

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited [2020] FCA 716

File number: NSD 1421 of 2019

Judge: **GLEESON J**

Date of judgment: 28 May 2020

Catchwords: **CONSUMER LAW** – unfair contract terms within the meaning of s 12BG(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**Act**) – where bank concedes impugned terms unfair – where parties seek declarations under ss 12BF, 12BG and 12GND, and variations of contract terms under s 12GNB of the Act – principles governing question of whether contract terms unfair under s 12BG

Legislation: *Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010* (Cth) s 24
Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA, 12BF, 12BG, 12BH, 12BK, 12GNB, 12GNC, 12GND
Australian Securities and Investments Commission Regulations 2001 (Cth) r 2B
Federal Court of Australia Act 1976 (Cth) s 21

Cases cited: *Advanced Medical Institute Pty Limited* [2015] FCA 368; [2015] ATPR 42-498
Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd [2017] FCA 602; [2017] ATPR 42-543
Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436
Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited [2015] FCA 1204; (2015) 239 FCR 33; [2015] ATPR 42-513
Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377; (2016) ATPR 42-517
Australian Competition and Consumer Commission v Coles [2014] FCA 1405

Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2006] FCA 1730; (2007) ATPR 42-140

Australian Competition and Consumer Commission v Econovite Pty Ltd [2003] FCA 964

Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd [2017] FCA 1224; [2017] ATPR 42-558

Forster v Jododex Australia Pty Ltd [1972] HCA 61; (1972) 127 CLR 421

Jetstar Airways Pty Ltd v Free [2008] VSC 539

Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28; (2016) 258 CLR 525

Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50; (2015) 236 FCR 199

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438

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Counsel for the Plaintiff:	R Scruby and T Jonker
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	P Neskovicin and C van Proctor
Solicitor for the Defendant:	Allens

ORDERS

NSD 1421 of 2019

IN THE MATTER OF BENDIGO AND ADELAIDE BANK LIMITED (ABN 11 068 049 178)

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **BENDIGO AND ADELAIDE BANK LIMITED (ABN 11 068
049 178)**
Defendant

JUDGE: **GLEESON J**

DATE OF ORDER: **28 MAY 2020**

THE COURT DECLARES THAT:

First Delphi Bank Contract

1. Pursuant to s 12GND of the *Australian Securities and Investments Commission Act 2001* (Cth) (**Act**), each of clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 of the Delphi Bank General Conditions dated July 2015 (**Delphi Conditions**) that comprises part of the small business contract between the defendant and the First Delphi Party (as identified in a confidential schedule provided to the defendant) dated 17 May 2018 (**First Delphi Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.
2. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) or alternatively ss 12GNB and 12GNC of the Act, each of clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 of the First Delphi Bank Contract is void *ab initio*.

Second Delphi Bank Contract

3. Pursuant to s 12GND of the Act, each of clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 of the Delphi Conditions that comprises part of the small business contract between the defendant and the Second Delphi Party (as identified in a confidential schedule provided to the defendant) dated 8 February 2018 (**Second Delphi Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.

4. Pursuant to s 21 of the FCA Act or alternatively s 12GNB and s 12GNC of the Act, each of clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 of the Second Delphi Bank Contract is void *ab initio*.

First Rural Bank Contract

5. Pursuant to s 12GND of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Rural Bank Facility Terms dated November 2016 (**Rural Conditions**) that comprises part of the small business contract between the defendant and the First Rural Party (as identified in a confidential schedule provided to the defendant) dated 5 June 2017 (**First Rural Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.
6. Pursuant to s 21 of the FCA Act or alternatively s 12GNB and s 12GNC of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the First Rural Bank Contract is void *ab initio*.

Second Rural Bank Contract

7. Pursuant to s 12GND of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Rural Conditions that comprises part of the small business contract between the defendant and the Second Rural Party (as identified in a confidential schedule provided to the defendant) dated 13 December 2017 (**Second Rural Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.
8. Pursuant to s 21 of the FCA Act or alternatively s 12GNB of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Second Rural Bank Contract is void *ab initio*.

Third Rural Bank Contract

9. Pursuant to s 12GND of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Rural Conditions that comprises part of the small business contract between the defendant and the Third Rural Party (as identified in a confidential schedule provided to the defendant) dated 5 July 2017 (**Third Rural Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.
10. Pursuant to s 21 of the FCA Act or alternatively s 12GNB and s 12GNC of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Third Rural Bank Contract is void *ab initio*.

Fourth Rural Bank Contract

11. Pursuant to s 12GND of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Rural Conditions that comprises part of the small business contract between the defendant and the Fourth Rural Party (as identified in a confidential schedule provided to the defendant) dated 15 August 2017 (**Fourth Rural Bank Contract**) is an unfair term within the meaning of s 12BG of the Act.
12. Pursuant to s 21 of the FCA Act or alternatively s 12GNB and s 12GNC of the Act, each of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Fourth Rural Bank Contract is void *ab initio*.

Delphi Conditions

13. Pursuant to s 12GND and s 12GNB of the Act, or alternatively s 21 of the FCA Act, any term in the same form as any of clauses 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 of the DelphiConditions in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Delphi Conditions and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and is void pursuant to s 12BF(1) of the Act and is void *ab initio*.

Rural Conditions

14. Pursuant to s 12GND and s 12GNB of the Act, or alternatively s 21 of the FCA Act, any term in the same form as any of clauses 2.3, 2.4, 4.2, 4.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1 and 13.1 of the Rural Conditions, in any small business contract entered into or amended or renewed on or after 12 November 2016 between the defendant and any of its customers, which incorporates the Rural Conditions and meets the definition of a small business contract within the meaning of s 12BF(4) of the Act and which is a standard form contract within the meaning of s 12BK of the Act and is a contract for a financial product or a contract for the supply or possible supply of financial services within the meaning of the Act is an unfair term within the meaning of s 12BG of the Act and is void pursuant to s 12BF(1) of the Act and is void *ab initio*.

THE COURT ORDERS THAT:

15. Pursuant to s 12GNB of the Act, the First Delphi Bank Contract be varied with effect from the date of the contract by replacing clause 14 with the clause relevantly specified in annexure “A” to these orders.
16. Pursuant to s 12GNB of the Act, the Second Delphi Bank Contract be varied with effect from the date of the contract by replacing clause 14 with the clause relevantly specified in annexure “A” to these orders.
17. Pursuant to s 12GNB of the Act, the First Rural Bank Contract be varied with effect from the date of the contract by replacing clauses 4.4 and 12.1 with the clauses relevantly specified in annexure “A” to these orders.
18. Pursuant to s 12GNB of the Act, the Second Rural Bank Contract be varied with effect from the date of the contract by replacing clauses 4.4 and 12.1 with the clauses relevantly specified in annexure “A” to these orders.
19. Pursuant to s 12GNB of the Act, the Third Rural Bank Contract be varied with effect from the date of the contract by replacing clauses 4.4 and 12.1 with the clauses relevantly specified in annexure “A” to these orders.
20. Pursuant to s 12GNB of the Act, the Fourth Rural Bank Contract be varied with effect from the date of the contract by replacing clauses 4.4 and 12.1 with the clauses relevantly specified in annexure “A” to these orders.
21. The defendant file and serve its undertaking to the Court not to use or rely upon certain contract terms, referred to in para 3 of the joint submissions filed on 7 May 2020, within seven days of the date of this order.
22. The defendant pay the plaintiff’s costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ANNEXURE “A”

Schedule

Replacement clause 14 of the Delphi Conditions

14. COSTS

The Borrower indemnifies the Bank in respect of, and shall on demand pay to the Bank all costs, (including legal expenses) and stamp duty and other taxes and fees in connection with:

- (a) the negotiation, preparation, review, amendment, execution, stamping and registration of;
- (b) any property valuations required by the Bank in connection with,
- (c) the exercise or attempted exercise of the preservation of any rights of the Bank under;
- (d) any Event of Default in relation to;

the Finance Agreement and each other Transaction Document (including, without limitation, any existing Security or other document which is or is to be a Transaction Document).

The Borrower is not required to indemnify the Bank in respect of any amount which arises from any mistake, fraud, negligence or willful misconduct by:

- (a) the Bank;
- (b) the Bank's officers, employees, contractors or agents; or
- (c) any receivers appointed by the Bank over any secured property.

Replacement clause 4.4 of the Rural Conditions

4.4 Change to terms

Acting reasonably and to the extent reasonably necessary to protect *our* legitimate business interests, we may vary any terms of the contract constituted by the *letter of offer* and these terms in accordance with the table below, or as otherwise expressly permitted by another clause of the contract.

Type of change	Minimum notice period
<i>Interest rate</i> changes linked to money markets or other external rates (except that we will not change a <i>fixed interest rate</i> during a <i>fixed rate period</i>)	As soon as reasonably practicable after the change
Changing any margin which applies to an <i>interest rate</i> (a margin is a component of <i>your interest rate</i> added to the base rate to reflect <i>our</i> costs and assessment of borrowing risk)	90 days, or shorter if the change is not adverse to <i>you</i>
Changing the manner in which interest is calculated or applied	90 days, or shorter if the change is not adverse to <i>you</i>
Changing the amount or frequency of repayments, or minimum repayments, required	90 days, or shorter if the change is not adverse to <i>you</i> ; or for a change to a minimum repayment amount resulting from changes linked to money markets or other external rates, 30 days, or shorter if the change is not adverse to <i>you</i>
Changing fees and charges resulting from changes to <i>our</i> cost base (however, we will not change how the <i>break cost</i> is calculated, in a way which may have the effect of increasing it, during a <i>fixed rate period</i>)	90 days, or shorter if the change is not adverse to <i>you</i>
Introducing or changing any government charge or tax	30 days, or shorter as required by law or if the change is not adverse to <i>you</i>
Changes: <ul style="list-style-type: none"> • of an administrative nature or which we make in order to fix an error, inconsistency or omission; • to replace a base rate or index with a different base rate or index; • to comply with regulatory changes 	30 days, or shorter as required by law or if the change is not adverse to <i>you</i>

Any other change which we reasonably consider will not be adverse to <i>you</i> (for example, because it has the effect of reducing <i>your</i> obligations or giving <i>you</i> further time to comply with a requirement)	No later than the date the change takes effect
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If *you* choose to exit the contract due to a change made by *us* under this clause, we will not charge *you* any discharge fees (but where a *fixed interest rate* applies, we may still charge *break costs* in accordance with clause 7).

We will give *you* notice of any variation in accordance with the table above and clause 13.5. Other than *interest rate* changes linked to money markets or other external rates, any variation will take effect from the date specified in the notice. If any law (including the *National Credit Code*) or *code* applies to the *facility* and requires *us* to give *you* a minimum period of prior notice of a variation taking effect, we will give at least that minimum period of notice.

Replacement clause 12.1 of the Rural Conditions

12. INDEMNITIES

Note: This clause contains indemnities given by *you* and each *guarantor* to *us* and provisions dealing with the extent of those indemnities

12.1 Nature

You and each *guarantor* indemnifies, and must keep indemnified, *us* against any liability, loss, cost or expense which *we* incur or sustain or for which *we* become liable, which is caused, or contributed to (to the extent of that contribution), by:

- (a) any *event of default*;
- (d) any act by *us* in reliance on any communication from *you* or to be given on *your* behalf;
- (f) any claim against *us* under, or in connection with, an *external obligation*; and
- (g) the repayment to, or receipt by, *us* of all or any part of an *advance*, in relation to which the *interest rate* is fixed, prior to the expiry of the *fixed rate period*.

You are not required to indemnify *us* in respect of any amount which arises from any mistake, fraud, negligence or willful misconduct by:

- (a) *us*;
- (b) *our* officers, employees, contractors or agents; or
- (c) any receivers appointed by *us* over any secured property.

REASONS FOR JUDGMENT

GLEESON J:

1 The plaintiff (**ASIC**) seeks declarations and other orders in connection with certain contracts used by the defendant (**Bank**) through two divisions, called Delphi Bank and Rural Bank. ASIC alleges and the Bank accepts that the contracts contain terms that are unfair within the meaning of s 12BG(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**Act**) and are therefore void pursuant to s 12BF(1) of the Act.

2 The impugned terms are contained in:

- (1) the Delphi Bank General Conditions dated July 2015 (**Delphi Conditions**); and
- (2) the Rural Bank Facility Terms (2016 Version 1) dated November 2016 (**Rural Conditions**).

3 The impugned terms are set out at Schedules 1 and 2 to these reasons. A complete version of the Delphi Conditions is contained in Schedule 3 to these reasons. A complete version of the Rural Conditions is contained in Schedule 4 to these reasons.

4 The parties filed joint submissions in relation to the relief sought by ASIC, including proposed orders to be sought from the Court to resolve the proceeding.

5 ASIC does not allege that the Bank has relied upon any of the impugned terms in a manner that is unfair, or that has caused any customers to suffer loss or damage. The Bank has given an undertaking to ASIC and will give an undertaking to the Court, not to use or rely upon any of the impugned terms. Consequently, ASIC has withdrawn its claim for injunctive relief against the Bank.

6 For the reasons set out below, I am satisfied that the Court has power to make the proposed orders and that it is appropriate to make orders substantially in the terms sought.

CONSUMER PROTECTION IN RELATION TO UNFAIR CONTRACT TERMS

7 Part 2 of the Act is headed “Australian Securities and Investments Commission and consumer protection in relation to financial services”. Division 2 of Pt 2 is headed “Unconscionable conduct and consumer protection in relation to financial services” and deals with unfair contract terms, unconscionable conduct, consumer protection and conditions and warranties in consumer transactions.

8 This matter is concerned with ss 12BF, 12BG, 12BH and 12BK, in Subdiv BA of Div 2 which is headed ‘Unfair contract terms’.

9 Section 12BF provides, relevantly:

- (1) A term of a ... small business contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract; and
 - (c) the contract is:
 - (i) a financial product; or
 - (ii) a contract for the supply, or possible supply, of services that are financial services.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- ...
- (4) A contract is a small business contract if:
 - (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - (b) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.
- (5) In counting the persons employed by a business for the purposes of paragraph (4)(a), a casual employee is not to be counted unless he or she is employed by the business on a regular and systematic basis.
- (6) For the purposes of subsection (4) and despite subsection 12BI(3), in working out the upfront price payable under a contract under which credit is or is to be provided, disregard any interest payable under the contract.

10 Section 12BK(1) provides that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

11 Relevantly, s 12BAA(7)(k) provides that, subject to subs (8), a “credit facility (within the meaning of the regulations)” is a financial product for the purposes of Div 2.

12 Regulation 2B(1) of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (**Regulations**) provides that the provision of credit for any period is a “credit facility” for

the purposes of s 12BAA(7)(k). By reg 2B(3)(a), “credit” means a contract, arrangement or understanding under which payment of a debt owed by one person (a debtor) to another person (a credit provider) is deferred or a debtor incurs a deferred debt to a credit provider. By reg 2B(3)(b)(i) and (ix), “credit” includes any form of financial accommodation and a financial benefit arising from or as a result of a loan.

13 Section 12BG deals with when a term will be ‘unfair’ and provides that:

- (1) A term of a contract referred to in subsection 12BF(1) is unfair if:
 - (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is transparent if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.
- (4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

14 Section 12BH provides some examples of the kind of terms that may be unfair including, relevantly:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

...

- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

...

- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;

...

- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract.

Unfairness: case law

- 15 The parties accepted that the case law dealing with the corresponding legislative regime in Chapter 2 of the *Australian Consumer Law*, Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**ACL**) is relevant to the interpretation of the provisions applicable in this case.
- 16 Section 24 of the ACL is in identical terms to s 12BG of the Act.
- 17 The underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377; (2016) ATPR 42-517 (**CLA Trading**) at [54(a)], *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 (**Jetstar**) at [112].
- 18 There is no presumption that terms of the kind listed in s 12BH are unfair. However, a contextual approach to statutory interpretation cannot ignore the matters at s 12BH which are specifically provided for the purpose of giving examples of potentially unfair terms: *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33; [2015] ATPR 42-513 (**Chrisco**) at [44].
- 19 Unfairness can be created by a number of terms operating in conjunction to create an overall effect: *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436 (**Ashley & Martin**) at [160].

20 The assessment of “unfairness” is to be carried out with a close attendance to the statutory provisions and is of a lower moral or ethical standard than unconscionability: *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 at [363]-[364].

Significant imbalance in parties rights and obligations: 12GB(1)(a)

21 Relevant principles outlined in *CLA Trading* at [54] include:

- (b) the requirement of a “significant imbalance” directs attention to the substantive unfairness of the contract: *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 at [37];
...
- (d) the “significant imbalance” requirement is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director-General of Fair Trading v First National Bank* at 494 [17] per Lord Bingham, applied in *ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [950];
- (e) significant in this context means “significant in magnitude”, or “sufficiently large to be important”, “being a meaning not too distant from substantial”: *Jetstar ...* at [104]-[105] per Cavanough J: Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [32]- [33];...

22 The lack of individual negotiation of contracts between an entity and its customers is not relevant to whether a term causes a significant imbalance in the rights and obligations arising under the contract. The assessment of that question requires consideration of the relevant term together with the parties’ other rights and obligations arising under the contract: *Chrisco* at [50]-[51].

23 It is suggested in *CLA Trading* at [54(c)] that it is useful to assess the impact of an impugned term on the parties’ rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. This exercise is less appropriate where the alleged unfairness is not created by a single term but by a number of terms operating in conjunction: *Ashley & Martin* at [160].

24 Factors that have been identified as relevant include whether:

- (1) The customer can “opt-out” of an unfair term: *Chrisco* at [52].

- (2) The contract gives one party a right without imposing on that party a corresponding duty or without giving any substantial corresponding right to the counterparty: *Chrisco* at [53]. A relevant example for the purposes of this matter is at *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224; [2017] ATPR 42-558 (*JJ Richards*) at [56(b)]. In that case, the price variation clause allowed the supplier to unilaterally increase the price of services for any reason. That clause created a significant imbalance in the absence of any corresponding right of the customer to terminate the contract or obtain a change to the scope or scale of services provided under the contract in response to a price increase.
- (3) The party advantaged by the term is better placed to manage or mitigate the risk imposed by the term than the customer: *JJ Richards* at [56(c), (g)]. An example relevant to this matter is found at *JJ Richards* at [56(g)]. There, an indemnity clause created an unlimited indemnity in favour of the supplier, even where the loss incurred by the supplier was not the customer's fault and the supplier could have avoided or mitigated the risk.

Not reasonably necessary to protect legitimate interests: 12GB(1)(b)

25 It is for the party advantaged by an impugned term to rebut the presumption at s 12BG(4) and prove that the impugned term is reasonably necessary to protect its legitimate interests: *Chrisco* at [43]. ASIC relies on the presumption to support its case that none of the impugned terms was at any relevant time reasonably necessary to protect the Bank's legitimate interests.

26 The parties noted the following relevant principles for completeness:

- (1) What is a "legitimate interest" and what is "reasonably necessary" will depend on the particular business of the supplier, including the particular circumstances of the business and the context of the contract as a whole: *Ashley & Martin* at [48], [51].
- (2) "Legitimate interests" may be of a business or a financial nature and are not necessarily monetary. A party may have interests in contractual performance that are intangible and unquantifiable: *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525 at [29], [161] and [266].
- (3) An analysis of what alternatives are available to the party protected by the impugned term and proportionality may be relevant to the question of what is "reasonably necessary" to protect a parties' legitimate interests: *Ashley & Martin* at [54]-[59], [168]; *JJ Richards* at [58(h)].

Detriment

27 More than a mere possibility of detriment is required: *Ashley & Martin* at [60].

28 Relevant examples of detriment include:

- (1) terms that would allow the supplier to charge the customer for damage because the customer has committed a breach of the contract that did not cause or contribute to the damage: *CLA Trading* at [80]; and
- (2) fees imposed on termination of a contract for medical services, comprising a 15% administration fee, a pro-rata fee for the expired portion of the treatment, a pro-rata fee for the 30 day notice period and the cost of medication supplied or prepared for the patient, whether the reason for termination was a change of mind very soon after a phone consultation, a severe adverse side effect or where the relevant medication proved ineffective: *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368; [2015] ATPR 42-498 (*Advanced Medical Institute*) at [951].

Transparency

29 As appears above, s 12BG(3) specifies characteristics of a transparent term, namely, that it is expressed in reasonably plain language; legible; presented clearly and readily available to any party affected by the term.

30 Transparency is to be considered in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term at s 12BG(1)(a)-(c): *Chrisco* at [43].

31 If a term is not transparent it does not mean that it is unfair and if a term is transparent, it does not mean that it is not unfair: *Chrisco* at [43].

32 In *JJ Richards*, Moshinsky J found (at [60]) that terms were not transparent where they were drafted in legal language and not in plain English; they were presented in a very small font size, and not in a way that drew them to the customer's attention, when they could have been presented in a manner that was clearer and more readily accessible to a small business customer.

33 In *Chrisco* at [81], Edelman J found that a term that did not clearly identify amounts that the customer will be charged or the means by which those amounts would be determined was not plain. In *Advanced Medical Institute*, North J found (at [953]) that a term lacked transparency

“to a significant extent” where the basis of calculation of an administration fee imposed by the term was not disclosed; the method of calculation of the cost of medication was not disclosed; the term itself was disclosed in a recorded message and the patient was not provided with a written copy of the term until after the contract was entered into, except in the case of patients who attended clinics.

34 Another matter relevant to transparency is whether terms interact with each other but do not refer to each other: *Chrisco* at [91].

Contract as a whole: s 12BG(2)(c)

35 “In considering ‘the contract as a whole’, not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question”: *CLA Trading* at [54(g)], citing *Jetstar* at [128].

36 It is appropriate to consider how impugned terms interact and how non-impugned terms might ameliorate the impact of impugned terms: *JJ Richards* at [61], [63].

