on any account whatsoever.
- 20.2 All other conditions and warranties which would, or may, but for this provision, be implied (whether by statute, law, trade usage or otherwise howsoever) into this Agreement (including but not limited to any identity, trueness to type, merchantability or fitness of the Licensed Plant Material for any particular purpose) are expressly excluded.
- 20.3 The Licensor makes no express or implied warranties (including but not limited to any identity, trueness to type, merchantability or fitness for any particular purpose) in relation to the Licensed Plant Material, and shall not be liable to the Licensee on account of any defect or failure of or in relation to the Licensed Plant Material whatsoever for loss of profits or any other loss or damage on any account whatsoever.

21. TESTING AT THE RISK OF THE LICENSEE

The Licensee acknowledges and accepts that it is testing the Licensed Plant Material solely at its own risk and cost in all regards including but not limited to the selection of the Variety to test, the condition of any plant material supplied by the Licensor or its authorised agents pursuant to this Agreement, any rootstock / scion combination selected, the number of trees to plant as part of the testing, the planting, cultivation (and harvesting of the fruit if applicable) and evaluation of the Licensed Plant Material and associated fruit and the Licensee nor any of its representatives shall have absolutely no claim on the Variety owner, the Licensor or their respective representatives relative to any such risk and / or cost associated with the testing of the Licensed Plant Material pursuant to this Agreement and

the Licensee indemnifies the Licensor, the Variety owner and any of their respective representatives accordingly.

22. INDEMNITY

The Licensee agrees to indemnify and hold harmless and defend the Licensor and its representatives against any and all claims, suits, losses, damage or other liabilities arising from:

- a) the supply of the Licensed Plant Material to the Licensee;
- b) any breach of this Agreement or any default or negligence of the Licensee and / or its representatives under this Agreement; and / or
- c) the testing of the Licensed Plant Material by the Licensee.

23. ENDURING PROVISIONS

Notwithstanding the termination of this Agreement, where any provision or covenant in this Agreement is required, intended or expressed to continue after termination of this Agreement, that provision or covenant shall remain in full force and effect notwithstanding such termination, and the Licensee shall be required to observe, perform and remain liable for all such terms and conditions, provisions or covenants, acts, matters or things.

24. RIGHT TO SUB-CONTRACT

The Licensor shall be entitled to sub-contract other third parties to carry out tasks on its behalf in connection with the performance of its obligations and / or the exercising of its rights under this Agreement. The Licensee has no right to sub-contract other third parties to carry out tasks on its behalf in connection with the performance of its obligations and / or the exercising of its rights under this Agreement without the prior written approval of the Licensor.

25. CONSENT / PERMISSION

If the permission, approval or consent of the Licensor is required to be given in this Agreement, the Licensor may give or withhold that permission or consent at the Licensor's sole and absolute discretion. For clarity, any permission, approval or consent granted by the Licensor may be granted unconditionally or subject to such conditions as specified by the Licensor. Where any conditions are specified as part of any permission, approval or consent granted by the Licensor any such permission, approval or consent is not effective unless such conditions are all satisfied.

26. GOODWILL

Any goodwill arising by virtue of this Agreement shall remain the property of the Licensor. The Licensee shall not be entitled to any payment or compensation from the Licensor in respect of goodwill upon the expiration or termination of this Agreement.

27. ENTIRE AGREEMENT

This Agreement contains all the terms and conditions as agreed between the parties and supersedes all prior negotiations, discussions, representations and warranties made between or by the parties.

28. THE LICENSOR'S USE OF THE PLANT MATERIAL OF THE VARIETY AND CONFIDENTIAL INFORMATION

The Licensee acknowledges and accepts that no provision of this Agreement in any way limits, conditions or otherwise affects the Licensor's right to:

- (a) use the plant material of the Variety or the Confidential Information in any manner as determined by the Licensor;
- (b) provide the plant material of the Variety or the Confidential Information to a third party; or
- (c) grant a third party an exclusive or non-exclusive license or other right to the plant material of the Variety.

