

elliott may
commercial memorandum



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THIS MORTGAGE MEMORANDUM (“MEMORANDUM”) CONTAINS IMPORTANT TERMS CONCERNING A FINANCIAL TRANSACTION INVOLVING THE CREDIT PROVIDER, ON THE ONE HAND, AND THOSE PERSONS IDENTIFIED IN THE MEMORANDUM SCHEDULE AS A BORROWER, GUARANTOR, MORTGAGOR AND/OR CHARGOR, ON THE OTHER HAND. THESE PARTIES AGREE AND DECLARE AS FOLLOWS:

1. DEFINITIONS

1.1 Some words in this memorandum appear in italics. Those words have the meaning given in this paragraph.

amount of credit means the amount identified as the amount of credit in the memorandum schedule. If there is no amount identified as the amount of credit in the memorandum schedule, then the amount of credit is the amount actually advanced by the credit provider under this memorandum, plus any deductions (including for payment of interest) and amounts applied to pay disbursements.

amount owing means the balance, accrued but unpaid and uncapitalised interest, and any deferred fees and charges payable to the credit provider.

authorised representative means the credit provider’s directors, principals, solicitors, or any employee with the word “manager” in his or her job title.

balance means the unpaid amount of credit, unpaid further advances, and unpaid capitalised interest.

balance increase means the difference between the balance at the start of an interest period and the balance at the start of a day within that interest period.

borrower means a person identified as the borrower in the memorandum schedule. If there is no person identified as the borrower in the memorandum schedule, then the borrower is a person:

- (a) who signs the memorandum schedule as the borrower; or
- (b) if (a) is not satisfied, is identified as a borrower under any letter of offer agreement or similar document; or
- (c) if (a) and (b) are not satisfied, who directs the credit provider to disburse the amount of credit.

charged property means all the property and rights of the chargor now or at any time in the future, wherever located or arising, including the chargor’s business, the goodwill of that business, and all property and rights referred to in the Charge of Property contained in this memorandum.

chargor means the person identified as the chargor in the memorandum schedule.

closing date means the date specified in the memorandum schedule as the closing date, as extended, or deemed extended, from time to time under this memorandum. If no date is specified in the memorandum schedule as the closing date, then the amount owing is immediately due and payable to the credit provider on demand or three months after the opening date (deemed closing date), whichever happens first.

collateral security means any current or future guarantee, encumbrance, charge, mortgage, negotiable instrument, agreement or other document held or taken by or given in favour of the credit provider or entered into by any transaction party as security for the payment of, or otherwise in connection with, all monies due to the credit provider.

credit provider means the person identified as the credit provider in the memorandum schedule. If no person is identified as the credit provider in the memorandum schedule, then the credit provider is the person:

- (a) who signs the memorandum schedule as the credit provider; or
- (b) if (a) is not satisfied, the person identified in the mortgage as the mortgagee; or
- (c) if neither (a) nor (b) is satisfied, who has advanced, or if there has been no advance, offered to advance, the amount of credit under this memorandum.

credit provider address for service means the address listed as the credit provider address for service in the memorandum schedule.

daily rate means the interest rate or discount rate, whichever is applicable, divided by 365 (if the rate is stated as an annual rate) or by 30.5 (if the rate is stated as a monthly rate).

1. DEFINITIONS CONT.

deal with means, in relation to a thing, to deal or attempt to deal with that thing in any way, including *dispose of* it or offer to *dispose of* it; to grant, create, vary, give up or allow to arise any rights to or in that thing; to increase liability under any rights, securities, leases, licences, permits, easements, covenants or public rights of way relating to that thing; to subdivide, consolidate, or dedicate it; or to erect, remove or change any improvements on that thing.

debtors means the *borrower*, the *mortgagor* and the *chargor*.

discount rate means the rate specified in the *memorandum schedule* as the discount rate.

dispose of means, in relation to a thing, to dispose, attempt to dispose of, or allow the disposal of that thing in any way, including selling, destroying, transferring, assigning, trading, swapping, alienating, surrendering, varying, leasing, subleasing, parting with possession of, or discounting it; to set it off against something else; or to enter into any arrangement or agree to any terms about *disposing of* it.

event of default means an event identified in this *memorandum* as an event of default under the heading "Events of Default".

fees means those items identified as fees in the *memorandum schedule*.

further advances means:

- (a) money that the *credit provider* pays, excluding the *amount of credit*, at a *transaction party's* direction; or
- (b) money that the *transaction party* has failed to pay to the *credit provider* when required by this *memorandum*, and which the *credit provider* chooses to capitalise, including overdue interest and rollover fees; or
- (c) money that the *credit provider* pays or becomes liable to pay as a result of, or in relation to, an *event of default* or the risk of an *event of default*; or
- (d) money that the *credit provider* pays, but which the *transaction party* was liable to pay, whether under this *memorandum*, under the law, or a security held by another person in relation to the *security property*, or under the law; or
- (e) loss or damage the *credit provider* suffers because of an *event of default* or threatened *event of default*; or
- (f) costs, including legal and administrative costs incurred, whether internally or externally, by the *credit provider* and which are recoverable under this *memorandum*, or under the law, against the *transaction party*; or
- (g) money recoverable by the *credit provider* from the *transaction party* under this *memorandum*, or under the law, excluding the *amount of credit* and uncapitalised accrued interest.

guarantor means the person identified as the guarantor in the *memorandum schedule*. If there is no person identified as the guarantor in the *memorandum schedule*, then the *guarantor* is a person:

- (a) who signs the *memorandum schedule* as the guarantor; or
- (b) if (a) is not satisfied, who is identified as a guarantor under any letter of offer agreement.

interest due date means the date identified as the interest due date in the *memorandum schedule*, being either the first or last day of an interest period.

interest period means the period of time specified as the interest period in the *memorandum schedule*. If there is no period of time specified in the *memorandum schedule* as the interest period, then the *interest period* is one calendar month, or the period between the *opening date* and the *closing date*, whichever is the shorter period of time. If the *interest period* is one or more months, this is taken to mean a calendar month. If a calendar month does not contain a day that corresponds to the day of the *opening date*, then the *interest period* for that month begins on the last day of that calendar month. For example, if the *opening date* is 31 January, the *closing date* is 31 May, and the *interest period* is one month, then the first day of the *interest periods* will be: 31 January, 28 or 29 February, 31 March and 30 April, respectively.

1. DEFINITIONS CONT.

interest rate means the rate specified as the interest rate in the *memorandum schedule*. If no rate is specified in the *memorandum schedule* as the interest rate, then the *interest rate* is the non-discount rate, however so identified, in any offer of finance, as amended, given by the *credit provider* to a *transaction party*, or representative of a *transaction party*, before a transaction party first signs the *memorandum schedule*.

memorandum means this document, the *memorandum schedule*, and any form of mortgage that refers to this document.

memorandum schedule means the annexure to this document headed "Memorandum Schedule" and any other schedule or annexure (however so described) referred to, or attached to, in any form of mortgage that is part of this *memorandum*. If there is an inconsistency between the attachment to this document headed "Memorandum Schedule" and any document within the meaning of *memorandum schedule*, then the latter prevails to the extent of the inconsistency.

minimum interest means the amount specified as the minimum interest in the *memorandum schedule*.

mortgage means, when used as a noun, a form of mortgage referring to this document, and the terms incorporated into that form of mortgage.

mortgaged property means the real property identified as mortgaged property in any *mortgage*, whether or not the real property is also subject to a fixed charge under this *memorandum*.

mortgagor means the person identified as the mortgagor in the *memorandum schedule* and/or any *mortgage*, whether or not that person is also identified as a chargor in the *memorandum schedule*.

opening date means the date specified as the opening date in the *memorandum schedule*. If no date is specified as the opening date in the *memorandum schedule*, then the *opening date* is the date on which the *credit provider* advances any *amount of credit* under this *memorandum*.

period rate means the *daily rate* multiplied by the number of days in the applicable *interest period*.

securing party means the *mortgagor* and/or the *chargor*.

security property means the *mortgaged property* and/or the *charged property* and/or any property subject to the charge granted by the *transaction parties* under clause 7.4 and/or 9.

security ratio means the percentage identified in the *memorandum schedule* as the security ratio.

shared scheme means any scheme applicable to *security property* because the *security property* is subject to legislation relating to strata title, unit title, community title or similar legislation regarding the sharing or division of title or other rights concerning property.

special terms means those additional terms contained in the *memorandum schedule* and referred to as special terms.

transaction party/parties means any person, other than the *credit provider*, who is a party to this *memorandum*, including without limitation, the *borrower*, the *guarantor*, the *mortgagor* and the *chargor*. Where any *transaction party* is a trustee of a trust it enters into this *memorandum* in its own rights and as trustee for any trust, whether or not such trust is referred to in this *memorandum*.

transaction party address for service means the address listed as the transaction party address for service in the *memorandum schedule*.

works means any building or earth works, or other works, however described, relating to the alternation, improvement, demolition, excavation, or repair of the *security property*.

[2. INTERPRETATION]

- 2.1 A reference to a document, including this *memorandum*, includes the document as amended or replaced from time to time.
- 2.2 Grammatical variations of defined terms do not change the meaning of the defined term. For example, ‘*dispose of*’ and ‘*disposing of*’ have the same corresponding meaning.
- 2.3 A reference to the law means the common law, principles of equity, statutes and regulations, in force from time to time, and includes any amendments, re-enactment, or replacements of any statute or regulation.
- 2.4 A person includes any individual or entity recognised by the law.
- 2.5 The pronoun “it” includes a reference to an individual.
- 2.6 Words in the singular include the plural and words in the plural include the singular.
- 2.7 A reference to something that consists of more than one part, includes a reference to the whole of the thing and any part of it.
- 2.8 A reference to more than one person includes a reference to all of those persons together, any combination of those persons, and each of them separately.
- 2.9 A reference to a party includes the party’s executors, administrators, successors and permitted assigns. If a party signs in a particular capacity it also includes the party in that capacity.
- 2.10 Headings are for reference only.
- 2.11 ‘\$’ and “dollars” refers to Australian currency.
- 2.12 In the event of conflict between any terms of this *memorandum* and any *special terms*, the *special terms* prevail.
- 2.13 The term “includes” means “includes, without limitation”.
- 2.14 This *memorandum* is not to be construed against the *credit provider* under any circumstances. If there is an ambiguity, then the reasonable construction most favourable to the *credit provider* manifests the contractual intent of the *transaction parties* and will prevail over any other interpretation.

[3. REPRESENTATIONS]

- 3.1 The *credit provider* will rely on the representations in this *memorandum* each time it advances money to any person under the *memorandum*.
- 3.2 The *transaction party* represents to the *credit provider* that:
 - 3.2.1 it has obtained independent legal and financial advice before agreeing to this *memorandum*;
 - 3.2.2 it benefits from agreeing to this *memorandum*;
 - 3.2.3 it is not subject to any condition that might affect its ability to understand the nature or terms of this *memorandum*;
 - 3.2.4 it does not rely for any purpose on any representation, promise, statement or other information, whether oral or in writing, given by the *credit provider*, a representative of the *credit provider*, or any person that the *transaction party* believes or alleges to act on behalf of the *credit provider*, except those representations, promises and statements contained in this *memorandum*;
 - 3.2.5 neither the *credit provider*, nor any representative of the *credit provider*, nor any person that the *transaction party* believes or alleges to act on behalf of the *credit provider*, has promised or suggested to the *transaction party* that any of them will or might secure refinancing for the *transaction party* (or for any other person) so as to enable the *transaction party* to meet its obligations under this *memorandum*;

[3. REPRESENTATIONS CONT.]

