

# **Commercial Loan Terms and Conditions**

Version April 2020

## **Bank of Sydney's Loan Terms and Conditions**

### **Version April 2020**

These terms and conditions apply to any Facility Agreement which incorporates these terms and conditions. Capitalised terms are defined at the end of these terms and conditions.

#### **1. Payments**

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##### **1.1 Payments**

- (a) The Customer must ensure all payments specified in the Facility Agreement are made no later than 11.00am (Sydney time) on the due date.
- (b) If a payment is due on a day which is not a Business Day, the due date for that payment is the next Business Day.
- (c) If a payment is due on a date in a month that does not have that date, then it will be due on the first Business Day of the next month.
- (d) All payments must be made as Bank of Sydney reasonably directs. Where the Facility is provided in a foreign currency, payments must be made in the foreign currency, or in Australian Dollars as Bank of Sydney directs. If the Customer makes a payment in a currency not directed by Bank of Sydney, Bank of Sydney may convert the amount received into the due currency (to do this it might be necessary to convert through a third currency) on the day it reasonably considers appropriate and at then prevailing exchange rates. The Customer must pay any costs directly incurred by Bank of Sydney in converting the amount received into the due currency and Bank of Sydney may deduct such costs from the resultant amount following the currency conversion. The Customer satisfies its obligation to pay in the due currency only to the extent of the amount of the due currency obtained by Bank of Sydney from the conversion and after deducting any conversion costs.
- (e) All money payable by the Customer under the Facility Agreement must be paid in cleared funds without set-off, counterclaim or condition and without any deduction or withholding.
- (f) Payments will be credited to the Customer only when actually received by Bank of Sydney in the correct currency. Any surplus money received by Bank of Sydney may not carry interest and may be paid by Bank of Sydney to the credit of an account in the Customer's name as directed by the Customer.
- (g) On or before the end of the Term, the Customer must repay the amount owing under the Facility in full (or at Bank of Sydney's election place money on deposit with Bank of Sydney to cover any outstanding commitments and grant a Security Interest in the amounts deposited, documented on such terms as Bank of Sydney may reasonably require).

## **1.2 Appropriation of payments**

All payments received by Bank of Sydney will be applied against the payment obligation for which the payment was made unless:

- (a) Bank of Sydney is not able to determine the payment obligation for which the payment was received; or
- (b) an Event of Default is continuing,

in which case Bank of Sydney may apply moneys received in any manner Bank of Sydney reasonably chooses.

## **1.3 Accrual of interest and charges**

Interest and charges accrue on a daily basis and on the basis of a year having 365 days. Interest and charges are payable in accordance with any written agreement (including any Facility Agreement) between Bank of Sydney and the Customer.

## **1.4 Deductions and withholdings**

All payments by the Customer under the Facility Agreement and these terms and conditions must be paid in full without any deduction or withholding (whether in respect of set off, counter-claim, duty, tax, charge, or otherwise) unless the Customer is prohibited by law from doing so or is required by law to make a deduction or withhold an amount, in which case the Customer must:

- (a) ensure that the deduction or withholding does not exceed the minimum amount legally required;
- (b) promptly pay to Bank of Sydney any additional amount necessary to ensure that the net amount received by Bank of Sydney equals the full amount which would have been received by Bank of Sydney had no deduction or withholding been made;
- (c) pay to the relevant taxation or other authority, within the period for payment permitted by applicable law, the full amount of the deduction or withholding (including the full amount of any deduction or withholding from any additional amount paid under this subclause);
- (d) if requested by Bank of Sydney, furnish to Bank of Sydney within the period for payment permitted by applicable law an official receipt for the payment of all amounts deducted or withheld of the relevant taxation or other authority.

## **1.5 Reserve requirements**

If at any time Bank of Sydney reasonably determines that there has occurred or may occur any introduction of or variation to any capital adequacy requirement, reserve requirement, official directive, statutory reserve deposit, special deposit, or any other imposition, restriction, or requirement in respect of assets held by, deposits in or for the account of, or loans by or liabilities (whether direct or contingent) of Bank of Sydney, its parent, or any Related Body Corporate of, or successor in title to, Bank of Sydney, whether or not having the force of law, or if there is a substantial change in the operation of the relevant financial market in which Bank of Sydney funds itself, the result of any of which in Bank of Sydney's reasonable opinion makes it illegal, or impractical for Bank of Sydney to make or continue the Facility or increases whether

directly or indirectly the cost to Bank of Sydney or decreases the effective return of Bank of Sydney (and Bank of Sydney's opinion will be final in relation to all these matters), then:

- (a) in cases other than solely increased cost or decreased effective return Bank of Sydney may by written notice to the Customer terminate the Facility Agreement and require repayment of the Debt on a date no earlier than 30 days after the date of the notice; or
- (b) in the case of increased cost or decreased effective return, Bank of Sydney may notify the Customer in writing in which case the Customer may elect to repay the Debt within 30 days from the date of the notice (which election once made will be irrevocable and binding on the Customer); or
- (c) in any case the amount of any cost, expense, or decrease in effective return suffered or incurred by Bank of Sydney because of any of these matters, and if repayment occurs any expense, loss, damage, or liability which Bank of Sydney may incur as a consequence of prepayment, must be paid promptly on demand to Bank of Sydney by the Customer.

## 1.6 GST

If any payment made to Bank of Sydney pursuant to or relating to the Facility Agreement constitutes consideration for a taxable supply for the purposes of GST, the amount to be paid for the supply will be increased so that the net amount retained by Bank of Sydney after payment of that GST is the same as if Bank of Sydney was not liable to pay GST in respect of that supply.