AGREED FACTS

37 The Bank is a publicly listed entity and the holder of an Australian Financial Services Licence. Delphi Bank and Rural Bank are divisions of the Bank.

38 The Bank is Australia’s fifth largest retail bank with around 1.7 million customers, more than \$70 billion of assets under management and a market capitalisation of around \$5.2 billion. It is a top 100 listed company on the Australian Stock Exchange.

Impugned contracts

39 The Bank has used the Delphi Conditions since at least November 2016 and the Rural Conditions since at least April 2017.

40 Between 12 November 2016 and 30 June 2019, the Bank entered into at least:

- (1) 147 facilities which incorporated the Delphi Conditions for which the upfront price payable under the contract did not exceed \$300,000;
- (2) 457 facilities which incorporated the Delphi Conditions for which the contract had a duration of more than 12 months and the upfront price payable under the contract did not exceed \$1 million;

- (3) 1,766 facilities which incorporated the Rural Conditions for which the upfront price payable under the contract did not exceed \$300,000; and
 - (4) 1,333 facilities which incorporated the Rural Conditions for which the contract had a duration of more than 12 months and the upfront price payable under the contract exceeded \$300,000 but did not exceed \$1 million,
- (individually, **relevant facility** and collectively, **relevant facilities**).

41 As at 30 June 2019, the Bank had:

- (1) 94 active facilities which incorporated the Delphi Conditions and had a contract value of less than \$300,000;
- (2) 202 active facilities which incorporated the Delphi Conditions and had a contract value of less than \$1 million;
- (3) 10,485 active facilities which incorporated the Rural Conditions and had a contract value of less than \$300,000; and
- (4) 5,044 active facilities which incorporated the Rural Conditions and had a contract value of less than \$1 million.

Individual contracts

42 ASIC illustrated its case by reference to six particular relevant facilities. Of these, two contracts incorporate the Delphi Conditions and four contracts incorporate the Rural Conditions.

43 The parties noted the following matters concerning the individual contracts:

- (1) The first Delphi Bank contract is a business loan incorporating the Delphi Conditions for \$150,000 with a term of 10 years. At the time of entry into the contract, the other party to the contract, (**First Delphi Bank Party**) conducted a business that had between six and eight employees.
- (2) The second Delphi Bank contract is a business loan incorporating the Delphi Conditions for \$252,000 with a term of 25 years. At the time of entry into the contract, the other party to the contract (**Second Delphi Bank Party**) conducted a business that had no employees.
- (3) The first Rural Bank contract is a facility incorporating the Rural Conditions for up to \$425,000 for 60 months. At the time of entry into the contract, the other party to the

contract (**First Rural Bank Party**) conducted a business that had no permanent employees or employees employed on a regular and systematic basis.

- (4) The second Rural Bank contract is a facility incorporating the Rural Conditions for up to \$385,000 for 60 months. At the time of entry into the contract, the other party to the contract (**Second Rural Bank Party**) conducted a business that had no permanent employees or employees employed on a regular and systematic basis.
- (5) The third Rural Bank contract is a facility incorporating the Rural Conditions for up to \$200,000, repayable on demand. At the time of entry into the contract, the other party to the contract (**Third Rural Bank Party**) conducted a business that had no permanent employees or employees employed on a regular and systematic basis.
- (6) The fourth Rural Bank contract is a facility that incorporates the Rural Conditions for up to \$150,000, repayable on demand. At the time of entry into the contract, the other party to the contract, (**Fourth Rural Bank Party**) conducted a business that had no permanent employees or employees employed on a regular and systematic basis.

Application of law to relevant facilities and individual contracts

44 The parties agreed that some, likely a significant number, of the relevant facilities are small business contracts within the meaning of s 12BF(4).

45 The parties also agreed that each of the individual contracts is a small business contract within the meaning of s 12BF(4).

46 The Bank accepted that each relevant facility (including each of the six individual contracts) is a standard form contract within the meaning of s 12BK.

47 The Bank also accepted that each relevant facility (including each of the six individual contracts) is:

- (1) A credit facility within the meaning of s 12BAA(7)(k) of the Act and the Regulations;
and
- (2) A financial product or a contract for the supply, or possible supply of services that are financial services within the meaning of s 12BF(1)(c) of the Act.

Unfair Terms

48 The impugned terms fall into the following four categories:

- (1) indemnification clauses (cl 14 of the Delphi Conditions and cl 12.1 of the Rural Conditions);
- (2) event of default clauses (cll 8(1)(c), (p), (q) and (v) of the Delphi Conditions and cll 10.1(c), (j), (k) and (n) of the Rural Conditions);
- (3) unilateral variation or termination clauses (cll 11.1 and 22.1 of the Delphi Conditions and cll 2.3, 2.4, 4.2 and 4.4 of the Rural Conditions); and
- (4) conclusive evidence clauses.

Indemnification clauses

49 On their proper construction, cl 14 of the Delphi Conditions and cl 12.1 of the Rural Conditions can be relied on by the Bank to make the customer liable for liability, loss or costs suffered or incurred by the Bank that:

- (1) the customer has not caused; and/or
- (2) has been caused by the Bank's mistake, error or negligence; and/or
- (3) could have been avoided or mitigated by the Bank.

50 The indemnification extends to the Bank's servants and agents (in respect of the Rural Conditions, this is so because of cl 12.3).

51 These terms create a significant imbalance in the parties' rights and obligations in that:

- (1) the customer has no corresponding rights;
- (2) the circumstances in which the liability, loss or costs may be incurred are not within the customer's control; and
- (3) the Bank controls at least some of the circumstances in which the liability, loss or costs may be incurred and can avoid or mitigate that liability, loss or costs.

52 These terms create detriment to the customer if applied or relied upon in an unfair manner because, in the above circumstances, the customer may be required to pay monies to the Bank in which the liability, loss or costs incurred are not within the customer's control, and may not have been caused by the customer, and may have been caused by the mistake, error or negligence of the Bank or its agents, and could have been avoided or mitigated by the Bank or its agents.

53 The terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see ss 12BH(1)(i) and (k). When regard is had to the Delphi Conditions and the Rural Conditions as a whole, there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms.

54 ASIC submits that the terms are not transparent within the meaning of s 12BG(3) because they are not expressed in reasonably plain language or presented clearly. ASIC further submitted that the terms are drafted in legal language and are not by their font or position in the contract drawn to the customer's attention (as distinct from other terms). In addition, taking for example Rural Conditions cl 12.1, to read this term in its entirety, it is necessary to read 35 definitions, including definitions that refer to other definitions. The Bank disagrees. However, the parties jointly submit that whether or not the Court determines that the terms lack transparency, the terms are in any event unfair under s 12GB(1).

55 As to cl 14 of the Delphi Conditions, I accept that it is not transparent in that it does not express the breadth of the borrowers' obligation in reasonably plain terms, instead setting out a multiplicity of examples "without limitation". The reference to "legal expenses on a full indemnity basis" is also not reasonably plain.

56 I also accept that cl 12.1 of the Rural Conditions lacks transparency because it does not state in reasonably plain terms the scope of the borrowers' obligation, and contains a multiplicity of cross-references.

57 The parties submitted that an indemnity clause may be appropriately restricted in its application so as not to fall within the ambit of the legislation. As explained below, the parties seek orders to vary the Delphi Conditions and the Rural Conditions to include amended forms of cl 14 of the Delphi Conditions and cl 12.1 of the Rural Conditions which are appropriately restricted.

Event of default clauses

58 The significant imbalance in the event of default impugned terms is created:

- (1) by the disproportionately severe default consequences set out below;
- (2) because none of the event of default clauses permit the customer to remedy a default which may be capable of remedy;

- (3) because each of the clauses creates a default based on events that may not involve any credit risk to the Bank (for example, by providing misleading or untrue information such as a director's date of birth); and
- (4) in relation to the following clauses, because they create an event of default in the circumstances set out below:
 - (a) an untrue or misleading statement being made or repeated by the customer (or its guarantors) which can in the context of the contract be insignificant, for example, an error as to a director's date of birth: Rural Conditions cl 8.1(c), Delphi Conditions cl 10.1(c);
 - (b) any part of a relevant document (including the Rural Conditions and the Delphi Conditions) being capable of becoming void or voidable, for example, due to this litigation which is entirely within the control of the Bank and not the customer: Rural Conditions cl 8.1(p); Delphi Conditions cl 10.1(n);
 - (c) the Bank unilaterally forms an opinion that something has happened where the Bank's opinion may be wrong or it may also be reasonable to hold the opposite opinion and the customer has no entitlement to rectify any matter on which the Bank's opinion is based: Rural Conditions cl 8.1(q); Delphi Conditions cl 10.1(j); and
 - (d) in vague and largely undefined circumstances: Rural Conditions cl 8.1(v).

59 Default consequences under the Rural Conditions include:

- (1) the Bank is entitled to cancel all or part of any facility with the customer: cl 8.2(a);
- (2) the Bank is entitled to make the outstanding sum due under any facility with the customer payable immediately or on demand: cl 8.2(b);
- (3) the Bank is entitled to enforce its rights under any "relevant document" (which includes any facility, terms and conditions, treasury agreement, guarantee or security document): cl 8.2(c). (The Bank may be required to give notice or to allow the customer to remedy a default before exercising its rights under cl 8 but it is not clear in what circumstances that will be so or how much notice will be given.);
- (4) the customer may be liable for an unspecified amount of break costs: cl 7.1 and cl 7.2. Given the discretion in cl 7.2(b), it is unclear how those costs will be calculated;

- (5) the customer indemnifies the Bank and may be held liable for the Bank's costs of attempting to enforce, restructure or amend the facility: cl 3.7(e) and cl 12.1(a). Those costs are of an unspecified amount and are incurred in circumstances where the customer has no control over how they are incurred;
- (6) there is no right of set-off for the customer but there is for the Bank: cl 3.1 and cl 13.14; and
- (7) with the exception of the right in cl 8.2, the customer does not have any right to prevent any of the above by demonstrating that it has remedied (or will remedy) any default that can be remedied or that there is no credit risk to the Bank.

60 Default consequences under the Delphi Conditions include:

- (1) the customer has no entitlement to use the facility or draw down any funds: cl 2(f);
- (2) the customer indemnifies the Bank and is liable for all costs incurred in relation to the event of default, including an unspecified amount of break costs: cll 11.3 and 14;
- (3) there is no right of set-off for the customer but there is for the Bank: cl 6.3 and cl 17.1; and
- (4) the customer does not have any right to prevent any of the above by demonstrating that it has remedied (or will remedy) any default that can be remedied or that there is no credit risk to the Bank.

61 Each of the impugned event of default clauses would cause detriment to the customer if relied upon within the meaning of s 12BG(1) because of the relevant default consequences.

62 The impugned event of default terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see ss 12BH(b), (c) and (h). When regard is had to the Delphi Conditions and the Rural Conditions as a whole, there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms.

63 ASIC submitted that the terms are not transparent within the meaning of s 12BG(3) for the following reasons:

- (1) they are not expressed in reasonably plain language or presented clearly;
- (2) the terms are drafted in legal language and are not by their font or position in the contract drawn to the customer's attention (as distinct from other terms);

- (3) each of the event of default terms interacts with other terms that it does not refer to: see for example, Rural Conditions cll 3.7(e), 7.1, 7.2, 8.2, 12.1, 13.14; and
- (4) each of the terms interacts with other terms that have the effect of imposing costs in circumstances where it is unclear what those costs will be or how those costs will be calculated: see, for example, Rural Conditions cl 7.1 and cl 7.2.

64 The Bank disagrees. However, the parties jointly submitted that whether or not the Court determines that the terms lack transparency, the terms are in any event unfair under s 12GB(1).

65 I am not persuaded that the relevant Delphi Conditions (cll 10.1(c), 10.1(j), 10.1(k) and 10.1(n)) or the relevant Rural Conditions (cll 8.1(c), 8.1(p), 8.1(q) and 8.1(v)) lack transparency.

Unilateral variation or termination clauses

66 Delphi Conditions cl 11.1 and cl 22.1 and Rural Conditions cll 2.3, 2.4, 4.2 and 4.4 are unilateral variation or termination clauses which permit the Bank to vary the upfront price of the contract, the financial services to be supplied under the contract and other terms of the contract.

67 These terms create a significant imbalance in the parties' rights and obligations because:

- (1) the terms allow the Bank to vary the financial services to permit the Bank to reduce the amount of funds that the customer would otherwise be able to utilise. The Bank's entitlement to do so is limited by the requirement that it give notice (14 days under the Rural Conditions, 30 days under the Delphi Conditions) but that notice period may not be sufficient to provide the customer with an opportunity to refinance;
- (2) the terms allow the Bank unilaterally to vary the contract to permit one party, but not the other, to vary the obligations at will;
- (3) some of the terms permit the Bank to terminate if the customer does not accept the new terms: see Delphi Conditions cl 11.2; Rural Conditions cl 4.2; and
- (4) the customer has no corresponding rights.

68 Terms which allow the Bank to cancel any part of the facility would cause the customer detriment if relied upon because they reduce the amount of funds available to the customer. If the customer wishes to terminate the facility as a result of the Bank relying on one of these terms, unspecified fees and break costs may be payable: see, for example, Rural Conditions

cll 3.7, 7 and 12. That would have the effect of imposing a termination fee regardless of the reason for termination.

69 Terms which allow the Bank unilaterally to vary the terms of the contract, unless used to reduce fees and charges payable or (otherwise benefit the customer) will cause detriment if relied upon in an unfair manner because:

- (1) if the customer accepts the change, it will incur higher fees and charges (or some other consequence which is detrimental to it); and
- (2) if the customer fails to accept the revised terms or fails to provide the additional security requested the facility may terminate in which case the customer is required to pay the outstanding sum within 30 days of 'our original request'. Unspecified fees and break costs may be payable (see, for example, Rural Conditions cll 3.7, 7 and 12). That would have the effect of imposing a termination fee regardless of the reason for termination.

70 These terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see ss 12BH(1)(a), (b), (c), (d) and (g). When regard is had to the Delphi Conditions and the Rural Conditions as a whole, there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms.

71 ASIC submitted that the terms are not transparent within the meaning of s 12BG(3) for the reasons described at [54] above. The Bank disagrees. However, the parties jointly submitted that whether or not the Court determines that the terms lack transparency, the terms are in any event unfair under s 12BG(1).

72 I accept that cl 11.1 lacks transparency, principally because it is predicated upon a "Periodic Review" or a "Periodic Revaluation", each of which is a complex defined term with no apparent "periodic" aspect. Clause 11.1(b) is also notably complex and it is not clear whether there is any limitation on the Bank's power to act "by notice to the Borrower ...".

73 In my view, cl 22 lacks transparency because its title "Changes" does not suggest the breadth of the terms. Similarly cl 2.3 and cl 2.4 of the Rural Conditions are not transparent because they are contained in a section entitled "Use of facility" which is not likely to suggest that it concerns cancellation of the facility. I also accept that cl 4.4 of the Rural Conditions is not transparent because its heading "Change to terms" does not suggest the comprehensive nature of the changes that are permitted by cl 4.4.

74 The parties submitted that a unilateral variation clause may be appropriately restricted in its application so as not to fall within the ambit of the legislation. The parties seek orders to vary the Rural Conditions to include an amended form of cl 4.4 which is appropriately restricted, as set out below.

Conclusive evidence clauses

75 Delphi Conditions cl 17.6 and Rural Conditions cl 13.1 are conclusive evidence clauses that have the effect of imposing the evidential burden on the customer in proceedings relating to the contract. These clauses also have the effect of allowing the Bank but not the customer to terminate the contract if the customer does not pay an amount stated in a certificate created by the Bank by a stated date, in circumstances where the certificate created by the Bank is conclusive evidence of the amount claimed unless the customer is able to demonstrate “manifest error” (in relation to cl 17.6 of the Delphi Conditions), or the customer is able to prove that the certificate is incorrect (in relation to cl 13.1 of the Rural Conditions).

76 These terms create a significant imbalance in the parties’ rights and obligations because:

- (1) the term allows the Bank to impose, by the issuing of a certificate, an evidential burden on the customer about matters upon which the Bank is best placed to provide primary evidence;
- (2) the Bank has no additional duty;
- (3) the customer has no corresponding right; and
- (4) in the case of the Delphi Conditions, the customer can only contest the amount stated in the certificate if the customer can demonstrate “manifest error”.

77 Each of the terms would cause detriment if relied upon because it requires the customer to disprove matters about which the Bank is best placed to provide primary evidence. Further, it would cause detriment if relied upon in circumstances where the certificate was wrong but the customer could not or did not seek to disprove it. This is particularly so in relation to the Delphi Conditions, where the customer cannot contest the amount stated unless the customer can prove that there has been “manifest error”.

78 These terms fall within the list of examples of terms set out in s 12BH(1) that may be unfair: see ss 12BH(1)(l) and (m). When regard is had to the Delphi Conditions and the Rural Conditions as a whole, there is nothing otherwise within the terms of the Delphi Conditions and the Rural Conditions which mitigates the unfairness of these terms.

79 ASIC submits that the terms are not transparent within the meaning of s 12BG(3) because they
are not expressed in reasonably plain language or presented clearly. The terms are drafted in
legal language and are not by their font or position in the contract drawn to the customer's
attention (as distinct from other terms).

80 The Bank disagrees. However, the parties jointly submitted that whether or not the Court
determines that the terms lack transparency, the terms are in any event unfair under s 12BG(1).

81 I agree that the phrase "determination of any amount ... is conclusive in the absence of manifest
error" in cl 17.6 of the Delphi Conditions lacks transparency by reason of its legal language. In
my view, cl 13.1 of the Rural Conditions is sufficiently clear to be transparent.

Conclusion

82 I am satisfied that each of the impugned terms is unfair for the reasons set out above.

RELIEF

83 Subdivision G of Div 2 "Enforcement and remedies" deals with the relief available in respect
of contraventions of Pt 2 of the Act, including in respect of terms declared to be unfair.

Declarations

84 Section 12GND(2), read with s 12GND(3), empowers the Court to declare that a term of a
small business contract, that is a standard form contract and a financial product, is an unfair
term on application by ASIC.

85 Section 12GND(5) provides, relevantly, that s 12GND(2) does not limit any other power of the
Court to make declarations. Thus, the Court's wide discretionary power to make declarations
pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) is not limited by s 12GND(2).

86 Before making a declaration, three requirements should be satisfied:

- (1) the question must be a real and not a hypothetical or theoretical one;
- (2) the applicant must have a real interest in raising it; and
- (3) there must be a proper contradictor: *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; (1972) 127 CLR 421 at 437 per Gibbs J quoting *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 per Dunedin LJ.

87 Where declarations are sought by consent, the Court's discretion is not supplanted; however,
the Court will not usually refuse to give effect to terms of settlement by declining to make

orders where they are within jurisdiction and are otherwise unobjectionable: *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602; [2017] ATPR 42-543 at [96] per Murphy J referring to *Australian Competition and Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] per French J (as his Honour then was).

88 In this case, the requirements of s 12GND(2) and the other requirements for making a declaration are satisfied in respect of each of the impugned terms:

- (1) There is a significant legal controversy in this case which is being resolved. The proposed declarations relate to conduct that contravenes the Act and the matters in issue have been identified and particularised by the parties with precision.
- (2) It is in the public interest for the ASIC to seek to have the proposed declarations made and for the proposed declarations to be made. ASIC, as the statutory authority responsible for enforcing the Act has a genuine interest in seeking the declaratory relief.
- (3) The Bank is a proper contradictor because it is the respondent and is the subject of the proposed declarations. The Bank therefore has an interest in opposing the making of the proposed declarations.

89 I am satisfied that the factual basis for each of the proposed declarations is contained in the agreed facts, as recorded above.

90 Further, having regard to Nicholson J's reasoning in *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140 at [6], I accept that the declarations sought are appropriate because they serve to:

- (1) record the Court's disapproval of the contravening conduct;
- (2) vindicate ASIC's claims that the Bank contravened the Act;
- (3) assist ASIC to carry out the duties conferred upon it by the Act; and
- (4) deter other corporations from contravening the Act.

91 Finally, as explained below, it is necessary for the declarations to be made to enliven the Court's power under s 12GNB to make other orders sought by ASIC.

Other orders

92 Section 12GNB(1) provides:

Without limiting the generality of section 12GD, if:

(a) a person:

...

(ii) is a party to a contract who is advantaged by a term (the declared term) of the contract in relation to which the Court has made a declaration under section 12GND; and

(b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-party consumers in relation to the contravening conduct or declared term;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

93 The Bank is a person referred to in s 12GNB(2)(b).

94 The Bank accepts that the impugned terms (which will be declared terms within the meaning of s 12GNB(1)(b)) are terms which are likely to cause a class of persons to suffer loss or damage.

95 Section 12GNB(3) provides relevantly:

(3) The Court must not make an order under subsection (1) unless the Court considers that the order will:

...

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct or declared term.

96 Section 12BA defined “non-party consumer” relevantly to mean:

(b) in relation to a term of a contract referred to in subparagraph 12GNB(1)(a)(ii)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the term.

97 A term referred to in s 12GNB(1)(a)(ii) is a term of a contract in relation to which the Court has made a declaration under s 12GND.

98 By s 12GNB(8), in determining whether to make an order under s 12GNB(1), the Court is not required to make a finding about which persons are non-party consumers in relation to the

declared term or about the nature of the loss or damage suffered, or likely to be suffered, by such persons.

99 The parties submitted that the term “suffer loss” in s 12GNB(1)(b) should not be read as importing a requirement that the Bank in relying on an impugned term has acted unfairly and improperly.

100 Section 12GNC sets out a non-exhaustive list of the orders that the Court can make under s 12GNB(1) against a person, including relevantly:

- (a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the Court thinks fit--to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the Court thinks fit--declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made) ...