29. COMPLIANCE WITH STATUTORY REQUIREMENTS

In respect of all matters pertaining to this Agreement and in the conduct of its business, the Licensee shall observe and comply with all statutory and regulatory requirements of all appropriate governments and applicable authorities.

30. SEVERABILITY OF PROVISIONS

- (a) If any provision of this Agreement is invalid, illegal or incapable of being enforced for any reason whatsoever all other provisions of this Agreement shall, nevertheless, remain in full force and effect, and no provision shall be deemed interdependent upon any other provision unless so expressed.
- (b) The Licensor reserves the right to terminate this Agreement if it determines any severance of any term of this Agreement adversely impacts on the intended conditions of the testing and evaluation and / or security of the Licensed Plant Material or any Confidential Information, the intellectual property rights of the Variety and / or the arrangements intended pursuant to this Agreement.

31. AMENDMENTS

This Agreement shall not be varied, amended or modified save in writing signed by both parties.

32. COUNTERPARTS

This Agreement may be executed by any number of counterparts and all of those counterparts taken together shall constitute one of the same Agreement.

33. FORCE MAJUERE

The Licensor will not be liable in respect of any delay or non-performance of its obligations under this Agreement arising through any cause or occurrence which is directly outside of the Licensor's control.

34. JOINT AND SEVERAL

Where the Licensee comprises of two or more persons or entities they are each jointly and severally liable for all obligations under this Agreement.

35. WAIVER

No Waiver (whether expressed or implied) by the Licensor of any breach by the Licensee of any of its obligations under this Agreement shall be deemed to constitute a waiver or consent to any other breach by the Licensee of any such obligations.

36. LAWS

This Agreement and all matters hereunder shall be construed according to the laws of the State of Victoria and the parties submit to the exclusive jurisdiction of the courts of that State.

37. NOTICES

The respective addresses (and facsimile numbers) for service for notices under this Agreement shall be those set out below for the Licensor and those set out in Items 1 and 2 of the Schedule for the Licensee, provided always that either party may by written notice to the other amend its details.

For the Licensor:

Attention: [*Contact Person Name*]

[*Licensor Entity*]

[*Address*]

Telephone:

Facsimile No:

Email:

38. GST

38.1 (Any reference in this Agreement to a fee, price, revenue, cost, expense or any other similar amount is a reference to that amount exclusive of GST (except to the extent the amount is expressed to be GST inclusive).

38.2 If GST is payable on a Taxable Supply made under, by reference to, or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional consideration (Additional Consideration) (except to the extent the Consideration is expressed to be GST inclusive).

38.3 Notwithstanding any other provision of this Agreement, the Licensee is not obliged to pay any amount of Additional Consideration unless and until the Licensor issues a Tax Invoice / Adjustment Note, if required, in respect of that amount.

38.4 Capitalised terms used in this clause 38 and not otherwise defined in this Agreement have the meaning given to them by the GST Law.

39. BINDING AGREEMENT

The Licensee warrants that it is authorised and has the capacity to execute this Agreement and to bind itself in relation to this Agreement.

40. LICENSEE LEGAL ADVICE

The Licensee acknowledges that it has had the opportunity to seek independent legal advice in relation to this Agreement and enters into this Agreement with full knowledge and understanding of its terms and conditions.

41. SUCCESSORS

This Agreement continues for the benefit of, and binds, a successor in title of a party, including a person to whom a party's rights and obligations are assigned in accordance with clause 16.

SAMPLE

This Agreement is dated _____ 20____

EXECUTION

Signed for and on behalf of [Licensor Entity])
Pty Ltd)

by

Signature of Authorised Signatory

Signature of Witness

Print name of Authorised Signatory

Print name of Witness

Signed for and on behalf of the Licensee)
)

by

Print name of Authorised Signatory

Signature of Authorised Signatory

who warrants that he / she has the authority to
bind the Licensee in the presence of

Signature of Witness

Print name of Witness

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SAMPLE

SCHEDULE 1

(Page 1 of 2)

Item

1. Licensee:

ACN / ABN:

Trading name:

Business Address (Physical):

.....

