

**R&D Loan Scheme  
Offer Letter dated [ • ] 2020**

**between**

**Callaghan Innovation**

**and**

**[Insert BORROWER'S name and address]**

**IMS Contract ID: [IMS Contract ID number]**

**1. INTRODUCTION**

- 1.1 This letter contains an offer by us to provide you with a loan under the R&D Loan Scheme on the terms set out in this letter ("**Offer Letter**").
- 1.2 You signing this Offer Letter and delivering it to us will constitute your acceptance of the offer contained in this Offer Letter. A legal contract made up of this Offer Letter and the Terms will be entered into and you will be legally bound by it when we have:
- (a) received this Offer Letter duly signed by you; and
  - (b) notified you that your Loan is available to be drawn.

**2. DEFINITIONS AND INTERPRETATION**

- 2.1 In this Offer Letter, "**Terms**" means the terms and conditions applying to loans made under the R&D Loan Scheme, a copy of which is annexed to this Offer Letter.
- 2.2 Words and expressions defined in the Terms have the same meanings in this Offer Letter.

**3. LOAN DETAILS**

- 3.1 Set out below are the details of the loan we are offering you under the R&D Loan Scheme:

**Loan Amount: \$[ • ]**

- 3.2 If you accept this offer, please sign this Offer Letter and send it to us to the following address: [RDLoanDocs@callaghaninnovation.govt.nz](mailto:RDLoanDocs@callaghaninnovation.govt.nz).

We accept the offer contained in this Offer Letter and agree to its terms.

**[Insert signature block for Borrower]**

## R&D Loan Scheme Terms and Conditions

### 1. INTRODUCTION

1.1 These are the terms and conditions applying to loans made under the R&D Loan Scheme ("**these Terms**"). These Terms and your Offer Letter together make up your **Loan Contract** which is legally binding on you.

1.2 You agree and confirm that:

- (a) your Application constitutes your request to us for a loan to be made to you under the R&D Loan Scheme for the purpose of funding Eligible R&D Activity;
- (b) we rely on the declarations, representations and statements that you make in your Application when we assess your eligibility to participate in the R&D Loan Scheme and how much you are entitled to borrow under the R&D Loan Scheme;
- (c) us sending an Offer Letter to you constitutes an offer by us to provide you with a loan under the R&D Loan Scheme on the terms contained in the Offer Letter and these Terms;
- (d) you signing the Offer Letter and delivering it to us constitutes your acceptance of the offer contained in the Offer Letter and these Terms; and
- (e) your Loan Contract will be entered into and you will be legally bound by it when we have:
  - (i) received your duly signed Offer Letter; and
  - (ii) notified you that your Loan is available to be drawn.

1.3 We have no obligation to provide you with your Loan unless and until we (at our absolute discretion) have notified you that your Loan is available to be drawn.

1.4 Your Loan Contract will be terminated when you have repaid all amounts owing to us under your Loan Contract.

### 2. DEFINITIONS AND INTERPRETATION

2.1 In these Terms:

"**Application**" means an application for a loan under the R&D Loan Scheme, completed and submitted through our online portal or in such other manner as we may specify or permit from time to time.

a "**claim**" includes a right to share in the distribution of surplus assets after the claims of creditors have been satisfied.

"**Change in Control**" means an event or series of events which result in any person (acting alone) or group of persons (acting in concert) acquiring or ceasing to have the ability:

- (a) to control more than 50% percent of your voting shares;
- (b) to appoint and/or remove the majority of the members of your governing body;
- (c) to otherwise control or having the power to control your affairs and policies; or
- (d) to be in a position to derive the whole or a majority of your benefit.

**"Crown"** means Her Majesty the Queen in right of New Zealand.

**"Default Interest Rate"** means the sum of:

- (a) 3% per annum; and
- (b) the IRD Rate.

**"Eligible R&D Activity"** means any R&D activity carried out by you which satisfies the criteria described under the heading "Eligible Research and Development Activity" in the Ministerial Direction, and includes any related expenses and overheads described in section 4 of the Guidelines.

**"Equal Ranking Creditors"** means all of your present and future creditors whose claims are entitled to be admitted in your Liquidation and whose claims rank or are expressed to rank equally with our claim to the Outstanding Amount.