101 In *Australian Competition and Consumer Commission v Coles* [2014] FCA 1405 at [70]-[73], Gordon J set out the following principles concerning making of orders by consent in civil penalty proceedings brought by the Australian Competition and Consumer Commission, which apply equally to cases of this kind:

[70] The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) 161 ALR 79 at [18].

[71] Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.

[72] Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac's Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].

[73] Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

- 102 Each counter-party to each relevant facility in relation to which a declaration will be made will be a non-party consumer for the purpose of s 12GNB(1)(c).
- 103 ASIC does not allege in this proceeding that the Bank has relied on any of the impugned clauses in a manner that is unfair or that has caused any customer to suffer loss or damage. The orders sought are preventative in nature.
- 104 As the parties acknowledged, the Court must not make an order unless satisfied that the order will prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the declared term.
- 105 The parties submitted, in relation to the Delphi Conditions, that the Court will be satisfied that the requirements of s 12GNB(2)(b) are met because:
- (a) each of cls. 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1, 14, 17.6 and 22.1 is unfair within the meaning of s 12BG;
 - (b) the parties agree that reliance by the Bank on any of cls. 10.1(c), 10.1(j), 10.1(k), 10.1(n), 11.1 or 14 would cause or be likely to cause the counter-party to suffer loss or damage;
 - (c) the parties agree that cls. 17.6 and 22.1 can be used in a manner that is unfair. If they are used that way, they would cause or be likely to cause the counter-party to suffer loss or damage;
 - (d) if a term is unfair, there is at least a risk that it will be used in a manner that is unfair;
 - (e) it is not necessary for the Court to make any findings as to the nature of the loss or damage likely to be suffered. It is submitted, however, that the loss or damage

would likely be what is characterised as detriment in relation to each of the relevant unfair terms; and

- (f) the orders are drafted to vary cl. 14 such that it cannot be used in a manner that is unfair.

106 In relation to the Rural Conditions, the parties submitted that the Court will be satisfied that the requirements of s 12GNB(2)(b) are met because:

- (a) each of cls. 4.2, 4.4, 2.3, 2.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v), 12.1, 13.1 and 22.1 is unfair within the meaning of s 12BG;
- (b) the parties agree that reliance by the Bank on any of cls. 2.3, 2.4, 8.1(c), 8.1(p), 8.1(q), 8.1(v) and 12.1 would cause or be likely to cause the counter-party to suffer loss or damage;
- (c) the parties agree that cls. 4.2, 4.4 and 13.1 and 22.1 can be used in a manner that is unfair. If they are used that way, they would cause or be likely to cause the counter-party to suffer loss or damage;
- (d) if a term is unfair, there is at least a risk that it will be used in a manner that is unfair;
- (e) it is not necessary for the Court to make any findings as to the nature of the loss or damage likely to be suffered. It is submitted, however, that the loss or damage would likely be what is characterised as detriment in relation to each of the unfair terms; and
- (f) the orders are drafted to vary cls, 4.4 and 12.1 such that they cannot be used in a manner that is unfair.

107 I accept those submissions and accordingly accept that it is appropriate to make the other orders sought. It is also appropriate to make an order that the Bank pay the costs of the proceeding.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:



Dated: 28 May 2020

SCHEDULE 1

10

Schedule 1

Extracts of the Delphi Conditions

Clause 10.1(c) of the Delphi Conditions

1. Clause 10.1(c) of the Delphi Conditions reads:

10. EVENTS OF DEFAULT

10.1 General

Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

(c) if any representation, warranty or statement made or repeated in or in connection with the Finance Agreement or any other Transaction Document is untrue or misleading (whether by omission or otherwise) when made or repeated.

Clause 10.1(j) of the Delphi Conditions

2. Clause 10.1(j) of the Delphi Conditions reads:

10. EVENTS OF DEFAULT

10.1 General

Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

(j) If an event occurs or circumstances arise which, in the opinion of the Bank may have a material adverse effect on the business, assets or financial condition of the Borrower, or a Relevant Company or on the ability of the Borrower or a Surety to perform its obligations under any Transaction Document.

Clause 10.1(k) of the Delphi Conditions

3. Clause 10.1(k) of the Delphi Conditions reads:

10. EVENTS OF DEFAULT

10.1 General

Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

(k) if any of the following occurs:

(i) any money, currency or commodity becomes due and payable or deliverable or capable of being declared due and payable or deliverable, in

respect of any actual or contingent indebtedness or obligation of the Borrower or a Relevant Company (other than at the option of the relevant Borrower or that Relevant Company) prior to the stated maturity of the indebtedness or obligation;

(ii) any Facility or obligation granted or owed by anyone to the Borrower or a Relevant Company, to provide or underwrite financial accommodation, or to acquire or assume any risk in respect of actual or contingent indebtedness, is prematurely terminated (other than at the option of the relevant Borrower or Relevant Company);

(iii) any money, currency or commodity owing or deliverable by the Borrower or a Relevant Company in respect of any indebtedness or obligation is not paid or delivered when due for payment or delivery (having regard to any applicable grace period);

Clause 10.1(n) of the Delphi Conditions

4. Clause 10.1(n) of the Delphi Conditions reads:

10. EVENTS OF DEFAULT

10.1 General

Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

(n) if all or any material provision of the Finance Agreement or any other Transaction Document does not have effect or ceases to have effect in accordance with its terms or is or becomes void, voidable, illegal, invalid or unenforceable other than by reason of equitable principles or laws affecting creditors' rights generally;

Clause 11.1 of the Delphi Conditions

5. Clause 11.1 of the Delphi Conditions reads:

11. TERMINATION, EARLY TERMINATION OR AMENDMENT

11.1 Reviews

The Bank may:

(a) If, upon conducting a Periodic Review, the Bank forms the opinion the Facility has not, in any period prior to the conducting of the Periodic Review, been performed by the Borrower to the satisfaction of the Bank; or

(b) if, upon undertaking a Periodic Revaluation of any Security, it appears the LVR of any Security is greater than the LVR (if any) specified in the Letter of Offer or the Bank forms the opinion that an event has occurred or circumstances have arisen since the date of the Letter of Offer or most recent prior Periodic Revaluation (whichever is the later) that may have a material adverse effect on the value or enforceability of any Security; or by notice to the Borrower to take effect 30 days after the date on which such notice be given, do any one or more of the following:-

(c) cancel the unused Facility Limit available under any of the Facilities, by reducing the Facility Limit for each relevant Facility; or

(d) terminate its obligation under the Finance Agreement, or

(e) declare that the Principal Outstanding on the day and all accrued but unpaid interest and fees and all other moneys actually or contingently owing or to become owing by the Borrower under or in respect of any or all of the Facilities are due and payable, in which case that Principal Outstanding and the relevant interest, fees and other moneys will be immediately due and payable by the Borrower; or

(f) require the Borrower to provide further Security in a form or of a type acceptable to the Bank or otherwise amend any of the terms on which any Facility is available.

Clause 14 of the Delphi Conditions

6. Clause 14 of the Delphi Conditions reads:

14. COSTS

The Borrower indemnifies the Bank in respect of, and shall on demand pay to the Bank all costs, fees and losses (including, without limitation, legal expenses on a full indemnity basis) and stamp duty and other taxes and fees in connection with the Finance Agreement and each other Transaction Document including, without limitation, in respect of:

(a) the negotiation, preparation, review, amendment, execution, stamping and registration of;

(b) any property valuations required by the Bank and any action taken by the Bank in connection with,

(c) the monitoring of compliance with the obligations of the Transaction Party under;

(d) the exercise or attempted exercise of the preservation of any rights of the Bank under;

*(e) any Event of Default or Potential Event of Default in relation to;
the Finance Agreement and each other Transaction Document (including, without
limitation, any existing Security or other document which is or is to be a Transaction
Document) and any action taken by the Bank in connection with the Finance
Agreement or a Transaction Document.*

Clause 17.6 of the Delphi Conditions

7. Clause 17.6 of the Delphi Conditions reads:

17.6 Conclusive evidence

*The Bank's determination of any amount for the purposes of the Finance Agreement
or any other Transaction Document (including, without limitation, the determination of
amounts owing by the Borrower) is conclusive in the absence of manifest error.*

Clause 22.1 of the Delphi Conditions

8. Clause 22.1 of the Delphi Conditions reads:

22. Changes

*22.1 We may change these terms and conditions at our absolute discretion at any
time. If any law regulates that change, we will only make the change to the extent
permitted by and subject to, the requirements of that law.*

SCHEDULE 2

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Schedule 2

Extracts of the Rural Conditions

1. Italicisation in the original Rural Conditions has been changed to bold in the extracts included in the extracts of the Rural Conditions in this Schedule.

Clause 2.3 of the Rural Conditions

2. Clause 2.3 of the Rural Conditions reads:

2.3 Term loans

*If the **facility** is a **term loan** (other than one for **development** purposes), **we** may, after the first **advance** and by providing at least 14 days prior written notice to **you**, cancel any unutilised portion of the **facility limit**.*

Clause 2.4 of the Rural Conditions

3. Clause 2.4 of the Rural Conditions reads:

2.4 Cancellation by us and reinstatement

We may at any time cancel any part of the facility limit that has not been utilised by giving you at least 14 days prior written notice, provided that if an event has occurred that may have a material adverse effect, or we have reasonable grounds for suspecting that such an event has occurred or is likely to occur, we may cancel that part of the facility limit that has not been utilised without prior notice to you.

At our discretion and provided there is no subsisting event of default or potential event of default, we may reinstate the cancelled portion of the facility limit at your request.

Clause 4.2 of the Rural Conditions

4. Clause 4.2 of the Rural Conditions reads:

4.2 Rights following review

*If following any review conducted by **us** in accordance with **clause 4.1**, **we** consider that there has been an event which has had a **material adverse effect** or that there has been a material adverse change in relevant market or industry conditions generally, we may require that **you** and/or each **guarantor** accept amended terms and conditions or provide additional **security**.*

*If **you** and/or each **guarantor** have not, within 10 **business days** of being requested by **us**, accepted the revised terms and conditions or provided the additional security requested, each **facility** will terminate and **you** will be required to pay the **outstanding sum** within 30 days of **our** original request.*

Clause 4.4 of the Rural Conditions

5. Clause 4.4 of the Rural Conditions reads:

4.4 Change to terms

*In addition to **our** rights under **clause 4.2**, **we** may vary any terms of the contract constituted by the **letter of offer** and these terms at any time without the consent of **you** or a **guarantor**. Without limiting that right, such variations may include:*

- (a) changing the **interest rate** (except that we will not change a **fixed interest rate** during a **fixed** rate period);*
- (b) changing any margin which applies to an **interest rate**;*
- (c) changing the manner in which interest is calculated or applied;*
- (d) changing the amount or frequency of repayments, or minimum repayments, required;*
- (e) changing fees and charges, or adding new fees and charges (provided that if the **facility** is a **regulated arrangement** **we** will not change how the **break cost** is calculated, in a way which may have the effect of increasing it, during **fixed rate period**); or*
- (f) changing the **facility limit**.*

***We** will give **you** notice of any variation in accordance with **clause 13.5**. Any variation will take effect from the date specified in the notice. If any law (including the National Credit Code) or code applies to the **facility** and requires **us** to give **you** a minimum period of prior notice of a variation taking effect, **we** will give at least that minimum period of notice.*

Clause 8.1(c) of the Rural Conditions

6. Clause 8.1(c) of the Rural Conditions reads:

8. EVENTS OF DEFAULT

Note: This clause lists the events of default and what happens if an event of default occurs.

8.1 Nature

*Each of the following is an **event of default**:*

(c) any representation, warranty or statement by **you** or a **guarantor** in any **relevant document** or any document delivered under any of them is not complied with or is incorrect in any material respect when made or deemed to be repeated;

Clause 8.1(p) of the Rural Conditions

7. Clause 8.1(p) of the Rural Conditions reads:

8. EVENTS OF DEFAULT

*Note: This clause lists the **events of default** and what happens if an **event of default** occurs.*

8.1 Nature

Each of the following is an **event of default**:

(p) all or any part of any **relevant document** or any **material document** is terminated or is able to be terminated or is, or becomes capable of becoming void, voidable, illegal, invalid or unenforceable or of limited force and effect.

Clause 8.1(q) of the Rural Conditions

8. Clause 8.1(q) of the Rural Conditions reads:

8. EVENTS OF DEFAULT

*Note: This clause lists the **events of default** and what happens if an **event of default** occurs.*

8.1 Nature

Each of the following is an **event of default**:

(q) any other event or circumstance occurs which, in **our** reasonable opinion, is likely to have a **material adverse effect**;

Clause 8.1(v) of the Rural Conditions

9. Clause 8.1(v) of the Rural Conditions reads:

8. EVENTS OF DEFAULT

*Note: This clause lists the **events of default** and what happens if an **event of default** occurs.*

8.1 Nature

Each of the following is an **event of default**:

(v) anything similar to anything referred to in the foregoing sub-clauses 8.1(a) to 8.1(u) (inclusive), or having a substantially similar effect, occurs.

Clause 12.1 of the Rural Conditions

10. Clause 12.1 of the Rural Conditions reads:

12. INDEMNITIES

*Note: This clause contains indemnities given by **you** and each **guarantor** to **us** and provisions dealing with the extent of those indemnities.*

12.1 Nature

You and each **guarantor** indemnifies, and must keep indemnified, **us** against any liability, loss, cost or expense (including consequential and economic loss) which **we** incur or sustain or for which we become liable, directly or indirectly, which is caused, or contributed to, by:

(a) any **event of default**;

(b) any **environmental liability**;

(c) the exercise or attempted exercise or preservation of any right by **us** under any **relevant document** or any **material document**;

(d) any act by **us** in reliance on any communication purporting to be from **you** or to be given on **your** behalf;

(e) any **drawing** requested by **you** not being provided by **us** for any reason, other than a default by **us**;

(f) any claim against **us** under, or in connection with, an **external obligation**; and

(g) the repayment to, or receipt by, **us** of all or any part of an **advance**, in relation to which the **interest rate** is fixed, prior to the expiry of the **fixed rate period**.

Clause 13.1 of the Rural Conditions

11. Clause 13.1 of the Rural Conditions reads:

13. MISCELLANEOUS

Note: This clause contains various additional provisions relevant to the arrangements between **us**, **you** and the **guarantor**.

13.1 Certificate

*A certificate signed by **us** or any **authorised officer** stating an amount owing to **us** at a particular date or as to any other matter or thing, is conclusive evidence against **you** and/or the **guarantor** (as the case may be) unless proved incorrect.*

SCHEDULE 3

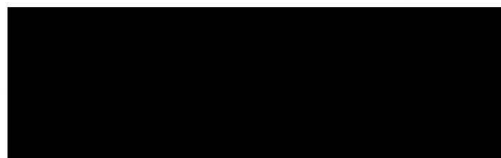
Annexure A

BAB.0011.0001.1760

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General Conditions



**Delphi Bank –
A division of Bendigo and Adelaide Bank Limited,
ABN 11 068 049 178 AFSL/Australian Credit Licence 237879**

1. GENERAL CONDITIONS AND LETTER OF OFFER

These general conditions are to be read with the Letter of Offer for each Facility, both of which, if the Letter of Offer is accepted, constitute an agreement ("**Finance Agreement**") between the Bank and the named Borrower(s) ("**Borrower**"). If there is any inconsistency between the Letter of Offer and these general conditions, the Letter of Offer prevails.

2. CONDITIONS PRECEDENT

The Borrower may not make any Drawing under, or otherwise make use of a Facility unless:

- (a) before making the first Drawing or otherwise using a Facility, the Borrower:
 - (i) if a corporation, has given the Bank copies, in form and substance satisfactory to the Bank, of:
 - (a) its Certificate of Incorporation;
 - (b) written details of its Nominated Account (to which the Bank may debit amounts for which the Borrower is liable) and a list of its Authorised Representatives, showing beside the name of each of them the true signature of that person;
 - (c) the latest return, which it has lodged in respect of its directors and secretaries under the Corporations Act;
 - (d) its Constitutionin each case certified by a director or secretary of it, as being complete correct and up to date-date, in full force and effect and not subject to any amendment or revocation; and
 - (ii) if a partnership, has given the Bank copies, in form and substance satisfactory to the Bank, of the partnership deed and any other document evidencing the terms of the partnership which the Bank may require; in each case certified by all the partners (unless otherwise agreed by the Bank) as being complete, correct and up to date, in full force and effect and not subject to any amendment or revocation; and
 - (iii) if the trustee of a trust, has given the Bank, in form and substance satisfactory to the Bank, the trust deed and any other documents evidencing the terms of the trust or identity of the beneficiaries which the Bank may require.
- (b) before the Borrower makes the first Drawing or otherwise uses a Facility, the Bank has received the results (satisfactory to the Bank) of any environmental audit or environmental site assessment required by the Bank in relation to the property or business of the Borrower or a Surety or a subsidiary of the Borrower or of a Surety, and the Borrower has paid all costs incurred by the Bank in relation to the audit or assessment, or both, as the case may be.
- (c) the Borrower has accepted the Letter of Offer paid the Establishment Fee, and is not in default under the Finance Agreement;
- (d) the Bank is satisfied that each Transaction Document has been or will be duly stamped;
- (e) the Bank is satisfied that the representations and warranties of the Borrower are true and correct as at the relevant Drawdown Date; and
- (f) without limiting the generality of paragraph (c), the Bank is satisfied that no Event of Default or Potential Event of Default has occurred and is continuing and that the provision of the Drawing will not result in the occurrence of an Event of Default.

3. INTEREST GENERALLY AND ON OVERDUE AND OVERDRAWN AMOUNTS

3.1 Interest Payments

Interest (at the rate applicable from time to time pursuant to the terms of the Finance Agreement, as notified by the Bank to the Borrower) will accrue to the Bank from the date of the first Drawing for so long as the Principal Outstanding remains unpaid. Such interest will be calculated daily on the Principal Outstanding and shall be debited by the Bank on the days specified in the Letter of Offer and if not specified, in arrears on the first Business Day of each month during the Term.

3.2 Overdue Amounts

The Borrower shall also pay the Bank interest on:

- (a) each amount which is due and payable by it but unpaid to the Bank under the Finance Agreement;
- (b) each amount drawn or debited in excess of a Business Mortgage Overdraft Facility; and
- (c) each amount drawn or debited in excess of cleared funds in a Nominated Account.

Unless otherwise specified in the Letter of Offer, the interest is payable at the Default Rate and accrues daily from and including the day on which the amount becomes due and payable or is drawn or debited as the case may be. The Borrower shall pay the interest on the last day of each calendar month or any other day nominated by the Bank.

4. TIMING, MANNER OF PAYMENT FOR INTEREST, FEES, CHARGES OR MARGINS

Interest, fees, charges and margins shall be paid by the Borrower at the times specified in the Letter of Offer or otherwise notified by the Bank.

The Bank may from time to time change the dates or timing or manner of payment for interest, fees, charges or margins under the Finance Agreement by giving 30 days' notice to the Borrower.

Information on current interest rates and fees and charges is available on request by contacting any of our branches or telephoning 1300 660 550

5. REPAYMENT

5.1 Facility Reduction Date

On any Facility Reduction Date for a Facility the Borrower shall ensure that the Principal Outstanding under that Facility is reduced so that it does not exceed the amount which is specified in the Letter of Offer as the Facility Limit for that Facility Reduction Date.

5.2 Termination Date

On the Termination Date for the Facility, the Borrower shall repay or pay to the Bank the Principal Outstanding in respect of that Facility, together with any unpaid interest and fees and all other amounts then outstanding but unpaid in relation to that Facility under the Finance Agreement and each other Transaction Document. On the last Termination Date for any of the Facilities the Borrower shall pay to the Bank, in addition to any other amount payable on that day, all other amounts outstanding but unpaid under the Finance Agreement and each other Transaction Document.

6. PAYMENTS GENERALLY

6.1 Immediately Available Funds

Subject to general condition 7.1, the Borrower shall pay each amount payable by it to the Bank under the Finance Agreement on the due date for payment in immediately available funds. All payments received by the Bank may be appropriated by the Bank as it sees fit.

6.2 Business Day

Except where provided differently in any Transaction Document, an amount otherwise payable on a day which is not a Business Day is payable on the preceding Business Day.

6.3 No set-off or counterclaim

To the maximum extent permitted by applicable law, the Borrower shall make each payment to the Bank under the Finance Agreement without any set-off or counterclaim and free and clear of, and without any deduction or withholding for or on account of, any taxes (other than any imposed on overall net income).

6.4 Gross up

If at any time a law requires the Borrower to make a deduction or withholding in respect of taxes from a payment to the Bank under the Finance Agreement:

- (a) it shall pay the Bank, at the time that payment is due, such additional amounts in the relevant currency as are necessary to ensure that, after that deduction or withholding is made, the Bank receives a net sum equal to the sum which the Bank would have received had no such deduction or withholding been made;
- (b) it indemnifies the Bank against any losses or costs incurred by the Bank because it fails to make any such deduction or withholding; and
- (c) it shall promptly deliver to the Bank copies of any receipts, certificates or other proof evidencing the amounts (if any) paid or payable in respect of any such deduction or withholding.

6.5 Currency Indemnity

If, under any law, whether as a result of a judgment or a liquidation or for any other reason, payment under or in connection with the Finance Agreement is made or is required to be satisfied in a different currency from the currency in which it is required to be paid under the Finance Agreement then, to the extent that the payment to the Bank, when converted by the Bank:

- (a) on the date of payment; or
- (b) in the case of a liquidation, the latest date for the determination of liabilities permitted by applicable law,

falls short of the amount due and unpaid under this Finance Agreement, the Borrower, as a separate and independent obligation, indemnifies the Bank against, and shall pay the Bank on demand the amount of the shortfall.

7. NOMINATED ACCOUNT

7.1 Debits

The Bank may, but need not, debit the Nominated Account (details of which must be given to the Bank under general condition 2) with any amount due and payable by the Borrower to the Bank under the Finance Agreement, and any costs, legal expenses or other amounts in respect of which the Borrower indemnifies the Bank under the Finance Agreement (whether or not the Bank has made demand).

