



Risky Business: How to manage it all without losing it all

A practical guide for Directors: Deeds of Access,
Indemnity and Insurance

Foreword: Why we need to talk about risk

Against the changing Australian corporate landscape, effectively managing business risk remains the central role of board directors. Challenge and opportunity are invariably intertwined, and the Board is charged with executing the overall risk management framework of the company and at the same time making complete business decisions balanced against the risk appetite of the company.

Effective risk management is taking calculated risks in pursuit of commercial imperatives and consequences. It is also central to ensuring the company is engaging in sound business practices in accordance with the company's governance framework.

But what about you – how often are you considering your personal risk and liability in the course of your role?

Now more than ever, directors need to be across a more diverse portfolio of risks, with balance sheet considerations sitting alongside a plethora of risks including strategic, technology, brand and regulatory risks. As the role and responsibilities of Australian boards continue to evolve, companies and their directors are being held to greater account in the public arena for their decisions and the outcomes.

Reputations, hard earned and deserved, are being challenged by a less-trusting public, and those that inform them in a legal and regulatory environment that increasingly tests decisions made in difficult moments.

In this context, directors should be considering not just the seismic economic shifts that impact their roles and responsibilities, but also the underlying impact on their personal liability.

This guide explores the key considerations that directors should be carefully analysing as they enter the boardroom in terms of their personal liability.

Our PwC Non-Executive Director program recognises that directors wear 'Many Hats' in their positions. In supporting this objective, we have prepared this practical guide for directors to assist them to effectively manage their personal liability. Tools, such as a sample Deed of Access, Indemnity and Insurance, have been included to guide and assist directors to navigate the protections available to them.

We trust that you will find this guide useful.



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Introduction and Purpose

This guide is designed to assist Australian directors in understanding and managing the risk of their own personal liability as they take on a directorship.

Directors have a wide range of legal duties under federal legislation (such as the *Corporations Act 2001* (Cth) (**Corporations Act**)) and State legislation (such as the occupational health and safety laws of each State and Territory). A director may also be subject to additional legal duties where the company operates in specialised industries.

Directors are exposed to the real risk of being drawn into protracted and expensive legal or regulatory actions where there has been an alleged breach of their duties. Directors can be personally liable for fines and penalties and compensatory claims while incurring significant costs in defending or participating in such actions or inquiries.

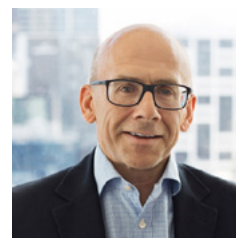
Indeed, regulators, shareholders and the community at large are increasingly scrutinising the conduct of directors. This is evident in the recent trend of directors being drawn into class actions against companies which can involve considerable time and expense for directors. Directors are often involved in these matters on the assumption (whether rightly or wrongly) that they should be personally accountable for all issues which occur within a company.

This trend has been exacerbated by the increasing availability of litigation funding in Australia, the willingness of dissatisfied shareholders to make such claims, and the heightened level of enforcement action by regulators against companies and their directors for alleged wrongdoing.

Given the ever-widening personal liability exposure of directors, how can such risks be appropriately managed to allow directors (particularly non-executive directors) to operate effectively and efficiently in an unpredictable market? This is a complex question. There is no single simple solution for directors to allow them to manage their risk of personal liability.

This guide seeks to assist directors in developing their risk management response in the context of the Deed of Access, Indemnity and Insurance (**Deed**) (and directors and officers liability (**D&O**) insurance), bearing in mind that while deeds are crucial, they are only one part of the risk management solution for directors.

In doing so, this guide takes the view that directors who fulfil their roles honestly, in good faith and for a proper purpose should be appropriately protected by the companies which they serve. Without such protection, few would be prepared to take on the role of directorship, and those who do would be incentivised to favour overly-conservative business decisions and processes over efficient and innovative alternatives which create value for their shareholders and the community.



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We have included in this guide a sample Deed. We invite you to use this guide and the sample Deed to increase your understanding of the protections potentially available to you through the use of an appropriate Deed.

We hope that you will find this guide to be a useful resource in assisting you to manage your risk of personal liability as a director. If you have any questions on any of the issues discussed in this guide, please feel free to contact us for assistance.