- 3.2.6 it has not agreed to the terms of this *memorandum* on the basis of a collateral agreement or understanding to which the *credit provider* is a party, or otherwise bound;
 - 3.2.7 it has capacity to agree to this *memorandum*;
 - 3.2.8 it is able to comply with its obligations under this *memorandum*;
 - 3.2.9 it has obtained all authorities, consents, permissions and ratifications from any person, including any partners, directors, shareholders or beneficiaries, necessary to allow the *transaction party* to agree to this *memorandum* and for it to comply with the obligations imposed by this *memorandum*;
 - 3.2.10 complying with the obligations imposed by this *memorandum* does not contravene any laws, agreement, articles of association, or deed;
 - 3.2.11 it has obtained all government approvals, including any approvals required under the *Foreign Acquisitions and Takeovers Act 1975* (Cth);
 - 3.2.12 it has complied with all tax obligations;
 - 3.2.13 it owns the property that it purports to the *credit provider* that it owns;
 - 3.2.14 it is not a trustee of any trust, except as disclosed in this *memorandum*;
 - 3.2.15 it signs this *memorandum* without any intent to delay or defraud an existing or future creditor;
 - 3.2.16 it has obtained all licences, permits, insurances, and it has taken all other steps, to ensure that it is entitled to carry on its business or its profession;
 - 3.2.17 it is not aware of any current or threatened proceedings before a court, tribunal or administrative body against it;
 - 3.2.18 it is not aware of any *event of default* that has already happened;
 - 3.2.19 it has fully disclosed to the *credit provider* all information relevant to the *credit provider's* consideration of the *credit provider's* risk associated with entering into this *memorandum*;
 - 3.2.20 the representations that it makes to the *credit provider* in this *memorandum* are correct and not misleading;
 - 3.2.21 all information that it has given to the *credit provider* in relation to the transaction contemplated by this *memorandum* is correct and not misleading;
 - 3.2.22 all financial statements that it has given to *credit provider* fairly represent the *transaction party's* financial position as at the date of the financial statements, and were prepared according to generally accepted Australian accounting practices;
 - 3.2.23 it understands and acknowledges that the *credit provider* is not required to advance any monies to, or at the direction of, any *transaction party* unless all of the *credit provider's* pre-settlement conditions have been complied with in full (or waived at the sole discretion of the *credit provider*) and the solicitors for the *credit provider* have certified to the *credit provider* that the transaction anticipated by the *memorandum* is ready to proceed and nothing has occurred that in the *credit provider's* subjective opinion would make the loan imprudent.
 - 3.2.24 it is not aware of any facts or circumstances that might suggest that any representation in this *memorandum* when made by another *transaction party* is incorrect or misleading.
- 3.3 A *transaction party* who agrees to this *memorandum* as trustee of a trust represents to the *credit provider* that:
- 3.3.1 it acknowledges and agrees that it is liable to the *credit provider* under this *memorandum* in its own right / personal capacity as well as in its capacity as trustee of any trust whether or not that trust is specifically identified in this *memorandum*;

[3. REPRESENTATIONS CONT.]

- 3.3.2 it is the only trustee of the trust;
- 3.3.3 it has disclosed to the *credit provider* all terms of the trust;
- 3.3.4 it is entitled to be fully indemnified out of trust assets in relation to liabilities arising under this *memorandum*;
- 3.3.5 agreeing to this *memorandum* and complying with its obligations:
 - 3.3.5.1 does not constitute a breach of trust; and
 - 3.3.5.2 benefits the beneficiaries;
- 3.3.6 the *credit provider's* rights under this *memorandum* have priority over the claims of beneficiaries of the trust.
- 3.4 If a *securing party* is a trustee, then that *securing party* represents to the *credit provider* that the *mortgage* or any charge is over the legal and beneficial interest in the *security property*.
- 3.5 The *securing party* represents to the *credit provider* that it has told the *credit provider* about:
 - 3.5.1 all contaminants, defects or major damage;
 - 3.5.2 all rights or claims;
 - 3.5.3 all proposed limits on use;
 - 3.5.4 all proposed acquisitions by a government body;
 - 3.5.5 all encroachments; and
 - 3.5.6 all encumbrances,affecting all real property that is *security property*.
- 3.6 Each *securing party* represents to the *credit provider* that all insurance maintained over its property that is *security property* is enforceable against the insurer.
- 3.7 A *transaction party* who purports to be an incorporated entity represents to the *credit provider* that it is duly incorporated according to law.
- 3.8 The *transaction party* declares that:
 - 3.8.1 the *credit provider* is not responsible to any *transaction party* for any representation, information, advice, assurance or opinion that the *credit provider* has given or will give any person; and
 - 3.8.2 it is unreasonable for any *transaction party* to rely on any representation, information, advice, assurance or opinion given by the *credit provider* to any person, including to the *transaction party*, except for those statements and promises in this *memorandum*;
 - 3.8.3 the *credit provider* does not owe the *transaction party* any duty of care in negligence or any fiduciary duty with respect to anything contemplated by or contained in this *memorandum*, and as consideration for the benefits offered by the *credit provider* under this *memorandum*, the *transaction party* fully releases the *credit provider* from any claim based on a breach of any such duty.

[4. LOAN AGREEMENT]

- 4.1 The *credit provider* will lend the *amount of credit* to the debtors on the opening date in accordance with this *memorandum*.

Obligation to Repay Amount Owing

- 4.2 The *debtors* must pay *further advances* to the *credit provider* on demand. If there is no demand for payment by the *credit provider* before the *closing date*, then the *debtors* must pay *further advances* to the *credit provider* on the *closing date*.

4. LOAN AGREEMENT CONT.

4.3 The *debtors* must repay the *amount owing* to the *credit provider* no later than the *closing date*.

Obligation to Pay Interest

4.4 The *debtors* are liable to pay the *credit provider* interest on the *balance* from the *opening date*, which is when the first *interest period* begins, until the *debtors* pay the *credit provider* the entire *amount owing*.

4.5 *Interest periods* run consecutively.

4.6 On each *interest due date* the *debtors* must pay the *credit provider* interest on the *balance*.

Calculating Interest Payable on First Day of Interest Period

4.7 If the *interest due date* is the first day of an *interest period*, then the amount of interest that the *debtors* must pay the *credit provider* on the *interest due date* for that *interest period* is calculated by:

4.7.1 dividing the *interest rate* by 365 (if the *interest rate* is stated as an annual rate) or by 30.5 (if the *interest rate* is stated as a monthly rate) to obtain the *daily rate*; then

4.7.2 multiplying the *daily rate* by the number of days in that *interest period* (including the *interest due date*) to obtain the *period rate*; then

4.7.3 multiplying the *period rate* by the *balance* at the start of that *interest period* and then rounding the result to the second decimal place.

4.8 In addition, if there is a *balance increase* during any *interest period* for which interest was payable on the first day of the *interest period*, then the *debtors* are liable to pay interest at the *daily rate* on the *balance increase*, as determined at the start of each day.

4.9 Interest payable on a *balance increase* compounds daily and must be paid on or before the earlier of:

4.9.1 the next *interest due date*;

4.9.2 the *closing date*; or

4.9.3 the date on which the *debtors* repay to the *credit provider* the entire *amount owing*.

Calculating Interest Payable on Last Day of Interest Period

4.10 If the *interest due date* is the last day of an *interest period*, then the amount of interest that the *debtors* must pay the *credit provider* on the *interest due date* for that *interest period* is calculated by applying the *daily rate* to the *balance*, at the start of each day that comprises that *interest period*.

4.11 Interest payable on the *balance* compounds daily so that accrued interest forms part of the *balance*.

Increases in the Balance If the Amount Owing Was Previously Paid in Full

4.12 If there is an increase in the *balance* after the *amount owing* has been previously reduced to zero, then for the purposes of calculating interest, a new *interest period* will be deemed to begin at the start of the date on which the increase occurred, and a new *closing date* will be deemed to fall on the last day of that *interest period*.

The Discount Rate

4.13 The *credit provider* will accept payment of interest at the *discount rate* if:

4.13.1 an *event of default* has not happened; and

4.13.2 the *debtors* otherwise comply with all obligations relating to the time and manner of interest payments.

Early Repayment

4.14 The *debtors* may repay the *amount of credit* before the *closing date* if the *debtors*:

4.14.1 give the *credit provider* written notice of its intent to repay the *amount of credit* on a specific proposed early repayment date; and

4. LOAN AGREEMENT CONT.

- 4.14.2 the *debtors'* notice is received by the *credit provider* at least three weeks before the proposed early repayment date; and
- 4.14.3 the *debtors* repay the *amount of credit* no later than two weeks after the proposed early repayment date; and
- 4.14.4 when the *debtors* repay the *amount of credit*, the *debtors* also pay the remainder of the *amount owing*, plus the lesser of:
 - 4.14.4.1 the *minimum interest*, less any payments of *interest* that have been made up to the date of repayment; and
 - 4.14.4.2 the interest that would have accrued on the *balance* if the *debtors* did not repay the *balance* early.
- 4.15 If the *debtors* repay the *amount of credit* before the *closing date* because of a demand by the *credit provider* following an *event of default*, then the *debtors* must also pay to the *credit provider* the *amount owing*, plus the lesser of:
 - 4.15.1 the *minimum interest*, less any payments of interest that have been made up to the date of repayment;
 - 4.15.2 the interest that would have been payable to the *credit provider* if the *debtors* did not repay the *amount of credit* early.
- 4.16 Under no circumstance are the *debtors* entitled to a refund of any interest paid to the *credit provider*.

Capitalisation of Unpaid Interest

- 4.17 If the *debtors* fail to pay interest to the *credit provider* when it is due, then the *credit provider* may at any time, and without notice to the *debtors*, choose to make the overdue interest a *further advance* as of the date that the interest payment was due.
- 4.18 Any decision by the *credit provider* to capitalise the overdue interest does not affect the *credit provider's* rights against any *transaction party* that arises from the *debtors'* failure to pay the interest when due.

Rollover of the Memorandum

- 4.19 If the *debtors* fail to repay the *amount owing* as of the *closing date* on or before the *closing date*, then the *credit provider* may extend this *memorandum* by another *interest period* and make the *closing date* the last date of the further *interest period*.
- 4.20 If the *credit provider* extends the closing date by a further *interest period*, then:
 - 4.20.1 all terms of this *memorandum* will continue to apply except that the *discount rate* will no longer be available; and
 - 4.20.2 the *debtors* agree to pay to the *credit provider* a rollover fee equal to 1.5% of the *amount owing* as of the *closing date*, which rollover fee is due to be paid on the first day of the new *interest period*; and
 - 4.20.3 the *credit provider* will abstain from taking enforcement action against any *security property* during the further *interest period*.
- 4.21 If the *debtors* fail to pay the rollover fee to the *credit provider* when it is due, then the *credit provider* may choose to make the rollover fee a *further advance* as of the date that the rollover fee was due.
- 4.22 Any decision by the *credit provider* to capitalise the overdue rollover fee does not affect the *credit provider's* rights against any *transaction party* that arises from the *debtors'* failure to pay the rollover fee when due.