**"Equity Holders"** means holders of your shares of any class or holders of such other securities or interests whose claims rank last in your Liquidation.

**"Event of Default"** has the meaning given in clause 11.1.

**"Final Repayment Date"** means the date falling 10 years (120 calendar months) after the Loan Amount is made available to you (subject to adjustment determined by us to fall on a working day, as notified to you).

**"Guidelines"** means the document entitled "Guidelines – Evidencing R&D for the R&D loan scheme" (Version 1.0 dated June 2020) and available at <https://www.callaghaninnovation.govt.nz/sites/all/files/rd-loan-scheme-guidelines.pdf>.

**"Higher Ranking Creditors"** means all of your present and future creditors whose claims are:

- (a) entitled to be admitted in your Liquidation; and
- (b) not expressed to rank equally with, or subordinate to, our claims in respect of the Outstanding Amount.

**"Independent Trustee"** means, if you are the trustee(s) of a trust, any such trustee that is a solicitor, accountant, professional adviser or other person acting in an independent role that is not a beneficiary or settlor of the trust (and whose relatives, spouse or partner, direct or indirect shareholders, directors or other members are not beneficiaries or settlors of the trust).

**"IRD"** means the Inland Revenue Department.

"**IRD Rate**" means the annual rate of interest equal to IRD's use of money interest (UOMI) rate for underpayments of tax (being the taxpayer's paying rate (as defined in the Tax Administration Act 1994) and currently available as the "debit rate" at <https://www.ird.govt.nz/managing-my-tax/penalties-and-interest/interest-on-overpayments-and-underpayments>).

you are in "**Liquidation**" when a liquidator, bankruptcy official or similar officer is appointed in respect of you or your assets.

"**Loan**" means the loan made or to be made to you under your Loan Contract.

"**Loan Amount**" means the amount advanced or to be advanced to you under your Loan Contract, as set out in your Offer Letter.

"**Loan Contract**" means these Terms and your Offer Letter.

"**Ministerial Direction**" means the Ministerial Direction to Callaghan Innovation entitled "Administration of a short-term loan scheme to support R&D-performing businesses in response to the COVID-19 crisis" and available at <https://www.callaghaninnovation.govt.nz/sites/all/files/2020-ministerial-direction-rd-loan-scheme.pdf>

"**Offer Letter**" means the document that contains our offer to you for a loan to be made under the R&D Loan Scheme, which is signed by you and delivered to us by email or in such other manner as we may specify or permit from time to time.

"**Outstanding Amount**" means, at any time, the principal amount of the Loan Amount outstanding for the time being (as reduced by any repayments that you make), together with all other money payable by you under your Loan Contract including all accrued interest (subject to clause 4.1, but including default interest).

"**Repayment Period**" means the period from the 36 Month Date to the Final Repayment Date.

"**R&D**" means research and development.

"**R&D Loan Scheme**" means the research and development loan scheme established by the Crown and administered by us under which we provide loans to assist businesses impacted by the COVID-19 economic shock to maintain their R&D activity.

"**we**", "**us**", "**our**" and related terms means Callaghan Innovation.

"**you**" and "**your**" mean the borrower named in the Offer Letter. If you are a partnership, an unincorporated joint venture, the trustees of a trust or otherwise do not have separate legal personality, those terms (unless the context requires otherwise) also include each of your partners, joint venturers, trustees or members jointly and severally, and you are still bound by your Loan Contract despite any changes to your membership or formation, including by death, incapacity, or retirement of any partner, joint venture, trustee or member, the admission of any new partner, joint venture, trustee or member, or in any other way.

"**12 Month Date**" means the date falling one year (12 calendar months) after the date the Loan Amount is made available to you (subject to adjustment determined by us to fall on a working day, as notified to you).

**"36 Month Date"** means the date falling three years (36 calendar months) after the date the Loan Amount is made available to you (subject to adjustment determined by us to fall on a working day, as notified to you).