Business Address (Postal):

.....

2. Contact details for the Licensee

Attention:

(Main contact person name for Licensee)

Telephone: Facsimile:

Email:

3. Variety, Source and maximum permitted number of test trees

<i>Cultivar Type</i>	<i>Cultivar Name</i>	<i>Maximum Number of test plants</i>	<i>Nursery / Licensed Plant Material Source</i>	<i>Date of supply / Year of planting</i>

(Page intentionally blank)

SAMPLE

SCHEDULE 1

(Page 2 of 2)

4. Licensed Site

Property

Address:.....

Registered Proprietor of Land:

Certificate of Title details:

Property Status for Licensee: Owned *Leased* *Share farm*

Other *Details (if 'Other'):*

5. Specific planting / growing location of the Licensed Plant Material

(a) Licensed Site location map attached *Yes* *To be provided by Licensee*
(*Licensed Site location map to be attached as Annexure 1*)

(b) GPS co-ordinates for the Licensed Plant Material

.....

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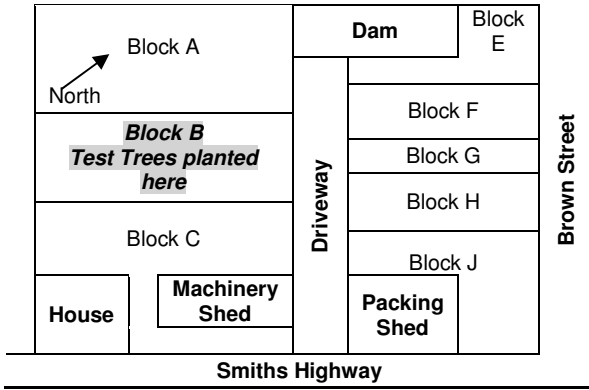
SAMPLE

ANNEXURE 1

(Property / Licensed Site Plan)

(Reference clause 6 of the Agreement)

Plan is to list adjacent roads, major structures (i.e. house, packing shed, office, etc) and location of test tree planting.



Sample Plan

SAMPLE

(Page intentionally blank)

SAMPLE

ANNEXURE 2
(Specific Reporting Requirements)

(Reference clause 9 (iii) of the Agreement)

[Insert any specific reporting requirements / format]

SAMPLE

(Page intentionally blank)

SAMPLE

ADDITIONAL SCHEDULE

(Addendum to add additional Plant Material to this Agreement)

Addendum to Testing & Evaluation Agreement

The Testing & Evaluation Agreement between [insert Licensor entity] (“**the Licensor**”) and [insert Licensee / Grower name / entity] (“**the Licensee**”) dated [date] (“**the Testing & Evaluation Agreement**”) relative to the testing and evaluation of proprietary cultivars has the Cultivar(s) defined below added to the Schedule of that Agreement from the date that this Addendum is signed by [insert Licensor entity] and the Licensee.

The parties acknowledge and agree that the terms and conditions of the aforementioned Testing & Evaluation Agreement apply to the Cultivar(s) and that this Addendum will form part of the Testing & Evaluation Agreement from the date of this Addendum being signed by both parties.

<i>Cultivar Type</i>	<i>Cultivar Name</i>	<i>Maximum Number of test plants</i>	<i>Nursery / Licensed Plant Material Source</i>	<i>Date of supply / Year of planting</i>

Signed for and on behalf of:

Licensor

By:
(Name of authorised signatory)

Title:

who warrants that they are duly authorised to sign this Addendum for and on behalf of the Licensor

.....
(Signature)

Date:

Licensee

By:
(Name of authorised signatory)

Title:

who warrants that they are duly authorised to sign this Addendum for and on behalf of the Licensee

.....
(Signature)

Date: