

DEED OF INDEMNITY AND DISCLAIMER: DIVING ACTIVITIES AUSTRALIA

This deed is entered into on _____ [insert date] ("**Effective Date**") between:

Name (including ABN or ACN)	Dive Spear and Sport Pty Ltd (ACN 608 629 518)
	("Dive Operator")

and

Name	
	("Participant")
Date of Birth	
Certification Agency	
Certification Level	
Certification Number	
Number of Logged Dives	
Emergency Contact	
Relationship	
Telephone Number	

IMPORTANT NOTICE FOR CONSUMERS

This document is a deed, which the most serious indication to the community that you really mean what has been agreed. It applies to **ALL** Diving Activities the Dive Operator provides to the Participant from time to time, and is enforceable by third parties involved in the Diving Activities.

The Participant may withdraw from this deed at any time by telling the Dive Operator in writing. However, if the Participant does this the Dive Operator reserves its rights and may refuse to provide the Participant further Diving Activities.

RISK WARNING

Diving Activities involve Inherent Risks and Obvious Risks including of personal injury, psychological trauma, disability, death, and loss or damage to personal property, including from:

- a) **Strenuous activity** where participants are required to exert themselves physically including risk of heart attacks, stroke, panic, hyperventilation, breaks and strains;
- b) **Use of compressed and mixed Breathing Gasses** including risk (i) of decompression sickness, embolism, oxygen toxicity, inert gas narcosis, or other barotrauma/hyperbaric injuries which may require treatment in a recompression chamber; or (ii) that Breathing Gasses may be contaminated, not as described or not safe for their intended purpose;
- c) **Exposure to the elements and the natural environment** including water currents, wave action, storm, wind, potentially harmful or fatal marine life (including bites or stings), temperature conditions both above-water and in-water resulting in hyperthermia or hypothermia, cuts and abrasions, or becoming lost or disorientated;
- d) **Overhead environments** including swim throughs, caverns, caves, and wrecks; including risk of line entanglement, entrapment, disorientation and failure to exit before running out of Breathing Gasses;
- e) **Boating** including as transport (to and from the dive site), on-board accommodation or for rescue purposes; including risk of slipping or falling while on board, being cut or struck by a boat while in the water, and injuries occurring while getting on or off a boat;
- f) **Shore entries** including risk of slips and falls, sharp edges or being forced by waves and currents against natural and made obstacles including rocks, platforms, ladders, stairs and ramps;
- g) **Diving Equipment** supplied, maintained, assembled and/or operated by Participant or Released Parties may malfunction, fail or be improperly used;
- h) **Remote Locations** where Participant may be remote in time and/or distance from medical treatment facilities including a recompression chamber or oxygen supply, and medical treatment may be delayed, unavailable or inadequate;
- i) **Accommodation and storage facilities** including risk of theft, loss or damage to personal property;
- j) **Negligence or recklessness** of Participant, the Released Parties and/or other participants, at all times even when under supervision the Participant has primary responsibility for their own safety;
- k) **Change of circumstances** including change of weather conditions, emergency or unforeseen situations which may, by circumstances beyond the control of the Released Parties or by reason of the Participant's own voluntary or involuntary responses, introduce new or greater risks than anticipated or cause participants to exceed the limits of their previous training, qualifications and experience; and
- l) Other risks of similar type or kind.

All of these risks are referred to as "**Diving Risks**" for the purpose of this Deed.

PARTICIPANT STATEMENT OF AFFIRMATION AND UNDERSTANDING

- 1) I, the Participant, acknowledge that I have read and understood the matters set out in this Deed, that I voluntarily accept all of its terms, and that I am of lawful age and/or legally competent to enter into this Deed.
- 2) The Participant assumes all risk and grants the releases and waivers of liability and gives indemnities in this Deed in consideration of each of the Released Parties separately permitting and/or enabling the Participant to engage in Diving Activities by way of their respective contributions including supply of property access, training, guidance, transport, accommodation, storage, Diving Equipment, Breathing Gasses, and any other resources or support.
- 3) This Deed shall take precedence over individual agreements, however concluded, between the Participant and the Dive Operator for provision of Diving Activities ("**Individual Agreements**"). Individual Agreements shall be taken to be concluded subject to execution of this Deed if the Deed has not yet been executed, and the Dive Operator may terminate any Individual Agreement without penalty if the Participant does not execute this Deed or a mutually acceptable alternative. This Deed shall apply without limitation to:
 - a) All Individual Agreements concluded, and
 - b) All Diving Activities conducted (notwithstanding the date of conclusion of the Individual Agreement), on or after the Effective Date and prior to termination of this Deed.

