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DEED OF GUARANTEE AND INDEMNITY

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

State Contracting Party Name

“Principal”

AND:

Applicant’s Name

A.C.N. XXX XXX XXX

“Applicant”

AND:

Guarantor’s Name

A.C.N.No. XXX XXX XXX

“Guarantor”

Deed of Guarantee and Indemnity

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# **Recitals**

**A**. The Principal has entered or is about to enter into the Guaranteed Agreement with the Applicant.

**B** The Principal requires as a condition to its entry into the Guaranteed Agreement that the Applicant procure from the Guarantor a guarantee and indemnity in respect of the Applicant’s Obligations.

**C** At the request of the Applicant, the Guarantor has agreed to enter into this Deed of Guarantee and Indemnity to provide a guarantee and indemnity in respect of the Applicant’s Obligations.

# **Agreed Terms**

# **Defined Terms & Interpretation**

* 1. **Defined Terms**

In this Deed:

**Applicant** means the company named as the Applicant in Item 2 of Schedule 1.

**Applicant’s Obligations** means the due and punctual observance and performance by the Applicant of all its liabilities, obligations and agreements (whether monetary or non-monetary, present or future, contingent, prospective or actual) to the Principal pursuant to or in connection with the Guaranteed Agreement.

**Business Day** means any day that is not a Saturday or Sunday or a public holiday in Adelaide, South Australia.

**Guarantee and Indemnity** means each of the guarantee and indemnity given by the Guarantor under this Deed.

**Guaranteed Agreement** means the agreement described in Item 4 of Schedule 1.

**Deed** means this Deed of Guarantee and Indemnity.

**Guarantor** means the company named as the Guarantor in Item 3 of Schedule 1.

**Insolvency** in respect of a body corporate includes where:

1. an administrator is appointed to the body corporate or action is taken to make such an appointment;
2. the body corporate resolves to be wound up;
3. an application is made to a court for an order or an order is made that the body corporate be wound up (whether on grounds of insolvency or otherwise);
4. the body corporate ceases to carry on business;
5. a receiver or a receiver and manager of property of the body corporate is appointed whether by a court or otherwise;
6. an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of the body corporate or one of them is appointed, whether or not under an order;
7. the body corporate enters into a compromise or arrangement with its creditors or a class of them;
8. the body corporate is or states that it is unable to pay its debts when they fall due; or
9. any event that is analogous or having substantially similar effect to any of the events described above,

and ‘insolvent’ will be construed accordingly.

**Machinery of Government** means a change to the structure, function or operations of the South Australian Government as a result of any government reorganisation, restructuring or other organisational or functional change.

**Principal** means the party named as the Principal in Item 1 of Schedule 1.

**Security** means any mortgage, pledge, lien, charge or other security and any guarantee, suretyship, or other obligation whereby a responsibility is assumed for any obligation or indebtedness or the insolvency or financial condition of any other person.

**State** means the Crown in the right of the State of South Australia and includes:

1. the Minister for Infrastructure and Transport;
2. the Commissioner of Highways; or
3. the Rail Commissioner,

and their administrators, substitutes, successors and permitted assigns arising from a Machinery of Government change.

* 1. **Interpretation**

In this Deed unless the context otherwise requires:

* + 1. words denoting the singular number include the plural and vice versa;
		2. words denoting individuals include corporations and vice versa;
		3. words denoting any gender any gender includes all genders;
		4. headings are for convenience only and will not affect interpretation;
		5. the words “include” and “including” are to be construed as without limitation;
		6. reference to clauses and schedules are references to clauses and schedules of or to this Deed; and
		7. references to any agreement or document include that agreement or document as varied, amended, novated, supplemented, renewed, extended or replaced from time to time.

# **Guarantee**

* 1. The Guarantor unconditionally and irrevocably guarantees to the Principal the performance by the Applicant of all of the Applicant’s Obligations.
	2. If the Applicant fails to execute and perform any of the Applicant’s Obligations, the Guarantor must, if required to do so by the Principal, complete or cause to be completed the Applicant’s Obligations in accordance with the Guaranteed Agreement.

