



ASIC

Australian Securities & Investments Commission

[PF 63]

Pro Forma 63

Deed of subordination

Issued: October 2017

(Previous version SPF 63D issued June 2004)

Corporations Act 2001 Chapter 7

This deed is for holders of Australian financial services licences who seek to have subordinated debt taken into account in satisfying the net tangible assets and surplus liquid funds requirements under their licence.

DEED OF SUBORDINATION

THIS DEED is made the day of 20[]

BETWEEN

[*Specify the name and address of the Debtor*], hereinafter called “the Debtor” of the first part

AND

[*Specify the name and address of the Lender*], hereinafter called “the Lender” of the second part

AND

THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION having its office at 120 Collins Street, Melbourne VIC 3000, hereinafter called “ASIC” of the third part.

Recitals

- A The Debtor holds an Australian financial services licence (the “AFS licence”).
- B The Lender at the request of the Debtor has agreed to lend to the Debtor the Principal Sum set out in the Schedule on the terms and conditions specified in the Schedule.
- C The Lender has agreed, at the request of the Debtor, to subordinate the Debt to the claims of the Unsubordinated Creditors of the Debtor, regardless of whether the Debtor has ceased to hold the AFS licence or the term of the loan has ended.
- D In consideration of ASIC agreeing to approve the Subordinated Debt for the purposes of the definition of “adjusted liabilities” in the AFS licence, the Lender and the Debtor have agreed to enter into the covenants in this Deed.

It is agreed as follows:

1 Definitions and interpretations

1.1 In this Deed, unless the context otherwise requires:

- (a) “Collateral” means any security or additional security to be provided to secure the Subordinated Debt.
- (b) “Debt” means the Principal Sum owed by the Debtor to the Lender and any interest, costs and charges relating to the debt but does not

include any subsequent amounts borrowed by the Debtor from the Lender.

- (c) “Principal Sum” means the sum specified in the Schedule as the Principal Sum borrowed by the Debtor from the Lender.
- (d) “Subordinated Debt” means the Debt, subordinated to the Unsubordinated Creditors of the Debtor, under this Deed.
- (e) “Unsubordinated Creditors” means the Debtor’s creditors (whether present or future, secured or unsecured) other than the Lender.

1.2 In this Deed, unless the context otherwise requires:

- (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 Debt

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

3 Terms and Conditions

- 3.1 Any demand by the Lender for repayment of the whole or any part of the Subordinated Debt shall be subject to Clauses 4 and 5.
- 3.2 The Debtor may, subject to Clauses 4 and 5, repay at any time the whole or any part of the Subordinated Debt.
- 3.3 The Debtor must pay interest and, in the event of any default by the Debtor under this Clause, default interest, to the Lender at the rates set out in the Schedule.

4 Subordination

- 4.1 The Lender, the Debtor and ASIC agree that the repayment of the Debt shall be subordinated at all times, unless and until ASIC gives a written consent under Clauses 5.1 or 5.2(a), to all the claims, demands, rights and causes of action of all Unsubordinated Creditors.
- 4.2 The Lender agrees with ASIC and the Debtor not to prove or claim, in the event of the insolvency of the Debtor, for the repayment of the Subordinated Debt in competition with any Unsubordinated Creditor or take any action which would in any way diminish any distribution,

dividend or payment which, but for such proof, claim or action, the Unsubordinated Creditor would be entitled to receive.

5 Conditions precedent to repayment

5.1 The Lender agrees with ASIC not, at any time (regardless of whether the term of the loan has ended or the Debtor has ceased to hold the AFS licence), to demand or commence proceedings for repayment or recovery of the whole or any part of the Subordinated Debt without the prior consent in writing of ASIC.

5.2 The Debtor agrees with ASIC as follows:

- (a) not to repay the whole or any part of the Subordinated Debt to the Lender at any time (regardless of whether the term of the loan has ended or the Debtor has ceased to hold the AFS licence) without the prior written consent of ASIC;
- (b) not to provide to the Lender any additional Collateral as security for the Subordinated Debt without the prior written consent of ASIC; and
- (c) to notify ASIC in writing if any demand is made or proceeding commenced by the Lender to recover the whole or any part of the Subordinated Debt.

5.3 ASIC will give the consent referred to in Clauses 5.1 and 5.2(a) if satisfied that:

- (a) in the case where the Debtor has ceased to hold the AFS licence—the Subordinated Debt is no longer required to assist the Debtor in meeting obligations arising from its AFS licence; or
- (b) in any other case—following the repayment or part repayment the Debtor will be capable of complying with the financial conditions in the AFS licence.

6 Variation and discharge

The Debtor and the Lender agree that the full agreement between the parties with respect to the subordination of the Debt 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 the prior written consent of all the parties.

7 Fees, charges and expenses

The Debtor must 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 made to this Deed.

8 Continuing agreement

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

9 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 non-exclusive jurisdiction of the Courts of that State or Territory and any Courts which hear appeals from those Courts in respect of any proceedings in connection with this Deed.

10 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 may from time to time specify by notice in writing to the other parties.

Executed as a Deed on the date set out above.

The Schedule

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

[*insert any other matters*]

[Select one signature block for completion by each of the three parties. Delete signature blocks that are not applicable for the Debtor and the Lender.]

[Where the Debtor is a company executing the deed without affixing a seal insert:]

Executed as a Deed by the Debtor in accordance with section 127 of the Corporations Act 2001 by:

.....
Secretary/Director	Director
[Insert Name]	[Insert Name]

[Where the Debtor is a company executing the Deed under common seal insert:]

THE COMMON SEAL of [insert company name])

was fixed in the presence of:)

)

.....
Secretary/Director	Director
[Insert Name]	[Insert Name]

[Where the Debtor is a natural person insert:]

Signed, sealed and delivered by:

.....
Name of Debtor [Insert Name]	Name of Witness [Insert Name]

[Where the Lender is a company executing the deed without affixing a seal insert:]

Executed as a Deed by the Lender in accordance with section 127 of the Corporations Act 2001 by:

.....
Secretary/Director	Director
[Insert Name]	[Insert Name]

[Where the Lender is a company executing the Deed under common seal insert:]

THE COMMON SEAL of [insert company name])
was fixed in the presence of:)
)

.....
Secretary/Director	Director
[Insert Name]	[Insert Name]

[Where the Lender is a natural person insert:]

Signed, sealed and delivered by:

.....
Name of Lender [Insert Name]	Name of Witness [Insert Name]

Signed, sealed and delivered by a Delegate of the Australian Securities and Investments Commission:

.....
Name of Delegate [Insert Name]	Name of Witness [Insert Name]
Title: [Insert Title]	Title: [Insert Title]