## 2. Representations and warranties

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### 2.1 Representations and warranties

Bank of Sydney has entered into the Facility Agreement relying on the following representations and warranties by the Customer and the Guarantor. The Customer and Guarantor represent and warrant to Bank of Sydney that the following is true and correct at the date of the Facility Agreement and at all times until payment of all of the Debt.

- (a) **(no Event of Default)** No event has occurred which constitutes or which with the giving of notice and/or the lapse of time and/or a relevant determination by Bank of Sydney would constitute an Event of Default.
- (b) **(no litigation)** No litigation, arbitration, or administrative proceedings or claims are presently in progress, pending, or threatened against the Customer, the Guarantor or any of their respective assets, which might by itself (or together with other proceedings or claims) materially adversely affect the Customer's ability to observe or perform its obligations under the Facility Agreement or any other Transaction Document that it is a party to.
- (c) **(disclosure)** The Customer and Guarantor have fully disclosed to Bank of Sydney in writing, all facts which might reasonably be considered to be material for disclosure in the context of the Facility Agreement.
- (d) **(duly incorporated)** The Customer and Guarantor, if a corporation, are duly incorporated under the laws of their place of incorporation and have the power and authority to enter into the Facility Agreement and have undertaken and

complied with the necessary corporate proceedings to ensure the Facility Agreement and each other Transaction Document that it is a party to is enforceable and binding on it.

- (e) **(financials)** If the Customer and/or Guarantor is a corporation, all financial accounts provided to Bank of Sydney were prepared in accordance with accounting principles and standards generally accepted in Australia and there has been no material adverse change in that financial position since the date when the financial accounts which have been provided to Bank of Sydney were prepared.
- (f) **(valid and enforceable)** The Facility Agreement and each other Transaction Document that it is a party to constitute legally valid, binding, and enforceable obligations of the Customer and Guarantor.
- (g) **(no contravention)** The execution and delivery of the Facility Agreement and the other Transaction Documents which it is a party to and the performance of any of the transactions contemplated by each of them will not contravene or constitute a default under any provision contained in any agreement, instrument, law, judgment, order, licence, permit, or consent by which the Customer and/or Guarantor are bound or affected.
- (h) **(no registration)** No registration with or approval of any authority is necessary for the entry into, or the performance by the Customer and Guarantor of the transactions contemplated by, the Facility Agreement and the other Transaction Documents which it is a party to and if required, all registrations and approvals have been, or will be, duly made or obtained and certified copies will be delivered to Bank of Sydney.
- (i) **(information true and correct)** All information provided by the Customer and the Guarantor to Bank of Sydney which is reasonably likely to be material to an assessment by Bank of Sydney to enter into the Facility Agreement and each other Transaction Document, is to the best of the Grantor's knowledge, information, and belief true and correct.
- (j) **(capacity)** The Customer and Guarantor have full legal capacity to own their assets and to carry on their business (if any) as it is now being conducted and to enter into and perform their obligations under the Facility Agreement and each other Transaction Document that it is a party to.
- (k) **(ownership)** Each Transaction Party owns all of its property and assets and no other person has any mortgage or other right or claim to any interests in any of them except as previously disclosed in writing to, and acknowledged in writing by, Bank of Sydney.
- (l) **(no property subject to trust)** The property(ies) disclosed to Bank of Sydney as an asset of a Transaction Party is not subject to any trust other than as disclosed in writing to, and acknowledged in writing by, Bank of Sydney.

## 2.2 No reliance on Bank of Sydney

The Customer acknowledges that it has not entered into the Facility Agreement relying on any representation, warranty, promise or statement of Bank of Sydney or of any person on behalf of Bank of Sydney.

### 3. Undertakings

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#### 3.1 Provision of information and reports

The Customer must furnish to Bank of Sydney within 30 days, any information reasonably requested by Bank of Sydney relating to:

- (a) the financial condition or state of affairs of the Customer; and
- (b) the compliance by the Customer with its obligations under the Facility Agreement and each other Transaction Document that it is a party to.

#### 3.2 Provision of certifications

The Customer must supply to Bank of Sydney acceptable certifications or reports (relating to such matters as Bank of Sydney reasonably requires) from Bank of Sydney's lawyers, valuers and others as reasonably required by Bank of Sydney from time to time. The Customer must meet the full cost of these third parties. These certifications may relate to the enforceability of any Transaction Document and the value of any property subject to a Security.

#### 3.3 Obligations in Transaction Documents

In addition to complying with the obligations in the Facility Agreement, the Customer must observe all the terms of the other Transaction Documents (including any mortgages or charges) which it is a party to.

#### 3.4 Financial statements

- (a) The Customer must provide to Bank of Sydney promptly after they become available but in any event within 120 days of the end of each financial year the accounts of the Transaction Parties in relation to the preceding financial year. The accounts must be prepared in accordance with generally accepted accounting principles consistently applied and the laws of the domiciles of the Transaction Parties.

In relation to any entity other than an individual, **account** means a balance sheet and profit and loss account signed and certified by two directors or if the entity has only one director by that director as being true and correct and, if required by Bank of Sydney, audited.

In relation to an individual, **account** means an assets, liabilities, and income statement certified as true and correct by the individual.