# **Indemnity**

The Guarantor, as a separate, additional and primary liability, unconditionally and irrevocably will indemnify the Principal and keep the Principal indemnified from and against all losses, damages, costs and expenses of any kind which may be suffered or incurred by the Principal by reason or in consequence of:

* 1. default by the Applicant in performing or observing the Applicant’s Obligations;
	2. the Principal attempting to enforce the Applicant’s Obligations; or
	3. the Principal attempting to enforce or preserve any of its rights under this Deed.

# **Nature of Guarantee and Indemnity**

The Guarantee and Indemnity:

* 1. is a separate, additional and principal obligation and will not be treated as ancillary or collateral to any other right or obligation however created or arising;
	2. may be enforced against the Guarantor without the Principal first being required to exhaust any remedy it may have against the Applicant or to enforce any Security it may hold with respect to the Applicant’s Obligations;
	3. is continuing and provided in respect of the whole of the Applicant’s Obligations under or in connection with the Guaranteed Agreement including any change in the Applicant’s Obligations as a result of any variation, amendment, supplement, renewal, extension or replacement of the Guaranteed Agreement or the occurrence of any other thing and regardless of whether the Guarantor is aware of, or has consented to, or has been given notice of, such variation, amendment, supplement, renewal, extension or replacement or other thing and irrespective of any rule of law or equity to the contrary;
	4. is irrevocable and will remain in full force and effect; and
	5. will not be considered as wholly or partially discharged by the performance at any time of any of the Applicant’s Obligations or by any settlement of account or by any other matter or thing whatsoever and will apply to the present and future scope of the Applicant’s Obligations.

# **Guarantor’s Liability is absolute**

The liability of the Guarantor is absolute and will not be subject to the execution of this Deed or any other instrument or document by any person other than the Guarantor and will not be affected by any act, omission, matter or thing which but for this provision might operate in law or in equity to reduce, release or otherwise exonerate the Guarantor from its obligations in whole or in part. Without limiting the generality of the foregoing, that liability will not be affected by:

* 1. the grant to the Applicant or any other person of any time waiver or other indulgence or concession or the discharge or release of any other Security held by the Principal with respect to the Applicant’s Obligations;
	2. any transaction or arrangement that may take place between the Principal and the Applicant, the Guarantor or any other person;
	3. the Insolvency of the Applicant;
	4. the Principal exercising or refraining from exercising any other Security or any of the rights, powers or remedies conferred on it by law or by the Guaranteed Agreement or any other agreement with any person or taking or failing to take any other Security;
	5. any variation, amendment, supplement, renewal or extension (including where it increases the Applicant’s Obligations);
	6. any extinguishment, unenforceability, failure, loss, release, discharge, abandonment or transfer either in whole or in part of the Guaranteed Agreement or any Security or in the future held by the Principal from the Applicant, the Guarantor or any other person;
	7. the Applicant’s Obligations or any part of them being or becoming wholly or partially illegal, void, voidable or unenforceable;
	8. any failure by the Principal to give notice to the Guarantor of any default by the Applicant under the Guaranteed Agreement;
	9. any failure by the Applicant or the Principal to disclose to the Guarantor any other fact, circumstance or event relating to the Applicant or the Applicant’s Obligations at any time prior to or during the currency of this Deed; or
	10. any legal limitation, disability, incapacity or other circumstances related to the Applicant.

# **Limitation of Liability**

* 1. Notwithstanding any other provision of this Deed save as provided for in clause 6.2, the aggregate of the liability of the Guarantor to the Principal under this Deed in respect of the Guaranteed Agreement shall not exceed the liability of the Applicant to the Principal arising out of or in connection with the Guaranteed Agreement assuming (for the purposes of determining the Guarantor’s liability under this Deed) that none of the Applicant’s Obligations are void, voidable, invalid, illegal or otherwise unenforceable for any reason.
	2. Nothing in this clause 6 shall restrict the amount of any award for costs that may be made in favour of the Principal in the event of proceedings taken in relation to this Deed.

