



Determination of requirements for an approved guarantee

Superannuation Industry (Supervision) Act 1993

I, Tom Karp, a delegate of APRA, under subsection 11E(1) of the *Superannuation Industry (Supervision) Act 1993* (the Act) and under subsection 33(3) of the *Acts Interpretation Act 1901*, REVOKE the Determination of requirements for an approved guarantee made on 15 July 2004 and under paragraph 11E(1)(a) of the Act and for the purposes of subsections 29DA(3) and 29DA(4) of the Act, DETERMINE that the requirements relating to an approved guarantee given by an ADI are:

- (i) an approved guarantee must contain solely the terms set out in the Schedule attached to this Determination.

Dated: 25 February 2005

[signed]

Tom Karp
Executive General Manager
Supervisory Support Division

Interpretation

In this Determination

APRA means the Australian Prudential Regulation Authority.

ADI has the meaning given in section 10 of the Act.

approved guarantee has the meaning given in section 11E of the Act.

Note 1 Under subsection 11E(2) of the Act, this Determination is a disallowable instrument.

Schedule- approved guarantee

DEED OF GUARANTEE

THIS DEED POLL is made by [*NAME AND ABN OF THE GUARANTOR*], which has its registered office at [*address*] (the Guarantor).

THE COVENANTS IN THIS DEED are given for the benefit jointly and severally of [*NAME OF TRUSTEE*] ABN [*ABN of Trustee*], which has its registered office at [*address*] (the Trustee) in respect of all superannuation entities of which the Trustee is or becomes the trustee during the term of this Guarantee, and any acting trustee or other trustee appointed in place of the Trustee.

WHEREAS:

- A. The Guarantor is an authorised deposit taking institution as defined in section 10 of the *Superannuation Industry (Supervision) Act 1993* (the Act).
- B. The Trustee is a constitutional corporation and has made application to the Australian Prudential Regulation Authority (APRA) for an RSE licence of a class that enables a trustee that holds a licence of that class to be a trustee of a public offer entity subject to any condition under subsection 29EA(1) of the Act on the basis that the Trustee meets the capital requirements under subsection <<29DA(3)>><<29DA(4)>> of the Act.
- C. This Deed is in the form of the approved guarantee in accordance with section 11E of the Act.
- D. The Guarantor accordingly undertakes the obligations specified in this Deed.

NOW THIS DEED WITNESSES:

Interpretation

1. In this Deed:
 - (a) *beneficiary* has the meaning given in section 10 of the Act.
 - (b) *default* means
 - (i) any failure by the Trustee to perform any duty or obligation imposed on the Trustee under Superannuation Law which results in any financial loss to any superannuation entity of which the Trustee is trustee, or
 - (ii) the breach by the Trustee of an enforceable undertaking under section 262A of the Act, to the effect that the Trustee shall make a payment of money to any superannuation entity of which the Trustee is trustee.
 - (c) *liability* means any debt, obligation or liability of whatsoever nature.

- (d) **agreed amount** means <<five million dollars>> Australian currency.<<insert amount where approval is applied for under subsection 29DA(4) of the Act.>>
- (e) **RSE licence** has the meaning given in section 10 of the Act.
- (f) **security** means any mortgage, charge, assignment, title retention arrangement, or other interest, agreement or arrangement of whatsoever nature the purpose of which is to secure the meeting of a liability, and includes a guarantee or indemnity given in relation to a liability.
- (g) **superannuation entity** includes a **superannuation entity** and a **registrable superannuation entity** as respectively defined in section 10 of the Act.
- (h) **superannuation fund** has the meaning given in section 10 of the Act.
- (i) **Superannuation Law** means any provision of the governing rules of any superannuation entity, or of the Act, or of the *Superannuation Industry (Supervision) Regulations 1994* (the Regulations) or of the Trustee Acts of any State or Territory of Australia, or any requirement of any other law governing superannuation entities or superannuation funds, or the law of equity, or any common law rules applying to trusts or any requirement imposed by APRA or any other government authority responsible for administering the laws or rules governing superannuation entities or superannuation funds.

