

**ASB BANK LIMITED  
GUARANTEE AND INDEMNITY**

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**SCHEDULE**

**FROM:**

("the Guarantor" and referred to in this Guarantee as "you" and "your/s")

**TO:**

**ASB BANK LIMITED**

("the Lender" and referred to in this Guarantee as "our/s", "us" and "we").

**IN RESPECT OF:**

("the Borrower")

**IMPORTANT:**

**This is a Guarantee and Indemnity for all joint and several obligations of the Borrower to us from time to time. There is no obligation for us to inform you of the financial condition or any other matter concerning the Borrower. You must make your own arrangements with the Borrower to keep yourself informed as to all matters relevant to this Guarantee and Indemnity.**

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**Maximum amount of your Liability:**

**Unlimited Amount:** Your liability to us under this Deed is unlimited.

**GUARANTORS ACKNOWLEDGEMENT AND EXECUTION**

**You acknowledge that:**

- (a) You have been advised by us in the absence of the Borrower to obtain **independent legal advice** before signing the Guarantee and Indemnity;
- (b) Subject to any limitation specified on the front page hereof, you understand that the Guarantee and Indemnity makes you liable for all present and future amounts owing to us by the Borrower, including future advances, amounts owing under the guarantees given by the Borrower, and amounts owing by the Borrower together with any other person;
- (c) We have no duty to keep you informed about the financial condition of the Borrower, and you must keep yourselves informed as to all matters relevant to the Guarantee and Indemnity;
- (d) You agree that this Guarantee and Indemnity may be signed in any number of counterparts all of which when taken together shall constitute the one and the same Guarantee and Indemnity. A party may enter into this Guarantee and Indemnity by executing any counterpart; and
- (e) **You have read this acknowledgement carefully and before signing the Guarantee and Indemnity, you acknowledge receipt of a disclosure copy of this Guarantee and Indemnity.**

**Initial Address of Guarantor for Notices:**

Address:

Fax No:

Phone No:

Attention:

**DEED DATED** this \_\_\_\_\_ day of \_\_\_\_\_

**SIGNED by**

\_\_\_\_\_

\_\_\_\_\_

**WITNESS** to all of the above signatures (*otherwise specify*)

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Witness Name

\_\_\_\_\_  
Witness Occupation

\_\_\_\_\_  
Witness Address

## 1. INTERPRETATION

### 1.1 Definitions: In this Deed, unless the context otherwise requires:

“**Borrower**” means each person so named in the Schedule;

“**Event of Default**” means an event or circumstance which would, either immediately, or with the giving of notice or lapse of time or both, enable us to require immediate payment of any Guaranteed Indebtedness by the Borrower or to make demand under this Deed;

“**Guaranteed Indebtedness**” means all indebtedness of the Borrower to us or incurred by us on behalf of the Borrower (including all interest, costs, taxes, stamp or similar duties or taxes, commissions, charges and expenses (including legal fees and expenses) incurred or sustained in any way by us in connection with that indebtedness or the enforcement or attempted enforcement of that indebtedness) and:

- (a) if more than one person is named as the Borrower, the indebtedness of each person named separately, as well as any two or more of them together;
- (b) if the Borrower is (or is described as a member or partner of) a partnership or firm, the indebtedness incurred on behalf of that partnership or firm by any former, present or future partner or member of that partnership or firm;
- (c) if the Borrower is an unincorporated body, the indebtedness incurred on behalf of that unincorporated body by each person who is now or later authorised or purporting to operate on account of the Borrower;
- (d) if the Borrower is described as the trustee of a trust, the indebtedness incurred on behalf of that trust by any former, present or future trustee;
- (e) if the Borrower is a company, the indebtedness of any new company arising from its amalgamation, reconstruction, or merger with or takeover by another company; and
- (f) includes the indebtedness of the Borrower either jointly or in common with any other person;

“**Guaranteed Obligations**” means all obligations (whether present or future but other than obligations to pay money) of the Borrower to us;

“**Guarantor**” means each person so named in the Schedule, and

“**Lender**” means ASB Bank Limited and its successors, assigns and transferees and is also referred to in these Terms as “**we**”, “**us**” and “**our**”;