- (b) If there are any changes to the relevant accounting principles which alter the effect of any financial covenants in the Facility Agreement (or the related definitions) the effected Transaction Party and Bank of Sydney will negotiate in good faith to amend the relevant financial covenants and definitions so that they have an effect comparable to that as at the date that the Facility Agreement is executed by that Transaction Party.
- (c) If the amendments are not agreed within 30 days (or such longer period as the relevant Transaction Party and Bank of Sydney may agree), the relevant Transaction Party will provide Bank of Sydney with the accounts, any reconciliation statements necessary to enable calculations based on the applicable accounting standards as they were prior to the introduction of such changes, and the changes will be disregarded for the purposes of the financial covenants in the Facility Agreement.

### 3.5 Identification Procedures

The Customer must from time to time promptly comply with any of Bank of Sydney's requirements regarding "know your customer" or similar identification procedures and produce any documents or other evidence requested by Bank of Sydney in that regard.

## 4. Default

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### 4.1 Event of Default

If any one or more of the following occur an Event of Default at Bank of Sydney's option will have occurred. If any of the following occur, the Customer must inform Bank of Sydney promptly.

- (a) The Customer does not pay to Bank of Sydney any amount payable by the Customer under any Transaction Document.
- (b) Any representation, warranty, reply to requisition, or any financial or other information provided to Bank of Sydney in connection with any Transaction Document is or becomes materially untrue, false, or misleading (including by way of omission) and the Bank of Sydney considers this materially increases Bank of Sydney's credit risk, and, where the circumstances giving rise to the untrue, false or misleading representation, warranty, reply or information are capable of being rectified such that the representation, warranty, reply or information would not be untrue, false or misleading if provided again, those circumstances are not remedied within 20 Business Days of Bank of Sydney's written notice.
- (c) Any other indebtedness or obligation (**Other Arrangement**) of any Transaction Party to the Bank of Sydney becomes due and payable before its specified maturity or Bank of Sydney is entitled to declare any indebtedness by the Transaction Party under an Other Arrangement due and payable due to a default by the Transaction Party as a result of any event of default under the Other Arrangement in the nature of the Events of Default set out in this clause 4.1.
- (d) Any Transaction Party defaults under any charge or security in favour of any person and enforcement proceedings are taken against that Transaction Party.
- (e) An Insolvency Event occurs in respect of any Transaction Party.
- (f) The assets of a Transaction Party are dealt with, or attempted to be dealt with in breach of any Transaction Document without the prior written consent of Bank of Sydney.
- (g) If a Transaction Party is an individual, the Transaction Party is made or declared bankrupt or becomes incapable of managing its own affairs or otherwise ceases to have legal capacity.
- (h) There is a material change in ownership, management or control of any Transaction Party without Bank of Sydney's prior written consent.
- (i) If a Transaction Party is a company, the Transaction Party is deregistered.
- (j) For any Transaction Party that is not a company, the status or capacity of that Transaction Party changes without the written consent of Bank of Sydney.

- (k) Any distress or execution is levied or enforced against any of the Customer's assets or property or any material enforcement proceedings are commenced against any Transaction Party.
- (l) All or any material part of the Facility Agreement or any other Transaction Document becomes illegal or it becomes unlawful for Bank of Sydney, to continue any facility provided under any Transaction Document.
- (m) In Bank of Sydney's reasonable opinion any of the money provided to the Customer pursuant to a Transaction Document is used for a purpose not permitted under a Transaction Document.
- (n) A Transaction Party fails to comply with a law or requirement of any Government Agency or it becomes unlawful to continue any Facility, and such action, if capable of remedy, is not remedied within 10 Business Days of request by Bank of Sydney.
- (o) Any Transaction Party fails to provide any financial information required under and in accordance with any Transaction Document.
- (p) Any Transaction Party ceases to hold any licence or permit necessary to conduct its business.
- (q) Any Transaction Party does not maintain any insurance required under and in accordance with any Transaction Document.

#### **4.2 Where the Customer is a Large Business Customer**

Where the Customer is a Large Business Customer, an Event of Default will also occur if:

- (a) There is default (other than by Bank of Sydney or a payment default) in the performance of any term, covenant, agreement, or condition contained or implied in any Transaction Document and such default is not remedied within 20 Business Days of the Customer being requested to do so by Bank of Sydney;
- (b) Early repayment is required under any financing arrangement a Transaction Party has with the Bank of Sydney, due to an event of default (however described) arising from failure to meet a payment obligation;
- (c) A Transaction Party breaches a Financial Undertaking;
- (d) For any corporate Transaction Party, any action is taken to start the winding up or deregistration of the company;
- (e) An application for an order is made to appoint a liquidator, provisional liquidator in respect of the Customer (or proceedings are commenced or a resolution passed or proposed in a notice of meeting for any of those things) and such application is not dismissed within ten Business Days;
- (f) The Customer commits an offence under the Corporations Act which has or is reasonably likely to have a Material Adverse Effect;
- (g) The Customer does any of the things contemplated by Part 2B.7 (changing company type), Part 2J.2 (self acquisition and control of shares) or Part 2J.3



(financial assistance in respect of shares) of the Corporations Act without Bank of Sydney's prior written consent, and such action, if capable of remedy, is not remedied within 10 Business Days of request by Bank of Sydney;

- (h) Anything occurs which could have a Material Adverse Effect.