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1. Overview

This guide provides a practical overview of:

- a. the extent of a director's personal liability exposure in Australia;
- b. the purpose of the Deed of Access, Indemnity and Insurance (**Deed**);
- c. the legislative framework and the relevance of the Deed in relation to:
 - i. a director's access to company information;
 - ii. the indemnity that a company may grant in favour of a director (including statutory restrictions on such an indemnity);
 - iii. the D&O insurance that a company may take out, including the elements of the D&O insurance policy and ability of the company to pay the premium; and
- d. the shareholder and board approvals required to enter into a Deed.

A sample Deed, which is unashamedly 'director friendly', is attached for reference and is intended as an aid to assist directors in ensuring that they procure a form of Deed which appropriately provides them with protection from the significant risk of personal liabilities that they assume as directors.



2. Directors and their personal liability

In Australia, a director can be personally liable for acts and obligations of the company under a wide range of State and Federal legislation. In many cases, this liability can be unlimited in amount.

The legislation under which a director will typically be most 'at risk' are:

- a. the Corporations Act, which sets out the most fundamental of a director's duties, including to act with the same care and diligence as a reasonable person would be expected to show in the role, to act in good faith in the best interests of the company, to not improperly use their position to gain an advantage, to not improperly use the information they gain in the course of their director duties to gain an advantage;
- b. the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**), which regulates areas such as product liability, consumer protection and anti-competitive behaviour;
- c. occupational health and safety laws;
- d. taxation laws;
- e. workplace relation laws; and
- f. environmental protection laws.

A director may also be personally liable under specialised laws which govern specific industries in which the company operates (for instance, construction, mining, gaming, private health, pharmacies, commercial fishing, liquor).

Extent of liability

The extent of a director's liability exposure depends on the nature of the breach and the legal action or claim. The two common claims brought against directors are:

- a. compensatory claims where liability is based on a breach of director's duties under legislation or at common law (for instance, claims by third parties for negligent or restrictive trade practices, or insolvent trading); and
- b. regulatory claims where liability is based on regulatory investigations or actions (for instance, by the Australian Securities and Investments Commission (**ASIC**), or occupational health and safety or environmental protection agencies).

The result can be a director being personally liable for significant fines and/or compensation orders whilst incurring considerable costs in defending such claims or proceedings. Where there are serious breaches, a director could even be imprisoned.

Class actions

In addition to the above, a recent development in the personal exposure of Australian directors is the increasing trend of securities class actions.

Directors can be personally liable under a wide range of legislation.

Most of these class actions primarily relate to inaccurate earnings guidance, accounting misstatements and failure to disclose escalating debt levels or imminent insolvency. Claims generally allege the contravention of the continuous disclosure laws under the Australian Securities Exchange (**ASX**) Listing Rules, trading while insolvent and/or misleading and deceptive conduct under the Competition and Consumer Act.

The actions and decisions of courts, ASIC and legislature have supported the ability of consumers and shareholders to bring such actions. The arrival of sophisticated and well capitalised commercial litigation funders in Australia has also significantly enhanced the ability of shareholders to initiate such claims against companies and their directors by way of class actions.

Directors in Australia today (including non-executive directors) should therefore be prepared for the possibility that they will be drawn into actions and claims that may once not have involved them.

3. Directors and the Deed

Given the extensive personal risks that a director in Australia faces, risks must be effectively managed so companies can still attract and retain capable directors.

The constitution as a solution?

A company's constitution often contains an indemnity in favour of the directors. It often also permits the company to pay the company's D&O insurance policy premiums.

However, constitutions can be amended without a director's specific consent. The indemnity provided in constitutions also often ceases once the director vacates office.

From a director's perspective, it is far preferable to enter into a separate Deed with the company to protect him or her from amendments to the constitution (for instance, an amendment to delete the indemnity). The Deed can also provide that the director is covered for claims for a period of time after he or she vacates office. Such Deeds often also deal with important ancillary matters such as access to company documents, and requiring the company to procure and maintain D&O insurance.

The Deed of Access, Indemnity and Insurance as a preferred (but partial) solution

It has become standard practice in Australia for directors and companies to enter into Deeds of Access, Indemnity and Insurance to appropriately protect directors against the risks of personal liability which arise by virtue of their position. This practice is supported by the Corporations Act and the courts.

We generally recommend that companies and directors enter into such Deeds, as well as carefully negotiate or review the company's D&O insurance policy to ensure the Deed works in harmony with such policy. The Deed and D&O policy should also be regularly reviewed to ensure that it reflects best market practice. The elements of a D&O insurance policy are further discussed later in this guide.