7.2 Excess Amounts

The Borrower shall pay to the Bank on demand:

- (a) each amount drawn or debited in excess of cleared funds in its Nominated Account; and
- (b) each amount drawn or debited in excess of its Facility Limit, if any.

8. REPRESENTATIONS AND WARRANTIES

The Borrower represents and warrants to the Bank that:

- (a) each Transaction Party, if an individual (including a partner in a partnership), is not bankrupt nor has any creditor's petition been made against it or any bankruptcy notice issued against it and, if not an individual, is a company limited by shares, incorporated, or taken to be incorporated, and existing

under the Corporations Act and is not in liquidation, provisional liquidation, receivership or under administration;

- (b) the Finance Agreement and each other Transaction Document to which it is a party constitute its valid and legally binding obligations, enforceable against each Transaction Party in accordance with their respective terms except to the extent limited by equitable principles and laws affecting creditors' rights generally;
- (c) neither the execution of, nor the exercise of rights, or performance of obligations by a Transaction Party under each Transaction Document to which it is a party, does or will:
 - (i) contravene any applicable law to which it or any of its property is subject, or any order of any governmental agency binding on it or any of its property;
 - (ii) contravene any authorisation, licence or exemption or give rise to a requirement that any authorisation, licence or exemption be obtained; or
 - (iii) contravene any provision of its constitution or, in the case of a partner, of any constituent document of the partnership, or any undertaking binding on it or any of its property (including partnership property);
- (d) no litigation, arbitration or administrative proceedings are taking place, pending or, to the best of the knowledge and belief of it or any of its officers, threatened against it or a Relevant Company or against its property (including partnership property) or that of a Relevant Company, which, if adversely determined, could have, either separately or in aggregate, a material adverse effect of the kind described in general condition 10.1(j);
- (e) its most recent financial statements and the most recent financial statements of each Surety, and all other accounts and financial statements which it is required to deliver to the Bank under the Finance Agreement give a true and fair view of its (or the relevant Surety's) financial position and of its (or the relevant Surety's) results of operations for the financial year then ended, and there has been no change since the dates of those accounts and statements which has a material adverse effect of the kind described in general condition 10.1(j);
- (f) no Event of Default or Potential Event of Default has occurred and is continuing;
- (g) none of its property (including partnership property), and no property of any Relevant Company are subject to a Security Interest;
- (h) except as disclosed by notice to the Bank before the date of the Letter of Offer:
 - (i) each Relevant Company has complied with all Environmental Laws relating to its business and property; and
 - (ii) each Surety has complied with all Environmental Laws in relation to property which is the subject of a Security given or to be given by it, and none of that property has been used in connection with the creation, treatment, storage or handling of, or polluted or contaminated by, a Pollutant or has been subject to a notice, direction, order or condition requiring a Pollutant to be cleaned up, contained or dealt with in any way and the Borrower is not aware that a notice, direction, order or condition of that kind is pending; and
- (i) unless previously indicated by notice from it to the Bank, accompanied by a copy of the relevant trust deed, it is not acting as trustee of any trust or settlement in entering into the Finance Agreement. If a Transaction Party is trustee of a trust (whether disclosed to the Bank or not), the Borrower:
 - (i) declares the that the Transaction Party is sole trustee of the trust and enters into each Transaction Document in its personal capacity and also as trustee for the benefit of the beneficiaries;
 - (ii) agrees it will not permit any amendment of the trust deed nor appointment of any additional or substitute trustee nor any vesting of the trust fund to occur;
 - (iii) warrants that relevant Transaction Party will perform all its obligations as trustee and will exercise its rights of indemnity from the trust fund and beneficiaries as necessary to meet its obligations under the Finance Agreement, and

- (iv) it will provide a copy of the trust deed and all amendments to the Bank upon request.

The Borrower acknowledges that the Bank has entered into, and performs its obligations under the Finance Agreement, in reliance on these representations and warranties.

The representations and warranties in this general condition are taken to be repeated by the Borrower on each Drawdown Date, with reference to the facts and circumstances subsisting at that date.

9. UNDERTAKINGS

The Borrower shall:

- (a) deliver (or procure that there are delivered) to the Bank:
- (i) for each Relevant Company, as soon as available and in any event within 120 days after the end of each financial year (unless otherwise agreed by notice from the Bank), the Financial Statements of it in relation to that financial year together, in each case, with all other reports which the Relevant Company or its directors are required by the Corporations Act to prepare in relation to the financial year, and the consolidated accounts (if any) which any other corporation is required by the Corporations Act to prepare in relation to the Relevant Company, in each case audited (unless otherwise agreed by notice from the Bank);
 - (ii) for a Borrower or a Surety which is an individual, within 14 days of a request to be made no more than once in a financial year on or before each Periodic Review, a statement of position in a form satisfactory to the Bank, signed by the individual and describing present assets and liabilities and providing an income and expenditure budget for the year following the date of the statement;
 - (ii) for a Borrower which is a partnership, as soon as available and in any event (unless otherwise agreed by notice from the Bank) within 120 days after the end of each financial year, the partnership accounts for that financial year, certified by two partners as giving a true and fair view of the financial condition of the partnership as at the end of that year, together with copies of the partnership income tax return and each partner's income tax return for the previous financial year; and
- (b) give the Bank upon request and in any event within five Business Days of request, projected cash flows in a form acceptable to the Bank, and any other information if requested by the Bank, certified as being correct and up to date, by the Borrower if an individual, two partners if the Borrower is a partnership, or a director if the Borrower is a corporation, relating to its financial condition, business, assets and affairs or any related body corporate of it (in terms of section 50 of the Corporations Act) as the Bank may request, whether for the purposes of a Periodic Review or for any other reason;
- (c) give the Bank copies of all documents, reports, notices, circulars, particulars and certificates which it provides to its shareholders or to any stock exchange at the same time as they are provided to its shareholders or to that stock exchange;
- (d) promptly arrange for the Bank, or a valuer chosen by the Bank, to have access to its (or any partnership) property or that of any of the Sureties, or any of its or their subsidiaries, to the extent required by the Bank for the purposes of any property valuation in connection with the Finance Agreement or any Security;
- (e) give the Bank prompt notice upon becoming aware of the occurrence of any Event of Default or Potential Event of Default;
- (f) give the Bank prompt notice upon becoming aware of a Change of Control;
- (g) give the Bank prompt notice of any litigation, arbitration or administrative proceedings affecting it or any of its subsidiaries or any of its or their property which, if adversely determined, could have either separately or in aggregate a material adverse effect of the kind described in general condition 10.1(j);

- (h) not create or permit to exist, and ensure that no Transaction Party creates or permits to exist a Security Interest, over any of its property;
- (i) apply the Principal Outstanding, which it draws under each Facility solely for the relevant purpose (if any) specified in the Letter of Offer;
- (j) at all times cause to be insured and kept insured for its full replacement value with a reputable insurance company, in the joint names of the relevant Surety and the Bank, or in the name of the relevant Surety with the Bank named as loss payee, all property which is subject to a Security and which is of an insurable nature, against loss, damage or public risk and such other risks as the Bank may from time to time require, and ensure that the premiums and other sums of money payable for the above purposes are paid, and produce to the Bank whatever it requires as evidence of compliance with this paragraph;
- (k) have prepared and provide to the Bank on request, at the cost of the Borrower, any environmental audit or assessment, in a form acceptable to the Bank, in respect of property subject to a Security, or any other property of the Borrower or a Guarantor or a subsidiary of the Borrower or a Guarantor, which the Bank may require from time to time;
- (l) comply, and ensure that each Relevant Company, complies with the requirements of all Environmental Laws, and ensure that each Surety complies with the requirements of all Environmental Laws in relation to property which is the subject of a Security given or to be given by it;
- (m) if the Borrower is a partnership, not permit the liability of any partner to be or become limited in terms of the partnership, except to the extent indicated on a copy of the official certificate as to the formation and composition of the partnership, which has been signed for identification by an Authorised Representative of the Bank before the date of the Finance Agreement, and not permit the liability of a limited partner to be reduced below that partner's maximum liability from time to time; and
- (n) not, without consent by notice from the Bank, make any amendment to its constitution.

10. EVENTS OF DEFAULT

10.1 General

Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

- (a) if the Borrower or a Surety fails to pay any amount which is due and payable by it under the Finance Agreement or any other Transaction Document;
- (b) if the Borrower or a Surety fails to perform any of its obligations under the Finance Agreement or any other Transaction Document (other than by non payment of an amount due and payable, or by failure otherwise constituting an Event of Default) and that failure is incapable of remedy or, if capable of remedy, continues for five Business Days after the Borrower receives a notice from the Bank requiring the failure to be remedied;
- (c) if any representation, warranty or statement made or repeated in or in connection with the Finance Agreement or any other Transaction Document is untrue or misleading (whether by omission or otherwise) when made or repeated;
- (d) if a bankruptcy notice is issued in respect of, or if an application is made or a resolution is passed for the winding up of the Borrower or a Relevant Company, and, in the case of an application, it is not dismissed or withdrawn within 10 Business Days, or the Borrower or a Relevant Company becomes insolvent, or an order is made for the winding up of the Borrower or a Relevant Company;
- (e) if a receiver, provisional liquidator, liquidator, trustee for creditors or in bankruptcy, or administrator is appointed to any property of the Borrower or of a Relevant Company.
- (f) if the holder of a Security Interest over any property of a Transaction Party whether by itself or through an agent takes possession of any of that property;

- (g) if the Borrower or a Relevant Company suspends payment of its debts, ceases or threatens to cease to carry on all or a material part of its business, is or states that it is, or is deemed by applicable law to be, insolvent or unable to pay any of its debts or takes any step for the purpose of entering into a compromise or arrangement with any of its members or creditors;
- (h) if any distress or execution is issued or levied against the Borrower or a Relevant Company or any of its property and the Borrower, or that Relevant Company, is unable, within five Business Days, to satisfy the Bank that there is no substantial basis for the judgement or order in respect of which the process was invoked;
- (i) if the Borrower or a Relevant Company passes a resolution or takes any step:
 - (i) to permit the giving of financial assistance, whether directly or indirectly, for the purpose of, or in connection with, an acquisition or proposed acquisition by a person of shares, or of any right or interest in shares, in it or any company of which it is a subsidiary;
 - (ii) to reduce its share capital;
 - (iii) to limit its ability to make calls on its uncalled share capital; or
 - (iv) to buy any shares in itself other than by way of redemption of redeemable preference shares,unless approved by notice from the Bank;
- (j) if an event occurs or circumstances arise which, in the opinion of the Bank may have a material adverse effect on the business, assets or financial condition of the Borrower, or a Relevant Company or on the ability of the Borrower or a Surety to perform its obligations under any Transaction Document;
- (k) if any of the following occurs:
 - (i) any money, currency or commodity becomes due and payable or deliverable or capable of being declared due and payable or deliverable, in respect of any actual or contingent indebtedness or obligation of the Borrower or a Relevant Company (other than at the option of the relevant Borrower or that Relevant Company) prior to the stated maturity of the indebtedness or obligation;
 - (ii) any Facility or obligation granted or owed by anyone to the Borrower or a Relevant Company, to provide or underwrite financial accommodation, or to acquire or assume any risk in respect of actual or contingent indebtedness, is prematurely terminated (other than at the option of the relevant Borrower or Relevant Company);
 - (iii) any money, currency or commodity owing or deliverable by the Borrower or a Relevant Company in respect of any indebtedness or obligation is not paid or delivered when due for payment or delivery (having regard to any applicable grace period); or
- (l) if the Borrower or a Relevant Company creates or permits to exist a Security Interest over any of its property;
- (m) if, without consent by notice from the Bank, the Borrower or a Relevant Company acquires, leases or otherwise alienates any property, or states any intention to do so other than in the ordinary course of carrying on its business as carried on at the date of the Finance Agreement;
- (n) if all or any material provision of the Finance Agreement or any other Transaction Document does not have effect or ceases to have effect in accordance with its terms or is or becomes void, voidable, illegal, invalid or unenforceable other than by reason of equitable principles or laws affecting creditors' rights generally;
- (o) if a Change of Control occurs; and
- (p) in respect of the Borrower or a Guarantor or a subsidiary of the Borrower or of a Guarantor, its land is charged, or a restraining order or clean up notice is issued, or it is prosecuted, under an Environmental Law or, in respect of a Surety, land subject to a Security given by it is charged, or becomes subject to a restraining order or clean up notice, or the relevant Surety is prosecuted in relation to that land, under an Environmental Law.

11. TERMINATION, EARLY TERMINATION OR AMENDMENT

11.1 Reviews

The Bank may:

- (a) if, upon conducting a Periodic Review, the Bank forms the opinion the Facility has not, in any period prior to the conducting of the Periodic Review, been performed by the Borrower to the satisfaction of the Bank; or
- (b) if, upon undertaking a Periodic Revaluation of any Security, it appears the LVR of any Security is greater than the LVR (if any) specified in the Letter of Offer or the Bank forms the opinion that an event has occurred or circumstances have arisen since the date of the Letter of Offer or most recent prior Periodic Revaluation (whichever is the later) that may have a material adverse effect on the value or enforceability of any Security; or by notice to the Borrower to take effect 30 days after the date on which such notice be given, do any one or more of the following:-
- (c) cancel the unused Facility Limit available under any of the Facilities, by reducing the Facility Limit for each relevant Facility; or
- (d) terminate its obligation under the Finance Agreement, or
- (e) declare that the Principal Outstanding on the day and all accrued but unpaid interest and fees and all other moneys actually or contingently owing or to become owing by the Borrower under or in respect of any or all of the Facilities are due and payable, in which case that Principal Outstanding and the relevant interest, fees and other moneys will be immediately due and payable by the Borrower; or
- (f) require the Borrower to provide further Security in a form or of a type acceptable to the Bank or otherwise amend any of the terms on which any Facility is available.

11.2 Notice

If, for the purposes of general condition 11.1(f), the Bank gives notice to the Borrower in the form of a letter, then, unless the Borrower accepts the letter in the manner provided, within 30 days after the date of the letter (or such longer time as the Bank allows by notice to the Borrower), the Bank's obligations terminate immediately and the Principal Outstanding under all Facilities and all other moneys actually or contingently payable are immediately due and payable as if the Bank had given a notice in accordance with general conditions 11.1(c), (d) and (e) effective in respect of all the Facilities, on the expiry of that 30 day period.

11.3 Break Costs

The Borrower indemnifies the Bank in respect of, and shall pay to the Bank on demand all costs and losses (including, without limitation, legal fees on a full indemnity basis) which the Bank may incur in connection with the occurrence of an Event of Default or any action taken under general conditions 11.1(c), (d), (e) or (f) including, without limitation, any amount which the Bank determines is required to compensate it for cost incurred as a result of premature payment of Principal Outstanding at any time or failure to roll any Bill (taking into account any benefit which (in the opinion of the Bank) will accrue to it as a result of the premature payment or failure to roll the Bill).

12. INCREASED COSTS ARISING FROM REGULATORY REQUIREMENT

Whenever the Bank determines that it is affected by the making of, or a change in (or a change in the interpretation or administration of) a law or a directive or request (whether or not having the force of law) by a government or governmental agency including, without limitation, with respect to taxes (other than on overall net income), capital liquidity, reserve or prudential requirement and that as a result

- (a) the effective cost to the Bank of providing or maintaining a Facility, or performing its obligations under a Transaction Document is in any way increased; or
- (b) the effective rate of return under a Transaction Document is in any way reduced;

the Borrower shall pay to the Bank on demand from time to time, and the Borrower indemnifies the Bank in respect of, each amount, which the Bank claims is necessary to compensate the Bank for the additional cost or reduction.

13. CHANGE OF LAW

If, in the opinion of the Bank, a new or changed law or a directive or request (whether or not having the force of law) of any government or governmental agency, or any amendment to or change in the interpretation or application of such a law or directive, renders it illegal in any jurisdiction, or otherwise impracticable, for the Bank to continue to make the Facilities available, then, for the purposes of this general condition, the Bank may give notice to the Borrower stating that this has happened. As soon as the Bank gives the notice, its obligation to make the Facilities available terminates and the Principal Outstanding is immediately due and payable together with all accrued but unpaid interest and fees and other amounts actually or contingently owing or to become owing by the Borrower under the Finance Agreement and each other Transaction Document.

14. COSTS

The Borrower indemnifies the Bank in respect of, and shall on demand pay to the Bank all costs, fees and losses (including, without limitation, legal expenses on a full indemnity basis) and stamp duty and other taxes and fees in connection with the Finance Agreement and each other Transaction Document including, without limitation, in respect of:

- (a) the negotiation, preparation, review, amendment, execution, stamping and registration of;
- (b) any property valuations required by the Bank and any action taken by the Bank in connection with,
- (c) the monitoring of compliance with the obligations of the Transaction Party under;
- (d) the exercise or attempted exercise of the preservation of any rights of the Bank under;
- (e) any Event of Default or Potential Event of Default in relation to;

the Finance Agreement and each other Transaction Document (including, without limitation, any existing Security or other document which is or is to be a Transaction Document) and any action taken by the Bank in connection with the Finance Agreement or a Transaction Document.

15. NOTICES

15.1 Authorised Representative

A notice from the Borrower to the Bank must be given by the Borrower itself (if an individual) or by an Authorised Representative in writing and delivered (by hand or by mail) to the Bank at the address given for the Bank in the Letter of Offer, or otherwise indicated by written notice to the Borrower. A notice from the Borrower, which is expressed or required to be irrevocable, is irrevocable, and binds the Borrower when given.

15.2 Authority to rely on notices

Notwithstanding anything in general condition 15.1, the Borrower authorises the Bank to act in accordance with any notice, request, acceptance or instruction given, orally or in writing, by its Authorised Representative to the Bank in relation to a Drawing or anything else under or in connection with the Finance Agreement.

15.3 Time of receipt

Unless otherwise stated for the purposes of any particular provisions in the Finance Agreement, a notice from the Bank to the Borrower must be given by an Authorised Representative, in writing and is treated as having been given and received:

- (a) if delivered to the Borrower's address to which the Letter of Offer is addressed (or whatever other address is specified by the Borrower by written notice to the Bank), when delivered;

- (b) if sent by the Bank to the Borrower by pre-paid mail, on the third Business Day after posting.

16. BUSINESS OVERDRAFT FACILITY

Where the Bank has agreed to make available a Business Overdraft Facility, the following terms shall apply to the execution of anything to the contrary in the general conditions but subject at all times to the Letter of Offer:

16.1 Availability

- (a) Full or partial repayment of the Principal Outstanding is allowed at any time without penalty,
- (b) The Borrower must repay the Principal Outstanding to the Bank immediately on demand,
- (c) The Bank is not obliged to honour any cheque or order drawn by the Borrower on the relevant account,
 - (i) which would result in the aggregate of the balances in all the Borrower's accounts exceeding the Facility Limit; or
 - (ii) If an Event of Default has occurred and is continuing or is likely to occur on or before the Drawdown Date.
- (d) An Excess Fee will be charged to the Nominated Account every time a Drawing exceeds the Facility Limit.

16.2 Cancellation

The Bank may cancel the Facility Limit in whole or in part at any time after the occurrence of an Event of Default, and the Borrower will have no claim against the Bank because of the cancellation including, but not limited to, a claim for costs or expenses incurred or damages sustained by the Borrower or a Relevant Company in relation to the Facility or arising from or in connection with the cancellation of the Facility.

16.3 Drawings

- (a) Subject to this general condition 16 the Borrower may draw cheques or orders during the term of the Facility.
- (b) When general condition 16.1(c) applies or after the Termination Date the Bank may at any time without notice to the Borrower dishonour cheque or order drawn under the Facility irrespective of:
 - (i) the nature, title or purpose of the account on which the cheque or order is drawn; or
 - (ii) the amount of the debit or credit balance in the relevant account or other account conducted with the Bank by the Borrower, or
 - (iii) Whether the aggregate of the balances in all of the Borrower's accounts exceeded the Facility Limit at the time a cheque or order is dishonoured; or
 - (iv) Any other circumstance, fact, matter or thing,
- (c) The Bank may at its discretion honour a cheque or order where general condition 16.1(c) applies and if it does, the Borrower will be liable accordingly.

17. MISCELLANEOUS

17.1 Set off and combination

If an Event of Default occurs, or the Bank exercises any of its rights under general condition 11.1(c), (d), (e) or (f) the Borrower authorises the Bank, without notice, to combine, consolidate, merge or apply any credit balance standing to its account (or accounts) with any office or branch of the Bank, or any amount available to the Bank by way of set-off, lien or counterclaim, in or towards satisfaction of money at any time due and payable or to become due and payable by it to the Bank under the Finance Agreement or any other Transaction Document (notwithstanding any prior agreement to the contrary) and authorises the Bank for this purpose, to do anything (including executing documents) in its name.

17.2 Continuing obligations

Each indemnity given by the Borrower in the Finance Agreement is a continuing obligation, separate and independent from the Borrower's other obligations, and survives termination of the Finance Agreement.

17.3 No waiver

The failure, delay, relaxation or indulgence on the part of the Bank in exercising any of its rights under the Finance Agreement (including, without limitation, rights available following an Event of Default or a Periodic Review or Periodic Revaluation) does not operate as a waiver of that right, or a waiver of any breach, nor does any single exercise of a right preclude any other or further exercise of it or the exercise of any other right under the Finance Agreement. A right may only be waived in writing, signed by the party to be bound by the waiver.

17.4 Assignment

The Borrower may not assign or transfer any of its rights or obligations under the Finance Agreement or any other Transaction Document without prior consent by notice from the Bank. The Bank may assign or transfer any of its rights or obligations under the Finance Agreement or any other Transaction Document without consent.