### 1.2 Construction of Certain References: In this Deed, unless the context otherwise requires, any reference to:

a “**business day**” means a day (other than Saturday or Sunday) on which registered banks are open for general banking business in New Zealand;

a “**Guarantee**” also includes:

- (a) an obligation of a person to pay, purchase, provide funds (whether by the advance of money, the purchase or subscription of shares or other securities, the purchase of assets or services or otherwise) or provide a security interest for the payment or performance of, or to indemnify against the consequences of default in the payment or performance of, or otherwise to be responsible for, indebtedness or obligations of another person; and
- (b) an obligation of a person to redeem or purchase share capital of another person incurred in connection with the purchase of that share capital by another person or the granting of any security interest in relation to that share capital;

“**indebtedness**” includes an obligation (whether present or future, actual or contingent, secured or unsecured, joint or several, as principal, surety or otherwise) relating to the payment of money;

“**partner**” means, in the context of a limited partnership:

- (a) each general partner of a limited partnership from time to time, being each person whose name is entered as a general partner of the relevant limited partnership; and
- (b) each limited partner of a limited partnership from time to time, being each person whose name is entered as a limited partner of the relevant limited partnership, in the register of limited partnerships maintained by the Registrar of Companies;

a “**person**” includes an individual, body corporate, an association of persons (whether corporate or not), a trust, a state and an agency of a state (in each case, whether or not having separate legal personality);

a “**security interest**” includes a mortgage, pledge, charge, lien, hypothecation, encumbrance, deferred purchase, title retention or other security arrangement of any kind, the practical effect of which is to secure a creditor;

“**tax(es)**” includes a present and future tax, levy, impost, duty, rate charge, fee, deduction or withholding of any nature regardless of where or by whom imposed, levied, collected, withheld or assessed and includes interest, penalties, fines, costs, charges or expenses or other amounts relating to or arising in connection with taxes;

a gender includes each other gender;

the singular includes the plural and vice versa;

any legislation includes a modification and re-enactment of, legislation enacted in substitution for and a regulation, order-in-council and other instrument from time to time issued or made under that legislation; and

a party to this Deed or another agreement includes, if an individual, that person's executors and administrators and, in the case of a body corporate or any other person, its successors and, in our case, our assignees and transferees and, in the case of the Guarantor, its permitted assignees and transferees.

Indebtedness which is payable “**on demand**” is due and payable on the date on which demand is made (or, if a later date is specified in the demand, on that date).

Headings shall be ignored in construing this Deed.

## 2. GUARANTEE AND INDEMNITY

2.1 **Guarantee:** You unconditionally and irrevocably Guarantee to us:

- (a) the due payment by the Borrower of the Guaranteed Indebtedness; and
- (b) the due performance of and compliance by the Borrower with the Guaranteed Obligations.

2.2 **Payment:** You undertake that if, for any reason, the Borrower does not pay when due (whether by acceleration or otherwise) any Guaranteed Indebtedness, you will pay the relevant amount immediately on demand by us.

2.3 **Unenforceability of Obligations:** As a separate and continuing undertaking, you unconditionally and irrevocably undertake to us that, should the Guaranteed Indebtedness not be recoverable from you under this Deed for any reason, including a provision of this Deed or an obligation (or purported obligation) of the Borrower to pay the Guaranteed Indebtedness or to perform or comply with a Guaranteed Obligation being or becoming void, voidable, unenforceable or otherwise invalid, whether or not that reason is or was known to us and whether or not that reason is:

- (a) a defect in or lack of powers of the Borrower or you, or the irregular exercise of those powers; or
- (b) a defect in or lack of authority by a person purporting to act on behalf of the Borrower or you; or
- (c) a legal or other limitation (whether under the Limitation Act 2010 or otherwise), disability or incapacity of the Borrower or you; or
- (d) a dissolution, amalgamation, change in status, constitution or control, reconstruction or reorganisation of the Borrower or you (or the commencement of steps to effect the same),

you will, as sole and independent obligation, pay to us on demand the amount which we would otherwise have been able to recover (on a full indemnity basis). In this clause, the expressions “Guaranteed Indebtedness” and “Guaranteed Obligation” include any indebtedness or obligation which would have been included in those expressions but for anything referred to in this clause.