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Most companies and directors contend a Deed of Access, Indemnity and Insurance is necessary to attract and retain competent directors.

For completeness, we note that directors and companies should of course have other measures in place to manage the risk exposure of directors (and the business risks of the company in general). This includes the company having appropriate risk management policies and procedures, and structuring the business to compartmentalise business risks (and personal liability exposure) where it is appropriate to do so. For instance, a business may set up separate limited liability subsidiaries with separate boards to manage certain activities or aspects of the business, and thereby reduce each board's direct oversight of operations to those managed by that particular subsidiary (and the head board's direct oversight to just the head company). A prospective director should also undertake due diligence on a company to ensure that he or she understands the corporate structure, scope of the business operations and key business risks, and to ascertain if the company has any compliance issues prior to taking up a directorship on its board.

A detailed consideration of these other measures falls outside the scope of this guide. That said, the use and role of the Deed should not be viewed in isolation to such measures. Directors and companies should regularly review the Deed and the company's D&O policy in the context of the strength of the company's overall governance and risk management architecture.

What is a reasonable level of protection under a Deed?

The scope of a Deed depends on the position agreed between a director and the company.

In recent years, Deeds have become increasingly sophisticated as directors become more focused on the issues for which they can be held accountable and their increased risk of potential personal liability. This has been exacerbated by the recent trend for courts to read down the indemnity in favour of the company and for insurers to seek to deny (or at least delay) coverage in contestable situations.

To determine the extent of protection offered under the Deed, the board should consider their fiduciary duties, the constitution, the Corporations Act, and whether entering into such a Deed is in the best interests of the company. Ultimately, whether the level of protection conferred under a Deed is 'reasonable' depends on the circumstances of the relevant company (including its resources and the legislation applicable to its industry) and the current market practice.

We consider the current prevalent market view to be that directors who fulfil their roles honestly, in good faith and for a proper purpose should be appropriately protected by the companies which they serve.

Directors, particularly of ASX-listed companies, are exposed to significant personal liability risks that can outweigh the value of their remuneration. This is particularly true given the recent trend in Australia of securities class actions involving directors. Without adequate protection, directors may be incentivised to be heavily risk-averse in managing the business at the expense of efficiency and innovation (and potentially, even at the expense of growing company value).

4. 'Risky Business' at a glance

Question	Answer	Section
Can directors be personally liable for the company's acts?	Directors can be personally liable under Federal and State based laws, including the Corporations Act, taxation, workplace health and safety, competition, and environmental laws. Criminal as well as civil penalties may apply. Securities class actions against directors are also a relatively recent trend in Australia.	2
Why is a Deed of Indemnity desirable?	Taking on a directorship exposes an individual to the risks of becoming involved in expensive legal actions. From a company's perspective, a Deed may be necessary to attract and retain competent directors. From a director's perspective, a Deed is necessary to protect him or her from such risks and to ensure that such protection may not be rescinded or amended without his or her consent (unlike an indemnity provided in a constitution).	3
Can a company enter into a Deed of Access, Indemnity and Insurance?	Companies may: <ul style="list-style-type: none"> • provide indemnities to directors within certain limits; • grant access rights broader than those contained in a company's constitution or the Corporations Act; and • provide for D&O insurance within certain limits. 	3, 7, 8
What does the sample Deed cover?	<p><i>Access to books:</i></p> <ul style="list-style-type: none"> • Directors are allowed access to company books throughout their tenure and for certain purposes for seven years after the end of the tenure. • Directors must treat all company books to which they have access as confidential and protect any legal professional privilege that may attach to any document except in certain cases set out in the Deed. <p><i>The company indemnifies a director against:</i></p> <ul style="list-style-type: none"> • any liability (other than legal costs) to the extent permitted by law; and • certain legal costs incurred in defending proceedings. <p><i>Insurance:</i></p> <ul style="list-style-type: none"> • The company agrees to maintain insurance to cover the director against certain liabilities incurred by the director in his or her role and for a period of seven years following the end of the tenure. • Post-retirement cover is important because D&O policies are taken out on a 'claims made' basis (i.e. the relevant policy for a director is the one held at the time a claim is notified). 	5, 6, 7
Are there any restrictions on the company providing an indemnity?	Companies may not indemnify a director for: <ul style="list-style-type: none"> • liabilities owed to the company or a related body corporate; • certain penalty or compensation orders; • liabilities owed to a third party from conduct not in good faith; • certain legal costs where the proceedings result in certain types of unfavourable decisions against the director; and • matters which contravene section 199A or 199B of the Corporations Act. 	6
Is shareholder approval required?	Shareholder approval is not required if: <ul style="list-style-type: none"> • the constitution authorises giving an indemnity to, and paying insurance premiums on account of, a director; and • giving such financial benefit is reasonable in the circumstances. 	8
Can a director vote on his or her Deed?	The Corporations Act generally disqualifies a director of a public company from voting where such a director has a material personal interest in the matter. However, the Corporations Act exempts Deeds from this restriction.	8