DECLARATION AS TO CAPABILITY

- 4) Participant undertakes and warrants they will not attempt to engage in Diving Activities:
 - a) Without adequate Diving Fitness;
 - b) Under the influence of alcohol or drugs;
 - c) If impaired by inadequate rest and nutrition;
 - d) Unless able to freely equalise all body air spaces without delay or impairment; or
 - e) With any known medical condition, or while taking any medication or other pharmaceuticals, unless with specific approval from a doctor to engage in Diving Activities.
- 5) Participant:
 - a) Acknowledges and warrants they are and will be physically and mentally fit and healthy to safely undertake the Diving Activities ("**Diving Fitness**");
 - b) Acknowledges and undertakes they are and will be solely responsible for assessing and/or seeking medical advice as to their own Diving Fitness;
 - c) Acknowledges and warrants they have and will have all prerequisite qualifications and experience to undertake the Diving Activities (including by reference to environmental conditions, depth, overhead environment, decompression obligations, composition and volume of Breathing Gasses, and type of Diving Equipment).
 - d) Warrants that all information provided to the Dive Operator, including certification level and logged number of dives, is correct to the best of their knowledge.

VOLUNTARY ASSUMPTION OF RISK

- 6) Participant:
 - a) Acknowledges Diving Activities are a Recreational Activity and a Dangerous Recreational Activity in which the Participant engages for enjoyment, relaxation or leisure;
 - b) Acknowledges the Diving Risks as a written and comprehensive risk warning;
 - c) Voluntarily assumes all risks of the Diving Activities including the Diving Risks;
 - d) Subject to Clause 7), acknowledges they are, and undertakes to be, solely responsible for their own safety and mitigation of Diving Risks; and
 - e) Subject to Clause 7), acknowledges they are, and undertakes to be, solely responsible for testing and satisfying themselves as to the fitness for purpose of

Diving Equipment and Breathing Gasses before use.

TRAINING COURSES

- 7) When under direct supervision of an Instructor during the conduct of a training course, Participant undertakes to seek further specific guidance from the Instructor where the mitigation of Diving Risks, testing and satisfying themselves as to the fitness for purpose of Diving Equipment and Breathing Gasses, or assessment of their Diving Fitness for that Diving Activity is beyond the Participant's current qualifications and experience.

CONDUCT OF PARTICIPANT

- 8) Participant undertakes to:
 - a) Abide by the reasonable directions of the Released Parties;
 - b) Not endanger themselves or the Released Parties by acting in a reckless, negligent or unsafe manner;
 - c) Not act in a manner which may reasonably detract from other participants' enjoyment of the Diving Activities (together, "**Rules of Conduct**").
- 9) Released Parties shall, in their sole discretion and without liability, have the right to restrict or refuse the Participant's engagement in Diving Activities for failure to abide by the Rules of Conduct ("**Refused Diving**"). Participant waives any right to claim or for any refund for amounts paid in respect of Refused Diving and dependent Diving Activities.

RELEASE AND INDEMNITY AND DISCLAIMER

- 10) Participant acknowledges the clauses in this Indemnity and Disclaimer section are material terms and that the Released Parties would not be willing to facilitate Diving Activities without the allocation of risk set forth in this Deed.
- 11) Participant undertakes to notify the Dive Operator immediately upon becoming aware of any injury or damage arising from or related to the Diving Activities and **indemnifies** the Released Parties against any Costs which could have been mitigated but for the Participant's non-compliance with this clause.
- 12) Participant consents to receive, and in addition to any other rights accruing pursuant to this Deed **indemnifies** the Released Parties for the costs and disbursements of, any medical treatment including transport by ambulance, which the Released Parties in their sole discretion consider necessary to protect the life and health of the Participant until such time as Participant regains capacity or Participants attorney is making those decisions.
- 13) **Participant releases, shall indemnify, defend and hold harmless the Released Parties against any and all Claims and Costs arising out of or in connection with Diving Activities and the subject matter of this Deed from any cause whatsoever including the negligence or breach of duty (statutory, contractual, in tort or otherwise) of the Released Parties and irrespective of any cause of action under contract, tort or otherwise at law. This clause shall apply irrespective of, and shall not be prejudiced by, any right of defence or appeal, and irrespective of whether the Participant was given prior notification of the Claim or incurring of the Cost.**
- 14) **To the extent permitted by law the Released Parties disclaim any guarantees, representations or warranties, express or implied, as to the availability, reliability, timeliness, performance, completeness, accuracy, merchantability, acceptable quality or fitness for purpose of Diving Activities, Diving Equipment, Breathing Gasses, training materials and standards for teaching and participating in Diving Activities.**
- 15) **The Released Parties disclaim the Guarantees relating to the supply of services, and the Participant releases, shall indemnify, defend and hold harmless the Released Parties against any and all Section 139A Costs.**
- 16) The Parties shall not be liable for any consequential, indirect, exemplary, punitive, special, incidental or