#### **4.3 Notice of Event of Default**

- (a) Subject to this clause and clause 4.4, Bank of Sydney may enforce any Transaction Document if an Event of Default occurs and:
  - (i) the Event of Default can be rectified but is not rectified within the time requested by Bank of Sydney;
  - (ii) the Event of Default cannot be rectified;
  - (iii) Bank of Sydney has been unable to locate the relevant Transaction Party despite making reasonable attempts to do so;
  - (iv) a Transaction Party is subject to an Insolvency Event;
  - (v) the Bank of Sydney is of the reasonable opinion it is necessary for it to act to manage a immediate risk;
  - (vi) the Bank of Sydney reasonably believes the Customer or a Guarantor has not complied with any material law or requirement of a Government Agency;
  - (vii) the Bank of Sydney reasonably believes that it was induced by fraud or misrepresentation on behalf of the Customer to enter into the Transaction Document or urgent action is necessary to protect a Security including where a Transaction Party has removed or disposed of any property subject to a Security or has enabled or instructed a person to do so without Bank of Sydney consent.
- (b) If an Event of Default occurs and the Customer is a Small Business customer, the Bank of Sydney will provide the Customer and a Guarantor with not less than 30 days to rectify any Event of Default, before exercising rights under clause 4.4 (excluding the right to charge default interest for late payment or other rights set out elsewhere in these Terms and Conditions).
- (c) The requirement for notice under clause 4.3(a) shall not apply in respect of any Facilities which are repayable on demand, however, if a failure to repay that Facility on demand also constitutes an Event of Default under another Facility the Customer has with the Bank of Sydney, the Bank of Sydney will comply with the requirements of the Banking Code of Practice if the Bank of Sydney enforces the other Facility based on that default.
- (d) The requirement for notice under clause 4.3(b) shall also not apply to any Facility if:
  - (i) the Event of Default is unable to be remedied; or
  - (ii) it is reasonable for the Bank of Sydney to exercise its rights under any Transaction Document to manage a material and immediate risk relating to the nature of the relevant default, the Customer's particular circumstances, or the value of a Security; or

- (iii) the Bank of Sydney has already given the Customer with a period to remedy the Event of Default and the Customer has not remedied that Event of Default.
- (e) If you are a Small Business customer, before taking any action in respect of a non-monetary Event of Default, any notice of the Event of Default provided by the Bank of Sydney to the Customer in respect of the Event of Default shall specify the grounds on which the Bank of Sydney considers there is a non-monetary default; and
- (f) Further, if you are a Small Business customer, the Bank of Sydney will only act on a specific non-monetary Event of Default if the Event of Default by its nature is material, or Bank of Sydney reasonably considers the Event of Default has had, or is likely to have a material impact on:
  - (i) a Transaction Party's ability to meet its financial obligations to Bank of Sydney (or its ability to assess these);
  - (ii) Bank of Sydney's security risk (or its ability to assess these); or
  - (iii) Bank of Sydney's legal or reputation risk where clause 4.1(b), 4.1(n) and 4.1(m) apply.

#### **4.4 Effect of Event of Default**

Despite any other provision of the Facility Agreement, while an Event of Default is continuing but subject to clause 4.34.3, Bank of Sydney may do any one or more of the following:

- (a) Demand and require immediate payment of the Debt and recover the Debt from one or more of the Transaction Parties in accordance with the terms of the Transaction Documents that they are a party to. The Debt may be recovered by Bank of Sydney exercising its rights under the Facility Agreement or under the Security or under any other collateral agreement without prejudice to and without reference to Bank of Sydney's rights under the other.
- (b) Cancel any or all Facilities available under the Facility Agreement, or vary the way that some or all Facilities operate or the conditions on which they are provided.
- (c) Enforce any Security held by Bank of Sydney from the Transaction Parties.
- (d) Exercise any rights Bank of Sydney has under a Transaction Document subject to any notice period in clause 4.3(b).
- (e) Perform any one or more of the Customer's obligations under any Transaction Document.
- (f) Effect a currency hedge or any other contract on its own account or on the Customer's account for the purpose of changing the effect of currency fluctuations on the Debt.
- (g) Convert that part of the Debt outstanding in any currency other than Australian Dollars to Australian Dollars in the manner and at the times Bank of

Sydney determines appropriate and provide the whole or any part of the Facility in Australian Dollars only.

If you are a Small Business customer, the Bank of Sydney will not enforce any Security held by the Bank if Sydney in connection with a guarantee, unless the Bank of Sydney has first enforced any Security that the Customer has provided for the guaranteed liability and the Bank of Sydney has first obtained Court judgment in favour of the Bank of Sydney against the Customer for payment of the guaranteed liability and either:

- (a) the judgment debt remains unpaid for at least 30 days after the Bank of Sydney has made a written demand on the Customer for payment;
- (b) the Bank of Sydney has made reasonable attempts to locate the Customer but without success; or
- (c) an Insolvency Event has occurred in respect of the Customer.

However, the above restriction on the Bank of Sydney's ability to exercise its rights against a Guarantor:

- (a) do not apply if the Guarantor has specifically agreed in writing (after the notice in clause 4.3 has been served) that the Bank of Sydney may enforce its rights under the guarantee before exercising its rights against the Customer and the Guarantor has agreed that the limitation on the Bank of Sydney's rights referred to in this clause do not apply; or
- (b) do not require the Bank of Sydney to first enforce any Security that the Customer has provided:
  - (i) if the Bank of Sydney reasonably expects that the net proceeds of that enforcement will not be sufficient to repay a substantial portion of the guaranteed liability, or
  - (ii) due to the Customer not providing the Bank of Sydney with information, documents, or access to premises or Securities as required, such that the Bank of Sydney is unable to reasonably assess whether the net proceeds of that enforcement will be sufficient to repay a substantial portion of the guaranteed liability.

Bank of Sydney is not liable to the Transaction Parties for any loss or damage the Transaction Parties may suffer or incur arising out of Bank of Sydney exercising any power under the Facility Agreement.