5. Access to company books

Existing rights

A director has existing rights of access to company books under the law (both at common law and under the Corporations Act). However, these rights are limited as to scope (e.g. they may extend only to financial records, or may be only for a specified purpose, such as for the purpose of defending a legal proceeding). Companies therefore often grant greater rights of access under a Deed.

At common law

At common law, a director has a general right to access and take copies of the company's records as necessary to enable the director to discharge his or her fiduciary or statutory obligations.

However, the director may only use company information for the purposes of the company. For example, if a director is being sued by the company for an alleged breach of duty owed to the company, it can be difficult for the director to demonstrate that access to documents (perhaps crucial to his or her defence) would be 'for the purposes of the company'.

Under the Corporations Act

The Corporations Act codifies certain rights of access for directors such that:¹

- a. a current director has a right of access to company books,² excluding financial records; and
- b. a former director has that same right for seven years after the director vacates office, including to financial records,

but in each case, only for the purpose of a legal proceeding to which a director is party, wishes to bring, or believes may be brought against him or her.

Under the Corporations Act, a current director also has a right of access to the company's financial records (which is not restricted by a specified purpose).³

Wider access rights under a Deed

Notwithstanding a director's existing rights of access at common law and under the Corporations Act, it is common for companies to grant wider access rights under a Deed.

That said, companies are often reluctant to provide unfettered access to company documents and access is commonly triggered by an adverse event (such as a regulatory investigation). In granting wider access, companies also often impose confidentiality obligations on directors subject to specified carve outs.

The sample Deed at the back of this guide sets out some illustrative provisions on this issue.

CI	Provisions of the sample Deed
2.1	Extends statutory access rights: for the purpose of any investigation or inquiry by any authority or external administrator of the company or related body corporate, or for any purpose in connection with an action involving the director as a party because of that director's position as a director of the company.
2.2	Manner of access: specifies where/when access will be granted (e.g. during business hours).
2.6	Confidentiality: imposes confidentiality obligation on the director, with specified carve outs (e.g. as necessary to obtain to prepare for any action; to the director's insurers).
2.7 to 2.9	Legal professional privilege: the company must notify the director of any privileged records. The director must not cause such privilege to be waived.

¹ See section 198F of the Corporations Act.

² Company books includes: a register; and any other record of information; and financial reports or financial records, however compiled, recorded or stored; and a document, but does not include an index or recording made under Subdivision D of Division 5 of Part 6.5 of the Corporations Act.

³ See section 290 of the Corporations Act.

6. Indemnity

A company may indemnify a director from any liability and legal costs incurred in his or her position as a director, subject to the restrictions set out in the Corporations Act. Many Deeds in Australia therefore provide indemnities 'to the maximum extent permitted by law' (which is the most attractive option for directors).

Under Section 199A of the Corporations Act, a company may **not** indemnify a director:

- a. in relation to a liability:
 - i. owed to the company or a related body corporate;
 - ii. for certain penalty or compensation orders; or
 - iii. owed to a third party which did not arise out of conduct in good faith; and
- b. in relation to legal costs incurred in defending or resisting proceedings:
 - i. in which the director is found liable for liability of the kind set out in paragraph (a);
 - ii. which are criminal and the director is found guilty; and
 - iii. brought by ASIC or a liquidator for a court order if the grounds for making the order are found to be established by the court.

Anything which purports to indemnify, insure or exempt a director from the above liabilities or legal costs will also be void to the extent of such indemnity, insurance or exemption.⁴

That said, Deeds of Indemnity often entitle directors to be indemnified for legal costs up to the time any adverse finding is made in the legal proceedings which prohibits such indemnification. If such an adverse finding is made, that director is then obliged to repay the amount of the legal costs to the company under the Deed.