4. LOAN AGREEMENT CONT.

Manner of Payment

4.23 Payment under this *memorandum* must be made at the *credit provider address for service*.

4.24 If the *credit provider* asks, the *transaction party* must do all things necessary to direct its bankers to make payments due to the *credit provider* under this *memorandum* by debiting the *transaction party's* bank account and crediting that amount to the *credit provider's* nominated bank account.

4.25 The *credit provider* does not receive any payment under this *memorandum* until it receives cleared funds or a bank cheque in Australian currency. Deemed payment is no payment at all. Only actual payment constitutes payment.

Failure to Proceed

4.26 If the *amount of credit* is not advanced because one or more of the *transaction parties* does not sign the *memorandum schedule*, or the *credit provider* learns that an *event of default* has happened before the *amount of credit* is advanced, or the *credit provider* is otherwise not required to proceed with the transaction in accordance with the terms of any letter of offer or similar agreement, then any *transaction party* who has signed the *memorandum schedule* must pay to the *credit provider* on the *opening date*:

4.26.1 the *minimum interest*;

4.26.2 and the *fees* identified in the *memorandum schedule*.

4.27 The securities given to the *credit provider* by any *transaction party* who has signed the *memorandum schedule* will secure the payment of the *minimum interest* and the *fees*, which will be deemed to be a *further advance* made on the *opening date*.

4.28 The rights of the *credit provider* to recover *minimum interest* and *fees* under this *memorandum*, are in addition to any rights the *credit provider* may have under another agreement, or under the law.

5. GUARANTEE AND INDEMNITY

Guarantee

5.1 The *transaction party* guarantees to the *credit provider*:

5.1.1 the payment, when due, of all money that any *transaction party* must pay the *credit provider* under this *memorandum*, including the *amount owing*; and

5.1.2 the performance, when due, of everything any *transaction party* must do under this *memorandum*; and

5.1.3 the payment, when due, of all money that any *transaction party* owes to the *credit provider*, actually or contingently, under any *collateral security*; and

5.1.4 the performance, when due, of everything any *transaction party* must do under any *collateral security*.

Indemnity

5.2 The *transaction party* indemnifies the *credit provider* against every expense incurred, including legal costs, internal costs, and any other loss suffered by the *credit provider* that relates to:

5.2.1 an *event of default*; or

5.2.2 any failure by any *transaction party* to pay money to the *credit provider* as required by this *memorandum*; or

5.2.3 any failure by any *transaction party* to perform any obligation imposed by this *memorandum*.

[5. GUARANTEE AND INDEMNITY CONT.]

5.3 The indemnity given by the *transaction party* will operate even if the *credit provider* cannot effectively demand performance from another *transaction party* for any reason, including because:

- 5.3.1 the other *transaction party* is affected by a legal limitation or special disadvantage, whether or not this was known or should have been known by the *credit provider*; or
- 5.3.2 the obligations of the other *transaction party* were void, voidable or unenforceable for any reason, whether or not this was known or should have been known by the *credit provider*; or
- 5.3.3 any law relating to bankruptcy or insolvency prevents the *credit provider* from enforcing an obligation against the other *transaction party*.

5.4 The *transaction party* is primarily liable to the *credit provider* for the:

- 5.4.1 payment, when due, of all money that any *transaction party* must pay the *credit provider* under this *memorandum*, or any *collateral security*, including the *amount owing*; and
- 5.4.2 performance, when due, of everything any *transaction party* must do under this *memorandum* or any *collateral security*.

5.5 The *credit provider* need not make any demand on any other *transaction party* or pursue any other rights under any security before it demands that the *transaction party*:

- 5.5.1 make any payment due to the *credit provider* under this *memorandum*; or
- 5.5.2 perform when due any obligation imposed on any *transaction party* by this *memorandum*.

5.6 If the *credit provider* incurs legal costs covered by this indemnity, then the *transaction party* will pay those costs to be assessed on the full indemnity basis.

Demand Not Required

5.7 The liability of the *transaction party* under this *memorandum*, including this guarantee and indemnity, is not conditional on any further step by any person, including any demand by the *credit provider* being made on any *transaction party*.

[6. MORTGAGE]

Mortgage Given as Security

6.1 The *securing party* gives the *credit provider* this *mortgage* over the *mortgaged property* so that it secures the *amount owing* as well as all monies due by any *transaction party* under a *collateral security* and may be enforced against the *mortgaged property* if there is an *event of default*, or any other failure to strictly comply with the obligations imposed by this *memorandum* or any *collateral security* on any *transaction party*.

6.2 The *securing party* agrees to do everything requested by the *credit provider* to help the *credit provider* register this *mortgage* over the *mortgaged property*.

Must Meet All Legal Obligations

6.3 The *securing party* must:

- 6.3.1 pay, when due, all amounts demanded by any government body from the *securing party* as the owner of *mortgaged property*;
- 6.3.2 comply with all laws and regulations relating to the *mortgaged property*;
- 6.3.3 comply with all directions and requirements of any government body relating to the *mortgaged property*;
- 6.3.4 comply with all leases and licences relating to the *mortgaged property*;

[6. MORTGAGE CONT.]

- 6.3.5 comply with all obligations to any person the performance of which is secured against the *mortgaged property*;
- 6.3.6 comply with all restrictive and other covenants relating to the *mortgaged property*;
- 6.3.7 not create a nuisance from the *mortgaged property*; and
- 6.3.8 obtain, maintain and renew all licences and permits needed for the *securing party* to comply with every obligation imposed by this *memorandum*.

Must Preserve the Property

6.4 The *securing party* must:

- 6.4.1 maintain the condition of the *mortgaged property*; and
- 6.4.2 carry on and maintain in an efficient manner any business operated from the *mortgaged property*, and any other use of the *mortgaged property* undertaken when the *securing party* agreed to this *memorandum*;
- 6.4.3 not do anything or allow anything to be done that might lower the value of the *mortgaged property*;
- 6.4.4 not *dispose of* any right to present or future profits, rents or other income of the *mortgaged property*;
- 6.4.5 clean up all contamination on the *mortgaged property*;
- 6.4.6 correct defects in the *mortgaged property*;
- 6.4.7 repair major damage to the *mortgaged property*; and
- 6.4.8 remove any encumbrance or caveat on the title of the *mortgaged property* to which the *credit provider* has not consented in writing.

Must Get the Credit Provider's Written Consent to Certain Dealings

6.5 Unless the *credit provider* consents in writing, the *securing party* must not:

- 6.5.1 *deal with or dispose of* the *mortgaged property*;
- 6.5.2 vary the terms of any security held by any person over the *mortgaged property*; or
- 6.5.3 erect, remove or change any improvement on any part of the *mortgaged property*.

6.6 If the *credit provider* imposes conditions on its consent, then the *securing party* must comply with those conditions.

Encroachment

6.7 If the *credit provider* asks, the *securing party* must:

- 6.7.1 remove from the *security property* any encroachment from adjoining land; and
- 6.7.2 eliminate any claim by an adjacent land owner based on an encroachment from the *security property* to the adjoining land, even if this requires obtaining an easement or buying the adjoining land.

Further Mortgage

6.8 The *mortgagor* must mortgage to the *credit provider*, on the same terms as this *mortgage*, any interest in real property that the *mortgagor* acquires:

- 6.8.1 to accommodate any encroachment; or
- 6.8.2 because of a right, claim or entitlement arising from the *mortgagor's* ownership of the *mortgaged property*.

[6. MORTGAGE CONT.]

Tacking

6.9 If the *credit provider* is obliged to make *further advances* or pay money under this *memorandum*, then this *mortgage* imposes that obligation on the *credit provider*.

Works

6.10 The *securing party* must get the *credit provider's* written consent before:

- 6.10.1 contracting for any *works*;
- 6.10.2 carrying out *works*; or
- 6.10.3 permitting *works*.

6.11 Before carrying out or permitting *works* the *securing party* must get all necessary approvals from any:

- 6.11.1 government body; and
- 6.11.2 *shared scheme* body, if the *mortgaged property* is part of a *shared scheme*.

6.12 The *securing party* must ensure that all *works* are:

- 6.12.1 in accordance with all laws, requirements of any government body, easements, conditions, and covenants that affect the *works*;
- 6.12.2 done by properly qualified and certified trade persons and professionals;
- 6.12.3 performed in accordance with all plans and contracts for the *works*; and
- 6.12.4 completed in a timely, proper and workmanlike manner.

6.13 The *securing party* must comply with all obligations under every contract relating to the *works*.

6.14 The *securing party* must promptly notify the *credit provider* if:

- 6.14.1 any party to a contract relating to the *works* is in breach of that contract;
- 6.14.2 any event happens that might result in a breach of that contract; or
- 6.14.3 any party to that contract is threatening to not perform under the contract.

6.15 The *securing party* must promptly notify the *credit provider* if it receives a notice from any party to a contract relating to the *works*.

6.16 The *securing party* must comply with any requests by the *credit provider* concerning the enforcement of any contract relating to the *works*, even if this involves prosecuting or defending legal proceedings.

6.17 The *securing party* must not vary, amend, waive, release or discharge any rights that it has against any party to a contract relating to the *works*, without the *credit provider's* written consent.

6.18 The *credit provider* is entitled to the amounts payable to the *securing party* as a result of legal proceedings against, or a settlement with, any person against whom the *securing party* asserted a right under a contract relating to the *works*. With respect to those amounts, the *securing party* must:

- 6.18.1 direct the liable person to pay the amount directly to the *credit provider*; and
- 6.18.2 hold on trust for the *credit provider* any amount that it receives, and promptly pay the amount to the *credit provider*.

6.19 The *credit provider* may use the amounts:

- 6.19.1 in relation to the *works*; or
- 6.19.2 in any other way this *memorandum* allows the *credit provider* to use money that is paid under this *memorandum*.

[6. MORTGAGE CONT.]

- 6.20** If the *credit provider* asks, the *securing party* must promptly give the *credit provider* a copy of any document relating to a claim for compensation against a government body.
- 6.21** The *securing party* must transfer to the *credit provider* all rights under any warranty, guarantee or builders' insurance relating to the *works* carried out, whether obtained before or after the *securing party* grants this *mortgage*.
- 6.22** If asked, the *credit provider* will transfer back to the *securing party* all rights under any warranty, guarantee or builders' insurance after the *credit provider* discharges this *mortgage*.
- 6.23** The *credit provider* may take over the *works* at any time.
- 6.24** The *credit provider* is not liable for anything relating to the *works* or any failure to complete the *works* under any circumstances, even if the *credit provider*:
- 6.24.1** has consented to or approved the *works*;
 - 6.24.2** has supervised the *works*;
 - 6.24.3** has taken over the *works*; or
 - 6.24.4** fails to complete the *works* after taking over the *works*.
- 6.25** The *securing party* releases the *credit provider* from any future claims relating to the *works* that the *securing party* may have against the *credit provider*.
- 6.26** Under all circumstances, the *securing party* remains solely responsible for the *works*.
- 6.27** If the *credit provider* asks, the *securing party* must promptly give the *credit provider* any information, or copies of any documents, relating to the *works*.