2.2 In addition, in these Terms and unless the context requires otherwise:

- (a) headings and examples are for reference only;
- (b) the singular includes the plural and vice versa;
- (c) a reference to any document or agreement, including these Terms and your Loan Contract, includes that document or agreement as amended, assigned, novated, supplemented, restated or substituted from time to time, except to the extent prohibited by these Terms;
- (d) a reference to a time of day is a reference to New Zealand time;
- (e) a reference to any monetary amount is to New Zealand currency;
- (f) an Event of Default is continuing until it has been waived in writing by, or remedied to the satisfaction of, us;
- (g) a party to your Loan Contract or another agreement includes its successors and its permitted assignees and transferees;
- (h) any legislation includes a modification and re-enactment of, legislation enacted in substitution for, and a regulation, order-in-council and other instrument from time to time issued or made under, that legislation; and
- (i) a reference to **"in writing"** (or equivalent) includes provision by email or through online services operated by us (including the IMS online service).

### **3. THE LOAN**

3.1 We will make the Loan available to you in the amount of the Loan Amount, on the terms and conditions set out in your Loan Contract.

3.2 You must use the Loan:

- (a) in accordance with the declarations, representations and statements made in your Application; and
- (b) to fund the Eligible R&D Activity and for no other purpose.

3.3 The Loan Amount will be paid in a single lump sum advance to the bank account specified in your Application on a working day determined by us.

### **4. INTEREST**

4.1 You will not be charged any interest on your Loan if you repay the Loan Amount in full on or before the 12 Month Date, except that interest will still accrue from day to day in accordance with clause 4.2 from the date the Loan Amount is made available to you:

- (a) if you do not repay the Loan Amount in full on or before the 12 Month Date; or
- (b) if you are required to repay the Loan Amount (or any Outstanding Amount) before the 12 Month Date in accordance with clause 11.2; or
- (c) at our discretion, if:
  - (i) an Event of Default occurs or exists before the 12 Month Date and you do not promptly notify us in accordance with clause 8.1(d)(i); or
  - (ii) you have voluntarily repaid the Loan Amount in full before the 12 Month Date but, if you had not done so, we could have required you to repay the Loan Amount (or any Outstanding Amount) due to circumstances existing before such voluntary repayment.

4.2 Subject to clause 4.1, interest will accrue from day to day at the rate of 3% per annum on the outstanding principal amount of the Loan Amount from the date the Loan Amount is made available to you.

4.3 You will be charged additional interest on your Loan if at any time you fail to comply with the undertaking in clause 3.2. The additional interest will be treated as having accrued from the date the Loan Amount was made available to you and will accrue from day to day at the IRD Rate on the outstanding principal amount of the Loan Amount .

4.4 Interest on your Loan will not compound or itself bear interest (except in accordance with clause 4.5) and will be calculated on the basis of the actual number of days elapsed and a year of 365 days (or 366 days in a leap year).

*By way of example only:*

- *If you repay the Loan Amount **in full** on or before the 12 Month Date then (subject to the exceptions in clauses 4.1(a), (b) and (c) above) you will not be charged any interest. If you only repay **part** of the Loan Amount on or before the 12 Month Date, you will be charged interest at the rate of 3% per annum for the entire period since the Loan Amount was made available to you.*
- *If you do not repay the Loan Amount in full on or before the 12 Month Date, then you will be charged interest at the rate of 3% per annum for the entire period since the Loan Amount was made available to you.*
- *If at any time you fail to comply with the undertaking in clause 3.2, you will be charged an additional amount of interest which is calculated at the IRD Rate for the entire period the Loan Amount is made available to you. This will be in addition to the 3% per annum interest rate already charged on the Loan Amount.*

4.5 If any amount is not paid to us in full when due then you must, on demand by us, pay to us interest on the overdue amount from the due date for payment until the actual date of payment to us (both before and after judgment) at the Default Interest Rate.

## **5. REPAYMENT**

- 5.1 You may repay all or any part of the Outstanding Amount at any time before such amounts become due in accordance with your Loan Contract.
- 5.2 You must repay the Outstanding Amount to us on the Final Repayment Date.
- 5.3 During the Repayment Period, you must make regular monthly instalment payments of principal and interest, as notified by us to you from time to time. Any such instalment payments will be calculated by us to spread the amount of the required repayments over the Repayment Period.
- 5.4 If any part of the Loan has not been applied to fund Eligible R&D Activity by 30 June 2021 (or such later date as we determine and notify to you in writing) you must immediately repay on the next working day that part of the Loan which has not been so applied.
- 5.5 No amount that is repaid may be re-borrowed.