2.4 **Crystallisation Prior to Dissolution:** If:

- (a) a resolution is proposed and put to the vote; or
- (b) a petition is presented and is heard or otherwise judicially considered,

which, if successful, would result in your bankruptcy or winding up, you are to pay immediately to us an amount equal to your maximum contingent liability under this Deed at that time. That amount will be a debt due from you to us.

2.5 **Suspense Account:** All moneys from time to time received by us in respect of the Guaranteed Indebtedness from or on your account may be placed in a suspense account with a view to preserving our rights to prove for the whole of the Guaranteed Indebtedness in the event of any proceeding in, or analogous to, dissolution, amalgamation, change in status, constitution or control, reconstruction or reorganisation of you or the Borrower.

## 3. NATURE OF GUARANTEE AND INDEMNITY OBLIGATIONS

3.1 **Liability as Sole Principal Debtor:** As between you and us (but without affecting the obligations of the Borrower) you are liable under this Deed as a sole and principal debtor and not merely as a surety.

3.2 **No Discharge:** You are not to be discharged, nor are your obligations to be affected, by anything which, but for this clause, would or might have discharged you or affected your obligations, including:

- (a) time, indulgence, waiver or consent whenever given to the Borrower, you or any other person; or
- (b) an amendment to any security interest, Guarantee, indemnity or other agreement (whether or not that amendment might increase your liability under this Deed or otherwise); or
- (c) the making of, or failure to make, a demand on the Borrower, you or any other person for payment; or
- (d) the failure to obtain a security interest (or a particular priority ranking of that security interest), or the failure of a person to execute or otherwise be bound by, a security interest, Guarantee, indemnity or other agreement (including without limitation, the failure of any person named above as the Guarantor, to execute this Deed); or
- (e) the enforcement of, or failure to enforce this Deed or any other security interest, Guarantee, indemnity or other agreement; or

- (f) the release of, or the release of the Borrower, you or any other person from, this Deed or any other security interest, Guarantee, indemnity or other agreement; or
- (g) the dissolution, amalgamation, change in status, constitution or control, reconstruction or reorganisation of the Borrower, you or any other person (or the commencement of steps to effect the same); or
- (h) any other matter or thing whatsoever.

We are to be under no liability to you in respect of any of these matters, even if your rights may be prejudiced as a result.

**3.3 Continuing Guarantee:** Your obligations under this Deed:

- (a) are by way of continuing security, notwithstanding intermediate payments, settlement of accounts or payments or any other matter or thing whatsoever; and
- (b) are in addition to, are not to be merged in and are without prejudice to, any security interest, Guarantee, indemnity or other agreement, whenever in existence, in favour of any person, whether from a Guarantor or otherwise.

**4. TERMINATION OF GUARANTOR'S LIABILITY**

**4.1 Termination of Future Liability:** You may serve a notice on us terminating your future liability (a "Termination Notice") at any time pursuant to clause 4.2 of this Deed.

**4.2 Termination Notice:** The Termination Notice:

- (a) must be served on each of our branches where you have an account; and
- (b) is to take effect in relation to an account only:
  - (i) if served on the branch where the account is kept; and
  - (ii) on the date specified in the Termination Notice, such date to be not earlier than the next business day after it is first served on our relevant branch (the "**Termination Date**").

**4.3 Guarantor to Remain Liable for Existing Guaranteed Indebtedness:** Notwithstanding that a Termination Notice has been served on us, you will remain liable under this Deed for:

- (a) all Guaranteed Indebtedness outstanding, but not received by us, on the Termination Date;
- (b) all other Guaranteed Indebtedness which will or may become payable to us after the Termination Date in connection with any business concluded either:
  - (i) prior to the Termination Date; or
  - (ii) on or after the Termination Date as a result of our commitment to provide financial services or accommodation to the Borrower made before the Termination Date.

**4.4 Termination if More than One Guarantor:** If there is more than one Guarantor:

- (a) a Termination Notice must be signed by each Guarantor wishing to terminate its future liability; and
- (b) a Guarantor failing to serve a Termination Notice remains fully liable under this Deed.