#### **4.5 Unfair contract laws**

If any unfair contract laws apply to the Facility Agreement, the Bank of Sydney will only take action under this clause 4 in a way that is consistent with those laws.

#### **4.6 End of term**

Where the Customer is a Small Business customer, Bank of Sydney will comply with any requirement under the Banking Code of Practice where there is no subsisting Event of Default to give the Customer prior notice of its decision not to extend the Customer's facilities before the due date for repayment in full.

## **5. Indemnities**

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### **5.1 General indemnity**

The Customer indemnifies Bank of Sydney and Bank of Sydney's officers, agents, and employees from and against all actions, claims, demands, losses, interest, fees, damages, costs (including reasonable legal costs on a solicitor and own client basis), and expenses of any nature (but excluding indirect cost, loss and expenses) which Bank of Sydney or Bank of Sydney's officers, agents, or employees sustain or incur or for which Bank of Sydney or Bank of Sydney's officers, agents, or employees may become liable (other than any action, action, claim, demand, direct loss, interest, fee, damage, cost, or expense caused by the Bank of Sydney, the Bank of Sydney's officers, agents, or employees' own negligence or wilful misconduct or any action, claim, demand, direct loss, interest, fee, damage, cost, or expense caused by any Related Body Corporate of the Bank of Sydney or any Controller appointed by the Bank of Sydney) at any time in respect of or arising from any one or more of the following:

- (a) the occurrence of any Event of Default;
- (b) the exercise, non-exercise, or purported exercise of any of Bank of Sydney's powers, rights, and privileges under any Transaction Document or consequent upon an Event of Default; or
- (c) any actual or assumed obligation of Bank of Sydney to pay any money or do anything in relation to the Facility.

Bank of Sydney may debit to the Customer's account in respect of any amounts payable by the Customer under this clause on any date after the date that the actions, claims, demands, losses, interest, fees, damages, costs and expenses are incurred provided that Bank of Sydney has first given the Customer at least five Business Days prior notice and the amounts have not been paid by the Customer prior to the date that Bank of Sydney proposes to debit the account.

### **5.2 Continuing indemnities and evidence of loss**

- (a) Each indemnity of the Customer contained in the Facility Agreement or these terms and conditions survive termination of the Facility Agreement and is a continuing obligation of the Customer, despite any settlement of account or the occurrence of any other thing.
- (b) A certificate signed by an officer of Bank of Sydney detailing the amount of any damage, loss, liability, cost (including reasonable legal costs on a solicitor and own client basis), charge, expense, outgoing or payment covered by any indemnity in the Facility Agreement or these terms and conditions is sufficient evidence unless it is proved incorrect.

## **6. Trustee provisions**

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### **6.1 Customer liable as trustee of the Trust and in its own right**

If the Customer enters into any Transaction Document or owns any property which is subject to a Security as trustee of a Trust (whether or not disclosed to Bank of Sydney), the Customer acknowledges that the relevant Transaction Document makes it personally liable as well as in its capacity as trustee of the Trust.

## **6.2 Trust warranties by the Customer**

The Customer warrants as follows.

- (a) All the powers and discretions conferred by the deed establishing the Trust are capable of being validly exercised by the Customer as trustee and have not been varied or revoked and the Trust is a valid and subsisting trust.
- (b) The Customer is the sole trustee of the Trust and has full and unfettered power under the terms of the deed establishing the Trust to obtain financial accommodation on behalf of the Trust.
- (c) The Facility Agreement is, or is being, executed and entered into as part of the due and proper administration of the Trust and for the benefit of the beneficiaries of the Trust.
- (d) No restriction on the Customer's right of indemnity out of or lien over the Trust's assets exists or will be created or permitted to exist and that right of indemnity will have priority over the right of the beneficiaries to the Trust's assets.

## **6.3 Restrictions on Trust dealings**

The Customer must not permit without Bank of Sydney's prior written consent:

- (a) any resettlement of the Trust or make any distribution of capital of the Trust;
- (b) any retirement or replacement of the trustee or any appointment of a new trustee of the Trust;
- (c) any amendment of the deed establishing the Trust;
- (d) any charging of any of the Trust's assets except as permitted by another Transaction Document;
- (e) any breach of the provisions of the deed establishing the Trust;
- (f) any termination of the Trust or variation of the vesting date; or
- (g) if the Trust is a unit trust, any transfer of dealing in, or issuing of more units.

If any of the above occur, the Customer must inform Bank of Sydney promptly. However, such notification does not remedy the failure by the Customer to first obtain Bank of Sydney's prior consent.

## **7. Administrative provisions**

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### **7.1 Costs and expenses**

The Customer must pay Bank of Sydney promptly following demand for:

- (a) Bank of Sydney's reasonable costs, charges and expenses in connection with the negotiation, preparation, execution, stamping, and registration of the Transaction Documents;
- (b) Bank of Sydney's reasonable costs, charges and expenses in connection with any consent, or any exercise, non-exercise, or attempted exercise of rights (including those arising from any Event of Default);

- (c) any stamp duty, loan duty or other duty including duties and taxes on receipts or payments including fines or penalties in relation to any Transaction Documents;
- (d) any government fees and charges in relation to the Facility, if any; and
- (e) including in each case:
  - (i) Bank of Sydney's reasonable internal administration costs including for the time spent by any internal lawyer on a solicitor and own client basis; and
  - (ii) reasonable legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is higher.

Bank of Sydney may debit to the Customer's account in respect of any amounts payable by the Customer under this clause on any date after the date that such costs, charges and expenses are incurred by Bank of Sydney provided that it has first given the Customer at least five Business Days prior notice and the amounts have not been paid by the Customer prior to the date that Bank of Sydney proposes to debit the account.