Guarantee

2. The Guarantor unconditionally guarantees all liabilities (up to the agreed amount) of the Trustee in respect of the Trustee's duties as trustee of all superannuation entities of which the Trustee is, or becomes the trustee of during the term of this Guarantee and shall pay upon demand made in accordance with Clause 5 of this Deed.

No requirement to proceed

3. Neither the acting trustee nor the Trustee is required to exhaust any remedies it may have (whether under Superannuation Law or otherwise) against any other person in relation to the default of the Trustee, but is entitled to demand and receive payment from the Guarantor immediately any payment is due under this Deed.

Term of the Guarantee

4. Except as provided in Clause 10 of this Deed, this Guarantee shall be for a period of five years commencing on the date an RSE licence issued by APRA to the Trustee comes into effect or on the date this Deed is signed by the Guarantor, whichever is later.

Written demand and time for payment

5. Written demand under this Guarantee may be made during the term of this Guarantee upon default by the Trustee (regardless of when the default occurs) and the Guarantor shall make cash payment under this Deed without set-off, whether legal or equitable, counter claims, conditions, deductions or withholdings, no later than 30 days after such demand is made:
- (a) by the Trustee; or
 - (b) by any acting trustee or other trustee appointed in place of the Trustee pursuant to the general law or to the provisions of the Act or the Regulations, or of any law of the Commonwealth or of any State or Territory; or
 - (c) by any receiver or receiver and manager or administrator or liquidator or provisional liquidator of the Trustee or of any superannuation entity of which the Trustee was trustee during the term of this Guarantee, appointed pursuant to any law of the Commonwealth or of any State or Territory; and
 - (d) such written demand shall contain, or be accompanied by particulars of the default by the Trustee upon which the demand is based, including a quantification of the amount of the liability (provided that neither bona fide errors or omissions in the particulars nor an inaccurate quantification of the liability shall invalidate the demand); and
 - (e) 'particulars of the default' may include an auditor's certificate or an order of a court or tribunal; and
 - (f) nothing in this clause shall be interpreted as requiring the Trustee or any other person referred to in subparagraph (b) or (c) of this clause to defend any claim or otherwise determine in a court or tribunal the amount of any liability prior to making demand upon the Guarantor; and
 - (g) nothing in this clause shall be interpreted as requiring the Guarantor to guarantee under this Deed any liability whatsoever of any acting or other trustee or receiver or receiver and manager or administrator or liquidator or provisional liquidator referred to in this clause.

Demand to be conclusive

6. (a) The particulars provided under clause 5(d) of this Deed shall be conclusive evidence of default by the Trustee and the Guarantor shall not be obliged to make any enquiry; and
- (b) The Trustee's determination (or the determination of any other person referred to in Clause 5 of this Deed) of any calculation required under this Guarantee, or which may be done for the purposes of this Guarantee (including, without limitation, the quantification of the amount of any liability) is, in the absence of manifest error, conclusive evidence of that matter or thing.

Interest on money due

7. The Guarantor shall pay interest on money payable but unpaid under clause 5 of this Deed, until the date of payment, at the rate of interest specified from time to time to be payable in respect of unpaid judgments in the rules of the Supreme Court of the State or Territory in which the registered office of the Guarantor is situated.