Shared Scheme

- 6.28** If the *mortgaged property* is part of a *shared scheme*, then the *securing party* must:
- 6.28.1** comply with all governing rules of the *shared scheme*; and
 - 6.28.2** pay all amounts owing to the *shared scheme* body.
- 6.29** The *securing party* must notify the *shared scheme* body of the *credit provider's* interest in the *mortgaged property*.
- 6.30** The *securing party* must preserve the rights of the *securing party* in the *mortgaged property* and the common property.
- 6.31** The *securing party* must use its best endeavours to ensure that:
- 6.31.1** the *shared scheme* body keeps the common property in good condition;
 - 6.31.2** the *shared scheme* body keeps insurance as required under the law; and
 - 6.31.3** nothing is done or not done that may allow the insurer to avoid or limit a claim against the *shared scheme's* insurance.
- 6.32** The *securing party* must promptly notify the *credit provider* if:
- 6.32.1** the *shared scheme* body does not comply with its legal obligations, including its insurance obligations;
 - 6.32.2** any insurance of the *shared scheme* is reduced or cancelled;
 - 6.32.3** anything happens that may allow the insurer to avoid or limit a claim against the *shared scheme's* insurance; or
 - 6.32.4** there is a proposal to amend or to terminate the *shared scheme* or its governing rules.

[6. MORTGAGE CONT.]

6.33 The *securing party* must promptly give the *credit provider* a copy of all notices from the *shared scheme* body, including documents relating to a proposed meeting or vote of the *shared scheme* body.

6.34 The *securing party* must vote whenever the *securing party* has a right to vote with respect to the *shared scheme*.

6.35 If the *credit provider* asks, then the *securing party* must:

- 6.35.1** the *securing party* must vote in the manner directed by the *credit provider*;
- 6.35.2** promptly sign and deliver a proxy in favour of a person nominated by the *credit provider*;
- 6.35.3** promptly give the *credit provider* any information, or copies of any documents, the *credit provider* asks for relating to the *shared scheme*, including any insurance policies maintained by the *shared scheme* body.

Rural Land

6.36 If any of the *mortgaged property* is used for grazing, farming, horticultural or agricultural purposes, then the *securing party* must pursue and maintain those activities on the *mortgaged property* in an efficient and reasonable manner.

6.37 The *securing party* must get the *credit provider's* written consent before:

- 6.37.1** giving any security over any stock, clip or crop on the *mortgaged property*;
- 6.37.2** *dealing with* any quota or contract for producing or selling crops or produce, or doing anything that could cause a quota or contract to be *disposed of*;
- 6.37.3** *dealing with* any licence relating to the use of the *mortgaged property* or do anything that could cause a licence to be *disposed of*.

Liquor, Gaming and Other Permits

6.38 If any of the *mortgaged property* is used under a permit, including liquor or gaming, then the *securing party* must ensure that the permit holder:

- 6.38.1** maintains the permit;
- 6.38.2** complies with all legal obligations, orders or requirements of a government body relating to the permit;
- 6.38.3** does all things needed to maintain the value of the permit;
- 6.38.4** promptly gives the *credit provider* a copy of any notices from any government body relating to the permit;
- 6.38.5** does not *deal with* or *dispose of* the permit;
- 6.38.6** if the *credit provider* asks, transfers the permit to the *credit provider* or its nominee.

[7. CHARGE OF PROPERTY]

7.1 To secure the *amount owing* and all amounts due under any *collateral security*, the *chargor* hereby grants to the *credit provider* a security interest ("Security Interest") over all of its present and after acquired property and/or assets including, without limitation, all of its present and future interest in:

- 7.1.1** real property, fixtures, buildings, plant and machinery;
- 7.1.2** uncalled and called but unpaid capital and share premiums;
- 7.1.3** goodwill;

[7. CHARGE OF PROPERTY CONT.]

- 7.1.4 patents, trademarks, copyrights, designs, trade secrets, confidential information and other intellectual property rights;
 - 7.1.5 all marketable securities, other securities, instruments (negotiable or otherwise);
 - 7.1.6 all book debts together with all books of account and other documents relating to the business transactions of the *chargor*;
 - 7.1.7 all other personal property;
 - 7.1.8 all computer and word processing software and hardware;
 - 7.1.9 any licence relating to the *chargor's* business or activities or the ownership of its business;
 - 7.1.10 any debt or monetary obligation due to the *chargor* whether actual or contingent;
 - 7.1.11 securities, instruments (negotiable or otherwise).
- 7.2 The *chargor* must not sell, give or allow any security interest over or otherwise deal with the *chargor's* property to which the Security Interest relates without first obtaining the *credit provider's* written approval. The *chargor* must not do anything else which may adversely affect the Security Interest or the *credit provider's* rights under it or under this *memorandum*.
- 7.3 The *chargor* may, in the ordinary course of its ordinary business, sell any of its personal property subject to the Security Interest which is a circulating asset under s340 *Personal Property Securities Act 2009*.
- 7.4 By way of additional security in respect of any monies that may be due and payable to the *credit provider* at any time, and to better secure the performance of the obligations of the *transaction party* under this *memorandum* and any *collateral security*, the *transaction parties* hereby charge and mortgage ("Charge") in favour of the *credit provider* all of their right, title and interest in any real property and/or personal property and assets.
- 7.5 Pursuant to the Security Interest and/or Charge, the *transaction parties* hereby consent to the *credit provider*:
- 7.5.1 perfecting the Security Interest by whatever means necessary, including but not limited to registration with the Insolvency and Trustee Service of Australia;
 - 7.5.2 lodging a caveat with the land titles office in the relevant State or Territory against any real property held by or on behalf of the *transaction party*, whether now or in the future; and
 - 7.5.3 registering a mortgage over any real property held by or on behalf of the *transaction party*, whether now or in the future.
- 7.6 If a *transaction party* commits an event of default under this *memorandum*, the *credit provider* may immediately, or later if it wishes, enforce the Charge and Security Interest to the full extent permissible, including, without limitation, by doing any of the following in any way it considers appropriate:
- 7.6.1 entering into, seizing, taking possession of, managing or using the *transaction parties'* property; and
 - 7.6.2 exercising any one or more of the powers that a receiver may exercise under section 420 of the *Corporations Act 2001* and any other powers contained in that Act or this *memorandum*.
- 7.7 The Charge is in addition to the Security Interest and any other charge(s) or security which may be held at any time by the *credit provider* from any *transaction party* and may be enforced against the *charged property* if there is:
- 7.7.1 an *event of default*; or
 - 7.7.2 any other failure to strictly comply with the obligations imposed on any *transaction party* by this *memorandum*.

Must Meet All Legal Obligations

- 7.8 The *chargor* must:
- 7.8.1 pay, when due, all amounts demanded by any government body from the *chargor*, including all taxes imposed on the *chargor* or the *charged property*;

[7. CHARGE OF PROPERTY CONT.]

- 7.8.2 comply with all laws relating to the *chargor*, the *charged property* or the *chargor's* business;
- 7.8.3 comply with all directions and requirements of any government body relating to the *chargor*, the *charged property* or the *chargor's* business;
- 7.8.4 obtain, maintain and renew all leases and licences relied on by, or required for, the *chargor* to comply with all obligations imposed on it by this *memorandum*;
- 7.8.5 comply with all leases and licences to which the *chargor* is a party, and which relate to the *charged property* or the *chargor's* business;
- 7.8.6 comply with all obligations to any person the performance of which is secured against the *charged property*; and
- 7.8.7 comply with all restrictive and other covenants relating to the *charged property*.

Must Preserve the Charged Property

7.9 The *chargor* must:

- 7.9.1 carry on and maintain its business in a business-like and efficient manner;
- 7.9.2 keep books of account and records that accurately reflect the financial position and dealings of the *chargor's* business;
- 7.9.3 keep documents that record all transactions involving the *charged property*;
- 7.9.4 maintain the condition of the *charged property*;
- 7.9.5 keep each part of the *charged property*; in good condition and working order;
- 7.9.6 remove any encumbrance or caveat over the *charged property*; to which the *credit provider* has not consented in writing;
- 7.9.7 not acquire any property for more than its fair market value; and
- 7.9.8 diligently collect all money owed to the *chargor* by any person;

7.10 The *chargor* must not:

- 7.10.1 dispose of any *charged property*; for less than its fair market value;
- 7.10.2 dispose of any right to present or future profits, rents or other income of the *charged property*; or the *chargor's* business;
- 7.10.3 declare or pay a dividend if the *credit provider* has made a demand on the *chargor* that remains unsatisfied;
- 7.10.4 call up, or receive in advance of calls, any of the uncalled capital or uncalled premiums subject to this charge and, if received, the *chargor* will hold the proceeds on trust for the *credit provider*.

Must Get the Credit Provider's Written Consent to Certain Dealings

7.11 Unless the *credit provider* consents in writing, the *chargor* must not:

- 7.11.1 *deal with* or *dispose of* any *charged property*;
- 7.11.2 erect, remove or change any improvement on any part of the *charged property*;
- 7.11.3 allow the amount secured against the *charged property* to increase, other than under a security given to the *credit provider* under this *memorandum*;
- 7.11.4 vary the terms of any security held by any person over the *charged property*;
- 7.11.5 start or buy a business other than that business carried on by the *chargor* when it agreed to in this *memorandum*;

[7. CHARGE OF PROPERTY CONT.]

- 7.11.6 enter into a reservation of title agreement with any person under which title to goods is reserved to the seller until payment is made for those goods;
 - 7.11.7 *dispose of* any claims against any third party, including debts and claims to damage or compensation;
 - 7.11.8 deposit money with any person as security for a debt or other obligation;
 - 7.11.9 allow *charged property* that is in Australia to be moved out of Australia; or
 - 7.11.10 enter into any financial arrangement with a related party.
- 7.12 If the *credit provider* imposes conditions on its consent, then the *chargor* must comply with those conditions.

[8. POWER OF ATTORNEY]

Appointment

- 8.1 Each *transaction party* separately and irrevocably appoints the *credit provider* and its *authorised representatives*, jointly and severally, to be the *transaction party's* attorney to exercise the powers granted to an attorney in this *memorandum*.
- 8.2 Each *transaction party* authorises the *credit provider* to register this power of attorney as required or allowed by law and agrees to do anything required to assist the *credit provider* to register this power of attorney.

Powers

- 8.3 An attorney appointed under this *memorandum* has the power, at any time, to do in the name of, or on behalf of, a *transaction party* everything:
- 8.3.1 that the *transaction party* is expressly or impliedly required to do under this *memorandum*; or
 - 8.3.2 the *credit provider* is expressly or impliedly authorised to do under this *memorandum*, or under any law, including, for example, selling the *security property* owned by the *transaction party* if there is an *event of default*.
- 8.4 Without limiting the powers of attorney, an attorney appointed under this *memorandum* has the power at any time to:
- 8.4.1 complete any blank or correct any manifest error in this *memorandum*, the *mortgage*, or *memorandum schedule*;
 - 8.4.2 do anything required to register the *mortgage* or charge over the *security property*;
 - 8.4.3 execute all documents that the attorney considers to be desirable to more effectively secure the performance of any *transaction party's* obligations under this *memorandum*;
 - 8.4.4 delegate its power of attorney (including this power to delegate) to any person, including, without limitation, any successor or assign of the attorney, or any receiver; and
 - 8.4.5 revoke any delegation of the powers of attorney at any time.
- 8.5 Without limiting the powers of attorney, after an *event of default*, an attorney appointed under this *memorandum* has the power to:
- 8.5.1 do everything a *transaction party* could do with respect to the *security property*, including selling the *security property* in the name of the *transaction party* who owns the *security property*;
 - 8.5.2 do everything a *transaction party* could do to:
 - 8.5.2.1 remedy an *event of default*; or
 - 8.5.2.2 mitigate the loss to the *credit provider* from an *event of default*;

[8. POWER OF ATTORNEY CONT.]