## **7.2 Notices**

- (a) Any notice or statement to be given or demand to be made on the Customer under the Facility Agreement:
  - (i) will be effectively signed on behalf of Bank of Sydney if it is executed by Bank of Sydney, by any of its officers, its solicitor, or its attorney; and
  - (ii) may be served by being delivered personally to, by being left at, or by being posted in a prepaid envelope or wrapper to the Customer's address specified in the Facility Agreement or the Customer's registered office, place of business, or residence last known to Bank of Sydney, or by being sent to the Customer by facsimile or e-mail transmission.
- (b) A demand or notice if:
  - (i) posted will be deemed served six days after posting; or
  - (ii) sent by facsimile or e-mail transmission will be deemed served on conclusion of transmission if transmission occurs prior to 5.00pm in the location to which the facsimile is sent or the recipient of the email is located, if after 5.00pm, it will be deemed to have been served at 9.00am on the next day that is not a Saturday, Sunday or public holiday in the location to which the facsimile is sent or the recipient of the email is located.
- (c) Service by any of these methods will be valid and effectual even though the Customer may not receive the document or if the document is returned to Bank of Sydney through the post unclaimed.

## **7.3 Waiver**

No failure to exercise and no delay in exercising Bank of Sydney's rights, powers, or privileges under the Facility Agreement operates as a waiver. No waiver of Bank of Sydney's rights, powers, or privileges under the Facility Agreement is effective unless

made in writing. Bank of Sydney may exercise all of its rights at any time and more than once.

#### **7.4 Bank of Sydney's certificate**

A certificate signed by or on behalf of Bank of Sydney or its solicitor as to a matter or as to an amount payable to Bank of Sydney in connection with the Facility Agreement is sufficient evidence of the matter or amount unless it is proved to be incorrect.

#### **7.5 Governing law**

The Facility Agreement is governed by and construed in accordance with the law for the time being in force in the state of New South Wales or, at Bank of Sydney's election, in the state or territory where Bank of Sydney's lending office or the Customer's place of residence is located. The Customer agrees to submit to the non-exclusive jurisdiction of the courts of that place.

#### **7.6 Assignment**

Bank of Sydney may assign, novate, or participate its rights and/or obligations under the Facility Agreement, the Security, any other collateral document or security, or any part of them. The Customer must execute any documents which in Bank of Sydney's opinion are reasonably necessary for those purposes. The Customer must not assign, novate, transfer, or deal with its rights or obligations under the Facility Agreement, the Security, or any other collateral document or security without the prior written consent of Bank of Sydney.

#### **7.7 Disclosure**

Bank of Sydney may disclose to a potential assignee, novatee, participant or any other person personal information about the Customer, any Guarantor, the Security, the Transaction Documents, and any other collateral documents or security.

#### **7.8 Consent**

Any authority, consent, or other thing to be given, made, or exercised by Bank of Sydney under the Facility Agreement may be done, given, or made how and when Bank of Sydney reasonably decides and on such terms and conditions as Bank of Sydney (acting reasonably) considers appropriate.

#### **7.9 Severability**

If any term, agreement, or condition of the Facility Agreement or the application of any term, agreement, or condition of the Facility Agreement to any person or circumstance is or becomes illegal, invalid, or unenforceable in any jurisdiction it will be severed and neither the remaining terms, agreements, and conditions nor the application, validity, or enforceability of the severed term, agreement, or condition in any jurisdiction will be affected.

#### **7.10 Other securities**

The Facility Agreement will not merge with, discharge, extinguish, postpone, or prejudice any other security or right held by Bank of Sydney and no other security or right will affect the Facility Agreement. The release of any security or other right will not affect Bank of Sydney's rights under any security or right other than the security

or right released and will not affect Bank of Sydney's rights to recover any money due from the Customer or anyone else.

#### **7.11 Set-off**

In addition to any other right of set-off of Bank of Sydney under a Transaction Document or at law, while an Event of Default is continuing Bank of Sydney may upon giving notice to the Customer combine, consolidate, or merge any or all of the Customer's accounts conducted with Bank of Sydney, and may set-off so much of the Debt that is then due and payable against them, even though those accounts and the Debt may not be in the same currency. Bank of Sydney may effect any currency conversion necessary or desirable for that purpose. Bank of Sydney need not allow any set-off between the Debt and any credit balance of any account conducted with Bank of Sydney by any person.

#### **7.12 Interest on judgment**

If a liability under the Facility Agreement becomes merged in a judgment or order then the Customer as an independent obligation must pay interest to Bank of Sydney on the amount of that liability from the date it becomes payable until it is paid both before and after the judgment or order despite the bankruptcy or insolvency of the Customer at a rate being the higher of the rate payable under the judgment, order, bankruptcy, or insolvency and the rate payable on the Debt.

#### **7.13 Interest on arrears**

The charging of interest on arrears of interest and fees and charges does not mean they are part of the principal sum or loan amount. These amounts only become part of the principal sum if Bank of Sydney elects to convert them to principal.

#### **7.14 Liability of Customer not affected**

The Facility Agreement and the Customer's liability under the Facility Agreement will not be terminated or affected by any change in the legal capacity, rights, obligations, or liability of any person including any change to the members of a partnership or joint venture. Bank of Sydney at its discretion may discontinue all or any transactions with the Customer and without limitation may decline to make any advances to the Customer on receipt of notice of death of the Customer or any change in the legal capacity, rights, obligations or liability of the Customer.