**5. NO COMPETITION WITH LENDER**

You will not without our written consent:

- (a) take, accept or hold a security interest from the Borrower, or in relation to the Guaranteed Indebtedness, from any other person; or
- (b) take steps to recover (whether directly or by set-off, counterclaim or otherwise) or accept money or other property, or exercise or enforce rights in respect of, indebtedness of the Borrower to you or, in relation to Guaranteed Indebtedness, indebtedness of any other person to you; or
- (c) claim, prove or accept payment in composition by, or a dissolution of, the Borrower or, in relation to Guaranteed Indebtedness, any other person,

and until such time as the Guaranteed Indebtedness has been fully paid and the Guaranteed Obligations have been fully satisfied you waive all rights of subrogation to which you would otherwise be entitled by reason of performance of your obligations under this Deed. If, notwithstanding this clause, you hold or receive any such security interest, money or property, you are to pay or transfer it to us immediately and, pending that payment or transfer, will hold it on trust for us.

**6. REPRESENTATIONS AND WARRANTIES**

You represent and warrant that:

- (a) you have full power and authority to enter into and comply with your obligations under, this Deed and have obtained all consents needed by you to do so;
- (b) this Deed has been duly authorised and entered into by you; and
- (c) your obligations under this Deed are legal, valid, binding and enforceable.

**7. PRIVACY ACT AUTHORITY**

You authorise us to discuss your financial statements and financial affairs at any time with your accountants, auditors and financial advisers, and irrevocably authorises and requests your accountants, auditors, financial advisers, credit reference

agencies, previous and current employers and any providers of credit to provide to us any information regarding you upon our request.

## 8. PAYMENTS AND SET-OFF

8.1 **Payments to be Free and Clear:** Each payment by you to us is to be unconditional and is to be in full, without any deduction or withholding whatsoever (whether in respect of set-off, counterclaim, charges or otherwise) unless such deduction or withholding is required by law. If any deduction or withholding is required by law, you will pay to us an additional amount so that the net amount actually received and retained by us on the due date (free from any liability in respect of any deduction or withholding, and ignoring any amount which we are deemed to have received by reason of any legislation) equals the full amount which we would have received had no deduction, withholding or payment been made or required.

8.2 **Set Off:** You irrevocably authorise us to apply (without prior notice or demand) any credit balance of yours on any account in any currency and at any of our offices in or towards satisfaction of any of your indebtedness then due to us under this Deed and unpaid. If at any time following an Event of Default, an amount is contingently due to us or an amount due is not quantified, we may retain and withhold repayment of any such credit balance and the payment of interest or other moneys pending that amount becoming due or being quantified and may set off the maximum liability which may at any time be or become owing to us by you and in each case without prior notice or demand. We:

- (a) may use any credit balance to buy other currencies and may break any term deposit to effect that application; and
- (b) need not exercise our rights under this paragraph which are without prejudice and in addition to our rights under this Deed and any right of set-off, combination of accounts, lien or other right to which we are at any time otherwise entitled (whether by contract or otherwise).

Our rights under this clause are contractual rights affecting the terms upon which a credit balance is held and the creation of those rights does not constitute the creation of a security interest in that credit balance.

8.3 **Deposits with Lender:** Each of your credit balances with us will be held on the following basis:

- (a) the credit balance and all your rights in relation to it, are incapable of assignment or of being the subject of a security interest (other than in favour of, or with our prior written consent); and
- (b) if at any time an Event of Default has occurred and has not been remedied, you will have no right to withdraw (and we will have no obligation to repay), any moneys from that credit balance (other than with our prior written consent).

## 9. TYPE OF GUARANTOR

9.1 **Two or More Guarantors:** If more than one person is named as the Guarantor, then:

- (a) **References to Guarantor:** Unless the context otherwise requires, each reference to the "Guarantor" will be a reference to each of them separately as well as to all of them together;
- (b) **Joint and Several:** Each of them is jointly and severally liable for all obligations of the Guarantor;
- (c) **Release:** We may, in our discretion, release any one or more of you provided that:
  - (i) no release shall be of any effect unless it is in writing and signed on behalf of us;
  - (ii) no other Guarantor shall be discharged, nor shall its obligations be affected by such release; and
  - (iii) we shall be under no obligation to any other Guarantor in respect of such release even though that Guarantor's rights in subrogation, contribution or otherwise may be prejudiced as a result; and
- (d) **Partnership:** Where the Guarantor also consists of partners in a partnership, each of them acknowledges (in addition to the above) that:
  - (i) distinct from its joint liability as a partner, it undertakes a separate liability for all of your obligations so that we may have recourse to your personal assets on the same basis as any other personal creditor; and
  - (ii) you are obliged to inform us immediately upon the appointment of a new partner and the retirement or death of any partner; and
- (e) **Limited Partnership:** Where the Guarantor is a limited partnership, each of the general partners acknowledges (in addition to the above) that:
  - (i) as general partner it is jointly and severally liable with the limited partnership and the other general partners for the unpaid debts and liabilities of the limited partnership so that we may have recourse to the general partner's personal assets on the same basis as any other personal creditor; and
  - (ii) you are obliged to inform us immediately upon the appointment of a new partner and the retirement or death of any partner.

9.2 **Trustee Guarantor:** If you are described as a trustee of a trust or an executor and trustee of an estate:

- (a) **Trustee Warranties:** You warrant and undertake to us that the entering into of this Guarantee is authorised by the relevant trust deed and/or by the Trustee Act 1956 and/or probate. The warranties and undertakings which have been given by the trustees and/or executors ("the **trustees**") in any trustee or executor certificate will also continue to apply.
- (b) **Enforcement:** In enforcing this Guarantee, we:

- (i) **Recourse to Trust Assets** May have full recourse to all of the assets of the trust or the estate (“the trust”) and will be subrogated to the trustee's right to be indemnified from those assets or by any other person (including any beneficiary of the trust); and
  - (ii) **Personal Assets:** May have recourse to the personal assets of the trustee unless that trustee is a Limited Liability Trustee in which case clause 9.2(c) applies;
- (c) **Limited Liability Trustee:** If we have agreed in writing that the Guarantor is a “**Limited Liability Trustee**”, then its personal liability will be limited to the assets of that trust. However, this limitation of personal liability will not apply, and we may exercise all the rights we have against the Limited Liability Trustee personally if the Limited Liability Trustee:
- (i) is in wilful breach of trust or has acted dishonestly; or
  - (ii) loses his or her right to be indemnified out of the assets of the trust for any reason,
- and in each such case, the Limited Liability Trustee will have full personal liability under this Guarantee, and we may have recourse to its personal assets as well as to the trust assets.
- (d) **Trustee Retirement:** Each trustee confirms and undertakes that the retirement of any trustee shall be effected in terms of section 45 of the Trustee Act 1956 and that, on retirement, it will notify us in writing that it has retired in accordance with those provisions. Each trustee is to remain liable under this Guarantee after it ceases to be a trustee until released in writing by us. We will release such trustee from its liabilities under this Guarantee (in its capacity as trustee and not, if applicable, in its personal capacity) when we are satisfied that all things requisite for vesting any trust assets charged to us in the continuing or new trustees has been executed and done.

## 10. ACCOUNTS AND CERTIFICATES

- 10.1 **Accounts:** The entries made in the accounts maintained by us are to be conclusive evidence of the existence and amounts of your obligations recorded in them.
- 10.2 **Certificates Conclusive:** Except for manifest error a certificate by us of an amount payable under this Deed is to be conclusive evidence for all purposes including for any proceedings.

## 11. NO OBLIGATION TO MARSHAL

We are not required to marshal, enforce or apply under, or appropriate, recover or exercise:

- (a) any security interest, Guarantee or other entitlement held at any time by us; or
- (b) any moneys or assets which we at any time hold or are entitled to receive, before this Deed is enforced.

## 12. ASSIGNMENT

- 12.1 **Benefit and Burden of this Deed:** This Deed is binding upon and is for the benefit of the parties and their respective successors and, in our case, our assignees or transferees and, in your case, your permitted assignees or transferees.
- 12.2 **The Lender:** We may assign or transfer all or part of our rights or obligations under this Deed without your consent. Each assignee or transferee is to have the same rights against you under this Deed (or a proportion of those rights if it is the assignee or transferee of part only) as if it were us.
- 12.3 **Disclosure of Information:** We may disclose, on a confidential basis, to a potential assignee, transferee or other person with whom contractual relations in connection with this Deed are contemplated, any information about you whether or not that information was obtained in confidence and whether or not that information is publicly available.
- 12.4 **The Guarantor:** You may not assign or transfer all or part of your rights or obligations under this Deed without our prior written consent.

