



**ASIC**

Australian Securities & Investments Commission

**[PF 183]**

**Pro Forma 183**

**Deed of subordination**

**Corporations Act 2001 Chapter 2M**

*Issued 13/8/1998*

*Reissued ##/##/2016*

*This pro forma relates to ASIC Corporations (Audit Relief) Instrument 2016/XX.*

DEED OF SUBORDINATION

This Deed is made the [*insert date*] day of [*insert month and year*]-

BETWEEN

[*insert name, ACN and address of borrower*] (the “Borrower”) of the first part

AND

[*insert name, ACN/ARBN and address of the lender*] (the “Lender”) of the second part

AND

the Australian Securities and Investments Commission (“ASIC”) having its office at [*insert address of office*] of the third part.

WHEREAS

- A The Lender has made or agreed to make, at the request of the Borrower, a loan (“the Loan”) to the Borrower of the amount set out in the Schedule on the terms and conditions specified in the Schedule.
- B The Lender has agreed, at the request of the Borrower, to subordinate ~~its loan~~ the Loan to the claims of the other Unsubordinated Creditors of the Borrower.
- C The Lender has not entered into any arrangement which gives rise to an existing charge to any party over the Loan.
- D The Borrower is desirous of obtaining relief under the Audit

Relief ~~Class Order~~Legislative Instrument from the requirement to have its financial report audited.

It is agreed as follows:

## 1 Definitions and interpretations

1.1 In this Deed, unless the context otherwise requires:

- (a) **Audit Relief** ~~Class Order~~Legislative Instrument means ASIC Corporations (Audit Relief) Instrument 2016/XX ASIC Class Order [CO 98/1417] (see [CO 98/1417] dated 13 August 1998 or a corresponding replacement ASIC legislative instrument.
- (b) **Collateral** means any security or additional security to be provided to secure the Subordinated ~~Debt~~Loan.
- (c) **Consolidated Financial Statements** has the same meaning as that term is given in Accounting Standard AASB 10 *Consolidated Financial Statements*.
- (d) **Financial Conditions** means, if the Borrower has obtained relief under the Audit Relief ~~Class Order~~Legislative Instrument at any time since the date of this Deed, that:
- (A) the ratio of total liabilities to total tangible assets of the Borrower does not exceed 70%;
- (B) if the Borrower is a Reporting Entity (within the meaning of Accounting Standard AASB 1053 Application of Tiers of Australian Accounting Standards) or voluntarily prepares consolidated Management Accounts or Consolidated Financial Statements, the ratio of total consolidated liabilities to total consolidated tangible assets does not exceed 70%; and
- (C) if the Borrower is a party to any ~~d~~dDeed of ~~c~~cCross ~~g~~gGuarantee for the purposes of relief to its wholly-owned entities under the Wholly-owned Entities ~~Class Order~~Legislative Instrument, the ratio of total consolidated liabilities of the entities comprising the closed group ("closed group" being as defined in that ~~class order~~legislative instrument) to total consolidated tangible assets of the entities comprising the closed group does not exceed 70%;
- where liabilities and assets are determined in accordance with paragraph ~~6~~(7) of the Audit Relief ~~Class Order~~Legislative Instrument.
- (e) **Financial Report** has the same meaning as that term is given in the *Corporations Act 2001*.

- (f) **Loan** means the Principal Sum advanced by the Lender to the Borrower and includes any related interest, costs and charges, ~~relating to the loan~~ but does not include any subsequent advances made by the Lender to the Borrower.
- (g) **Management Accounts** means management accounts prepared by the Borrower for the purposes of the Audit Relief ~~Class Order~~Legislative Instrument.
- (h) **Principal Sum** means the sum specified in the Schedule as the Principal Sum advanced by the Lender to the Borrower.
- (i) **Subordinated Loan** means the Loan subordinated to the ~~un~~Unsubordinated ~~C~~Creditors of the Borrower pursuant to this Deed.
- (j) **Unsubordinated Creditors** means the Borrower's creditors (whether present or future, secured or unsecured) other than the Lender.
- (k) **Wholly-owned Entities** ~~Class Order~~Legislative Instrument means ASIC Class Order [CO 98/1418] ~~(see [CO 98/1418] dated 13 August 1998, ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX—~~ or a corresponding replacement ASIC legislative instrument.
- 1.2 (a) Words importing the singular are taken to include the plural and vice versa.
- (b) References to laws include all laws amending, consolidating or replacing the laws referred to.
- (c) Headings do not form a part of this Deed and are inserted only for convenience of reference.