8.5.3 do everything that the *transaction party* may lawfully authorise an agent to do in respect of this *memorandum* and the *security property*, including selling the *security property*; and

8.5.4 exercise the right of a *transaction party* who is a trustee of *security property*, or who is a party to this *memorandum* in its capacity as a trustee, to be indemnified out of trust assets and exercise any rights against beneficiaries or subsequent trustees.

8.6 All powers of attorney granted to an attorney under this *memorandum* may be exercised in the name of the *transaction party*, or in the name of the *credit provider* on the *transaction party's* behalf.

Irrevocable

8.7 This power of attorney is given for valuable consideration as a security for:

8.7.1 the performance of all obligations of any *transaction party* under this *memorandum*, including the payment of *amount owing*;

8.7.2 any proprietary interests granted to the *credit provider* under this *memorandum*.

8.8 This power of attorney cannot be revoked by any person.

Ratification

8.9 An attorney appointed under this *memorandum* may exercise its powers without any need for ratification or confirmation from any *transaction party*. But, if an attorney asks a *transaction party* to ratify or confirm any actions taken by an attorney under this power of attorney, then the *transaction party* will promptly do so.

[9. FURTHER CHARGE OVER ALL PROPERTY]

9.1 As further security for the performance of all obligations imposed on any *transaction party* under this *memorandum* or any *collateral security* the *transaction party* grants the *credit provider* a further charge over all of the *transaction party's* property acquired before or after it enters into this *memorandum*.

9.2 The further charge will take effect if there is an *event of default*.

9.3 After an *event of default*, the *transaction party* must:

9.3.1 give the *credit provider* a mortgage in registrable form over all real property owned by the *transaction party*; and

9.3.2 do all things the *credit provider* asks to enable that mortgage to be registered.

[10. EVENTS OF DEFAULT]

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

Money is Not Paid

10.1 The *credit provider* does not receive any money owing when due under this *memorandum*.

10.2 The *credit provider* does not receive an interest payment when due under this *memorandum*.

Non-Performance

10.3 A *transaction party* does something that it is not allowed to do under this *memorandum*.

10.4 A *transaction party* does not do something that it is required to do under this *memorandum*.

10.5 If this *memorandum* requires the *credit provider's* consent before something happens or is allowed to happen, and that thing happens or is allowed to happen without a *transaction party* getting the *credit provider's* consent at the time or in the manner required by this *memorandum*.

10. EVENTS OF DEFAULT CONT.

10.6 A *transaction party* does not comply with the terms of any consent given by the credit provider to a *transaction party* under this memorandum.

10.7 A *transaction party* does not fully comply with an obligation contained in any third-party security relating to the *security property*, or relating to any other real property held by the *transaction party*

10.8 There is an *event of default* (however named) under a *collateral security* or a third-party security enforceable against the *security property*.

Undertakings Not Carried Out

10.9 A *transaction party* does not fully comply with an undertaking it gave to the *credit provider* in relation to this memorandum within the required time, or if no time is specified, within 5 business days.

Misrepresentations

10.10 A *transaction party* gives the *credit provider* incorrect or misleading information in relation to this memorandum.

10.11 Any representation given to the *credit provider* in this memorandum is incorrect or misleading.

10.12 Any person, other than the *credit provider*, acts fraudulently in relation to this memorandum.

10.13 Any *transaction party* uses money received from the *credit provider* under this memorandum for a purpose that is different to the purpose represented by a *transaction party* to the *credit provider*.

Change of Control

10.14 A *transaction party* dies or is unable to manage his or her affairs.

10.15 After the *opening date* of this memorandum, any *transaction party* that is a company, except a publicly-listed company, changes:

- 10.15.1** directors;
- 10.15.2** shareholder voting rights or privileges;
- 10.15.3** shareholders;
- 10.15.4** the amount of share capital; or
- 10.15.5** its articles of association or constitution.

Insolvency

10.16 A *transaction party*:

- 10.16.1** becomes bankrupt, or a step is taken by a person other than the *credit provider* to make this happen;
- 10.16.2** is unable, or states that it is unable, to pay debts when they fall due;
- 10.16.3** stops paying any of its debts, or indicates to any person that it may do so;
- 10.16.4** is insolvent, or indicates to any person that it is, or may be, insolvent;
- 10.16.5** is deemed insolvent by failing to comply with a statutory demand issued by any person to the *transaction party*;
- 10.16.6** has a garnishee order, distress, attachment or execution issued or levied against the *transaction party's* assets, or a step is taken by a person other than the *credit provider* to make this happen;
- 10.16.7** does not satisfy within 5 business days a judgment debt enforceable against the *transaction party*;
- 10.16.8** enters into a compromise or arrangement with its creditors or a class of those creditors, or a step is taken by a person other than the *credit provider* to make this happen;

10. EVENTS OF DEFAULT CONT.

- 10.16.9 has a receiver or, receiver and manager, trustee in bankruptcy, trustee for the benefit of creditors, controller, administrator, provisional liquidator or liquidator is appointed to it or any of its assets, or a step is taken by a person other than the *credit provider* to make this happen; or
- 10.16.10 is wound up, whether or not due to insolvency, or a step is taken by a person other than the *credit provider* to make this happen.

Registration

- 10.17 In relation to the registration of any security or security interest contemplated by this *memorandum*, including the *mortgage* and the Charge of Property:
 - 10.17.1 a requisition by any government body is not complied with to the satisfaction of the requisitioning body within 7 business days of the requisition;
 - 10.17.2 any document or information needed to register any security contemplated by this *memorandum*, including the *mortgage* and the Charge of Property, is not produced to the *credit provider* within 5 business days of the *credit provider* asking for the document or information from any *transaction party*.
- 10.18 Any security contemplated by this *memorandum*, including the *mortgage* and the Charge of Property, is presented for registration to the appropriate government body but is not registered to the *credit provider's* satisfaction.

Enforceability

- 10.19 This *memorandum* or any part of this *memorandum*:
 - 10.19.1 is void, voidable, or otherwise unenforceable by the *credit provider*, or any *transaction party* asserts that this is so; or
 - 10.19.2 is subject to being terminated, rescinded or avoided by any *transaction party*; or
 - 10.19.3 is affected by fraud, or any *transaction party* asserts that this is so.
- 10.20 Any *transaction party* asserts that it did not sign any document relating to this *memorandum* where the document purports to bear its signature.
- 10.21 Any *transaction party* asserts that it did not read, or did not understand, the *memorandum* before agreeing to its terms.
- 10.22 Compliance with any obligations, or enforcement of any rights, contained in the *memorandum* is unlawful, or any *transaction party* asserts that this is so.
- 10.23 A change in the law or the withdrawal of a licence or permit prevents:
 - 10.23.1 a *transaction party* complying with any obligation imposed by this *memorandum*; or
 - 10.23.2 the *credit provider* exercising or enforcing its rights under this *memorandum*.

Third-Party Securities

- 10.24 Any security over the *security property*, other than a security held by the *credit provider*, becomes enforceable.
- 10.25 A third party holding a security over any of the assets of any *transaction party* takes, or attempts to take, possession of any assets of that *transaction party* pursuant to a right to do so in the security held by the third party.
- 10.26 A third party holds a security over the *security property* that ranks in priority to any security given by the *transaction party* to the *credit provider* under this *memorandum*, and the *credit provider* did not consent in writing to the third party's security having priority over the *credit provider's* security.
- 10.27 A *transaction party* lodges or allows another person to lodge a caveat, writ or any other form of encumbrance over the *security property*.

10. EVENTS OF DEFAULT CONT.

Adverse Developments

10.28 Either the *mortgaged property* or the *charged property* decreases in value by more than 10% below:

10.28.1 any prior valuation; or

10.28.2 any prior representation by any *transaction party* about the value of the *mortgaged property* or *charged property*.

10.29 The *amount owing* plus any monies secured in priority to the *amount owing* divided by the fair market value of the property that is *mortgaged property*, when expressed as a percentage, exceeds the *security ratio*.

10.30 Anything happens that, in the *credit provider's* opinion, materially reduces, or is likely to materially reduce, the *security property's* value.

10.31 A government body indicates that it intends to compulsorily acquire any of the *security property*.

10.32 There is, in the *credit provider's* opinion, a material deterioration in a *transaction party's* financial condition.

10.33 Anything happens that, in the *credit provider's* opinion, prejudices any *transaction party's* ability to meet its obligations under this *memorandum*.

10.34 A *transaction party* commits an offence under any Commonwealth or state law.

Business of Transaction Party

10.35 A *transaction party* stops carrying on its usual business, activity or employment, or indicates to any person that it may do so.

10.36 A *transaction party* that is a company:

10.36.1 buys its own shares; or

10.36.2 agrees with any person to dispose of any of its own assets other than in the ordinary course of business.

10.37 A *transaction party* stops being a trustee.

10.38 A *transaction party* stops being a beneficiary of a trust.

Government-Issued Permit or Licence

10.39 A government-issued permit or licence relating to use of the *security property* is:

10.39.1 not maintained;

10.39.2 *dealt with* or *disposed of*;

10.39.3 subjected to limitations that are not imposed on all permits or licences of the class to which the permit or licence belonged immediately before the limitation was imposed;

10.39.4 is voluntarily varied or amended without the *credit provider's* written consent.

10.40 Something is done that is prohibited by a government-issued permit or licence relating to the use of the *security property*.

10.41 Something is not done that a government-issued permit or licence relating to the use of the *security property* requires to be done.

10.42 The holder of a government-issued permit or licence relating to the use of the *security property* fails to comply with all legal obligations, orders or requirements relating to the permit or licence.

10.43 A government-issued permit or licence relating to the use of the *security property* is not transferred to the *credit provider* or its nominee, when the *credit provider* requests such a transfer.

10. EVENTS OF DEFAULT CONT.

Changes to Trust

10.44 A *transaction party* is a trustee of a trust, and:

- 10.44.1 the trust is changed in any manner;
- 10.44.2 the trustee stops being the trustee of the trust assets;
- 10.44.3 a new trustee is appointed;
- 10.44.4 there is a capital distribution to beneficiaries;
- 10.44.5 there is a transfer of trust assets to another trustee;
- 10.44.6 the trustee breaches its obligations under the trust;
- 10.44.7 the trustee's right to be indemnified out of trust assets is changed, removed or limited; or
- 10.44.8 the trust *deals with* or *disposes of* trust assets other than in the ordinary course of business.

11. OBLIGATION TO PREVENT AN EVENT OF DEFAULT

11.1 A *transaction party* must do all things necessary to prevent an *event of default* from happening. A failure to comply with this obligation is an *event of default*.

12. CONSEQUENCES OF AN EVENT OF DEFAULT

12.1 If there is an *event of default*, then the *credit provider* may exercise all rights granted in this *memorandum*, or under the law, regardless of whether the *event of default* is caused by something outside the control of any *transaction party*.

Accelerate the Due Date

12.2 If there is an *event of default*, then the *credit provider* may choose to make the due date for *amount owing* the date of any *event of default*, or any later date. The *credit provider* need not notify any *transaction party* about a choice made under this clause, and the choice may be made with retrospective effect.