Guarantor's obligations not to be prejudiced or diminished by certain matters

8. The Guarantor's obligations under this Deed are absolute and unconditional in any and all circumstances, and shall not be prejudiced, released, discharged, reduced or otherwise affected by anything (whether done by or on behalf of, or occurring with or without the consent of or notice to, the Guarantor, the Trustee, any beneficiary or any other person) including:
 - (a) any variation or novation of any agreement or arrangement between the Trustee and any other person;
 - (b) any act or omission by a beneficiary or any other person which prejudices, releases, waives, varies or delays its rights in respect of the Trustee or any security;
 - (c) any security becoming void, unenforceable or diminished;
 - (d) the principal contract between the Trustee and the Guarantor being illegal or void or becoming wholly or partially voidable or otherwise unenforceable;
 - (e) any beneficiary or other person becoming a party to or bound by a compromise, assignment, scheme of arrangement or reconstruction in relation to any superannuation entity of which the Trustee is trustee, or accepting any sum of money in relation thereto;
 - (f) any failure by any person to make any claim or exercise any of its rights in relation to the Trustee, the Guarantor or a security (whether such rights arise under this Deed or otherwise), and any delay or forbearance by any beneficiary in relation to the exercise of such rights;
 - (g) the revocation, cancellation or variation under the Act of the RSE licence held by the Trustee;
 - (h) the breach by the Trustee of any condition of the RSE licence held by the Trustee;
 - (i) the appointment of an investigator, an acting trustee, or other trustee in place of the Trustee pursuant to the general law or the provisions of any law of the Commonwealth or of any State or Territory;
 - (j) the appointment of any receiver, or receiver and manager or administrator or liquidator or provisional liquidator of the Trustee or of any superannuation entity of which the Trustee is trustee during the term of this

Guarantee, appointed pursuant to any law of the Commonwealth or of any State or Territory;

- (k) the winding up of the Trustee or the Guarantor;
- (l) any reorganisation or reconstitution of or change in the Trustee or the business of the Trustee including the entry by the Trustee into a partnership, joint venture or other joint enterprise or commercial relationship with any person;
- (m) any material change in circumstances affecting the Trustee or any transaction, agreement, arrangement or matter which is the subject of the guarantee or of any other covenant in this Deed;
- (n) the suspension or removal of the Trustee under Part 17 of the Act;
- (o) the winding up or dissolution or both of any superannuation entity of which the Trustee is trustee, under section 142 of the Act or otherwise;
- (p) any other fact, matter, circumstance or thing whatsoever which, but for this paragraph, would or might operate to prejudice, release, discharge, reduce or otherwise affect the Guarantor's obligations under this Deed (the preceding paragraphs of this clause not limiting by implication the scope of this paragraph);
- (q) any relief granted by a court under Part 17 of the Act or under any other relevant legislation or any term in the governing rules of a superannuation entity exempting or excusing the Trustee from breach of trust.

Indemnity

9. The Guarantor acknowledges that any liability of the Trustee to the Guarantor is incurred by the Trustee in its personal capacity only, and that the Guarantor will not be entitled to any right of indemnity out of the assets of the superannuation entity whether by way of subrogation or otherwise in relation to any rights that it has against the Trustee arising out of or in connection with this Deed or from any payment made under or pursuant to the Deed and will secure its rights against the Trustee over assets of the trustee or its related entities other than assets of the superannuation entity.

Revocation and variation

10. The guarantee given by this Deed shall not be varied or revoked except with the written consent of APRA, and only in such manner and subject to such conditions as APRA in writing allows, provided always that the Guarantor shall remain liable in respect of any rights that have fully or contingently accrued during the term of this Deed and irrespective of whether any demand has been made by or on behalf of the Trustee under Clause 5 of this Deed or otherwise.

Warranty of capacity to enter into and comply with Deed

- 11. The Guarantor warrants to the Trustee that it has all requisite authorities, rights and powers to enter into this Deed and to comply with the covenants in it.

Warranty that representations and promises have not been relied on

- 12. The Guarantor warrants that it has not entered into this Deed in reliance on or as a result of any representations or promises by the Trustee and that it has relied wholly on its own investigations and enquiries in deciding whether it would enter into this Guarantee.

Jurisdiction

- 13. This Deed shall be deemed to be made in the State or Territory where the Trustee has its registered office.

Notices

- 14. Written communications to the Guarantor contemplated by this Deed may be validly made by delivering or posting the communication to the registered office of the Guarantor or to such other address as the Guarantor shall nominate in writing.

Dated

SIGNED

<<The common seal of [Name of Guarantor] was affixed hereto in accordance with its Articles of Association in the presence of

.....
Director

.....
Director/Secretary

OR

<<In accordance with section 127 of the *Corporations Act 2001* by:

.....
Director

.....
Director/ Secretary

OR

By authority of the Board of the Guarantor under registered power of attorney number
<<insert number>>

>.....

<<signatory>>