17.5 Disclosure

The Bank may disclose any information about any Transaction Party, which the Bank considers appropriate, and may give a copy of the Finance Agreement or any part of it;

- (a) to any Surety or potential assignee;
- (b) to the Bank's related bodies corporate and shareholders, or to any employee, banker, lawyer, auditor or other consultant of the Bank, its related bodies corporate or its shareholders;
- (c) if required by law or by any Government Body or stock exchange; or
- (d) in connection with any legal proceedings relating to a Transaction Document or a document delivered under or in relation to a Transaction Document;

17.6 Conclusive evidence

The Bank's determination of any amount for the purposes of the Finance Agreement or any other Transaction Document (including, without limitation, the determination of amounts owing by the Borrower) is conclusive in the absence of manifest error.

17.7 Severability

Any provision of the Finance Agreement which is invalid or unenforceable in any jurisdiction will, for the purposes of that jurisdiction, be read down, if possible, so as to be valid and enforceable, or otherwise severed to the extent of the invalidity or unenforceability, without affecting the validity or enforceability of the remaining provisions of the Finance Agreement or of that provision in any other jurisdiction.

18. LAW AND JURISDICTION

The Finance Agreement is governed by the laws of the place of the Bank's office as shown in the Letter of Offer, and the parties submit to the non-exclusive jurisdiction of the courts of that place, and any place that may hear appeals from those courts, in respect of any proceedings in connection with the Finance Agreement or any other Transaction Document.

19. Privacy Policy

The Bank collects personal (including financial) information about you so that we can provide your account and other products or services. When we obtain personal information about you, its collection use and disclosure is governed by our Privacy Policy, which can be viewed on our website at www.delphibank.com.au, or made available to you on request at one of our branches or by telephone on 1300 660 550.

In general, we will not use or disclose personal information collected about you otherwise than for a purpose set out in our Privacy Policy, for a purpose you would reasonably expect, a purpose required or permitted by law, or a purpose otherwise disclosed to, or authorised by, you.

You may contact us on 1300 660 550 to find out what personal information we hold about you and, if necessary, to correct any inaccurate or incomplete information.

20. Dispute Resolution Procedure

We would like to know about any concerns that you may have about any of our products or services.

Please raise your concerns with our staff at any branch. If your concern is still not resolved, our branch staff will assist you in completing a Customer Complaint Form and offer you our "Resolving Your Complaint" brochure, which outlines the steps we will take and the options available to you if you are not satisfied with the outcome. We aim to solve all complaints immediately if possible and investigate any unresolved complaints within 10 business days otherwise we will advise you in writing that we need further time to complete our investigation. If an investigation continues beyond 45 business days, we will inform you in writing of the reasons and provide you with a monthly update on the progress and the anticipated time for a decision to be finalised.

When we advise you of the outcome of our investigation, we will notify you in writing of the reasons for our decision by reference to the conditions in the Terms and Conditions (where applicable) and advise you of any adjustments we have made to your account.

If we fail to carry out these procedures or cause unreasonable delay in resolving your complaint, we may be liable for part or all of the amount of the disputed transaction where that failure or delay has prejudiced the outcome of the investigation.

If you feel your complaint has not been resolved to your satisfaction, we invite you to contact our Dispute Resolution Officer at PO Box 309 Collins St West Melbourne VIC 8007, or by telephone on (03) 8627 2727, for further investigation. If you still remain dissatisfied with the outcome, and you would like an independent external review of the complaint and the result, you can contact the Financial Ombudsman Service Limited, GPO Box 3A, Melbourne Vic 3001, phone: 1300 780 808, Website: www.fos.org.au.

21. Code of Banking Practice

- 21.1 We are bound by the Code of Banking Practice. The Code of Banking Practice requires us to draw your attention to the availability of general descriptive information concerning our banking services. This includes information about account opening procedures, our obligations regarding the confidentiality of your information, complaint handling procedures, bank cheques, the advisability of you informing us promptly when you are in financial difficulty and the advisability of you reading the terms and conditions applying to this banking service.

The Code of Banking Practice applies to the contract if you are an individual or small business borrower. If you are not an individual or small business borrower then the Code of Banking Practice does not apply to this contract.

- 21.2 You should inform us promptly if you are experiencing financial difficulty.

22. Changes

- 22.1 We may change these terms and conditions at our absolute discretion at any time. If any law regulates that change, we will only make the change to the extent permitted by and subject to, the requirements of that law.
- 22.2 You agree that we can give notice of changes to these terms and conditions, any material change to, or any significant event that affects any of the matters specified in this document in writing, (including changes to fees and charges and interest rates), by an advertisement in a major daily newspaper or in any other way permitted by law, including electronically.

23. Direct Debits and Standing Orders

A "Direct Debit" is a debit from your account that you have arranged with a merchant ("Biller"). For example, you may authorise your local council to debit your council rates directly from your account.

To cancel a Direct Debit, you can contact either the Biller or us. If you contact us, we will promptly process your request, however we suggest that you also contact the Biller to inform them of the cancellation. We will promptly process any complaint by you that a Direct Debit was unauthorised or otherwise irregular.

A "Standing Order" is where you authorise us to debit your account on a regular basis and credit the funds to another account held with us. An example would be to debit your deposit account and credit the funds to your home loan account with us to meet repayments.

To cancel a Standing Order, you must contact us at least two business days before the next payment date.

If you ask us to cancel a Direct Debit or a Standing Order and the cancellation of the Direct Debit or Standing Order puts you in breach of your contract with another party, we will not be responsible for any such breach or for any loss or damage you may suffer in connection with any such breach.

24. INTERPRETATION

24.1 General

In the Finance Agreement unless the context otherwise requires:

- (a) expressions defined or explained in the Letter of Offer and, these general conditions have the same meaning throughout;
- (b) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation under, that legislation or legislative provision;
- (c) a reference to an individual or person includes a corporation and vice versa;
- (d) a reference in the Letter of Offer to two or more persons or to a partnership as Borrower is a reference to them (or the partners as appropriate) jointly and each of them severally;
- (e) a reference to any agreement or document is to that agreement or document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;
- (f) a reference to any party to the Finance Agreement or any other document or arrangement includes that party's executors, administrators, substitutes, successors and permitted assigns;
- (g) a reference to "financial statements" in relation to a financial year of a body corporate, or in relation to a body corporate, is to financial statements as defined in section 9 of the Corporations Act and a reference to "financial statements" of an individual or a partner is to a statement of position or (in the case of a partner) partnership accounts and interim management statement of the kinds described in general condition 9(a);
- (h) a reference to a "subsidiary" of another body corporate is to:
 - (i) a subsidiary of that other body corporate in accordance with Part 1.2 Division 6 of the Corporations Act; and
 - (ii) for the purposes of the meaning of "Change of Control" and general conditions 9(f) and 10.1(0), a subsidiary of that other body corporate by one or more applications of the provisions of Division 6 of Part 1.2 of the Corporations Act, on the basis that, on each application of those provisions, the immediate holding company of the body corporate to which those provisions are applied satisfies each of the tests set out in section 46(a) of the Corporations Act;
- (i) headings are for convenience of reference only and do not affect interpretation.

24.2 Interpretation

In the Finance Agreement unless the context otherwise requires:

"**Authorised Representative**" means, in respect of the Borrower, a person appointed by its board of directors (or, in the case of a partnership, by the partners) as an Authorised Representative, the appointment to be evidenced by notice to the Bank, showing the signature of each nominated person and bearing the certification of its director or secretary (or in the case of a partnership, of the partners (unless otherwise agreed by the Bank) certifying that each signature is correct and, in respect of the Bank, means each director, secretary and person whose title includes the word manager, or any other person (or member of a class of persons) nominated by notice from the Bank to the Borrower;

"**Bank's Bill Buying Rate**" means, in respect of any amount, for any period, the rate expressed as a yield percent per annum quoted by the Bank for the first day of that period, for bank bills having an aggregate face value equal to that amount and tenors equal to, or as near as practicable to the duration of that period;

"**Bill**" means a bill of exchange, which is, or is to be accepted, or accepted and discounted under a Commercial Bill Facility;

"**Borrower**" means

- (a) the Borrower named in the Letter of Offer; or
- (b) if:
 - (i) one or more companies is named as Borrower in the schedule to the Letter of Offer, then each of them; or-
 - (ii) the Borrower is described in the Letter of Offer as the partners of a partnership, then in general condition 8 each partner and otherwise each of the partners jointly and severally, except in **general conditions 6.4, 10.1, 15.1, 15.3 and 18.2** where a reference to "Borrower" is a reference to any of them;

"**Business Day**" means a day on which the Bank is open for general banking business in Melbourne and any other place, which is given as a place for payment in the Letter of Offer;

"**Change of Control**" means, in relation to a corporation:

- (a) the person who controls (as defined in section 50AA of the Corporations Act) or group of persons who acting together control it, cease to have that control;
- (b) if it is a subsidiary, it ceases to be a subsidiary of the body corporate which is its holding company; or
- (c) a change takes place in its directors, a transfer of shares in it is registered or new shares, convertible notes or options for shares in its capital are issued;

"**Default Rate**" means an interest rate per annum 4.50% higher than the interest rate from time to time applying to the Facility;

"**Drawdown Date**" means the date on which a Drawing is or is proposed to be provided to the Borrower (including as part of a rollover) under the Finance Agreement;

"**Drawdown Notice**" means a notice given by a Borrower in a form approved by the Bank requesting a Drawing;

"**Drawing**" means an amount of Principal Outstanding provided, or to be provided, to the Borrower on any date under a Facility, and the expression "to make a Drawing" means to draw the relevant amount of Principal Outstanding;

"**Environmental Law**" means an Act of parliament, which has the purpose of protecting the environment from pollution including, without limitation, pollution relating to air, water, noise or chemicals (and any statutory modification of, or legislative provision substituted for, and any subordinate legislation under an Act of parliament of that kind);

"**Event of Default**" means each event or circumstance described in general condition 10.1;

"**Facility**" means each facility detailed in the Letter of Offer;

"**Financial Statements**" means a balance sheet, an income statement, a cash flow statement and a statement of changes in equity together with any notes, directors' declarations, directors' reports and

auditor's reports attached to, intended to be read with or required by the *Corporations Act 2001* to accompany those documents;

"Fixed Interest Period" means any period of the Term for which an interest rate has been specified by the Bank and accepted by the Borrower to be fixed at a particular rate;

"Guarantor" means a Surety which has given, or is to give Security by way of guarantee or other liability, which is not limited to the value of assets charged by the Surety;

"LVR" means Loan to Value Ratio, which is the amount of the Facility Limit as a percentage of the value ascribed by the Bank to the Security and notified by the Bank to the Borrower;

"Nominated Account" means the account held by the Borrower with the Bank detailed in the Letter of Offer.

"Periodic Revaluation" means in respect of any Security, a valuation undertaken at any time during the Term as the Bank may determine by a valuer appointed by the Bank provided always a Periodic Revaluation shall not be undertaken of any Security within a period of less than 3 years after last valued by the Bank;

"Periodic Review" means a review of any Facility and the Borrower's performance thereunder conducted at any time during the Term that the Bank may determine by a notice in writing to the Borrower, and for which purpose the Borrower must upon request allow the Bank and persons acting on the Bank's behalf to inspect and take copies of all extracts from the business and financial records of the Borrower and any Relevant Company and give reasonable assistance to them;

"Pollutant" means a substance which is controlled by an Environmental Law, or in respect of which an Environmental Law purports to provide protection;

"Potential Event of Default" means an event or circumstance which, with the passage of time or the giving of notice would become an Event of Default;

"Principal Outstanding" means, on any day:

- (a) in respect of a Business Overdraft Facility and in respect of a Business Loan Facility, the aggregate amount outstanding on that day;
- (b) in respect of a Commercial Bill Facility, the aggregate face value of all outstanding Bills on that day;

"Relevant Company" means each Surety, each subsidiary of the Borrower, each subsidiary of a Surety and each other corporation specified as a Relevant Company in the Letter of Offer;

"Security" means each Security (including, without limitation, each cross deed of covenant and each guarantee) required in the Letter of Offer;

"Security Interest" means, without limitation, a mortgage, pledge, lien, charge, assignment, title retention or any other arrangement (including without limitation, any set off arrangement) having a similar commercial effect as a grant of Security, other than the Securities and any other Security indicated to the Bank by notice given by the Borrower before entering into the Finance Agreement or created subsequently with prior consent by notice from the Bank;

"Surety" means a person who gives or is to give a Security;

"Termination Date" means the last day of the Term specified in the Letter of Offer in respect of a Facility or if no Term is specified, the date stated by the Bank in a notice given pursuant to general condition 11.1; and

"Transaction Document" means the Letter of Offer, these general conditions, each document evidencing a Security and each other document contemplated by or required in connection with the Finance Agreement and each document or agreement entered or to be entered into for the purpose of amending or novating any of them.

SCHEDULE 4

BAB.0010.0001.0827

Annexure B

35



Facility Terms

(2016: Version 1)

BEFORE YOU ACCEPT ANY LETTER OF OFFER (WHICH INCORPORATES THESE TERMS) YOU SHOULD CAREFULLY CONSIDER:

- **YOUR FINANCIAL POSITION; AND**
- **THE PROVISIONS OF THESE TERMS, THE LETTER OF OFFER AND THE SECURITIES; AND**

YOU SHOULD SEEK ADVICE FROM YOUR LAWYER OR ACCOUNTANT.

FACILITY TERMS

(2016: Version 1)

These terms form part of the *letter of offer* from *us* to *you* and any *guarantor* and, once the *letter of offer* is accepted, *you* and any *guarantor* are bound by these terms, which may be varied by *us* from time to time under **clause 4**. These terms apply to all *facilities* described in each *letter of offer* between *us* and *you*.

This version of the terms replaces all previous versions.

For *your* assistance, defined expressions are shown in italics "*like this*" when used in these terms. Please refer to **clause 15** for the meaning of defined expressions.

1. CONDITIONS

Note: This clause sets out various steps that must be taken before *you* may request a *drawing* under a *facility*. Other requirements are set out in these terms and may be included in the *letter of offer*.

1.1 General conditions precedent

We are not obliged to provide a *drawing* under a *facility* unless:

- (a) we receive, in a form and substance satisfactory to *us*, the *letter of offer* duly accepted, the *securities* and any other documents *we* or *our* solicitors reasonably consider necessary or desirable;
- (b) we receive any other documents *we* or *our* solicitors reasonably require to evidence that all necessary action was taken to authorise the execution and delivery of each *relevant document* and each *material document*;
- (c) the relevant *account* for that *facility* has been established in accordance with *our* standard procedures and the requirements of all relevant *government bodies*;

- (d) the *securities* are stamped and registered in such jurisdictions and with such *government bodies* as are required for the *securities* to be valid, fully enforceable and to confer the priority specified in the *letter of offer* or, if not specified, as required by *us*;
- (e) any other requirement separately notified by *us* to *you* and/or the *guarantor* or contained in the *letter of offer* is satisfied;
- (f) if any of the *secured property* includes plant, equipment, crops, livestock or improvements, *we* receive proof of insurance of those items (for their full insurable value) and with an insurer approved by *us* with *our* interest noted on that insurance;
- (g) *we* receive satisfactory results to *our* searches and enquiries in connection with *you*, the *guarantor*, the *trust* and the *secured property*;
- (h) *we* are satisfied that each of the representations and warranties contained in each *relevant document* and each *material document* is correct;
- (i) *we* are satisfied that since the date of the relevant *letter of offer* no event has occurred that may have a *material adverse effect*;
- (j) *we* are satisfied that there is no subsisting *event of default* or *potential event of default*; and
- (k) in the case of a *drawing* relating to an *external obligation*, *we*:
 - (1) approve the form, and the beneficiary, of the *external obligation* which must, unless otherwise agreed by *us*, have an expiry date before the *repayment date* for the *facility*; and

- (2) receive a request and indemnity from *you* (in form and substance acceptable to *us*).

1.2 **Conditions precedent for first drawing for development purposes**

If any *drawing* under a *facility* is to be used to assist in completion of a *development* the following must be received by *us* before the first *drawing* for that purpose is made:

- (a) evidence acceptable to *us* or *our consultant* that all *development consents* required in connection with that *development* have been obtained and are satisfactory;
- (b) evidence acceptable to *us* or *our consultant* that the *builder* is qualified, appropriately licensed and competent to complete the *development* in accordance with the *development consents*, the *plans and specifications* and the *building contract*;
- (c) evidence acceptable to *us* that the contractor's all risks insurance is in place, that *our* interest is noted on the policy and the policy is satisfactory in all respects;
- (d) evidence satisfactory to *us* or *our consultant* that the *plans and specifications* are in accordance with the *development consents*;
- (e) evidence acceptable to *us* that each *material document* has been executed and is satisfactory in all respects; and
- (f) evidence acceptable to *us* that all other *pre development conditions* have been met.

1.3 **Further conditions precedent for drawings for development purposes**

Our obligation to make available any *drawing* to assist in completion of a *development* is subject to the further conditions precedent that:

- (a) we receive a certificate from *our consultant* that the works in relation to the *development* for which the *drawing* is required have been satisfactorily completed and the *cost to complete* is less than the aggregate balance then remaining under all *facilities* available to assist in completion of the relevant *development* after the proposed *drawing*;
- (b) we receive a certificate from the *builder* confirming that all payments due to the *builder* under the *building contract* have been made other than those the subject matter of the proposed *drawing*;
- (c) we receive a certificate or statutory declaration from the *builder* confirming that all its subcontractors have been paid or will be paid from the proceeds of the proposed *drawing*; and
- (d) evidence that *our consultant* has been paid all of its costs and expenses.

1.4 **Conditions precedent for our benefit**

These conditions precedent are for *our* benefit only. *We* may waive or defer (with such requirements or conditions as *we* see fit) the satisfaction of any of them at any time.

1.5 **Conditions subsequent**

You and/or each *guarantor* must comply with any conditions subsequent specified in the *letter of offer* within the time permitted by the *letter of offer*. Failure to do so will constitute an *event of default*.

2. **USE OF FACILITY**

Note: This clause sets out various requirements that apply to the use of a *facility*. Others may be specified in the *letter of offer*.

2.1 **General**

You and each *guarantor*:

- (a) agree that at no time may the debit balance of an *account* or the *external exposure* under all *outstanding external obligations* exceed the *facility limit* applicable to the relevant *facility*;
- (b) agree that the *facility* may only be used for an *approved purpose* and that any *drawing* used for any purpose other than an *approved purpose* must be immediately repaid;
- (c) authorise *us* to debit each *advance* under a *facility* to the *account* for that *facility* or to the *account* nominated for that purpose in the *letter of offer* on the date that it is provided to *you* or at *your* request; and
- (d) agree that the *facility* will be advanced in accordance with the *method of advance* (if any) specified in the *letter of offer*.

2.2 Usage and access

Banking accounts terms and conditions may regulate the way in which a *facility* can be accessed by *you* and, to the extent they apply to the use of a *facility*, they are incorporated in, and form part of, these terms.

In addition, but subject to the other provisions of these terms and the *letter of offer*, *you* may by notice in writing to *us* request a *drawing*.

We may, at any time after the occurrence of an *event of default*, cancel or restrict access to an *account* via any card, internet or telephone access arrangements, cheque or other arrangements described in *banking accounts terms and conditions*.

2.3 Term loans

If the *facility* is a *term loan* (other than one for *development* purposes), we may, after the first *advance* and by providing at least

14 days prior written notice to *you*, cancel any unutilised portion of the *facility limit*.

2.4 Cancellation by us and reinstatement

We may at any time cancel any part of the *facility limit* that has not been utilised by giving *you* at least 14 days prior written notice, provided that if an event has occurred that may have a *material adverse effect*, or we have reasonable grounds for suspecting that such an event has occurred or is likely to occur, we may cancel that part of the *facility limit* that has not been utilised without prior notice to *you*.

At *our* discretion and provided there is no subsisting *event of default* or *potential event of default*, we may reinstate the cancelled portion of the *facility limit* at *your* request.

2.5 Non usage

If no *drawing* under a *facility* has been made within 90 days of the date of acceptance of the *letter of offer*, we may, by notice to *you*, cancel that *facility* and *our* obligation to provide that *facility* ceases on the date of that notice.

2.6 Prepayment

Where the *facility* has been provided at a variable *interest rate*, *you* may at any time repay all or any part of the debit balance of any *account* without any additional cost.

Where the *facility* relates to the issue of an *external obligation*, *you* may at any time discharge *your* obligations under that *facility* by returning the original of that *external obligation* and paying to *us* any amount paid by *us* under that *external obligation* which has not already been reimbursed by *you* together with interest on that amount.

2.7 Redraw

If the *letter of offer* indicates that a redraw option applies to the *facility* we may, subject to this **clause 2.7** and the other terms of the *letter of offer*, permit any prepaid amount to be redrawn by *you* provided it is not less than \$5,000 (or any other amount specified

in the *letter of offer*) or such other amount as may be agreed by *us*.

A 'prepaid amount' is the amount by which the total repayments of principal made by *you* exceed the total repayments of principal required under the *facility* at any time.

The following conditions apply in relation to redraws:

- (a) the *facility* must have been fully drawn on the date that the first repayment on the *facility* was due;
- (b) the *facility* must not be fully repaid at the time *you* wish to redraw;
- (c) the amount of *your* early or additional repayments, less any previous redraws, must total the minimum amount (if any) of each redraw specified in the *letter of offer*;
- (d) *you* and any *guarantor* must have complied with the terms of the *facility* and each other *relevant document* to *our* satisfaction; and
- (e) the *securities* must not, in *our* opinion, have diminished in value nor varied in any other way from when they were given to *us*.

The amount of any redraw made under this clause will be debited to the *account* and will then incur interest on the same basis as principal owing on the *facility*.

2.8 Priority

Without prejudice to *our* rights under any *relevant document*, if *we* become aware that:

- (a) any other person holds a security interest or encumbrance over any *secured property*; or
- (b) the *securities* are not registered with the priority required by *us*,

then *we* are not obliged to continue to provide the *facility* until *we* have entered

into a priority agreement with all relevant parties on terms satisfactory to *us*.