Statutory Rights and Powers

12.3 If there is an *event of default*, then the *credit provider* may exercise all rights and powers under any law, including those granted to mortgagees or chargees.

Mitigate or Remedy a Default

12.4 If there is an *event of default*, then the *credit provider* may do all things that the *credit provider* considers necessary or desirable to remedy or mitigate an *event of default*.

12.5 Any money spent by the *credit provider* exercising its right to remedy or mitigate an *event of default* is a *further advance* under this *memorandum*.

Possession

12.6 If there is an *event of default*, then the *credit provider* may:

- 12.6.1 take or enter into possession of the *security property*, or any part of it;
- 12.6.2 give up possession of the *security property*, or any part of it;
- 12.6.3 eject any *transaction party* or tenant from the *security property*; and
- 12.6.4 collect rent from any occupant of the *security property*.

12. CONSEQUENCES OF AN EVENT OF DEFAULT CONT.

Personal Possessions

- 12.7** If there is an *event of default*, then the *credit provider* may request that any *transaction party* remove from the *security property* any personal possessions that are not part of the *credit provider's* security under this memorandum.
- 12.8** If the personal possessions are not removed within 5 business days after the *credit provider's* request, then the *transactions parties* consent to the *credit provider disposing* of the possessions as the *credit provider* sees fit.
- 12.9** Any proceeds from the *disposal* of personal possessions, after costs, may be applied by the *credit provider* in the same manner as any other money received under this memorandum.
- 12.10** If there is a net loss from the *disposal* of personal possessions, then the loss incurred by the *credit provider* will be a *further advance*.

Deal with the Security Property

- 12.11** If there is an *event of default*, then the *credit provider* may:
- 12.11.1** do anything in relation to the *security property* that an absolute owner of the *security property*, or a receiver of the *security property*, could do;
 - 12.11.2** exercise the rights and powers of any *transaction party* in relation to the *security property*, including carrying on any business conducted from the *security property*, and creating, *dealing with* or *disposing of* rights and powers relating to any proprietary right, intellectual property, licence, permit or agreement relating to the *security property*;
 - 12.11.3** do anything in relation to the *security property* that the *credit provider* determines is desirable to protect the *security property*;
 - 12.11.4** appoint any *transaction party* as the *credit provider's* trustee with respect to money received as income by the *transaction party* from the use, or right to use, the *security property*, and demand that the *transaction party* pay to the *credit provider* all money held on that trust;
 - 12.11.5** pay the *securing party's* debt under any third-party security over the *security property* as declared by the holder of the third-party security;
 - 12.11.6** obtain a release or transfer of any security over the *security property*; and
 - 12.11.7** *dispose of* or *deal with* the *security property*, including selling the security property free from any rights or claims of the *securing party*. Where the *credit provider* is required under statute, or this document, or otherwise, to provide any notice prior to being entitled to exercise its power of sale in respect of *security property*, such period of notice shall be the period of five (5) days, unless a longer period is prescribed by law with such period incapable of being varied by agreement between the parties.

Proceedings

- 12.12** If there is an *event of default*, then the *credit provider* may initiate, prosecute, defend or settle any legal proceedings relating to the *security property*, in the name of any *transaction party* who owns the relevant *security property*, or in the name of the *credit provider*.

Bank Accounts

- 12.13** If there is an *event of default*, then the *credit provider* may operate the *transaction party's* bank accounts, alone or jointly with others, and withdraw money, and sign, present and endorse negotiable instruments, all in the name of the *transaction party* and to the exclusion of the *transaction party*.

[12. CONSEQUENCES OF AN EVENT OF DEFAULT CONT.]

Appoint a Receiver

12.14 If there is an *event of default*, then the *credit provider* may appoint one or more receivers of the *security property* or the income from the *security property*, or both, and authorise them, at any time before or after appointment, to:

- 12.14.1** do anything the *securing party*, or an absolute owner of the *security property* could do or lawfully authorise an agent to do;
- 12.14.2** do anything the directors or controllers of a *securing party* could do if the *securing party* did not agree to this *memorandum*;
- 12.14.3** do anything the *credit provider* may do under this *memorandum* before or after an *event of default* in relation to the *security property* (other than appoint a receiver);
- 12.14.4** do anything the law allows the receiver to do;
- 12.14.5** do anything the *credit provider* may lawfully authorise a receiver to do;
- 12.14.6** borrow money from the *credit provider* to exercise any of the receiver's rights or powers; and
- 12.14.7** give receipts.

12.15 If the receiver borrows money from the *credit provider*, then all money owing by the receiver to the *credit provider* under any loan agreement between the *credit provider* and the receiver, including all interest and charges, will become a *further advance*.

12.16 If the *credit provider* appoints a receiver, then the *credit provider* may:

- 12.16.1** terminate any receivership; and
- 12.16.2** appoint another, or reappoint the same, person as receiver if a receivership is terminated, or a receiver can no longer be an agent of the *securing party*.

12.17 The receiver, unless the appointing document states otherwise, will be the agent of the *securing party* and:

- 12.17.1** the *securing party* is solely responsible for the receiver's actions;
- 12.17.2** the *securing party* is responsible for the receiver's remuneration, which may be determined by the *credit provider* in consultation with the receiver; and
- 12.17.3** the receiver must carry out instructions given by the *credit provider* but the receiver is not required to carry out instructions from any *transaction party*.

12.18 The *credit provider's* rights and powers are not affected or limited by the appointment of a receiver or any action taken by the receiver.

Other Remedies

12.19 If there is an *event of default*, then the *credit provider* may exercise any and all rights and power under this *memorandum*, or under the law, whether or not those rights or powers are specifically identified under the heading "Consequences of an Event of Default".

[13. INSURANCE]

Obligation to Maintain Insurance

13.1 The *securing party* must insure all *security property* of an insurable nature and any works:

- 13.1.1** against the risk of fire, storm, tempest, flood, water damage, malicious damage, theft, earthquake, explosion and other usual risks, for the reinstatement or replacement value of the *security property*;

[13. INSURANCE CONT.]

- 13.1.2 against public liability risk for the amount of at least \$1 million, or any other amount that the *credit provider* requests at any time; and
- 13.1.3 as requested by the *credit provider* at any time for other risks, including, without limitation, worker's compensation, employer's indemnity insurance, business interruption, loss of rent, or default under this *memorandum*.
- 13.2 The *securing party* must maintain all insurance that a prudent person carrying on the same business or profession as the *securing party* would maintain.
- 13.3 The insurance must record the *credit provider's* interest as mortgagee or chargee, as the case may be. If the *securing party* does not comply with this obligation, that failure will not impair any of the *credit provider's* rights under this *memorandum*.
- 13.4 If reasonably obtainable, the insurance must contain a provision holding that the mortgagee or chargee is covered under the insurance, even if the *securing party* has breached a condition or warranty in the insurance.
- 13.5 If the *credit provider* asks, the *securing party* must get the insurance from an insurer approved by the *credit provider*.
- 13.6 The *securing party* must do everything needed to maintain the insurance.
- 13.7 The *securing party* must not do or permit anything that may allow the insurer to avoid or limit a claim against the insurance.

Insurance Claims

- 13.8 The *securing party* must notify the *credit provider* if:
 - 13.8.1 the *securing party* has a claim against the insurance; or
 - 13.8.2 any event happens that might allow the *securing party* to make a claim against the insurance.
- 13.9 The *securing party* must pursue any claim against the insurance.
- 13.10 The *securing party* must comply with any request by the *credit provider* concerning the manner in which any claim against the insurance is to be pursued, even if the claim against the insurance relates also to another property.
- 13.11 The *securing party* must not agree to terms with the insurer regarding the insurer's liability for any claim against the insurance, without the *credit provider's* written consent.
- 13.12 The *securing party* must notify the *credit provider* about any insurer's decision about a claim against the insurance.
- 13.13 The *credit provider* may take over the *securing party's* rights with respect to any claim against the insurance and exercise those rights in any manner the *credit provider* chooses.

Credit Provider Is Entitled to Insurance Proceeds

- 13.14 The *credit provider* is entitled to the proceeds of any claim against the insurance.
- 13.15 The *securing party* must:
 - 13.15.1 direct the insurer to pay the proceeds of any claim to the *credit provider*; and
 - 13.15.2 hold any proceeds received by the *securing party* on trust for the *credit provider* and promptly pay those proceeds to the *credit provider*.
- 13.16 If the *credit provider* asks, the *securing party* must promptly give the *credit provider* a copy of any document relating to the insurance.

[14. COMPENSATION]

Compensation Claim

- 14.1 The *securing party* must notify the *credit provider* if:
- 14.1.1 the *securing party* has a claim for compensation against a government body; or
 - 14.1.1 any event happens that might allow the *securing party* to make a claim for compensation against a government body, including a compulsory acquisition, resumption, or road widening.
- 14.2 The *securing party* must pursue any claim against the government body.
- 14.3 The *securing party* must comply with any request by the *credit provider* concerning the manner in which any claim against the government body is to be pursued, even if the claim against the government body relates also to another property.
- 14.4 The *securing party* must not agree to terms with the government body regarding the government body's liability for any claim, without the *credit provider's* written consent.
- 14.5 The *securing party* must notify the *credit provider* about the any decision by the government body about a claim for compensation.
- 14.6 The *credit provider* may take over the *securing party's* rights with respect to any claim for compensation and exercise those rights in any manner the *credit provider* chooses.

Credit Provider is Entitled to Receive Compensation

- 14.7 The *credit provider* is entitled to the proceeds of any claim for compensation.
- 14.8 The *securing party* must:
- 14.8.1 direct the government body to pay any compensation to the *credit provider*; or
 - 14.8.2 hold any compensation received by the *securing party* on trust for the *credit provider* and promptly pay that compensation to the *credit provider*.
- 14.9 If the *credit provider* asks, the *securing party* must promptly give the *credit provider* a copy of any documents relating to a claim for compensation against a government body.

[15. USE OF MONEY RECEIVED BY THE CREDIT PROVIDER]

The Credit Provider's Discretion

- 15.1 The *credit provider* may apply to the payment of any part of the *amount owing* any money that it receives under this *memorandum*, including, without limitation:
- 15.1.1 payments made toward the *amount owing*;
 - 15.1.2 insurance proceeds;
 - 15.1.3 compensation; or
 - 15.1.4 money received due to the exercise of any right or power given to it under this *memorandum*, or under the law.
- 15.2 The *credit provider's* discretion to apply money that it receives is limited only by statute, and cannot be fettered by any request, demand or condition purportedly imposed by the person making the payment to the *credit provider*.
- 15.3 The *credit provider's* decision may be made when it receives payment, or any later time.
- 15.4 If the money received by the *credit provider* is insurance proceeds or compensation that the *credit provider* was entitled to receive under this *memorandum*, then the *credit provider* may, in its discretion, choose to use the money to pay any part of the *amount owing*, or to replace or reinstate the *security property*.

15. USE OF MONEY RECEIVED BY THE CREDIT PROVIDER CONT.

No Marshalling

15.5 The *credit provider* is under no obligation to marshal for the *transaction party* any security held by the *credit provider* or anything that the *credit provider* is entitled to receive.

Security for Payment

15.6 If the *amount owing* cannot be determined, or all or some part of the *transaction party's* liability to pay the *credit provider* is contingent or prospective, then the money received by the *credit provider* may be deposited in an account of the *credit provider's* choosing as security for payment.