# **Payment**

* 1. The Guarantor must pay any amount due under this Deed within thirty (30) Business Days of demand by or on behalf of the Principal.
	2. All payments by the Guarantor under this Deed are to be free of any set-off or counterclaim and without deduction or withholding.

# **Joint and Several Guarantee**

Where the Guarantee and Indemnity is given by more than one entity the obligations on the part of the Guarantor contained in this Deed take effect as joint and several obligations and references to the Guarantor take effect as references to those persons or any of them. None of them will be released from liability under this Deed by reason of:

* 1. any other Guarantor not executing this Deed;
	2. this Deed ceasing to be binding on any other Guarantor; or
	3. the Insolvency of any other Guarantor;

and the release by the Principal of any Guarantor from this Deed (or any part of it) will not affect the liability of the Guarantor.

# **Insolvency of Applicant**

The Guarantor will not prove in the Insolvency of the Applicant for any amount owing by the Applicant other than upon the basis that it irrevocably directs the payment of the proceeds of any such proof to the Principal to the full extent of the amount then required to satisfy the obligations and liabilities under the Guaranteed Agreement.

# **Representations and Warranties to the Principal**

The Guarantor represents and warrants to the Principal that:

* 1. it is a corporation and it is duly registered and remains in existence;
	2. it is not the trustee of any trust; [\**if the Guarantor is the trustee of a trust, this clause 10.2 is to be removed and clause 11 (Guarantor as Trustee) is to be used]*]
	3. the execution, delivery and performance of this Deed by it does not breach its Constitution or any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
	4. this Deed constitutes a valid and legally binding obligation of it in accordance with its terms;
	5. no litigation, mediation, conciliation, criminal or administrative proceedings are current, pending or, to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect on its business assets or financial condition;
	6. all information provided by it or the Applicant to the Principal in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and
	7. it has taken all corporate and other action required to enter into this Deed and to authorise the execution and delivery of this Deed and the satisfaction of its obligations under this Deed.

*[Clause below is to be used where the trustee acts as trustee of a trust. Clause 9.2 is then also to be deleted.]*

# ***Guarantor as Trustee***

*If the Guarantor is acting as trustee of a trust, then in relation to this Deed:*

* 1. *the Guarantor enters this Deed and is liable both personally and in its capacity as a trustee of that trust;*
	2. *it must not assign, transfer, mortgage, charge, release, waive, encumber or compromise its right of indemnity out of the assets of that trust (but, for the avoidance of doubt, may apply its right of indemnity out of the assets of the trust to any of its liabilities including those arising in relation to this Deed);*
	3. *it must not retire, resign nor by act or omission effect or facilitate a change to its status as the sole trustee of that trust; and*
	4. *it represents and warrants that:*
		1. *such trust has been duly established and currently exists;*
		2. *it is the duly appointed, current and only trustee of that trust;*
		3. *as trustee it has the power to enter into and perform its obligations under this Deed;*
		4. *it has an unqualified right of indemnity out of the assets of that trust in respect of its obligations;*
		5. *it either has no conflict of interest affecting it as trustee (and/or its directors, if any) or such conflict is otherwise overcome by the terms of the relevant trust agreement; and*
		6. *no breach of the relevant trust agreement exists or would arise.*

# **Notices**

* 1. Any demand or notice will be made in writing signed by an officer or agent of the Principal and may be served on the Guarantor either by hand, by post or by email. It will be presumed that a person who signs a demand or notice on behalf of the Principal is duly authorised to do so in the absence of proof to the contrary.
	2. Any demand or notice may be addressed to the relevant address or email address specified for the Guarantor in Item 5 of Schedule 1 or last notified in writing to the Principal.
	3. The Principal’s address for the purposes of this Deed is as stated in Item 5 of Schedule 1 or such other address notified by the Principal in writing to the Guarantor.
	4. A notice of demand given to the Guarantor in accordance with this clause is treated as having been given and received:
		1. on the day of delivery if delivered before 5.00 pm on a Business Day, otherwise on the next Business Day;
		2. if sent by post, on the third Business Day after posting; and
		3. if transmitted by email before 5.00 pm on a Business Day and the sender does not receive a transmission error message, on the day of transmission, otherwise on the next Business Day.