2.9 Payment on account of outstanding sum

If *we* receive a prepayment from *you* on account of *our* obligations under any *outstanding external obligation*, that prepayment will be held by *us* to cover *your* obligations under **clauses 12 and 14**. Nothing in this clause affects *our* rights under **clause 13.14**.

2.10 Gross up

If any law requires *you* to deduct or withhold an amount in respect of *tax* from any payment required under a *relevant document*, *you* must:

- (a) advise *us* in writing of that obligation;
- (b) pay the relevant *tax* and provide evidence of payment; and
- (c) increase the amount payable to *us* so that *we* receive the full amount payable as though no deductions or withholdings (including in relation to amounts payable under this **clause 2.10**) had been required.

2.11 Special drawdown provisions and undrawn facility fee

(a) Application

This **clause 2.11** applies to a *facility* if the *letter of offer* says that it applies, provided that sub-paragraphs (b), (c) and (d) do not apply to a *facility* which is described as an Access Facility in the *letter of offer*.

(b) Drawdown period for a facility

You must draw down the *facility limit* in full within the *drawdown period*, unless *we* agree otherwise in writing. *We* may agree to vary the *drawdown period* in *our* discretion.

Unless otherwise specified in the *letter of offer*, the *facility limit* must be drawn down in one amount.

(c) **Amounts undrawn are cancelled**

We may, by notice to *you*, cancel *your* access to any part of the *facility limit* that is not drawn down by the end of the *drawdown period*.

(d) **Undrawn facility fee**

During any part of the *drawdown period* when the *interest rate* applying to a *facility* is a *fixed interest rate*, *you* must pay *us* an undrawn *facility* fee of 0.2% per month on the daily amount of any part of a *facility limit* not drawn down. The undrawn *facility* fee is payable monthly in arrears.

(e) **Procedure for drawings**

You cannot make a drawing if to do so would cause the *facility limit* to be exceeded.

Funds paid to the *account* must be cleared before *you* can draw against those funds.

To make a *drawing* under a *facility* which is described as an Access Facility in the *letter of offer*, *you* must:

- (1) provide a payment instruction in writing to *our* relevant regional office (using a form approved by *us* for that purpose);
- (2) apply separately to use *our* online services; or
- (3) apply separately for a cheque book or Visa card.

A payment instruction may be given to *our* regional office where *your facility* is administered by delivering it or posting it to *us* at that office, sending it to *us* at that office by

facsimile, sending it to *us* at that office by email, or by phone to *us* at that office. A payment instruction is not effective until we receive and approve it.

To make a *drawing* under any other type of *facility* *you* must complete and provide to *us* a disbursement authority (using a form approved by *us* for that purpose).

(f) **Method of payment**

A payment instruction or disbursement authority must specify which of the following payment methods *you* request *us* to use when making payment:

- (1) crediting the *account* or any other account *you* may have with *us* in accordance with *your* instructions;
- (2) posting *you* a cheque drawn in *your* favour;
- (3) depositing a cheque at a branch of *your* bank or other financial institution to the credit of *your* account; or
- (4) if cleared funds are required, by same day transfer, or other means, to the credit of the *account*. Any charges payable by *us* for arranging the deposit of clear funds will be charged to the *account*.

We will seek to make the relevant payment using the method requested by *you*, but we may make the payment by any other method we deem necessary and shall notify *you* of that method of payment.

(g) **Time limit on requests under facility**

If *you* wish to make a *drawing* *you* must provide *us* with a payment instruction or disbursement authority (as applicable) before 10.00 a.m. on

the *business day* on which you wish to make the *drawing*.

If we receive a payment instruction or disbursement authority later than 10.00 a.m., the applicable payment may not be available until the following *business day*.

(h) **Minimum amount of drawing**

The minimum amount of each *drawing* (if any) is as specified in the *letter of offer*, but a *drawing* for less than the minimum amount may be permitted where:

- (1) the *drawing* is being made to make a payment to another *facility* that you have with us; or
- (2) the amount available to be drawn is less than the minimum amount.

3. PAYMENT OBLIGATIONS

Note: This clause sets out various requirements relating to the payments required to be made including when those payments are required, how they are calculated and where, and how, they must be made.

3.1 General

All payments required to be made under or in connection with a *relevant document* must be made:

- (a) in cleared funds free of any set-off, counterclaim or deduction;
- (b) by 4 pm on a *business day*;
- (c) in Australian dollars; and
- (d) to us at our address shown in the *letter of offer* or as subsequently advised to you in writing.

3.2 Interest

You must pay interest on the debit balance of each *account*.

Subject to **clause 3.8**, interest will be calculated on the daily debit balance of an *account* at the *interest rate* applicable to the relevant *facility* (converted to a daily rate) and will be debited to that *account* (or to such other *account* specified in the *letter of offer*) on the dates specified in the *letter of offer* (or monthly in arrears if no dates are specified).

The *interest rate* may consist of a base rate and a margin. If it does, the current base rate applicable to the relevant *facility* can be obtained by telephoning us.

Any *interest rate* set out in the *letter of offer* may change before the first *advance* is made, if there is a change in the *interest rate(s)* applicable to the relevant type of *facility*.

3.3 Conversion of interest rate

You may request us to change an applicable variable *interest rate* to a *fixed interest rate* or vice versa during the term of any *facility*.

If we agree to such a variation, the varied terms will be as agreed between us and you, and we will issue a revised *letter of offer*, or notice of agreed variation, to you. Our agreement may be subject to conditions.

If we agree to change a *fixed interest rate* to a variable *interest rate* prior to the end of a *fixed rate period*, one of our conditions may be that you pay a *break cost* calculated in accordance with **clause 7**.

3.4 Fees and charges

You must pay us all the fees and charges in the amounts and at the times specified in the *letter of offer* and (unless the *facility* is regulated) in the relevant *fees and charges schedule* and in each other *relevant document*, and you authorise and direct us to debit those fees to the relevant *account*, to such other *account* nominated in the *letter of offer* or to any other account you have with us on the due date for payment.

3.5 **Calculation**

Interest and, where applicable, fees are calculated daily on the basis of a 365 day year or, in the case of a leap year, a 366 day year.

3.6 **Repayments**

You must repay to *us* the *outstanding sum* on or before the *repayment date* applicable to the relevant *facility* or, if no *repayment date* is specified, on demand and must, if required by the *letter of offer*, make such other repayments on the due dates for payment specified in the *letter of offer*.

You must also immediately repay any amount by which the *outstanding sum* exceeds the *facility limit* at any time.

The original of each *external obligation* must be returned to *us* on the *repayment date* applicable to the *facility* relating to that *external obligation*.

3.7 **Other costs and expenses**

You must pay on demand all other costs, charges, duties and expenses including legal costs reasonably incurred (on a full indemnity basis), registration costs, discharge costs, stamp duty, government charges, court fees and valuation costs specified in any *relevant document* or which are incurred by *us* in connection with:

- (a) the preparation, negotiation and execution of each *relevant document* and *external obligation*;
- (b) the stamping and, where necessary, registration of each *relevant document* and *external obligation*;
- (c) the conduct of any searches and enquiries including obtaining any valuation or other report required by *us* and obtaining advice on any *trust deed*;

- (d) any valuations or revaluations undertaken by *us* in accordance with the *relevant documents*;
- (e) the enforcement and attempted enforcement or preservation by *us* of *our* rights under any *relevant document* or any *material document*, including any legal recovery costs (such as mediation costs) and any costs associated with restructuring or amending the *facilities*;
- (f) any request for amendment, consent, approval or waiver in connection with any *relevant document*, any *material document* or any *external obligation*; and
- (g) any advice obtained, or assessment undertaken, in connection with the *relevant documents*, the *material documents*, any *external obligation* or *our* rights and duties under them including all costs and expenses of *our consultant*.

You authorise *us* to debit those costs and expenses to the relevant *account* and acknowledge that *you* are liable for these costs and expenses even if no *drawing* is ever made under the *facility*.

3.8 **Default Interest**

You and any *guarantor* must pay interest on any moneys due but unpaid under the *relevant documents* including, without limitation, on any debit balance of an *account* in excess of the *facility limit* applicable to that *account*, at the *overdue rate*. Interest on unpaid amounts is calculated from but excluding the date the payment was due to and including the date the payment is made. Interest not paid when due will be capitalised monthly and will be debited to the relevant *account* on the first day of each month in arrears.

3.9 Merger

If the liability of *you* or a *guarantor* to pay to *us* any moneys payable under a *relevant document* becomes merged in any deed, judgement, order or other thing, then *you* or the *guarantor* (as the case may be) must pay interest on the amount owing from time to time under that deed, judgement, order or other thing at the higher of the rate payable under the applicable *relevant document* and the rate fixed by, or payable under, that deed, judgement, order or other thing.

3.10 Appropriation

We may appropriate any payment we receive in any way we see fit towards satisfaction of moneys owing by *you* and/or the *guarantor*. To the extent permissible, any law, and any direction from *you* and/or a *guarantor*, as to appropriation does not apply.

4. REVIEW AND VARIATION

Note: This clause contains provisions dealing with reviews of the *facilities* and variations which may be made.

4.1 Review

We may review the *facilities* and/or the financial position and performance of *you* and/or a *guarantor* at any time (provided that we will not review the *facilities* more than once in any twelve month period unless otherwise specified in the *letter of offer*) and at any other time when we suspect that an event or events which may have a *material adverse effect* has occurred. *You* and each *guarantor* must provide such information as we reasonably request to enable each such review to take place.

4.2 Rights following review

If following any review conducted by *us* in accordance with **clause 4.1**, we consider that there has been an event which has had a *material adverse effect* or that there has been a material adverse change in

relevant market or industry conditions generally, we may require that *you* and/or each *guarantor* accept amended terms and conditions or provide additional *security*.

If *you* and/or each *guarantor* have not, within 10 *business days* of being requested by *us*, accepted the revised terms and conditions or provided the additional *security* requested, each *facility* will terminate and *you* will be required to pay the *outstanding sum* within 30 days of our original request.

4.3 Saving provision

Nothing in this **clause 4** affects *our* rights should an *event of default* occur and we may exercise *our* rights as a result of an *event of default* even if negotiations under **clause 4** are in progress.

4.4 Change to terms

In addition to *our* rights under **clause 4.2**, we may vary any terms of the contract constituted by the *letter of offer* and these terms at any time without the consent of *you* or a *guarantor*. Without limiting that right, such variations may include:

- (a) changing the *interest rate* (except that we will not change a *fixed interest rate* during a *fixed rate period*);
- (b) changing any margin which applies to an *interest rate*;
- (c) changing the manner in which interest is calculated or applied;
- (d) changing the amount or frequency of repayments, or minimum repayments, required;
- (e) changing fees and charges, or adding new fees and charges (provided that if the *facility* is a *regulated arrangement* we will not change how the *break cost* is calculated, in a way which may have the effect of increasing it, during *fixed rate period*); or

- (f) changing the *facility limit*.

We will give *you* notice of any variation in accordance with **clause 13.5**. Any variation will take effect from the date specified in the notice. If any law (including the *National Credit Code*) or *code* applies to the *facility* and requires *us* to give *you* a minimum period of prior notice of a variation taking effect, we will give at least that minimum period of notice.

4.5 Acceptance

You and/or each *guarantor* acknowledge that any usage by *you* of the relevant *facility* after the date that a variation is notified to *you* and/or each *guarantor* (whether under **clause 4.2 or 4.4**) constitutes acceptance of that variation.

5. REPRESENTATIONS AND WARRANTIES

~~those revised terms~~
Note: This clause contains various representations and warranties given by *you* and each *guarantor*. We rely on these representations and warranties when entering into the *facility* and when each *drawing* is made. Other warranties are included in **clause 10**, the *securities* and may also be set out in the *letter of offer*.

5.1 Representations and warranties

You and each *guarantor* represents and warrants that:

- (a) all information provided to *us*, including in the *finance application*, is true and correct and is not false or misleading;
- (b) if a corporation, it is duly incorporated in accordance with the laws of its place of incorporation, validly exists under those laws and has the capacity to sue and be sued in its own name and to own its property and conduct its business as it is being conducted;
- (c) unless it has disclosed the contrary to *us* in writing prior to the date of acceptance of the *letter of offer*, it is not the trustee of any *trust*;

- (d) it has taken all necessary steps, and has all requisite power, to properly accept the *letter of offer* and execute, and enter into the transactions evidenced by, each *relevant document* and each *material document*;
- (e) each *relevant document* and *material document* to which it is a party is its valid and binding obligation, enforceable in accordance with its terms subject to laws relating to *insolvency* and creditor's rights generally and to the discretionary nature of equitable remedies;
- (f) acceptance of the *letter of offer* and execution of each other *relevant document* and each *material document* and entering into the transactions evidenced by them does not cause a breach of any existing law, its constitution (if applicable) or any other agreement to which it is a party;
- (g) other than as disclosed in writing to *us* prior to the date of acceptance of the *letter of offer*, it has not granted any *encumbrance* (other than a *permitted security interest*) over all or any part of the *secured property*;
- (h) it has obtained all necessary consents, licences, approvals and other authorisations from all relevant persons and *government bodies* in connection with acceptance of the *letter of offer* and execution of each *relevant document* and each *material document* and entry into the transactions evidenced by them;
- (i) no *insolvency event* has occurred or is threatened;
- (j) it has paid all rates, taxes and other outgoings which are due and payable by it;

- (k) it has not failed to disclose to *us* any material information which a reasonable person would consider relevant to the assessment by *us* of the *finance application* and to *our* decision to provide the *facility*;
- (l) (unless the *facility* is a *regulated facility*) the *drawings* provided, or to be provided, under each *facility* have been, or will be, applied wholly or predominantly for business or investment purposes (other than investment in residential property);
- (m) it has obtained and relied on such independent legal, accounting and other advice and information as is necessary or desirable to understand the *relevant documents* and its obligations under them;
- (n) it is in its, and its creditors, best interests for it to enter into and comply with its obligations under the *relevant documents*, that the transactions evidenced by the *relevant documents* to which it is a party are not uncommercial and that it has, or will, obtain a real benefit from entering into, and performing its obligations under, the *relevant documents*;
- (o) no *event of default* or *potential event of default* has occurred;
- (p) it has complied with all *environmental legislation* including in relation to the *development* (where relevant);
- (q) where relevant, it has obtained all necessary *development consents*;
- (r) its obligations under each *relevant document* rank at least equally with all its other unsecured and unsubordinated obligations except obligations mandatorily preferred by law;
- (s) it and its property are free of any right of immunity from set-off, proceedings or execution in respect of its obligations under the *relevant documents*;
- (t) no litigation or other proceedings are current or threatened against it and it is not aware of any *environmental liability* affecting it; and
- (u) no representation, warranty, promise, assurance or other statement has been made to it by any person (including *us* and *our* past or present servants and agents) concerning or relating to any *relevant document* or any *material document* other than those contained in the *relevant documents* or the *material documents*.

5.2 Reliance

You and each *guarantor* acknowledge that we rely on the representations, warranties, covenants and acknowledgements set out in these terms and in the other *relevant documents* in agreeing to provide the *facility* and that we would not have agreed to provide the *facility* but for those representations, warranties, covenants and acknowledgements.

5.3 Survival and repetition

Each representation and warranty set out in these terms survives the acceptance of the *letter of offer* and is deemed to be repeated with reference to the facts and circumstances then existing on the date each *drawing* is provided and on the first *business day* of each month.

6. COVENANTS

Note: This clause contains various obligations by *you* and each *guarantor*. Others are contained elsewhere in these terms, in the *letter of offer* and in the *securities*.

6.1 Positive covenants

You and each *guarantor* must:

- (a) if a corporation, provide to *us* as soon as available (but in any case within 4 months after the end of each financial year) a copy of its *financial statements* for that year unless as otherwise stipulated in the *letter of offer*;
- (b) if a natural person or a partnership, provide to *us* as soon as possible (but in any case within 4 months after the end of each financial year) a copy of the balance sheet and profit and loss account of each of its businesses for that year;
- (c) ensure that all *financial statements* and other accounts provided to *us* are prepared in accordance with the *Corporations Act* (if applicable) and accounting principles and practices generally accepted in Australia and consistently applied;
- (d) if we reasonably suspect there has been an adverse change in the financial position of *you* or a *guarantor*, provide to *us* within 14 days of request by *us*, copies of its most recently prepared trading statements, cash flow statements, budgets and balance sheets;
- (e) keep and maintain proper books of account (in accordance with the *Corporations Act*, if applicable), make true and correct entries of all its dealings and make its accounts and financial records available for inspection by *us*;
- (f) maintain its assets in a good state of repair and condition;
- (g) provide any information we may reasonably request in relation to its financial condition and its business operations including any information specified in the *letter of offer*;
- (h) promptly provide to *us* details of all information in the possession of *you* and each *guarantor* relating to any additional financial indebtedness incurred by *you* or a *guarantor* since the latest financial information provided to *us* including but not limited to indebtedness under all financial leases or other similar obligations;
- (i) take all action necessary to obtain and promptly renew all authorisations, approvals, consents, licences and exemptions required under any applicable law to conduct its business operations and to perform its obligations under, or required on its part for the validity and enforceability of, all *relevant documents* and each *material document* including make all payments when due under any lease, licence or other arrangement for the use of any property;
- (j) notify *us* in writing as soon as it becomes aware of:
 - (1) an *event of default* or a *potential event of default*;
 - (2) any actual or threatened litigation, arbitration or mediation proceeding relating to it or any of the *secured property*;
 - (3) any notification to it of a proposal to compulsorily acquire, resume or confiscate any of its property; and
 - (4) any other thing which has, or may have, a *material adverse effect*;
- (k) comply with the provisions of the *Corporations Act* (if applicable) and all existing laws;
- (l) punctually comply with all requirements of any *government body*;
- (m) punctually pay all rents, instalments of purchase money, interest, rates, *taxes* and other

- money payable by it and, at the request of *us*, deliver evidence of its payment;
- (n) punctually perform all of its obligations under each *relevant document* and each *material document*;
- (o) promptly on receipt provide to *us* copies of all material correspondence, advices and notices, including notices of any default under, or in connection with, all *material documents*;
- (p) carry on and conduct its businesses in a proper and efficient manner;
- (q) keep *us* fully informed of all relevant information regarding it, including providing not less than 14 days prior written notice of any proposed change in name, business structure or contact details and must immediately notify *us* of any material changes in business activities;
- (r) insure and keep insured all its property able to be insured against loss or damage by fire and such other risks against which a prudent owner would insure for its full insurable value and maintain workers' compensation, public risk, employees' liability, business interruption and other insurances which are necessary or appropriate having regard to its business and property and other insurances specified by *us* or required under any *relevant document*, in all cases, with a solvent and respectable insurer approved by *us* and provide copies of the relevant policies and evidence of the currency of all insurances to *us* upon request; and
- (s) ensure that the following payments are promptly credited to the relevant *account* upon receipt:

- (1) an amount equal to the input tax credit to which it is entitled in relation to a *development* (irrespective of that credit being offset against other moneys owing to the Australian Tax Office) in connection with GST where we have funded that *development*; and
- (2) full proceeds of settlement of *pre development agreements* relating to the sale of all or any part of the property included in the *development* (inclusive of GST).

6.2 Negative covenants

You and each *guarantor* must not, until all moneys owing (actually and contingently) to *us* in relation to all *facilities* have been repaid in full:

- (a) cause or permit to exist any *encumbrance* other than a *permitted security interest* on any *secured property*;
- (b) without *our* prior written consent, advance any money or grant accommodation to any person, permit money to remain owing to it by any person or repay money now or in the future owing by it to any person, other than in the ordinary course of its ordinary business;
- (c) without *our* prior written consent, cause or permit *you* or any *guarantor* to enter into any merger, reconstruction or amalgamation or acquire any property or business or make any investment if the property, business or investment is substantial in relation to *you* or any *guarantor*;
- (d) without *our* prior written consent, vary, amend, terminate or otherwise deal with any *material document*;

- (e) in any financial year, declare any dividend or dividends or otherwise pay or distribute any amount to any of its shareholders if it makes an operating loss before tax in that financial year or exceeding the percentage (if any) set out in the *letter of offer* of its profit after tax in that financial year;
- (f) without *our* prior written consent, cause or permit any change in the nature of its business as now conducted or to carry on any other business which is substantial in relation to its present business as now conducted; or
- (g) without *our* prior written consent, enter into any derivative transaction except a *treasury agreement* or for the purpose of hedging any actual or projected *interest rate*, foreign exchange or other exposures arising in the ordinary course of trading and not for speculative purposes.

6.3 Valuation covenants

You and each *guarantor* agree that *we* may, at *your* expense, engage a valuer (selected by *us* in *our* absolute discretion) to value or revalue all or part of the *secured property* at least once every three years or at any time *we* reasonably consider necessary. Each valuation must:

- (a) be addressed to *us* and be accompanied by confirmation from the valuer that *we* have, in relying on the valuation, the benefit of the valuer's professional indemnity insurance; and
- (b) be in form and substance satisfactory to *us*.

If following any valuation *we* reasonably consider that any *financial ratio* has been breached *we* may immediately require *you* to remedy such breach by notice in writing. *You* must remedy the breach within the time period specified by *us* by:

- (a) repaying such portion of the *facility*, or
- (b) providing to *us* such additional *security*,

as will, in *our* reasonable opinion, remedy the breach.