More than One Loan Account

15.7 If a *debtor* has more than one loan account with the *credit provider*, then the *credit provider* may, without notice to the *debtors*, apply any money received under this *memorandum* to the payment of any one or more of any *debtor's* accounts.

Surplus

15.8 If the *credit provider* receives more than it is entitled to retain under this *memorandum*, then the *credit provider* will pay the surplus to any person entitled to give receipts, including the *transaction party*, for those amounts or the *transaction party* and have no further liability to the *transaction party*.

16. KEEPING THE CREDIT PROVIDER INFORMED

Event of Default and Security Property

16.1 If the *credit provider* asks, a *transaction party* must promptly declare under penalty of perjury whether the *transaction party* believes that an *event of default* has happened.

16.2 A *transaction party* must promptly notify the *credit provider* in writing every time:

16.2.1 it becomes aware that an *event of default* has happened, or it believes that an *event of default* might have happened; or

16.2.2 there is a change in the use of the *security property* or there is a new tenant or occupier of the *security property*.

16.3 The *securing party* must promptly:

16.3.1 notify the *credit provider* if the *security property* is affected by any:

16.3.1.1 contaminant;

16.3.1.2 defect; or

16.3.1.3 major damage; and

16.3.4 give the *credit provider* a copy of any notice, order or demand from any government body concerning the *security property*.

Books and Records

16.4 The *transaction party* must keep books of account and records that accurately reflect the financial position of the *transaction party* and dealings involving:

16.4.1 any business the *transaction party* carries on; and

16.4.2 the *security property*.

[16. KEEPING THE CREDIT PROVIDER INFORMED CONT.]

- 16.5 The *transaction party* must allow the *credit provider*, and any persons appointed by the *credit provider*, to inspect those books of account and records at any reasonable time.
- 16.6 If the *credit provider* asks, the *transaction party* must promptly, but no later than 10 business days following the request, give the *credit provider*:
- 16.6.1 its most recent tax return;
 - 16.6.2 consolidated financial statements for the previous financial year;
 - 16.6.3 unaudited interim financial statements; and
 - 16.6.4 any other book of account or record maintained by the *transaction party*.

Requests for Information

- 16.7 If the *credit provider* asks, the *transaction party* must promptly give the *credit provider* all requested information that relates to:
- 16.7.1 the *transaction party's* financial position;
 - 16.7.2 the *security property* and any claims concerning it;
 - 16.7.3 any lease, tenancy, licence, security or other arrangement related to the *security property* and any claims concerning it; or
 - 16.7.4 the *securing party's* performance of obligations under this *memorandum*.

Access to Security Property

- 16.8 The *securing party* must give the *credit provider*, and any persons appointed by the *credit provider*, complete and unfettered access to *security property* in order to:
- 16.8.1 inspect its condition;
 - 16.8.2 inspect *any works*;
 - 16.8.3 find out whether the *mortgagor* is complying with its obligations under this *memorandum*;
 - 16.8.4 carry out the *credit provider's* rights or powers of the *credit provider* under this *memorandum* or under the law;
 - 16.8.5 perform any valuation of the *security property*, whether or not the valuation is one that the *securing party* is obliged to obtain under this *memorandum*;
 - 16.8.6 do anything that the *securing party* was required to do under this *memorandum*;
 - 16.8.7 remedy any failure by the *securing party* to comply with its obligations under this *memorandum*, or mitigate the effect of any *event of default*.
- 16.9 Unless there is an *event of default* or an emergency, the *credit provider* will give the *securing party* reasonable notice of the *credit provider's* intent to exercise its right to enter the *security property*.

Valuation of Security Property

- 16.10 If the *credit provider* asks, the *securing party* must get a valuation of the *security property*.
- 16.11 The valuation must be:
- 16.11.1 done by a licensed valuer approved in writing by the *credit provider*; and
 - 16.11.2 given to the *credit provider* within 30 days of the *credit provider's* request.
- 16.12 Unless an *event of default* has happened, the *securing party* is not obliged to get more than one valuation of the *security property* more than once in any 6 month period.

17. THE CREDIT PROVIDER'S RECOVERABLE COSTS

Obligation to Pay the Credit Provider's Costs

17.1 The *transaction parties* must pay the *credit provider* all internal and external costs and expenses, enforcement expenses, including legal fees and costs, that the *credit provider* incurs, pays or becomes liable to pay because of, or in relation to:

- 17.1.1 this *memorandum*;
- 17.1.2 any security granted to the *credit provider* under this *memorandum*;
- 17.1.3 an *event of default* under this *memorandum*;
- 17.1.4 doing anything that a *transaction party* should have done under this *memorandum*;
- 17.1.5 preserving or maintaining the *security property*, including insurance, rates and taxes payable for the *security property*; and
- 17.1.6 any proceeding, whether before a court, tribunal, arbitral body, administrative body or other decision-making body, in which the *credit provider* becomes involved that is concerned with:
 - 17.1.6.1 the rights or obligations of the *credit provider* or any *transaction party* under this *memorandum*;
 - 17.1.6.2 any security granted to the *credit provider* under this *memorandum*; or
 - 17.1.6.3 an *event of default* under this *memorandum*.
- 17.1.7 The *transaction party* is to pay all of the *credit provider's* legal costs and expenses on the full indemnity basis.

Costs are a Further Advance

17.2 All costs and expenses that a *transaction party* must pay the *credit provider* under this *memorandum*:

- 17.2.1 are to be paid in full without deduction;
- 17.2.2 are a *further advance*;
- 17.2.3 are immediately due and payable.

Examples of Recoverable Costs

17.3 By way of example only, and without limiting a *transaction party's* obligation to pay the *credit provider's* costs and expenses under this *memorandum*, the *transaction party* must pay the *credit provider* the:

- 17.3.1 costs and expenses incurred by the *credit provider* in reviewing, considering or perfecting the *credit provider's* rights under this *memorandum*, registering any security granted to the *credit provider* under this *memorandum*, investigating any potential or actual *event of default* under this *memorandum*, and instructing external advisors and legal representatives on any matters arising out of the *memorandum*;
- 17.3.2 costs and expenses incurred dealing with any communications, documents, encumbrances affecting the *security property* or a *transaction party*;
- 17.3.3 costs and expenses incurred obtaining advice in relation to this *memorandum*, any rights or obligations arising under the *memorandum*, the *security property* or any *transaction party*;
- 17.3.4 costs and expenses incurred by the *credit provider* in appointing any person to manage the loan facility and/or to facilitate an exit strategy or a refinance of the *amount owing* whether or not an event of default has occurred at a rate and in a manner agreed to between the *credit provider* and such other person as the *credit provider* may nominate;

[17. THE CREDIT PROVIDER'S RECOVERABLE COSTS CONT.]

- 17.3.5** costs and expenses of any report, survey, inspection done in relation to the *security property*;
- 17.3.6** costs and expenses incurred enforcing or attempting to enforce any rights under this *memorandum*, including taking possession of, *dealing with*, or *disposing of*, the *security property*;
- 17.3.7** costs and expenses incurred in relation to maintaining, improving or marketing the *security property*;
- 17.3.8** professional costs and outlays incurred by the *credit provider* in relation to reviewing or analysing any financial or other information given to the *credit provider* by a *transaction party*;
- 17.3.9** all taxes, fees, duties, fines or penalties payable because of or in relation to this *memorandum*, or any security given to the *credit provider* by this *memorandum*;
- 17.3.10** if there is an *event of default*, the amount that the *credit provider* pays to any third party to discharge or release any right, lease, option, licence, or security over the *security property*;
- 17.3.11** costs and expenses incurred by the *credit provider* defending, prosecuting, or intervening in, any proceeding or part of any proceeding, whether or not a *transaction party* is a party to the proceeding, where the proceeding relates to:
- 17.3.11.1** this *memorandum*;
- 17.3.11.2** any actual or purported right or security given, or actual or purported obligation imposed, by this *memorandum*; or
- 17.3.11.3** the *security property*;
- 17.3.12** the amount of any costs order made against the *credit provider* in a proceeding, if the proceeding is one that the *credit provider* would be entitled to recover its own costs and expenses against the *transaction party* under this *memorandum*.

[18. PERFORMANCE]

Time for Performance

- 18.1** If a thing must be done on a day that is not a business day, then the thing must be done on the preceding business day.

Time of the Essence

- 18.2** Time is of the essence with respect to the performance of all of the *transaction party's* obligations under this *memorandum*.

No Set-off, Withholding or Deductions

- 18.3** The *transaction party* must not assert any cross-claim, set off or other deduction against any payment owing to the *credit provider* under this *memorandum*.
- 18.4** The *transaction party* must ensure that all taxes or other charges are paid, and that payment of the amounts owing to the *credit provider* under this *memorandum* are not subject to any further deductions.

Transaction Party's Expense

- 18.5** If the *transaction party* must do something, then the *transaction party* must pay for it to be done. If the *credit provider* pays for something to be done that the *transaction party* was obliged to pay for, then the payment will be a *further advance*, without prejudice to any rights that the *credit provider* may have if there is an *event of default*.

[19. RELEASE AND DISCHARGE]

Irrevocable and Continuing Securities

- 19.1** The guarantee and indemnity, mortgage, Charge, Charge of Property, power of attorney provisions and further charge under clause 9 are irrevocable and continuing securities.
- 19.2** Those securities survive the repayment to the *credit provider* of the *amount owing* or the settlement of any account between the *transactions party* and the *credit provider*.
- 19.3** The *transaction party* is not entitled to a release or discharge of those securities while there remains an *amount owing* or the *credit provider* apprehends the potential for a claim against the *transaction party* under this *memorandum*, including if, in the *credit provider's* opinion, there is a prospect of:
- 19.3.1** litigation involving the *credit provider* that might give rise to a right to recover damages, costs or expenses against the *transaction party*; or
 - 19.3.2** a payment received by the *credit provider* being taken back as a preferential payment; or
 - 19.3.3** an *amount owing* arising in the future.
- 19.4** Any release or discharge of those securities may be on any terms that the *credit provider* sees fit.
- 19.5** The *credit provider* may demand that the *transaction parties* release all known and unknown, existing and future claims against the *credit provider* that relate to, or arise out of, the transaction contemplated by this *memorandum*.

Any Release or Discharge Must Be In Writing

- 19.6** The *credit provider's* rights under this *memorandum*, including under the securities granted in favour of the *credit provider*, and the *credit provider's* rights under the law cannot be released, discharged, waived or limited, except by:
- 19.6.1** the *credit provider* doing so in a written notice that makes specific reference to the right being waived, released or discharged; and
 - 19.6.2** the written notice being signed by the directors of the *credit provider*.
- 19.7** There can be no release, discharge, waiver, estoppel or limitation on any rights of the *credit provider* that arise out of any oral statements, actions or failure to act by the *credit provider*.