reliance damages, or for any damages related to lost profits, or business interruption, ("**Indirect Damages**") even if the Parties knew or should have known of the possibility of, or could reasonably have prevented, such Indirect Damages.

- 17) To the extent that any disclaimer, exclusion of liability, warranty, release or guarantee in this Deed is deemed by a court of competent jurisdiction to have failed in its essential purpose, the Released Parties' aggregate liability is limited to the lesser of the amount paid by Participant for the specific Diving Activities the subject of the Claim or the amount of \$100.

DEFINITIONS AND GENERAL TERMS

- 18) **Definitions.** In this Deed:

- a) "**Breathing Gasses**" means any mix of oxygen, nitrogen, helium and any other gas howsoever described and intended for respiration (for example common mixes generically described as air, nitrox, trimix, helitrox or oxygen), including when such gas mixes are supplied in a compressed state.
- b) "**Certification Agency**" means an organisation which publishes standards for participating, conducting and teaching Diving Activities and issues certifications to individuals assessed as meeting the skills, knowledge and other requirements of those standards (including BSAC, CDAA, GUI, IART, NAUI, PADI, SDI/TDI, and SSI).
- c) "**Claims**" means any claim including demands, threatened or filed proceedings, fines, awards, penalties howsoever arising including any liability, damages, or cause of action.
- d) "**Costs**" mean any cost, expense or disbursement incurred by reason of a Claim or otherwise pursuant to the Diving Activities, including judgment debts, adverse costs orders, settlement sums, penalties, fines, professional legal fees, administrative costs of proceedings, expert witness costs, or costs required for compliance with orders for equitable relief.
- e) "**Deed**" means this Deed of Indemnity and Disclaimer.
- f) "**Divemaster**" means a Diving Activity professional holding current certification from a Certification Agency to guide participants and provide logistics for Diving Activities.
- g) "**Diving Activities**" means the active or passive presence of the Participant on or beneath the water surface using Diving Equipment to deliver Breathing Gasses or by breath hold; use of Diving Equipment; use of Breathing Gasses; education and training courses; and associated logistics, preparation, and travel.
- h) "**Diving Equipment**" means any apparatus for the delivery of gas for respiration howsoever configured, including snorkel, hookah, open circuit SCUBA, and semi-closed or closed circuit rebreathers.
- i) "**Duration**" means 5 years from the Effective Date.
- j) "**Guarantees relating to the supply of services**" means the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law.
- k) "**Instructor**" means a Diving Activity professional holding current certification from a Certification Agency to teach, guide participants, and provide logistic support for Diving Activities.
- l) "**Jurisdiction**" means New South Wales.
- m) "**Legislation**" means variously the *Civil Liability Act 2003* (QLD), *Civil Liability Act 2002* (NSW), *Civil Liability Act 1936* (SA), *Civil Liability Act 2002* (TAS), *Wrongs Act 1958* (VIC), or *Civil Liability Act 2002* (WA) as enacted in the Jurisdiction.
- n) "**Parties**" means Participant and Dive Operator.
- o) "**Reckless Conduct**" has the same meaning as in Section 139A of the *Competition and Consumer Act 2010* (Cth).

- p) "**Released Parties**" means the Dive Operator, boat operator, independent contractor, landowner, other participants, booking agent, gas blender, Instructor, Divemaster, Certification Agency, and author of training materials, and for each of the aforementioned parties the corporate participants thereof (including shareholders, members, partners, directors, officers, managers, employees, affiliates, and subcontractors).