## 2 Loan

The Lender acknowledges that it has advanced or has agreed to advance, at the request of the Borrower, the Principal Sum for the period specified in the Schedule on terms and conditions set out in the Schedule.

## 3 Conditions of loan

- 3.1 Any demand by the Lender for repayment of the whole or any part of the Subordinated Loan shall be subject to Clauses 4 and 6.
- 3.2 The Borrower may, subject to Clauses 4 and 6, repay at any time the whole or any part of the Subordinated Loan.
- 3.3 The Borrower will be indebted to the Lender in relation to interest accumulating in relation to the Subordinated Loan at the

rate set out in the Schedule.

- 3.4 The Borrower must not make any payments of interest to the extent that they would result in, or in the reasonable opinion of the directors of the Borrower would (in the foreseeable future) be likely to result in, a Financial Condition not being met.

#### **4 Subordination**

- 4.1 The Lender, the Borrower and ASIC mutually acknowledge covenant and agree that the repayment of the Principal Sum and all other monies owing to the Lender pursuant to this Deed shall be subordinated at all times, during the term of the Subordinated Loan, to all the claims, demands, rights and causes of action of all Unsubordinated Creditors.
- 4.2 The Lender covenants and agrees with ASIC and the Borrower not to prove or claim, in the event of the insolvency of the Borrower, for the repayment of the Subordinated Loan in competition with any Unsubordinated Creditor or which would in any way diminish any distribution, dividend or payment which, but for such proof or claim, the Unsubordinated Creditor would be entitled to receive.

#### **5 Set-off and charges**

- 5.1 The Borrower and Lender agree and covenant with ASIC not to enter into any arrangement whereby the Subordinated Loan is capable of being set-off at any time against any amounts which are owed, or which may become owing in the future, by the Lender to the Borrower.
- 5.2 The Lender agrees and covenants with ASIC not to enter into any arrangement whereby a charge would be created in relation to the Loan.

#### **6 Conditions precedent to repayment**

- 6.1 The Lender agrees and covenants with ASIC not, at any time, to demand or commence proceedings for repayment or recovery of the whole or any part of the Subordinated Loan without prior approval in writing of ASIC. Such consent shall be granted if ASIC is satisfied that the Borrower is capable of complying with the Financial Conditions following the withdrawal of the Subordinated Loan.
- 6.2 The Borrower agrees and covenants with ASIC as follows:
- (i) not to repay the whole or any part of the Subordinated Loan to the Lender without prior written approval of ASIC,
  - (ii) not to provide to the Lender any ~~additional~~ collateral as security for the Subordinated Loan without prior written approval of ASIC, and

- (iii) to notify ASIC in writing if any demand is made or proceedings commenced by the Lender to recover the whole or any part of the Subordinated Loan.

## 7 Variation and discharge

The parties acknowledge and agree that the full agreement between them with respect to the sSubordination of the Loan is set out in this Deed and that no variation or amendment of the terms of this Deed or discharge of the obligations under this Deed will be carried out or effected without prior written approval of all the parties.

## 8 Fees charges and expenses

The Borrower shall pay all of the legal charges, stamp duties and other expenses incurred by the Lender and ASIC in connection with the preparation, execution and implementation of this Deed and any amendments of the Deed.

## 9 Continuing agreement

This Deed shall constitute a continuing agreement and shall bind the parties and their successors and assigns.

## 10 Governing Law

This Deed shall be governed by and construed in accordance with the laws of [*specify the state or territory*] and the parties agree to submit to the jurisdiction of the cCourts of that state.

## 11 Notices

Any notice, demand, consent in writing or other communication required to be given under this Deed shall be given to or served upon the respective parties to this Deed at their address specified in this Deed or at such other address as each of the parties from time to time specify by notice in writing to the other parties.

IN WITNESS WHEREOF the parties hereto have executed this Deed under Seal the day and year first above written.

### THE SCHEDULE

- 1 Principal Sum:
- 2 Term:
- 3 Rate of interest:
- 4 Payable:

[*insert any other matters*]

The COMMON SEAL of [*insert name of the Borrower*] was placed on the [*insert date*] day of [*insert month and year*] in accordance

with its constitution in the presence of:

.....

Signing clause for the Lender \*

The COMMON SEAL of the AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION was duly affixed hereto in the presence

of ..... on .....

\* Where the Lender is a company:

The COMMON SEAL of [*insert name of Lender*] was placed on the [*insert date*] day of [*insert month and year*] in accordance with its constitution in the presence of:

.....

Where the Lender is a natural person:

Signed Sealed and Delivered by

..... on .....

in the presence of:

..... on .....