## **6. PAYMENTS**

- 6.1 You must make all payments to us under your Loan Contract in New Zealand dollars in a manner notified by us to you.
- 6.2 Unless we notify you otherwise, any payment from you will be applied first towards payment of accrued interest (including default interest) and then towards repayment of principal amounts.
- 6.3 All payments to be made by you under your Loan Contract must be made:
  - (a) without any set-off, counterclaim or condition; and
  - (b) without any deduction or withholding for any tax or any other reason unless the withholding or deduction is required by law.

## **7. YOUR REPRESENTATIONS TO US**

- 7.1 You represent and warrant to us that:
  - (a) all information (including declarations, representations, statements, consents, confirmations, evidence and other materials) provided by you or on your behalf in your Application or otherwise in connection with your Loan Contract is true and accurate, and there are no facts or circumstances which have not been disclosed to us which would make that information untrue, inaccurate or misleading;
  - (b) any person completing your Application and/or signing your Offer Letter and delivering it to us on your behalf has authority to do so, and no action has been taken to remove any such person acting as trustee or general partner of a limited partnership (as applicable);
  - (c) (if you are not a natural person) you are duly established, registered (to the extent applicable) and existing under the laws of New Zealand, and your board or committee or equivalent has been correctly and validly appointed;

- (d) (if you are a natural person acting as a trustee of a trust) you have full mental capacity, are not a minor and are physically located and legally working in New Zealand (allowing for temporary absences);
- (e) no action has been taken for or with a view to:
  - (i) (if you are not a natural person) your dissolution, termination, disestablishment, deregistration, winding up or other end; or
  - (ii) (if you are a limited partnership) removing your general partner;
  - (iii) the appointment of a liquidator, statutory manager, administrator, receiver, bankruptcy official or similar officer in respect of you or any of your assets;
- (f) (if you are the trustee(s) of a trust) you have not lost, limited or prejudiced your right to be reimbursed from the trust property;
- (g) you have the power to enter into and perform your obligations under your Loan Contract, have taken all necessary action, to authorise that entry and performance, and hold all necessary authorisations and consents for that entry and performance;
- (h) your obligations under your Loan Contract are legal, valid, binding and enforceable against you;
- (i) your entry into, and the performance of your obligations, under your Loan Contract, do not and will not breach any agreement or instrument binding upon you or any of your assets (including any other loan agreement); and
- (j) no Event of Default is continuing or might reasonably be expected to result from the making of the Loan to you.

7.2 The representations made above are deemed to be repeated by you on the date we make the Loan Amount available to you and on each day there is any Outstanding Amount by reference to the facts and circumstances then existing.

## **8. YOUR UNDERTAKINGS TO US**

8.1 You undertake to us that, for so long as there is any Outstanding Amount, you will:

- (a) (if you are not a natural person) maintain your existence and (to the extent applicable) registration in New Zealand and will not relocate outside New Zealand;
- (b) (if you are a natural person acting as a trustee of a trust) continue to be physically located and legally working in New Zealand (allowing for temporary absences);
- (c) promptly obtain, comply with and do everything needed to maintain any authorisations required to enable you to perform your obligations under your Loan Contract;
- (d) promptly notify us if:
  - (i) any Event of Default occurs; or



- (ii) you cease to carry on the business in connection with which the Eligible R&D Activity was carried out; and
- (e) comply with each declaration, statement, agreement and undertaking made in your Application and Loan Contract including in relation to (without limitation):
  - (i) use of the Loan Amount (including restrictions as to application and distribution of proceeds); and
  - (ii) keeping of evidence, materials or other records, and provision to us for audit purposes (as required).

## **9. INVESTIGATION**

9.1 We are entitled at any time to investigate:

- (a) your compliance with your Loan Contract; and
- (b) whether you met the criteria to be eligible to participate in the R&D Loan Scheme at the time you made your Application.

9.2 We may give you written notice requiring you to deliver to us or our agent such copies of your books, records and accounts, and any other information, that are relevant to your participation in the R&D Loan Scheme, including your compliance with your Loan Contract and the Eligible R&D Activity that you have carried out.

9.3 You must:

- (a) take all reasonable steps to co-operate with us or our agent if we carry out an investigation and otherwise take all reasonable steps to facilitate that investigation, including (but without limitation) by permitting us or our agent to have access to and to inspect the premises at which the Eligible R&D Activity is carried out; and
- (b) comply with a notice given under clause 9.2 above.