#### **7.15 Statutes**

So far as is lawful, the provisions of all statutes and regulations at any time operating directly or indirectly to:

- (a) lessen, modify, or affect the Customer' obligations in favour of Bank of Sydney; or
- (b) stay, postpone, or otherwise prevent or prejudicially affect the exercise of all or any of Bank of Sydney's rights, powers, and remedies conferred by the Facility Agreement

are negated and excluded from and will not apply to the Facility Agreement. All powers, rights, and remedies conferred on Bank of Sydney by law, in equity, or by any statute will be in addition to those contained in the Facility Agreement and will not curtail, diminish, or qualify any of them.



### **7.16 Inconsistency**

If there is an inconsistency between these terms and conditions and any provisions of the Security, these terms and conditions will prevail.

### **7.17 Statements of Account**

Where the Banking Code of Practice applies, Bank of Sydney will provide the Customer with a statement of account as required by the Banking Code of Practice and at a minimum every 6 months.

### **7.18 Electronic signature**

If the Facility Agreement is signed by a Transaction Party by use of electronic signature(s) (including by signing on an electronic device or by digital signature), then the Transaction Parties jointly and separately:

- (a) agree that Bank of Sydney may rely on the electronic signature(s) as having the same force and effect as handwritten signature(s); and
- (b) unconditionally consent to any method used by the Bank of Sydney (at its discretion) to identify the signatories and to confirm their intention to enter into a binding legal agreement.

## **8. Banking Code of Practice**

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This clause applies if a Customer is a natural person or is using any banking service (as that term is defined in the Banking Code of Practice) provided by Bank of Sydney in connection with a Small Business.

- (a) Bank of Sydney is bound by the Banking Code of Practice when it provides that banking service to that Customer;
- (b) where a Facility has more than one Customer, each Customer will be separately liable for all amounts owing under the Facility (as well as being jointly liable). Any Customer can request Bank of Sydney, in writing, to terminate its liability in respect of:
  - (i) a Facility if the Facility has not been drawn; or
  - (ii) future drawings or redraws if a Facility or part of it has been drawn and the Bank of Sydney can terminate any obligation to extend further credit to any other Customer who is a co-borrower.

Bank of Sydney will not allow any further drawings upon receiving such request;

- (c) if a Customer is having financial difficulty in making payments under a Facility, the Customer may advise Bank of Sydney promptly so that Bank of Sydney can try to help the Customer overcome its financial difficulties with the Facility. Bank of Sydney will work with the Customer or, if the Customer requests, with the Customer's authorised financial counsellor or adviser.

Please contact Bank of Sydney for further information about Bank of Sydney's processes for dealing with customers in financial difficulty or visit <https://www.banksyd.com.au/support-financial-hardship.html>; and

- (d) if there is any inconsistency between these terms and conditions and the Banking Code of Practice, the Banking Code of Practice will prevail.

Where The Bank of Sydney attends the signing of a guarantee, the Bank of Sydney will ensure that the Guarantor does not sign the guarantee in the presence of the Customer, unless:

- (i) the Guarantor is a director of a company that has only one director, and that company is to be the Customer under the Facility;
- (ii) the Guarantor and the Customer are the same person, and that person is acting as trustee of a Trust in one of these roles and is acting in their personal capacity in the other role; or
- (iii) the Guarantor is a director, shareholder or manager of a company, that has provided a guarantee for the company's commercial asset financing.

Bank of Sydney will ensure the Banking Code of Practice is available and accessible, including in hard copies and electronically. The Customer may request a copy in a branch or over the phone and a copy will be provided for free.

Bank of Sydney will provide any information required to be provided under the Banking Code of Practice including without limitation information on the current standard fees, charges and interest rates upon request by the Customer.

Acting reasonably, the Bank of Sydney may vary the terms of this Facility Agreement. The Bank of Sydney will provide the Customer with notice of any such changes as required by law. In exercising the Bank of Sydney's rights to vary this Facility Agreement, (other than a change relating to the interest rates), the Bank of Sydney may only vary other terms and conditions of this Facility Agreement provided that:

- (a) the variation does not adversely affect the Customer; and
- (b) the Bank of Sydney provide the Customer with at least 30 days calendar notice of the variation unless a change that is unfavourable to the Customer is reasonable for the Bank of Sydney to manage a material and immediate risk. In such case, the Bank of Sydney will provide the Customer with written notice as soon as reasonably practicable.

If the Customer is in financial difficulty, the Customer may have rights under the National Consumer Credit Protection Act. Therefore, the Customer should inform the Bank of Sydney of any financial difficulty as soon as possible. The Bank of Sydney will work with the Customer to try and help the Customer overcome those difficulties.

The Customer should consult The Bank of Sydney website at [www.bankofsydney.com.au](http://www.bankofsydney.com.au) to find details of accessing the Bank of Sydney's hardship arrangements.

## 9. Making a Complaint

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- (a) If Bank of Sydney makes a mistake, or its service does not meet the Customer's expectations, for the fastest possible resolution to any complaint, the Customer should either:
- (i) talk to its Relationship Manager; or
  - (ii) Customer Complaints Officer  
Phone: 13 95 00 Fax: 1300 888 710  
Email: [complaints@banksyd.com.au](mailto:complaints@banksyd.com.au)  
Mail: GPO Box 4288, Sydney NSW 2001.
- (b) If the issue cannot be resolved promptly, the Customer's Relationship Manager (or another staff member of Bank of Sydney), will take responsibility and work with the Customer to resolve the issue promptly. If the issue cannot be resolved promptly, Bank of Sydney will keep the Customer informed on the progress of the matter and how long Bank of Sydney expects it will take to have the issue resolved.
- (c) If the Customer is not satisfied with the steps taken by Bank of Sydney to resolve the complaint, or with the result of Bank of Sydney's investigation, the Customer may wish to contact the Australian Financial Complaints Authority who to make a complaint for resolution under their Complaint Resolution Scheme Rules.