No Release or Discharge By Other Events

- 19.8** The liability of the *transaction party* under this *memorandum* will not be released or discharged by:
- 19.8.1** any act or omission that would have affected or discharged all or part of a *transaction party's* liability at common law, but for this clause;
 - 19.8.2** any delay, mistake or negligence on the part of the *credit provider*;
 - 19.8.3** the *credit provider* granting any forbearance or indulgence to any person, including a *transaction party*;
 - 19.8.4** an agreement or arrangement being entered into with any person, including a *transaction party*;
 - 19.8.5** any variation or rights and obligations between the *credit provider* and a *transaction party*;
 - 19.8.6** another *transaction party* being released or discharged from further liability to the *credit provider*, whether by the *credit provider* or by other means;
 - 19.8.7** any security or claim against any *transaction party* or *security property* being waived, released, transferred, sold, or abandoned;
 - 19.8.8** any claim of the *credit provider* against a *transaction party* being void, voidable or unenforceable for any reason, including a reason that was known or should have been known to the *credit provider* when it entering into this *memorandum*;

[19. RELEASE AND DISCHARGE CONT.]

- 19.8.9 any security being granted by the *credit provider* to another person;
- 19.8.10 the *credit provider* becoming bound by operation of a law relating to insolvency or bankruptcy because of the financial position of a *transaction party*;
- 19.8.11 the transfer or assignment of the *credit provider's* rights under this *memorandum*;
- 19.8.12 any changes to the *credit provider's* composition; or
- 19.8.13 the *credit provider* obtaining judgment against a *transaction party*.

[20. GENERAL PROVISIONS]

Deed

20.1 Each *transaction party* who signs this *memorandum* is deemed to sign, seal and deliver the *memorandum* as a deed. The deed takes effect from the *opening date*.

Brokers and Agents

20.2 Any person, whether or not described as an agent or broker, who introduces a *transaction party* to the *credit provider* is not an agent or representative of the *credit provider*, and has never had any authority to speak on behalf of the *credit provider* or bind the *credit provider* in any way.

20.3 The *credit provider* may pay money to any person for any reason in relation to the transaction contemplated by this *memorandum*. A payment to a person does not make that person an agent or representative of the *credit provider*.

Parties Immediately Bound

20.4 The *transaction party* who signs this *memorandum* does so with the intent of being immediately and unconditionally bound by its terms.

20.5 The *transaction party* who signs this *memorandum* is bound by its terms even if one or more other persons named in the *memorandum* do not become a *transaction party*, or a *transaction party* who signed the *memorandum* stops being bound by its terms.

Transaction Party Liability

20.6 If a *transaction party* consists of more than one person, then each of those persons is:

- 20.6.1 jointly and severally liable for the obligations of the *transaction party* under this *memorandum*; and
- 20.6.2 bound by the acts or representations of any one or more of the other persons comprising the *transaction party*.

Judgment Debts

20.7 If the *credit provider* obtains a judgment against a *transaction party* for an amount that is *amount owing*, or part thereof, then interest will accrue on that judgment at the *interest rate*, compounding daily.

No Competing Claim Against Credit Provider

20.8 Until the *amount owing* is paid to the *credit provider* in full, the *transaction party* must not:

- 20.8.1 assert any claim against the *security property* or against any other *transaction party* that will diminish the amount available to be paid toward the *amount owing*; or
- 20.8.2 benefit from any payment or distribution that is made by an executor or external administrator after another *transaction party's* death or insolvency.

[20. GENERAL PROVISIONS CONT.]

20.9 If the *transaction party* receives any amount from a claim, or payment or distribution from an estate or external administrator, then the *transaction party* will hold those amounts on trust for the *credit provider*.

Rights Are Cumulative and Do Not Merge

20.10 The *credit provider's* rights and powers under this *memorandum* are in addition to the *credit provider's* rights and powers under the law.

20.11 Nothing in this *memorandum* limits or impairs the *credit provider's* exercise of any of its rights or powers under the law.

20.12 Except by operation of statute that this *memorandum* does not or cannot contract out of, the law will not affect the *credit provider's* rights or a *transaction party's* obligations under this *memorandum*.

20.13 The *transaction party's* obligations under this *memorandum* will not merge with any judgment, security or other obligation of a *transaction party* to the *credit provider*.

Priority Agreements

20.14 The *credit provider* may enter into agreements with persons holding security over the *security property* regarding any priority between the *credit provider's* security and another security. The *credit provider* need not notify the *transaction party* about those agreements.

Assignment

20.15 Without notice to the *transaction party*, the *credit provider* may transfer all or any of its rights, powers or obligations under this *memorandum*, and may do so without giving notice to the *transaction party*.

20.16 The *transaction party* may not assign any right or obligation contained in this *memorandum*.

Conflicts of Interest

20.17 The *transaction party* consents to the *credit provider* or receiver exercising any and all rights or powers of the *credit provider* or receiver, as the case may be, whether arising under this *memorandum* or under the law, including under the powers of attorney, even if:

- 20.17.1** doing so involves a conflict of duty owed by the *credit provider* or receiver, to any person, on the one hand, and any duty owed to the *transaction party*, on the other hand;
- 20.17.2** doing so involves a conflict of the interests of the *credit provider* or receiver, on the one hand, with the interests of the *transaction party*, on the other hand; or
- 20.17.3** the *credit provider*, or receiver, has a personal interest in the manner, or outcome, of the exercise of the right or power.

Dealings With Third Parties

20.18 Any person dealing with the *credit provider* or a receiver need not inquire with any *transaction party*, or any other person about any matter, even if dealing with the *credit provider* might affect the rights, obligations or property of any *transaction party*.

20.19 If the *credit provider* or receiver breaches any duty to any *transaction party* in dealing with another person, that is a matter that will be dealt with between the *credit provider* or receiver, on the one hand, and the *transaction party*, on the other hand.

20.20 Under no circumstance will any *transaction party* assert any claim against any person or the property of any person that arises from that person having dealt with or acquired property from the *credit provider* or the receiver.

20.21 All *transaction parties* acknowledge that this *memorandum* may be shown to a person who deals with the *credit provider* or receiver and the *transaction parties* hereby encourage that person to deal with the *credit provider* or receiver in reliance on the matters contained in this part of the *memorandum* headed "Dealings with Third Parties."

[20. GENERAL PROVISIONS CONT.]

Negligence by Credit Provider

20.22 The *credit provider* is not liable to the *transaction party* for exercising or refusing to exercise any discretion, power or right under this *memorandum* or under the law, even if the *credit provider* delays or is negligent.

Severability

20.23 If a clause in this *memorandum* is held to be illegal, invalid or unenforceable, then the clause will be read down to the extent necessary to make the clause valid and enforceable. If that clause cannot be read down, then the clause will be deemed to be severable from the remainder of this *memorandum*.

20.24 If a clause of this *memorandum* is unenforceable against one or all transaction parties, the other clauses in this *memorandum* remain enforceable.

Notices

20.25 Any written communications between the *credit provider* and a *transaction party*, including demands, notices, requests, consents, certificates, disclosures, or confirmations, and to the extent permitted by law, originating process, may be effectively served on the recipient:

20.25.1 if the recipient is a *transaction party*, by addressing the written communication to a *transaction party* and:

20.25.1.1 mailing or delivering the communication to the *transaction party address for service*;
or

20.25.1.2 transmitting the written communication to a facsimile number or email address provided by a *transaction party* as a means of communicating with that *transaction party*; or

20.25.2 if the recipient is the *credit provider*, by obtaining a written confirmation from the *credit provider* that the communication has been received, or served.

20.26 A communication from a *transaction party* to the *credit provider* that is made under this *memorandum* must be in writing;

20.27 A communication from a *credit provider* to a *transaction party* that is made under this *memorandum* need not be in writing, unless this *memorandum* expressly requires the communication to be in writing.

20.28 A communication by the *credit provider* to any *transaction party* is an effective communication to all *transaction parties*.

20.29 A communication that is mailed by the *credit provider* to a *transaction party address for service* is deemed to have been received by all *transaction parties* on the second business day after it is mailed, unless a *transaction party* confirms earlier receipt.

Prior Communications

20.30 Unless this *memorandum* expressly provides otherwise, nothing communicated between any of the parties prior to entering into this *memorandum* qualifies, amends, supplements, limits or places any conditions upon the obligations of the *transaction party* or the rights and powers of the *credit provider* under this *memorandum*.

Amendment

20.31 This *memorandum* can only be amended or supplemented by a written document that:

20.31.1 contains those amendments or supplements;

[20. GENERAL PROVISIONS CONT.]

20.31.2 states that it is intended to constitute an amendment or supplement to this *memorandum*; and

20.31.3 is signed by the party to be bound by the amendment or supplement.

Title Documents

20.32 If the *credit provider* asks, the *securing party* must give any original title documents to the *credit provider*, unless another person with a security over the *security property* holds those documents under a possessory right that is superior to the *credit provider's* claim to possession of those documents.

20.33 If the *credit provider* has possession of any original title documents, then the *credit provider* may keep them until the *credit provider* discharges its security over the *security property*.

20.34 The *credit provider* may give any other holder of security over the *security property*:

20.34.1 any documents relating to the *security property*, including title documents, releases, declarations, copies of this *memorandum*; and

20.34.2 any information relating to the *credit provider's* interest in the *security property*, including details of the *amount owing* under this *memorandum*.

20.35 The *credit provider* is not liable to the *transaction party* for anything with respect to any refusals to release, or delays in releasing, documents held by the *credit provider*.

Personal Property Securities Act 2009

20.36 If the *credit provider* determines that this *memorandum* (or any transaction in connection with it) is or contains a Security Interest for the purposes of the *Personal Property Securities Act 2009* (Cth) ("PPSA") the *transaction parties* agree to do anything (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) reasonably required for the purposes of ensuring that the Security Interest is enforceable, perfected (including, where possible, by control in addition to registration) or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the *credit provider* or enabling the *credit provider* to exercise rights in connection with the Security Interest.

20.37 The *credit provider* need not give any notice or document under the PPSA (unless the notice is required by the PPSA and cannot be excluded) and need not, to the full extent allowed under the PPSA, comply with any of the provisions of the PPSA that would otherwise apply to this *memorandum*. The *transaction parties* waive any and all rights they would otherwise have under the PPSA to the fullest extent permissible.

20.38 The *transaction parties* agree not to enforce any rights they may have against the *credit provider* under the PPSA to the extent that they are in conflict with the *credit provider's* rights.

20.39 The *transaction parties* must not under any circumstance seek to register or record with ITSA or any other person any interest or claim against the *credit provider* under the PPSA and the *transaction parties* hereby undertake not to do so.

20.40 To the maximum extent permitted by law, the *transaction parties* agree that nothing in sections 130 or 143 of the *Personal Property Securities Act 2009* will apply to this *memorandum*.

20.41 To the maximum extent permitted by law, the *transaction parties* agree to waive their rights under the PPSA to:

20.41.1 receive notice of removal of an accession under section 95;

20.41.2 receive notice of an intention to seize collateral under section 123;

20.41.3 receive notice of disposal under section 130;

20.41.4 receive a statement of account under sections 132(3)(d) and 132(4);

- 20.41.5 receive notice of retention under section 135;
- 20.41.6 redeem collateral under section 142;
- 20.41.7 reinstate a security agreement under section 143;
- 20.41.8 object to purchase of collateral by the credit provider under section 129; and
- 20.41.9 receive a verification statement under section 157.

[21. FURTHER ASSISTANCE]

- 21.1 If the *credit provider* asks, the *transaction party* must do all things necessary or desirable, including signing and executing any document, that the *credit provider* considers desirable to perfect or better secure the *credit provider's* rights and powers under this *memorandum*, or the *credit provider's* rights and powers under the law as the holder of a security given, or purported to have been given, by the *transaction party* to the *credit provider*.