6.4 Development covenants and acknowledgements

Where the *approved purpose* of a *facility* is, or includes, funding of a *development*, *you* and each *guarantor*:

- (a) acknowledge that any inspection of the *development* by *us* or *our consultant* is for *our* purposes only;
- (b) acknowledge that neither *we* nor *our consultant* are responsible for any part of the *development*, any defect or omission in the works relating to the *development* or any other thing in connection with the *plans and specifications*, the *building contract*, the *development* or the *development consents* even if approved by *us*;
- (c) covenant to provide to *us* upon request or procure the provision of:
 - (1) copies of all *plans and specifications*, *development consents* and the *building contract*;
 - (2) copies of all bills of quantity, surveys, purchase orders, invoices, payment receipts and other information relating to the *development*;
 - (3) copies of all progress reports and cash flow projections relating to the *development*; and
 - (4) such other information concerning the *development* as requested by *us* and/or *our consultant* to enable

- inspections of the *development* to be undertaken and to be satisfied with any progress claim made by the *builder* under the *building contract*;
- (d) agree to give *us* notice of each site meeting and to permit *our consultant* and any other person nominated by *us* to attend each site meeting;
- (e) covenant to provide *us* and *our consultant* access to any real or leasehold property relating to the *development* for the purpose of conducting inspections and to attend any site meetings;
- (f) covenant to take all necessary and reasonable steps to:
- (1) ensure that each stage of the *development* is completed by the estimated completion date and in accordance with the *building contract*, *development consents* and *plans and specifications*;
- (2) procure the issue of any certificate of occupancy, certificate of completion or similar certificate from the relevant *government body* upon completion of the *development* or the relevant stage of the *development* and provide a copy to *us* promptly after issue;
- (3) meet all *cost overruns* from its own resources on a monthly basis and provide evidence to *us* of payment; and
- (4) deliver to *us* any guarantee or security bond issued by the *builder* under, and in accordance with, the *building contract*;
- (g) acknowledge that we, in determining the amount of a *drawing* requested to meet the costs of the *development*, will, unless otherwise agreed, exclude the value of materials claimed which are off-site or delivered on site but not incorporated in the *development*;
- (h) covenant not to amend the *building contract* or agree to any change to the *plans and specifications* without *our* prior written consent;
- (i) unless otherwise specified in the *letter of offer*, covenant not to agree to, or request, any variation to the works as outlined in the *building contract* without *our* prior written consent; and
- (j) covenant to comply with all *environmental legislation* relating to, or affecting, the *development* and provide prompt notice to *us* of any actual or alleged breach of any such *environmental legislation*.
- 6.5 **PPSA Law**
- (a) We need not give any notice under the *PPSA Law* (including a notice of a verification statement) unless the notice is required by the *PPSA Law* and cannot be excluded.
- (b) If *you* and/or any *guarantor* hold any security interests for the purposes of the *PPSA Law*, *you* or the *guarantor* (as the case may be) agrees to implement, maintain and comply in all material respects with procedures for the perfection of those security interests. These procedures must include procedures designed to ensure that the relevant party takes all steps under the *PPSA Law* to continuously perfect any such security interest including all steps necessary:
- (1) for *you* or the *guarantor* to obtain the highest ranking

- priority possible under the *PPSA Law* in respect of the security interest (such as perfecting a purchase money security interest or perfecting a security interest by control); and
- (2) to reduce the risk as far as possible of a third party acquiring an interest free of the security interest (such as including the serial number in a financing statement for personal property that may or must be described in the registration by serial number).
- (c) You and each *guarantor* agree to arrange an audit of the above *PPSA Law* procedures, if requested by us. Such costs of any audit are for your account.

7. BREAK COSTS

Note: This clause applies where a *fixed rate period* applies to a *facility* and sets out the additional costs which may be payable in certain circumstances.

7.1 Break costs

Where a *fixed interest rate* applies and, for any reason (including, for the avoidance of any doubt, as a result of the occurrence of an *event of default* or a review under **clause 4**), the whole or part of the debit balance of the relevant *account* is repaid or received by us before it was due to be paid under these terms and during a *fixed rate period*, you must, on demand, pay to us (by way of indemnity) the amount determined by us (in good faith and whether before or after payment or receipt) to be necessary to compensate us for any loss, cost, expense or damage including any loss of bargain or expectation we have, or will, suffer as a result of that repayment or receipt.

7.2 Break costs calculation

The *break cost* payable under **clause 7.1** will be the sum of:

- (a) The amount (if any) specified in the *letter of offer* as our break administration fee; and
- (b) What we calculate to be the present day value of either (in our discretion):
- (1) the difference between the amount which we would have received had there been no early repayment and the amount that we will be able to receive by lending those moneys to, or investing those moneys with, someone else at the then market rate of return, taking into account differences in *interest rates*; or
- (2) the difference between our cost of funds at the date of commencement of the *fixed rate period* and our cost of funds for the remaining period of the *fixed rate period* as at the date of the early repayment.

7.3 Acknowledgements

Where the *facility* is provided at a *fixed interest rate* or is the subject matter of a *treasury agreement* you and each *guarantor* acknowledge that:

- (a) it understands that movements in interest rates generally may result in it losing the possible benefit of having a *facility* with an *interest rate* that is fixed;
- (b) it has assessed, understands and accepts the risk of movements in *interest rates* generally;
- (c) it understands the consequences of repayment (voluntarily or otherwise) of a *facility* to which a

fixed interest rate or treasury agreement applies;

- (d) it has been advised to obtain, and has had sufficient opportunity to obtain, financial advice prior to making its decision to accept a *fixed interest rate* or to enter into the corresponding *treasury agreement*; and
- (e) it has not otherwise relied on any advice or opinion from *us* or any of *our* officers or agents (past or present) in deciding to accept a *fixed interest rate* or to enter into the corresponding *treasury agreement*.

8. EVENTS OF DEFAULT

Note: This clause lists the *events of default* and what happens if an *event of default* occurs.

8.1 Nature

Each of the following is an *event of default*:

- (a) *you* or a *guarantor* fails to pay to *us* when due any amount required to be paid under any *relevant document*;
- (b) *you* or a *guarantor* does not perform or comply with any other covenant, agreement or undertaking contained in any *relevant document* or any *material document* and if that default is capable of rectification:
 - (1) it is not rectified within 5 *business days* (or any longer period agreed by *us*) of its occurrence; and
 - (2) *you* or any *guarantor* does not during that period take all action which in *our* opinion is necessary or desirable to promptly remedy that default;
- (c) any representation, warranty or statement by *you* or a *guarantor* in any *relevant document* or any document delivered under any of

them is not complied with or is incorrect in any material respect when made or deemed to be repeated;

- (d) any other indebtedness of *you* or a *guarantor* becomes due and payable or capable of being declared due and payable before its stated maturity;
- (e) any *encumbrance* held by any person over any property of *you* or a *guarantor* becomes enforceable;
- (f) an *insolvency event* occurs in relation to *you* or a *guarantor*;
- (g) if *you* enter into a *relevant document* or any *material document* as partners, there is any change in the composition of that partnership without *our* prior written approval;
- (h) *you* or a *guarantor* enters into or resolves to enter into any arrangement, composition or compromise with or an assignment for the benefit of any of its creditors or a person is appointed under any applicable law to investigate any part of the affairs of *you* or a *guarantor*;
- (i) execution is levied against any of the assets of *you* or a *guarantor*;
- (j) a distress, judgement, attachment or other execution is levied or made against or enforced or applied over *you* or a *guarantor* or all or any of its assets and undertaking or a caveat is lodged against all or any part of its assets
- (k) *you* or a *guarantor* ceases, or threatens to cease, to carry on its business;
- (l) an authorisation from a *government body* necessary to enable:
 - (1) *you* or a *guarantor* to comply with its obligations

- under a *relevant document*;
or
- (2) *us* to exercise *our* rights
under a *relevant document*;
ceases to be in full force and effect;
- (m) if *you* or a *guarantor* is a corporation,
a step is taken under sections
601AA, 601AB or 601AC of the
Corporations Act to deregister it;
- (n) if, without *our* prior written consent,
there is a change in the identity of
the person or persons who control
you, any *guarantor* or any *trust*;
- (o) in relation to each *trust* (if any):
- (1) the beneficiaries resolve to
wind up the *trust*, or the
trustee is required to wind up
the *trust* under the *trust deed*
or applicable law, or the
winding up of the *trust*
commences;
- (2) the *trust* is held or is
conceded by the trustee not
to have been constituted or
to have been imperfectly
constituted;
- (3) the trustee ceases to be
entitled to be indemnified out
of the *trust* property in
respect of its obligations
under the *relevant*
documents or to have a lien
over them;
- (p) all or any part of any *relevant*
document or any *material document*
is terminated or is able to be
terminated or is, or becomes
capable of becoming void,
voidable, illegal, invalid or
unenforceable or of limited force and
effect;
- (q) any other event or circumstance
occurs which, in *our* reasonable
opinion, is likely to have a *material*
adverse effect;
- (r) without the prior written consent of
us, *you* or a *guarantor* increases its
liability under any *encumbrance*
over any part of the *secured*
property ranking ahead of the
securities;
- (s) an *event of default* (however
described) occurs under, or there is
any failure to observe any covenant
or undertaking contained in, the
securities or any *material document*;
- (t) the death of *you* or a *guarantor*;
- (u) the *securities* do not have the
priority specified in the *letter of*
offer or, if not specified, as required
by *us*; or
- (v) anything similar to anything referred
to in the foregoing sub-clauses 8.1(a)
to 8.1(u) (inclusive), or having a
substantially similar effect, occurs.
- 8.2 **Exercise of rights**
- Subject to any obligations we may have to
serve *you* with notice and/or give *you* an
opportunity to remedy a default (under the
National Credit Code if this is a *regulated*
arrangement or under any other law or code
that applies to the *facility*), if an *event of*
default occurs we may do any one or more of
the following:
- (a) cancel all or any part of any *facility*;
- (b) make the *outstanding sum* under
or in connection with any *facility*
immediately due for payment or
payable on demand; or
- (c) enforce *our* rights under any
relevant document.
- 8.3 **Investigation**
- If we reasonably believe that an *event of*
default is, or may be, continuing, we may
appoint a person to investigate whether this
belief is accurate. *You* and/or the *guarantor*
must co-operate with and comply with all
reasonable requests made by this person.
If there is or was an *event of default*, *you*

must pay all costs reasonably incurred in connection with the investigation.

9. GST PROVISIONS

Note: This clause sets out various requirements that *you* and/or the *guarantor* must observe and deals with the payment of any applicable GST

9.1 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under a *relevant document* are exclusive of GST.

9.2 Payment of GST

If GST is payable by a supplier or by the representative member for a GST group of which the supplier is a member, on any supply made under any *relevant document*, the recipient will pay to the supplier an amount equal to the GST payable on the supply.

9.3 Timing of GST payment

The recipient will pay the amount referred to in **clause 9.2** in addition to and at the same time that the consideration for the supply is to be provided under the *relevant document*.

9.4 Tax invoice

The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under **clause 9.2**. The recipient can withhold payment of the amount until the supplier provides a tax invoice or an adjustment note, as appropriate.

9.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a supplier under a *relevant document*, the amount payable by the recipient under **clause 9.2** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

9.6 Reimbursements

Where a party is required under a *relevant document* to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

10. TRUSTS

Note: This clause applies where *you* or a *guarantor* acts as trustee of a *trust*, whether or not we are aware of the existence of that *trust*.

10.1 Additional representations and warranties

You and each *guarantor* represents and warrants to *us*, in relation to each *trust*, that:

- (a) the *trust* is validly formed and the *trust deed* has been validly executed and stamped;
- (b) it is validly appointed as the trustee of the *trust*, is not in breach of its obligations as trustee and no circumstances exist by which it may be removed as trustee;
- (c) each *relevant document* and each *material document* is executed pursuant to, and in proper exercise of its powers as trustee of, the *trust* and all formalities required in connection with such execution have been observed;
- (d) the *approved purpose* and performance by it of its obligations under the *relevant documents* and the *material documents* is for a

- proper purpose of, and provides commercial benefit to, the *trust* and its beneficiaries;
- (e) it is entitled to be fully indemnified out of the assets of the *trust* for its liability under each *relevant document* and each *material document* and it has not charged its right of indemnity to any other party;
- (f) it will, at *our* request, exercise its right of indemnity against the assets of the *trust*;
- (g) it is the legal owner of all the assets of the *trust*;
- (h) there is no dispute between it and any other person in relation to the *trust* or the assets of the *trust*;
- (i) it is empowered to carry on its business as now conducted or contemplated and to own its property and assets in its capacity as trustee of the *trust* and there is no restriction or condition in the *trust deed* upon such activity by it;
- (j) the *trust* has not terminated and no event for the vesting of the assets of the *trust* has occurred;
- (k) the assets of the *trust* have not been re-settled or set aside and are sufficient to satisfy its right of indemnity;
- (l) all action required under the *trust deed* in relation to execution of the *relevant documents* and the *material documents* and the entry into the transactions contemplated by them has been taken; and
- (m) any copy of a *trust deed* supplied to *us* is a true and complete copy of the original and no other documents exist which affect the terms of the *trust*.
- 10.2 **Further obligations**
- You* or the *guarantor* (as the case may be) must not, without *our* consent:
- (a) cease to be the trustee of the *trust* or do anything which would cause or enable its removal, or retire, as trustee of the *trust*;
- (b) cause or permit the *trust* to be determined or a vesting date to be appointed;
- (c) do or permit anything which adversely affects its right of indemnity against the assets of the *trust*;
- (d) re-settle, set aside or distribute any of the assets of the *trust* unless required to do so by the *trust deed*;
- (e) in any way vary or permit to be varied the terms of the *trust deed*;
- (f) make any distribution of the capital of the trust fund of the *trust* or, whilst any *event of default* or *potential event of default* subsists, the income of the *trust*;
- (g) issue, redeem, cancel, transfer or otherwise deal with any units issued under the *trust deed*;
- (h) mix or blend the assets of the *trust* with any other assets; or
- (i) delegate any of its power as trustee of the *trust* or exercise any power of appointment.
- 10.3 **Additional covenants**
- You* and each *guarantor* must:
- (a) ensure that no other person is appointed as trustee of the *trust* and, if *we* consent to any person becoming a trustee of the *trust* (whether in replacement of or in addition to *you* of the *guarantor*), procure such person to enter into a deed with *us* under which that

person agrees to perform the obligations identical to those of *you* or the *guarantor* under the *relevant documents* and the *material documents*; and

- (b) comply with all of its duties as trustee of the *trust*.

10.4 Liability

The liability of *you* and any *guarantor* under the *relevant documents* and the *material documents* is not limited or otherwise affected by it being trustee of the *trust* or by the extent of its ability to indemnify itself out of the assets of the *trust*. *You* and/or each *guarantor* are liable under the *relevant documents* and the *material documents* personally and as trustee of the *trust*.

11. PARTNERSHIP

Note: This clause applies where *you* enter into the agreement as partners in a partnership.

11.1 Partnership

Where *you* enter into a *relevant document* or any *material document* as partners in a partnership:

- (a) *you* represent and warrant that *you* are all the partners of that partnership;
- (b) each of *you* as a separate, independent, principal and personal obligation must pay to *us* all amounts due under the *facility* whether or not we may recover any sum from the partnership assets;
- (c) the *relevant documents* and the *material documents* continue to be binding on each of *you* notwithstanding any changes in the composition of the partnership;
- (d) and the partnership is dissolved:
 - (1) *you* must immediately give written notice of that event to *us*; and

- (2) each of *you* must act in relation to the administration of the partnership assets in the manner (if any) directed by *us*;

- (e) a retiring partner is not discharged from any liability to *us* as a result of an agreement between the then existing partners; and

- (f) the obligations of a retiring partner to *us* under any *relevant document* and any *material document* are not affected by anything which might otherwise affect them at law or in equity.

12. INDEMNITIES

Note: This clause contains certain indemnities given by *you* and each *guarantor* to *us* and provisions dealing with the extent of those indemnities

12.1 Nature

You and each *guarantor* indemnifies, and must keep indemnified, *us* against any liability, loss, cost or expense (including consequential and economic loss) which we incur or sustain or for which we become liable, directly or indirectly, which is caused, or contributed to, by:

- (a) any *event of default*;
- (b) any *environmental liability*;
- (c) the exercise or attempted exercise or preservation of any right by *us* under any *relevant document* or any *material document*;
- (d) any act by *us* in reliance on any communication purporting to be from *you* or to be given on *your* behalf;
- (e) any *drawing* requested by *you* not being provided by *us* for any reason, other than a default by *us*;
- (f) any claim against *us* under, or in connection with, an *external obligation*; and

- (g) the repayment to, or receipt by, *us* of all or any part of an *advance*, in relation to which the *interest rate* is fixed, prior to the expiry of the *fixed rate period*.

12.2 Scope

Each indemnity contained in these *terms* and in any other *relevant document* is:

- (a) a continuing obligation;
- (b) an additional, separate and independent obligation; and
- (c) not limited by, and does not limit, any other indemnity.

12.3 Preservation of Liability

The liability of *you* and each *guarantor* under each indemnity contained in these *terms* and in any other *relevant document* is not affected by any act or omission of *us* (or *our* servants and agents) or by anything that might otherwise affect that liability at law or in equity.

13. MISCELLANEOUS

Note: This clause contains various additional provisions relevant to the arrangements between *us*, *you* and the *guarantor*.

13.1 Certificate

A certificate signed by *us* or any *authorised officer* stating an amount owing to *us* at a particular date or as to any other matter or thing, is conclusive evidence against *you* and/or the *guarantor* (as the case may be) unless proved incorrect.

13.2 Assignment

We may assign *our* rights under a *relevant document* to any person at any time without the consent of *you* or a *guarantor*. Neither *you* nor any *guarantor* may, without *our* prior consent in writing, assign or encumber any rights under a *relevant document*.

13.3 Statements

We will provide *you* with an *account* statement in relation to each *facility*:

- (a) as frequently as specified in the *letter of offer*, or
- (b) if no frequency is specified in the *letter of offer*, at least as frequently as required by any law or *code* which applies to the *facility*.

Statements may be provided by *us* in any way described in **clause 13.5**.

13.4 Electronic communications

To the extent permitted by any applicable law or *code*:

- (a) a requirement under a *relevant document* or any applicable law or *code* to give or provide information (including notices and statements) in writing may be satisfied by giving or providing the information by means of an *electronic communication*; and
- (b) a requirement under a *relevant document* or any applicable law or *code* for a signature by a person will be taken to be met if a method is used to identify the person and indicate their intention which satisfies the requirements of the *Electronic Transactions Act*.

13.5 Notices and other communications

- (a) All notices, notifications, demands, certificates, consents, approvals, waivers and other communications given or provided under a *relevant document* (all "communications" for the purposes of this **clause 13.5**) must be given or provided in writing.
- (b) Communications from *you* or a *guarantor* to *us* may be:
 - (1) left at, or sent by pre-paid post to, *our* address set out in the *letter of offer* or such other address as we advise

- you* of in writing from time to time;
- (2) sent by fax to *our* fax number set out in the *letter of offer* or such other fax number as *we* advise *you* of in writing from time to time; or
- (3) given or provided in such other manner as is provided for by any law or *code* which applies to the *facility*.
- (c) *You* and each *guarantor* agree that communications from *us* to *you* or the *guarantor* (as the case may be) may be given or provided as follows:
- (1) if *you* or the *guarantor* have provided *us* with an email address, sent electronically to that email address or such other email address as *you* or the *guarantor* (as the case may be) may advise *us* of in writing from time to time;
- (2) if *you* have access to an internet banking facility provided by *us*, made available by *us* for *you* to view by using that internet banking facility;
- (3) by such other method of *electronic communication* as is permitted by law;
- (4) delivered to *you* personally;
- (5) left at, or sent by pre-paid post to, the address for *you* or the *guarantor* (as the case may be) set out or in the *letter of offer* or the address of the place of residence or business of *you* or the *guarantor* last known to *us*; or
- (6) left at any real property that is *secured property*,
- subject to any different or additional requirements of any law or *code* which applies to the *facility*; or
- (7) in such other manner as is allowed by law (which may include publication of notices in newspapers in some cases).
- (d) If a communication is given or provided by:
- (1) post, it will be deemed received five *business days* after posting (or seven *business days* after posting if sent to or from a place outside Australia);
- (2) email, it will be deemed received at the time shown in the sender's email system as the time that the email was sent;
- (3) being made available to view by using *our* internet banking facility, it will be deemed received at the time it is posted on that facility; and
- (4) fax, it will be deemed received at the time shown in the transmission report as the time that the whole fax was sent.

13.6 No merger

Subject to **clause 15.4**, nothing in these terms prejudicially affects any *security* or any rights *we* may have against *you*, any *guarantor* or any other person nor do the *securities* prejudicially affect *our* rights under these terms.

These terms do not merge with or prejudicially affect, and are not prejudicially affected by, any *encumbrance* or other right or remedy to which *we* are entitled or a judgement which *we* obtain against *you* or a *guarantor* or any other person in connection with the *relevant documents*. *We* may still exercise *our* rights

under the *relevant documents* as well as under the judgement, other *encumbrance* or the right or remedy.

13.7 **No waiver or variation**

Subject to **clause 4**, any waiver under, or variation of, a *relevant document* is effective only to the extent it is in writing.

13.8 **Exercise of rights**

No failure on *our* part to exercise, no delay in exercising and no course of dealing with respect to any rights, powers or remedies under any *relevant document* impairs or operates as a waiver of those rights, powers or remedies. No single or partial exercise of any of these rights, powers or remedies precludes any further exercise of them or the exercise of any other rights, powers or remedies.

13.9 **Moratorium**

Any legislation that varies, prevents or prejudicially affects the exercise by *us* of any right, power or remedy conferred on *us* under any *relevant document* is, to the extent permitted by law, excluded.

13.10 **Time of the essence**

Time is of the essence of *your*, and any *guarantor's*, obligations under any *relevant document*.

13.11 **Severance**

Any provision of a *relevant document* that is prohibited, void or unenforceable in any jurisdiction, whether pursuant to the law or a *code* is, as to that jurisdiction, ineffective to the extent only of the prohibition or unenforceability without invalidating the remaining provisions or affecting the validity or enforceability of the provision in any other jurisdiction.