# **Waivers, Remedies are cumulative**

* 1. No failure to exercise and no delay in exercising on the part of the Principal any right to remedy under this Deed will operate as a waiver. No single or partial exercise of any right or remedy will preclude any other or further exercise of that or another right or remedy.
	2. The rights and remedies provided to the Principal in this Deed are cumulative and are not exclusive of any rights or remedies provided by law.
	3. This Deed does not replace, merge with or adversely affect, and is not adversely affected by any other guarantee or indemnity, or any security, right or remedy, to which the Principal or the State is entitled. The Principal and the State (as applicable) can still exercise the rights under this Deed as well as under the other guarantee or indemnity, security, right or remedy.

# **Governing Law and Jurisdiction**

This Deed is governed by the laws of the State of South Australia. The courts of South Australia have exclusive jurisdiction to determine any proceeding in relation to this Deed. Any proceeding brought in a Federal Court must be instituted in the Adelaide Registry of that Federal Court. The Guarantor undertakes not to apply to transfer any proceedings to another registry of the Federal Court.

# **Severability of Provisions**

Any provisions in this Deed which is held by a Court to be illegal, void, prohibited or unenforceable in any jurisdiction will as to that jurisdiction be ineffective to the extent only of the illegality, prohibition, voidness or unenforceability without invalidating the remaining provisions of the Deed or affecting the validity of that provision in any other jurisdiction.

# **Costs of this Deed**

Each party must pay its own costs arising from the preparation, negotiation and execution of this Deed.

**Execution**

**EXECUTED** as a Deed

**Executed** by the Applicant:

Applicant’s Name Pty Ltd

(A.C.N. XXX XXX XXX)

in accordance with Section 127(1) of

the Corporations Act by Authority of

two Directors or a Director and the

Company Secretary:

--------------------------------------------------- ---------------------------------------------------

Director Signature Director / Company Secretary Signature

--------------------------------------------------- ---------------------------------------------------

Print Name Print name

--------------------------------------------------- ---------------------------------------------------

Date Date

**Executed** by Guarantor:

Guarantor’s Name Pty Ltd

(A.C.N. XXX XXX XXX)

in accordance with Section 127(1) of

the Corporations Act by Authority of

two Directors or a Director and the

Company Secretary:

--------------------------------------------------- ---------------------------------------------------

Director Signature Director / Company Secretary Signature

--------------------------------------------------- ---------------------------------------------------

Print Name Print name

--------------------------------------------------- ---------------------------------------------------

Date Date

Director/Secretary

# **Schedule 1**

**ITEM 1: The Principal**

[State contracting entity name], a body corporate pursuant to the [insert relevant Act – eg *Administrative Arrangements Act 1994*] of [insert address]

**ITEM 2: The Applicant**

[Applicant’s Name] Pty Ltd ACN [ ] of [insert address]

**ITEM 3: The Guarantor**

[Guarantor’s Name] Pty Ltd ACN [ ] of [insert address]

**ITEM 4: The Guaranteed Agreement**

The agreement [entered into on [insert date]] / [to be entered into on or around the date of this Deed] between the Principal and the Applicant, titled [insert] (contract reference [insert])

**ITEM 5: Address for Notices**

|  |  |
| --- | --- |
| The Principal: | Department for Infrastructure and Transport83 Pirie Street,Adelaide SA 5000.Attention: Executive Director, Commercial and Contract Management |
| The Applicant: | Applicant’s Name Pty Ltd Applicant’s Address,CITY STATE POSTCODE,Email: Applicant@email.com.au Attention: Applicant’s Representative |
| The Guarantor: | Guarantor’s Name Pty Ltd Guarantor’s Address,CITY STATE POSTCODEEmail: Guarantor@email.com.auAttention: Guarantor’s Representative |