Australian Financial Complaints Authority  
GPO Box 3 Melbourne VIC 3001  
Telephone: 1800 931 678  
Fax: +61 (03) 9613 6399  
Internet: <https://www.afca.org.au/>

## 10. Definitions and interpretation

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### 10.1 Definitions

In these terms and conditions unless the context otherwise requires:

**Business Day** means any day other than a Saturday, Sunday, public or bank holiday in New South Wales. The definition of Business Day may change in accordance with prevailing market practice as determined by Bank of Sydney from time to time;

**Banking Code of Practice** means the Australian Bankers' Association Banking Code of Practice (July 2019 version) as amended by any amendment that is adopted by Bank of Sydney;

**Controller** has the meaning set out in the Corporations Act;

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

**Customer** means the person named as the 'Customer' in the Facility Agreement;

**Debt** means the aggregate money (including principal, interest fees and other amounts payable in connection with the Facility Agreement) from time to time either actually or contingently payable by the Customer to Bank of Sydney under the Facility Agreement and includes any part of that money;

**Event of Default** means any event described as such in these terms and conditions;

**Facility** means any facility provided by Bank of Sydney to the Customer pursuant to a Facility Agreement or otherwise;

**Facility Agreement** means any facility agreement or letter of offer between Bank of Sydney and the Customer;

**Financial Undertaking** means any undertaking which relates to the financial position, circumstance or controls of a Transaction Party and its Related Body Corporates, including without limitation any financial ratio (howsoever described) with which the Transaction Party must comply (for example, loan to valuation ratio, interest cover ratio, loan to total development cost ratio and so forth);

**Government Agency** means a government or government department, a governmental, semi-governmental or judicial person or a person (whether autonomous or not) charged with the administration of any applicable law;

**GST** means any tax, levy, charge or impost implemented under the A New Tax System (Goods and Services Tax) Act (GST Act) or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar affect to, the GST Act;

**Guarantor** means the guarantor named in the Facility Agreement, if any, and anybody else who at any time guarantees the performance of the Facility Agreement;

**Insolvency Event** means the happening of any of the following events:

- (a) a Transaction Party is unable to pay its debts as they fall due;
- (b) an order is made appointing a liquidator, provisional liquidator in respect of a Transaction Party (or proceedings are commenced or a resolution passed or proposed in a notice of meeting for any of those things);
- (c) an order is made or any effective resolution is passed for the winding up of a Transaction Party;
- (d) except to reconstruct or amalgamate while solvent on terms approved by Bank of Sydney, a Transaction Party enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any class of its creditors;
- (e) a controller is appointed to or over or takes possession of all or a substantial part of the assets or undertaking of a Transaction Party;
- (f) a Transaction Party is or is deemed or presumed by law or a court to be insolvent;

- (g) a Transaction Party takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a Transaction Party; and
- (h) anything analogous or having a substantially similar effect to any of the events specified above happens in respect of a Transaction Party under the law of any applicable jurisdiction;

**Large Business Customer** is any customer who at the relevant time:

- (a) is not a Small Business or a natural person; or
- (b) has more than \$3 million in total debt to all credit providers (including undrawn limits, pending finance applications and debt of Related Body Corporates);

**Material Adverse Effect** means, in respect of a person, a material adverse effect in the reasonably held opinion of the Bank of Sydney on:

- (a) the person's business, property or financial condition;
- (b) the person's ability to perform its obligations under a Transaction Document;
- (c) the effectiveness or priority of any Security Interest in a Transaction Document; or
- (d) the value of any property the subject of a Security Interest in favour of Bank of Sydney;

**Related Body Corporate** has the meaning given by the Corporations Act;

**Security** means any security specified in the Facility Agreement;

**Security Interest** means a 'security interest' as defined in section 12(1) of the Personal Property Securities Act (Cth) 2009;

**Small Business** means a small business as defined under the Banking Code of Practice (if applicable);

**Term** means the term of the Facility as provided under the Facility Agreement;

**Transaction Document** means:

- (a) the Facility Agreement (which includes these terms and conditions); and
  - (b) any security or guarantee given in relation to the Facility Agreement,
- and any document or agreement entered into or given under any of the above;

**Transaction Party** means:

- (a) the Customer; and
- (b) any Guarantor,

and **Transaction Parties** means any two or more of them; and

**Trust** means the trust, if any, named in the Facility Agreement and any other trust of which the Customer is trustee.

## 10.2 Interpretation

In the document unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) an Event of Default is continuing or subsisting if it has not been remedied to the satisfaction of Bank of Sydney or waived by Bank of Sydney in writing;
- (c) the singular includes the plural and vice versa;
- (d) words denoting any gender include all genders;
- (e) reference to a person includes any other entity recognised by law and vice versa;
- (f) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (g) any reference to a party to the document includes its successors and permitted assigns;
- (h) any reference to any agreement or document includes that agreement or document as amended at any time;
- (i) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (j) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (k) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.

Call us on 13 95 00  
Visit our website [www.banksyd.com.au](http://www.banksyd.com.au)  
Email us at [info@banksyd.com.au](mailto:info@banksyd.com.au)

Bank of Sydney Ltd  
ABN 44 093 488 629 AFSL 243 444