13.12 **Terms which may operate unfairly**

If:

- (a) the contract constituted by the *letter of offer* and these terms is a

consumer contract or *small business contract*; and

- (b) a term of the contract would, but for this clause, be 'unfair' (as defined in section 12BG(1) of the ASIC Act),

we may only apply or rely upon that term to the extent that doing so is reasonably necessary to protect *our* legitimate interests.

13.13 **Power of attorney**

You and each *guarantor* irrevocably appoints *us* as its attorney with power to appoint and remove at *our* pleasure any one or more of *our authorised officers* as substitute attorneys to do, at any time after the occurrence of an *event of default*, everything that *you* or that *guarantor* may lawfully authorise an agent to do in relation to any *relevant document* or any *material document*.

13.14 **Set-off and combination**

You and each *guarantor* authorise *us* at any time to set-off against, or combine with any money, any amount standing to the credit of any *account* of *you* and/or the *guarantor* with *us* in or towards satisfaction of any sum due but unpaid by *you* and/or the *guarantor* (as the case may be) to *us* under any *relevant document* or other agreement or arrangement.

We have no obligation to exercise *our* rights under this clause.

To the extent legally permissible, *you* and each *guarantor* may not exercise against *us* any right of set-off otherwise available.

13.15 **Governing law**

These terms and the *letter of offer* are governed by the laws of the jurisdiction of *our* address as shown in the *letter of offer* and, if no address is shown, where the *account* is situated and *you* and each *guarantor* submit to the non-exclusive jurisdiction of the courts of that place.

13.16 **Authorisation**

You and each *guarantor* authorise *us* to provide a copy of any *relevant document* to any *government body* in which the *securities* are to be stamped, lodged, filed or registered.

13.17 **Authorised officers**

A determination by, or an opinion of, *our authorised officer* given to *you* and/or the *guarantor* is deemed to be a determination by, or an opinion of, *us*.

13.18 **Rights cumulative**

Our rights under the *relevant documents* are cumulative and are in addition to any other rights we have.

13.19 **Disclosure**

We may disclose to any person any information in *our* possession relating to *you*, the *guarantor*, the *relevant documents*, the *material documents* and any *external obligation* if:

- (a) *you* or the *guarantor* (as the case may be) consent (which consent may not be unreasonably withheld or delayed);
- (b) we are legally required or permitted to do so;
- (c) we are otherwise permitted under the *relevant documents* or the *material documents* to do so;
- (d) it is publicly available;
- (e) it is in accordance with any directive or request of a *government body*;
- (f) that person proposes to enter, or has entered, into a contract or dealing with *us* in connection with the *relevant documents* or the *material documents* or the subject matters of the *relevant documents* or the *material documents*;

(g) that disclosure is necessary or desirable to enable *us* to exercise or deal with its rights or obligations under the *relevant documents*, the *material documents* or any *external obligation*;

(h) that disclosure is to a related body corporate (as that expression is defined in the *Corporations Act*) of *us*; or

(i) that disclosure is to *you* or any *guarantor*.

13.20 **Illegality**

If *our* compliance with *our* obligations under the *relevant documents* becomes illegal, we may by written notice cancel the *facility*. Upon receipt of such notice of cancellation *you* must immediately pay to *us* the *outstanding sum* and all other moneys owing (actually or contingently) by *you* to *us* in connection with that *facility*.

13.21 **Increased costs**

If, as a result of any change of law or directive or change of interpretation of any law or directive, we determine (reasonably and in good faith) that the cost to *us* of providing the *facility* is increased or *our* return is reduced, *you* must on demand pay to *us* the amount certified by *us* as being necessary to compensate *us* for such increased cost or foregone return.

13.22 **Business days**

If:

(a) the day on which any payment is due under a *relevant document* is not a *business day*, that payment must be made on the preceding *business day*; and

(b) the day on which any other thing is to be done under a *relevant document* is not a *business day*, that thing must be done on the following *business day*.

13.23 **Independence and survival**

Each indemnity in a *relevant document* is a continuing obligation, separate and independent from the other obligations of the indemnifying party and survives the termination of that *relevant document*.

13.24 **Privacy Act**

We will comply with *our* obligations under the Privacy Act 1988 (Cth) in *our* dealings with *you* and a *guarantor*. Our privacy policy is available at any of *our* offices and on *our* website.

13.25 **Other legislation**

If we consider that the Anti-Money Laundering & Counter-Terrorism Financing Act 2006 (Cth) or any similar legislation may apply to *you*, a *guarantor* or to any use of a *facility*:

- (a) *you* and each *guarantor* must provide to *us* such information as we may require to ensure we comply with *our* obligations under that legislation; and
- (b) we may take such steps including, refusing to provide a *facility*, withdrawing a *facility* and disclosing information, as we consider necessary to comply with *our* obligations under that legislation.

13.26 **Further assurance**

You and each *guarantor* agree to do anything which we ask (such as obtaining consents, signing and producing documents) to bind *you*, each *guarantor* and any other person intended to be bound under the *relevant documents* and to show whether *you* and each *guarantor* is complying with the *relevant documents*.

Without limiting the above paragraph, *you* and each *guarantor* agree to make such amendments to the *relevant documents*, and to do such other things, as we may require from time to time to ensure that any security interest that we have arising out of or in connection with the *relevant*

documents is perfected under the *PPSA Law* and to otherwise protect *our* position under the *PPSA Law*.

13.27 **Commissions**

You and each *guarantor* acknowledge that:

- (a) we may pay or be paying a commission or other benefit to third parties in connection with a *facility*;
- (b) we may receive or have received a commission or benefit in connection with a *facility*; and
- (c) the obligation of *you* and/or a *guarantor* to reimburse any fees, costs or expenses is not affected by any commission or benefit which may have been, or be, received by *us* and any such commission or benefit (even if quantifiable) is to be ignored.

13.28 **Counterparts**

The *letter of offer* may consist of a number of copies, each executed by one or more parties to the *letter of offer*. When taken together, the executed copies are taken as making up the one document.

14. EXTERNAL OBLIGATIONS

Note: This clause sets out the provisions which apply to a *facility* which is, or includes, an *external obligation*

14.1 **Application**

This **clause 14** applies where the *facility* is, or involves, the issue by *us* of an *external obligation*.

14.2 **Payment**

You and each *guarantor* irrevocably and unconditionally authorise *us* to pay immediately any amount claimed at any time against *us* under any *external obligation* and acknowledge that we may pay the amount of any such claim:

- (a) without reference to, or obtaining any further authority from, *you* or a *guarantor*; without enquiring whether the claim has been properly made; and
- (b) notwithstanding that *you* or a *guarantor* (or any other person) may dispute the validity of the claim; and
- (c) notwithstanding any direction from *you* or a *guarantor* not to make that payment.

14.3 Voluntary payment

We may, at any time (in *our* absolute discretion) and without notice to *you* or a *guarantor*, make a voluntary payment to the holder of any *external obligation* to terminate *our* obligations under, or in connection with, that *external obligation*.

14.4 Reimbursement

You must pay to *us*, immediately following *our* demand for payment, an amount equal to each amount demanded from, or paid (whether voluntarily or otherwise) by, *us* under an *external obligation*. *You* irrevocably and unconditionally authorise *us* to debit to the relevant *account* (or if *you* have no existing *account* with *us*, to open an *account* in *your* name and debit to that *account*) any payment made by *us* under, or in connection with, an *external obligation*, even if we have not demanded payment from *you*.

15. DEFINITIONS AND INTERPRETATION

Note: This clause contains various definitions that are used in both these *terms* and the *letter of offer*. It also contains simple rules to assist in understanding these *terms* and the *letter of offer*.

15.1 Definitions

In these terms:

"account" means, in relation to a *facility*, the account specified in the *letter of offer* relating to that *facility* or (if no account is

specified) the account established by *us* in *your* name for recording all transactions connected with that *facility*;

"advance" means each advance of funds made under a *facility* by *us* to *you* or at *your* request or direction;

"approved purpose" means the permitted purpose for a *facility* specified in the *letter of offer*;

"ASIC Act" means the Australian Securities and Investments Commission Act 2001 (Cth);

"Australian dollars" and **"\$"** means the currency of Australia;

"authorised officer" means:

- (a) for *us*, any director, secretary or attorney of ours, any lawyer acting for *us*, any employee of ours whose title includes the word "manager" or who is acting in such a role, and any person appointed as an authorised officer by *our* board; and
- (b) for *you*:
 - (1) if *you* are an individual, *you*; or
 - (2) if *you* are a corporation, any director or secretary of yours, or any person from time to time nominated by *you* as an authorised officer by written notice to *us* accompanied by certified copies of signatures of all persons so appointed.

"banking accounts terms and conditions" means any terms and conditions regulating how a *facility* may be accessed which are issued by *us* from time to time and which are published on *our* website or are available by telephoning *us*;

"break cost" means a break cost calculated in accordance with **clause 7**;

"builder" means the person referred to as the builder in the *building contract*;

"building contract" means the contract made between *you* and/or a *guarantor* and the *builder* in connection with the *development*, a certified copy of which will be or has been provided to *us*;

"business day" means a day on which banks in general are open for business in the city of *our* address as shown, or as otherwise specified in, the *letter of offer*;

"cash flow budget" means a budget prepared and agreed to by *you* and submitted to, and accepted by, *us* from time to time, as required to be provided to *us* under a *relevant document*;

"code" means any code of practice that applies to a *facility*;

"consultant" means a quantity surveyor, investigative accountant, lawyer, valuer, real estate agent, consultant or other suitably qualified person appointed by *us* at *your* cost in all respects;

"consumer contract" has the meaning given in section 12BF(3) of the *ASIC Act*;

"Corporations Act" means the Corporations Act 2001 (Cth);

"cost overrun" means the difference (if a negative number) between the estimated cost of each stage of the *development* provided to, and approved by, *us* and the actual amount required to complete that stage of the *development*;

"cost to complete" means at any time the amount required to complete the *development* in accordance with the *building contract*, the *plans* and *specifications* and the *development consents* as estimated by *our consultant*;

"development" means the building or other works which are to be carried out by the *builder* in accordance with the *developments consents*, the *plans* and *specifications* and the *building contract*;

"development consents" means each approval, licence, permit, or consent from any *government body* necessary or desirable to enable the *development* to be completed;

"drawdown period" means, if **clause 2.11** applies to a *facility*, the *drawdown period* as specified in the *letter of offer* or, if none is specified, the period of 4 months starting on the *establishment date*.

"drawing" means a use of a *facility* by, or at the request or direction of, *you* including, the making of an *advance* and the issue of an *external obligation*;

"electronic communication" has the meaning given in the *Electronic Transactions Act*;

"Electronic Transactions Act" means the Electronic Transactions Act 1999 (Cth);

"encumbrance" means, in relation to any property, any interest in or right over the property, and, anything which prevents, restricts or delays the registration of any interest in or right over the property and includes any "security interest" under, and as defined in, any *security*;

"environmental legislation" means any law, regulation, statute, code, treaty, licence, condition or ordinance relating to environmental matters including land use and development, planning, pollution, waste disposal, toxic and hazardous substances, conservation of natural or cultural resources, climate change, resource allocation, rehabilitation, contamination, health, safety and occupational health, safety and welfare;

"environmental liability" means any obligation, expense, fine, penalty, cost, damage or expense which could be imposed on *us*, *you* and/or a *guarantor* directly or indirectly arising from a breach of any *environmental legislation* by any person or as a result of the retrospective effect of any *environmental legislation*;

"establishment date" means the first day of the second month after the date we write to you to confirm the terms of the *facility*.

"event of default" means any of the events referred to in **clause 8** and any other *event of default* (however described) referred to in a *letter of offer* or a *relevant document*;

"external exposure" means, at any time, the maximum liability (actual or contingent) of us at that time under each *outstanding external obligation* plus any amount paid by us under an *external obligation* which has not been reimbursed to us under **clause 14.4**;

"external obligation" means any letter of credit, bank guarantee, performance bond or other obligation to a third party assumed by us at your request or direction;

"facility" means each facility which we agree to provide to you in a *letter of offer* and any other arrangement between us and you relating to the provision of financial accommodation by us to you including the issue by us of an *external obligation* at your request;

"facility limit" means in relation to a *facility*, the amount specified in, or determined in accordance with, the *letter of offer* as the *facility limit* for that *facility*;

"fees and charges schedule" means the document entitled Schedule of Fees and Charges published by us from time to time, a copy of which is available on our website or by telephoning us;

"finance application" means, in relation to a *facility*, any finance application, however described, made by you and/or a *guarantor* to us relating to that *facility* together with all documents attached to, or forming part of, that application;

"financial ratio" means any *financial ratio* or financial covenant set out in the *letter of offer*;

"financial statements" means:

- (i) a statement of financial performance;
- (ii) a statement of financial position; and
- (iii) a statement of cash flows;

together with any notes to those documents and a directors' declaration as required under the *Corporations Act* and any other information necessary to give a true and fair view;

"fixed interest rate" means an *interest rate* which we have agreed to fix for a period;

"fixed rate period" means a period during which a *fixed interest rate* applies;

"government body" means any person, body politic or other thing exercising an executive, legislative or other governmental function or any judicial function and any person deriving by delegation a right directly or indirectly from any other *government body*;

"GST Law" has the same meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

"guarantor" means each person, if any, described in the *letter of offer* as a *guarantor* and any other person who, now or in the future, gives an indemnity, a guarantee or a guarantee and indemnity to us in relation to your obligations to us, and if there is more than one person so described or included, a reference to *"guarantor"* is a reference to them jointly and each of them severally;

"insolvency event" means, in relation to a person:

- (i) the appointment of a liquidator, provisional liquidator, administrator or controller (as those expressions are defined in the *Corporations Act*) to the person or over the whole or any of the person's property;
- (ii) the person being, or stating that the person is, unable to pay all the person's debts as and when they become due and payable;

- (iii) the person commits an act of bankruptcy (as defined in Bankruptcy Act 1966 (Cth));
- (iv) the person being, or stating that the person is, an insolvent under administration (as defined in the Corporations Act) or is otherwise deemed insolvent under the Corporations Act;
- (v) the person is taken under Section 459F of the Corporations Act to have failed to comply with a statutory demand;
- (vi) any event described in Section 461 of the Corporations Act occurs in relation to the person; or
- (vii) any action is taken to make any appointment referred to in this definition;

"interest rate" means, in relation to a facility, the interest rate specified in, or determined in accordance with, the letter of offer or these terms for that facility;

"letter of offer" means each letter of offer from us to, or accepted or executed by, (whether alone or jointly with any other person) you and/or a guarantor accompanying or incorporating these terms and each other agreement or arrangement which incorporates these terms entered into between us and you and/or a guarantor which relates to the provision of financial accommodation, or the issue of an external obligation, by us to, or at the request of, you;

"material adverse effect" means a material adverse effect upon:

- (i) the ability of you or a guarantor to comply with obligations under any relevant document or material document;
- (ii) the value, effectiveness, priority or enforceability of any security; or
- (iii) the financial position, management or business operations of you or a guarantor;

"material documents" means all pre development agreements, the building contract, the plans and specifications, the

development consents and all other documents we and you agree are material documents;

"method of advance" means a method of advance specified in the letter of offer;

"National Credit Code" means the National Credit Code set out in Schedule 1 of the National Consumer Credit Protection Act 2009 (Cth)

"outstanding external obligation" means any external obligation under which we have any actual or contingent liability to the beneficiary of that external obligation;

"outstanding sum" means, at any time, the aggregate of the debit balance of each account, the external exposure, accrued interest, costs, expenses, accrued fees and any amount payable pursuant to clause 7.1;

"overdue rate" means:

- (i) if a "default rate" is specified in the letter of offer, that rate; or otherwise
- (ii) the aggregate of 3% per annum and the interest rate applicable to a facility or, if no interest rate is applicable to a facility, the aggregate of 3% per annum and our unsecured lending rate (as published from time to time);

"permitted security interest" means an encumbrance which:

- (i) is in favour of, or has been approved in writing by us; or
- (ii) constitutes a purchase money security interest in inventory arising in the ordinary course of your, or a guarantor's (as applicable), business; or
- (iii) arises by operation of law or statute to secure the payment of taxes or other moneys to a government body provided those taxes or moneys are not due for payment;

"plans and specifications" means the plans and specifications in respect of the development which have been approved by us or our consultant and all relevant government bodies;

"potential event of default" means anything that, with the giving of notice or lapse of time or both, would become an *event of default*;

"PPSA" means the Personal Property Securities Act 2009 (Cth);

"PPSA Law" means:

- (i) the *PPSA*;
- (ii) any regulations made at any time under the *PPSA*; and
- (iii) any amendment made at any time to any other legislation as a consequence of a law referred to in sub-paragraphs (i) and (ii) above;

"pre development agreements" means any agreement relating to the sale or lease of the whole or any portion of the property comprised in a *development*;

"pre development conditions" means all terms and conditions which must be met by *you* and/or a *guarantor* (as set out in the *letter of offer*), prior to the first *drawing* for the purposes of funding a *development*;

"regulated arrangement" means a credit contract, guarantee or mortgage to which the *National Credit Code* applies;

"relevant document" means:

- (i) each *letter of offer*;
- (ii) these *terms*;
- (iii) the *securities*;
- (iv) the *Banking Accounts Terms and Conditions*;
- (v) each *fees and charges schedule*, unless the *facility* is a *regulated arrangement*;
- (vi) any indemnity given to *us* in connection with an *external obligation*;
- (vii) each *treasury agreement*;
- (viii) any other agreement or arrangement made between *you* and/or any *guarantor* (whether

alone or jointly with any other person) and *us*;

- (ix) any document required in connection with, or to give effect to, a transaction contemplated by any document listed above;
- (x) any document amending or varying any of the above;
- (xi) any document in connection with the full or partial discharge or release of any *security* or any other *relevant document*; and
- (xii) any document agreed between the parties to be a *relevant document*;

"repayment date" means, in relation to a *facility*, the date specified in the *letter of offer* as being the *repayment date* or termination date for that *facility*;

"secured property" means property subject, or intended to be subject, to a *security*;

"securities" means any security agreement, mortgage, charge, lien, indemnity, guarantee, guarantee and indemnity and other security interest described in the *letter of offer* or held by *us* which secures or guarantees an obligation or liability of *you* or a *guarantor* to *us* together with any document required in connection with, or to give effect to, a transaction contemplated by any of them;

"small business contract" has the meaning given in section 12BF(4) of the *ASIC Act*;

"special conditions" means any *special conditions* set out in the *letter of offer*;

"taxes" means all present and future *taxes*, levies, imposts, stamp and other duties, fees, compulsory loans, withholdings or deductions and penalties and interest imposed in relation to any of them, but does not include a tax on *our* net income or GST;

"term loan" means a *facility* in respect of which the amount available to be drawn does not ordinarily increase as repayments are

made (except to the extent that any redraws are allowed if prepayments are made);

"treasury agreement" means any *interest rate* swap agreement, *interest rate* cap agreement, *interest rate* collar agreement, forward rate agreement, forward exchange agreement, option agreement, futures contract, hedging agreement and any other derivative agreement which may now or in the future be made between *us* and *you* and/or a *guarantor*;

"trust" means any *trust* or settlement of which *you* or a *guarantor* is trustee, whether or not we have been notified of the existence of such *trust*; and

"trust deed" means each instrument establishing or varying a *trust*.

"unregulated arrangement" means a credit contract, guarantee or mortgage to which the *National Credit Code* does not apply;

"we", **"us"** and **"our"** means or refers to the bank identified in the *letter of offer* and its successors and assigns.

"you" and **"your"** means or refers to each person described in the *letter of offer* as the borrower and, if more than one person is so described, a reference to *"you"* or *"your"* is a reference to *you* jointly and each of *you* severally.

15.2 Interpretation

In these terms:

- (a) the singular includes the plural and vice versa;
- (b) a reference to any gender includes all other genders;
- (c) "person" includes a partnership, a corporation, an unincorporated association and an authority;
- (d) the whole includes any part;
- (e) headings and notes do not affect its interpretation;

- (f) a reference to a document or legislation includes a reference to that document or legislation as varied, amended or replaced from time to time;
- (g) a reference to a person includes that person's executors, administrators, successors and permitted assigns;
- (h) a reference to time is to time in the city used for the purposes of determining a *business day*;
- (i) where an example of something is given, it does not limit what else may be included;
- (j) words and expressions which are not defined in these terms but which have a defined meaning in *GST Law* have the same meaning as in the *GST Law*;
- (k) a reference to an accounting term is (unless otherwise defined) a reference to that term as it is used in the accounting standards (as defined in the *Corporations Act*) or, if not inconsistent with those standards, in generally accepted accounting principles and practices in Australia; and
- (l) words and expressions which are not defined in these terms but which have a defined meaning in the *PPSA Law* have the same meaning as in the *PPSA Law*.

15.3 Two or more borrowers

Where two or more of *you* are named as the borrower in the *letter of offer*:

- (a) the provisions and obligations in the *relevant documents* applying to *you*, including the obligation to repay *the outstanding sum*, apply to *you* jointly and to each of *you* severally; and
- (b) each of *you* nominates, appoints and authorises the first person who is

named as borrower in the *letter of offer*, on behalf of all of *you*.

- (1) to do all necessary acts, matters and things to apply for the *facility* including to provide information to *us*; and
- (2) to receive any notice, demand, consent, communication or other document from *us* in relation to the *facility*;

and authorises *us* to rely upon this authority in all *our* dealings with *you*.

15.4 **Inconsistency**

To the extent of an inconsistency between these terms, the *letter of offer* and any *security*, the following order of precedence applies:

- (a) First, any *special conditions* in the *letter of offer*;
- (b) Second, the remainder of the *letter of offer*;
- (c) third, these *terms*; and
- (d) fourth, the *security*.