- q) "**Section 139A Costs**" means Costs where the Guarantees relating to the supply of services are the basis of the Claims excluding for Reckless Conduct by the Released Parties, and where such Costs are limited to those arising from: (a) death; or (b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or (c) the contraction, aggravation or acceleration of a disease of an individual; or (d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual: (i) that is or may be harmful or disadvantageous to the individual or community; or (ii) that may result in harm or disadvantage to the individual or community.

- 19) "**Dangerous Recreational Activity**", "**Inherent Risks**", "**Obvious Risks**", and "**Recreational Activity**" have the same meaning as in the Legislation.
- 20) **Publicity.** The Participant consents to the Released Parties taking photographs and/or video of the Participant, or publishing the name of the Participant, in connection with the Participant's presence at and participation in the Diving Activities (the "**Publicity Material**"). The Participant grants the Released Parties a worldwide, royalty-free, non-exclusive, and irrevocable license for the use of the Publicity Material including in marketing and promotional material and on social media.
- 21) **Counterparts.** This Deed may be executed in counterparts and shall become binding on a party when executed and delivered to the other parties, even if the other parties have not yet executed the Deed.
- 22) **Electronic Signatures.** The Parties consent to the requirement for signature being met by electronic signatures including by application of digitised signature, digital pen, typed signature, DocuSign, or similar methods, and such electronic signatures shall be sufficient to bind the Parties to this Deed.
- 23) **Governing Law; Jurisdiction.** This Deed and any dispute or claim arising out of or in connection with this Deed or its subject matter shall be governed by and construed in accordance with the laws of the Jurisdiction. The Parties irrevocably agree the courts of the Jurisdiction shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Deed or its subject matter.
- 24) **Survival.** Each indemnity, disclaimer, warranty, undertaking as to defence, and release in this Deed survives the expiry or termination of this Deed.
- 25) **Successors.** This Deed shall be binding upon the Participant and the Participant's heirs, administrators, executors, personal representatives, dependents and successors. The Participant shall have no right to assign any claim or cause of action against the Released Parties in connection with Diving Activities.
- 26) **Enurement.** This Deed enures for the benefit of the Released Parties and their respective successors and assigns.
- 27) **Variations.** No variation, modification or waiver of any provision in this Deed, nor consent to any departure by any Party from any such provision, shall be effective unless in writing and signed by the Parties as a deed of variation.

- 28) **Entire Agreement.** This Deed constitutes the entire agreement between the Parties relating in any way to its subject matter and supersedes and merges all prior discussion and any prior agreement. Each Party acknowledges that in entering into this Deed it has not relied on any warranty, representation or other promise of any nature not contained in this Deed.
- 29) **Additional Rights.** Any right that the Released Parties may have under this Deed is in addition to and does not replace or limit any other right the Released Parties may have.
- 30) **Construction.** No rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of, or seeks to rely on, this Deed or any part of it.
- 31) **Severability.** If any provision of this Deed is found by a court of competent jurisdiction to be unenforceable for any reason, the remainder of this Deed shall continue in full force and effect to the maximum extent permitted by law.

PARENT/GUARDIAN COVENANT

- 32) Where the Participant is not of the age of majority and/or legally competent to enter into the terms of this Deed, the parent/guardian of the Participant in their personal capacity:
 - a) Represent and warrant they are the parent/guardian of the Participant;
 - b) Represent and warrant the representations contained in this Deed are true and correct;
 - c) Guarantee the rights and indemnities granted as against the Participant pursuant to the terms of this Deed;
 - d) **Personally covenant to indemnify the Released Parties in terms of this Deed;** and
 - e) Give Participant permission to participate in Diving Activities with the Released Parties unaccompanied and acknowledge that the Released Parties will not provide any special assistance to the Participant.

EXECUTED AS A DEED

SIGNED SEALED AND DELIVERED by in the presence of:		
		Participant's Name
Witness' Signature		Participant's Signature

SIGNED SEALED AND DELIVERED by in the presence of:		
		Parent/Guardian's Name
Witness' Signature		Parent/Guardian's Signature

SIGNED SEALED AND DELIVERED by by its authorised officer in the presence of:		DIVE SPEAR AND SPORT PTY LTD
		Dive Operator's Name
Witness' Signature		Authorised Officer's Signature
		Authorised Officer's Name and Position