9.4 Nothing in clause 9.3 requires you to disclose to us or our agent any privileged document or any personal information if such disclosure would breach the Privacy Act 1993.

## **10. ANNUAL REPORTS**

10.1 You will provide to us, no later than 30 days after 30 June 2021 (or such later date as we notify to you under clause 5.4), a report in the form specified by us, which may include:

- (a) a description of the Eligible R&D Activity that has been carried out;
- (b) copies of invoices for all costs of \$1,000 or more incurred by you in carrying out the Eligible R&D Activity; and
- (c) a certificate from you signed by a director, partner, trustee or member (as applicable) confirming that, to his or her knowledge after having made due enquiry:
  - (i) the Loan has been applied solely in accordance with clause 3.2; and

- (ii) you have otherwise complied with your Loan Contract in all material respects.

10.2 You will provide to us, no later than five months after the end of each financial year:

- (a) a copy of your financial statements for that financial year; and
- (b) a report containing any additional information relating to the Loan and the Eligible R&D Activity specified by us (if any).

## 11. EVENTS OF DEFAULT AND ACCELERATION

11.1 Each of the events and circumstances set out in this clause is an "**Event of Default**":

- (a) you do not pay on the due date any amount payable under your Loan Contract in the manner in which it is expressed to be payable;
- (b) you breach or otherwise do not comply with any undertaking set out in clause 3.2 or 8.1;
- (c) any declaration, representation, statement, consent or confirmation (or any other information, including evidence and other materials) made, deemed to be made or provided by you or on your behalf in your Application or otherwise in connection with your Loan Contract:
  - (i) is untrue, inaccurate or misleading in any material respect on the date on which it was made; or
  - (ii) becomes untrue, inaccurate or misleading in any material respect; or
- (d) you suspend making payments on any of your debts, or any action is taken for or with a view to:
  - (i) (if you are not a natural person) your dissolution, termination, disestablishment, deregistration, winding up or other end; or
  - (ii) the appointment of a liquidator, statutory manager, administrator, receiver, bankruptcy official or similar officer in respect of you or any of your assets;
  - (iii) a rescheduling or moratorium of your indebtedness (or of any part which you will or might otherwise be unable to pay when due); or
  - (iv) a composition or general assignment with or for the benefit of your creditors; or
- (e) you cease to carry on the business in connection with which the Eligible R&D Activity was carried out; or
- (f) you, or all or substantially all of your assets for the business or organisation for which the Loan Amount was provided, are sold or transferred; or
- (g) there is a Change in Control without our prior written consent.

- 11.2 On and at any time after the occurrence of an Event of Default, we may, by notice to you (and without prejudice to any other rights which we may have under any other document or at law):
- (a) declare all or part of the Outstanding Amount to be immediately due and payable, and at that point the amount so declared shall become immediately due and payable; and
  - (b) charge interest and/or default interest (as applicable) in accordance with clause 4.

## **12. RANKING IN YOUR LIQUIDATION**

- 12.1 If you are in Liquidation our claim for payment of the Outstanding Amount will rank:
- (a) in priority to your Equity Holders;
  - (b) equally with the claims of your Equal Ranking Creditors; and
  - (c) junior to the claims of your Higher Ranking Creditors in that:
    - (i) all claims of your Higher Ranking Creditors must be paid in full before our claim for payment of the Outstanding Amount is paid; and
    - (ii) until your Higher Ranking Creditors have been paid in full, we must not claim in your Liquidation in competition with your Higher Ranking Creditors so as to diminish any distribution or payment which, but for our claim, your Higher Ranking Creditors would have been entitled to receive.
- 12.2 Clause 12.1 is intended to confer a benefit on, and may be enforced by, your Higher Ranking Creditors.

## **13. GENERAL**

### **13.1 Notices:**

- (a) Any communication to be made under your Loan Contract must be made in writing and shall be:
  - (i) provided through our online portal or any other online service as we may designate from time to time; or
  - (ii) delivered or sent to the address or email address of the relevant party, and marked for the attention of the person or office holder, set out in your Application (in the case of communications from us to you) or for that purpose on our website (in the case of communications from you to us); or
  - (iii) such other address or email address as that party may from time to time designate to the other).
- (b) Any communication to be made under or in connection with your Loan Contract shall be deemed to have been made:
  - (i) if delivered through our online service or by hand, upon delivery;

- (ii) if sent by pre-paid post, 3 working days after posting; and
- (iii) if sent by email, when actually received in the recipient's inbox in readable form.