## 13. ELECTRONIC COMMUNICATION:

- (a) You consent to us giving to you documents, notices and communications in relation to your products and services in electronic form by electronic communication through, for example:
  - (i) any internet banking system provided by us (for example via your messaging inbox and/or document storage function within that internet banking system); or
  - (ii) any application available through your mobile device approved by us for this purpose.
- (b) You agree that any such electronic communication is taken to be dispatched by us and received by you at the time it is uploaded to the relevant system.
- (c) You consent to any such documents, notices and communications being in a commonly used format (for example, PDF) and being accessible by commonly used software (for example Internet Explorer).

## 14. NOTICES

- 14.1 In addition to any notice provision contained in these Standard Guarantee Terms or any other document, written notice may be sent to you under this Deed at the address or facsimile number last known to us. In the case of a letter, notice will be deemed to be received by you on the third business day after posting. In the case of a facsimile, notice will be deemed to be received by you on the business day on which it was dispatched or, if dispatched after 5.00pm, on the next business

day. By being so delivered notice will be deemed to have been served on you personally, without prejudice to any other lawful means of service.

## 15. EXPENSES AND STAMP DUTY

15.1 **Expenses:** You will pay each cost and expense (including all legal expenses on a solicitor and own client basis) sustained or incurred by us in connection with:

- (a) the preparation, negotiation and entry into, of this Deed and each other transaction required or contemplated thereby; and
- (b) each amendment to, or waiver in respect of, this Deed or any other transaction required or contemplated by this Deed; and
- (c) the exercise of, or in protecting or enforcing or otherwise in connection with, our rights under this Deed or another transaction required or contemplated by this Deed.

In each case on demand and on a full indemnity basis.

15.2 **Taxes:** You will promptly pay any stamp or similar duty or any tax (including GST) and registration fee payable in connection with:

- (a) the entry into, performance, registration, enforcement or admissibility in evidence of this Deed; and
- (b) an amendment to, or waiver in respect of, this Deed.

And will indemnify and hold us harmless against any liability with respect to, or resulting from any failure to pay, when due, any duty, tax or fee.

## 16. MISCELLANEOUS

16.1 **Rights and Waivers:** Time is of the essence in respect of all dates and times for performance by you of your obligations under this Deed. Our rights under this Deed are cumulative, may be exercised as often as we consider appropriate and are in addition to any other contractual rights we may have against you and our rights provided by law. No failure to exercise, and no delay in exercising, any such right will operate as a waiver of that right, nor will a single or partial exercise of a right preclude another or further exercise of that right or the exercise of another right. No waiver by us of our rights will be effective unless it is in writing signed by us.

16.2 **Information:** We have no duty or responsibility to provide you with any information concerning the financial statements, financial condition or any other matter concerning the Borrower.

16.3 **Amendments:** No amendment to this Deed will be effective unless it is in writing signed by you and us.

16.4 **Partial Invalidity:** The illegality, invalidity or unenforceability of a provision of this Deed under any law shall not affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of another provision.

16.5 **Governing Law:** This Deed is to be governed by and construed in accordance with New Zealand law.

16.6 **Jurisdiction:**

- (a) **In New Zealand:** Each of the parties irrevocably and unconditionally agrees that the courts of New Zealand shall have jurisdiction to hear and determine each suit, action or proceeding ("**proceedings**"), and to settle disputes, which may arise out of or in connection with this Deed and for those purposes irrevocably submits to the jurisdiction of those courts.
- (b) **Other Jurisdictions:** This submission to jurisdiction does not (and is not to be construed to) limit our rights to take proceedings against you in another court of competent jurisdiction nor shall the taking of proceedings in one or more jurisdictions preclude the taking of proceedings in another jurisdiction, whether concurrently or not.
- (c) **Service in New Zealand:** You agree that the process by which any suit, action or proceeding in New Zealand is begun may be served on you by being delivered to you at the address last known to us or your registered office, without prejudice to any other lawful means of service.