13.2 **Amendment:** We may amend the terms of your Loan Contract (including by way of amending these Terms) from time to time by at least 30 days' notice to you.

13.3 **Independent trustees:** If you are the trustees of a trust, the liability of any Independent Trustee under your Loan Contract is limited to the trust property available to meet that liability. However, this limitation does not apply if the Independent Trustee loses its right to be indemnified out of the trust property, or diminishes the value of the trust property through its fraud or wilful breach of trust (in which case we can claim against the Independent Trustee personally to the extent we are unable to recover amounts due to us from the trust property).

13.4 **Privacy:**

- (a) We may collect personal information about you in order to assess your Application and to administer and enforce your Loan Contract (including to determine the maximum Loan Amount and for audit purposes). For these purposes we may obtain personal information about you from your Application, our own records, from the IRD and other government departments and government agencies and (where reasonably necessary) from third party organisations.
- (b) We may share any information (including personal information) collected from your Application or otherwise obtained as described above with:
  - (i) our agents and advisers for the purposes of administering your Loan Contract and complying with our obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009;
  - (ii) the IRD, the Ministry of Business, Innovation and Employment, and other government departments and government agencies, including (without limitation) for statistical and audit purposes; and
  - (iii) with any debt recovery organisation or similar agency for the purposes of collection or enforcement, and with any credit reporting agency,

or to any other person as required at law, under any regulation or to provide an answer to any parliamentary questions, meet any parliamentary requirements, or provide information to a Minister.

- (c) You agree that you consent to us taking such action and any such information (including personal information) being used for such purposes, as described in this clause 13.4. You have a right to access and correct any personal information about you under the Privacy Act 1993.

13.5 **Official Information Act:** You acknowledge that we are subject to the Official Information Act 1982 and that we are obliged to disclose information under that Act if requested to do so and provided there are no grounds under that Act to withhold the information.

13.6 **Publicity:**

- (a) Any media release or other public statements produced or contributed to by you that refers to us or includes quotes from our staff must be approved by us in writing prior to publication or release.
- (b) You must provide any such proposed media release or public statement to us for our written approval at least 48 hours before the proposed publication or release time.
- (c) Any media release or other public statement produced by you that refers or otherwise relates to the Eligible R&D Activity that is funded by your Loan, must refer to your participation in the R&D Loan Scheme (unless you have good reason to exclude such a reference).
- (d) You must notify us of any enquiry relating to the Eligible R&D Activity that is funded by your Loan made by the media to you or your staff.

13.7 **Assignment:**

- (a) You are not permitted to assign or transfer any of your rights or obligations under your Loan Contract without our prior written consent.
- (b) We may (i) assign or transfer any of our rights, powers and obligations under your Loan Contract without your consent and (ii) disclose to any potential assignee or transferee such information (including personal information) about you and your Loan Contract as we consider appropriate. Any assignee or transferee may use such information for the same purposes and in the same manner as we can.

13.8 **Evidence of indebtedness:** Our certificate as to any amount payable under your Loan Contract shall, except for manifest error, be conclusive.

13.9 **No waiver:** No failure on our part to exercise and no delay in exercising, any right under your Loan Contract operates as a waiver of that right, nor shall any single or partial exercise of any right under your Loan Contract prevent any other or further exercise thereof or the exercise of any other right. The remedies provided under your Loan Contract are cumulative and not exclusive of any remedies provided by law.

13.10 **Partial invalidity:** The illegality, invalidity or unenforceability of any provision of your Loan Contract shall not affect the legality, validity or enforceability of any other provision.

13.11 **Governing law:** Your Loan Contract is governed by New Zealand law. The parties irrevocably submit to the non-exclusive jurisdiction of the courts of New Zealand.

13.12 **Offences:** The Crown may take action against you or prosecute you for offences under the Crimes Act 1961. You may be liable to pay penalties, fines or subject to imprisonment as a result. Such prosecution does not stop other legal actions being taken against you.