The courts have supported this approach. As such, companies often enter into loan agreements with directors to fund legal costs pending the establishment of the director's right to be indemnified. Deeds of indemnity often include provisions governing such loan agreements and any subsequent repayments.

The sample Deed at the back of this guide sets out some illustrative provisions on this issue.

Extent of indemnity: A question of formulation

A Deed of Indemnity commonly indemnify directors for loss, liability, and costs and expenses incurred by such directors in their capacity as director.

In *NRMA v Whittlam [2007] NSWCA 81*, the Court determined that such an indemnity does not cover a director's costs in commencing a defamation proceeding against third parties (even if the underlying defamation arose out of events in which the director acted in his capacity as an officer). This is because the director in this case was found to have acted outside his capacity as a director in commencing such proceedings. The Deed was also found to not cover any loss from defamation.

This case illustrates the need for a Deed to be carefully drafted (and for directors to understand the scope of such deeds) to minimise the risk of any future disputes or misunderstandings over the coverage of the indemnity. For instance, see clause 3.3(c) of the sample Deed, which provides a limited ability for directors to commence actions against third parties under the indemnity.

⁴ See section 199C of the Corporations Act.

CI	Provisions of the sample Deed
3.1	Indemnity for liabilities: the company indemnifies the director against liabilities (other than legal costs) to the maximum extent permitted by law.
3.2	Indemnity of legal costs: the company indemnifies the director for legal costs to the maximum extent permitted by law, including where the outcome of an action is not yet known, but excluding costs incurred where the outcome of certain litigation is unfavourable.
3.3	No double: applies to the extent the director is not actually indemnified by a third party (including an insurer). Conduct obligations: indemnity is limited to the extent that the director has not complied with certain notification/conduct obligations. No indemnity or loan: for actions between the company/subsidiary and the director.
3.5	Obligations: the director has notification, mitigation and reasonable assistance obligations.
5.1	Disputed claim: the company will pay for legal costs in connection with proceedings brought by the director against the D&O insurer where the insurer disputes that claim.
6.1	Payment on demand: the company must pay amounts due on demand by the director.
6.3	No expense/payment: No expense or payment needs to be incurred or made before a director enforces the indemnity.
6.5	Advancement of funds: pending the final outcome of the claim (and whether the director may be indemnified under the Deed), the company must cover the reasonable legal costs incurred by the director in defending proceedings.
6.5	Repayment: a director must repay costs for which he is not entitled to be indemnified.
7	Independent advice: a director may obtain independent professional advice to support his or her duties to the company, and the company must pay the reasonable costs of such advice.



7. D&O insurance

It is now also standard practice for companies in Australia to have D&O insurance policies in place. A D&O insurance policy is a liability insurance payable to the director and/or the company which effectively indemnifies the director against certain loss and costs arising from his or her ‘wrongful acts’ done (or not done) in his or her role as a director.

From a director’s perspective, it is desirable for the company to have a robust D&O insurance policy in place, as this ensures that the director remains indemnified even if the company has insufficient funds to meet a claim or if the company is deregistered.

Deeds of indemnity in Australia therefore generally include provisions on the company taking out an appropriate D&O policy for a period of time after a director leaves his or her position. The sample Deed at the back of this guide sets out some illustrative provisions on this issue.

Coverage under D&O insurance policies

As mentioned above, a D&O insurance policy indemnifies a director against certain loss and costs arising from his or her ‘wrongful acts’.

CI	Provisions of the sample Deed
4.1	Seven years: the company must take out D&O insurance from the time of his or her appointment until 7 years after he or she ceases to be a director.
4.2	Provide details: the company must provide a copy of the D&O insurance policy and other relevant documents on the director’s request.
4.3	Additional D&O: the director may obtain his or her own D&O insurance and seek reimbursement for payment of the premium. NB: this is a more unusual provision and is director-friendly.

The scope of what is considered a ‘wrongful act’ depends on the insurer and industry. A typical definition includes any actual or alleged breach of duty, breach of trust, neglect, error, misstatement, misleading statement, omission, breach of warranty of authority or other act done by any insured persons or any liability asserted against them solely because of their status as directors.

A number of standard exclusions typically restrict the coverage, such as for loss arising from certain conduct of the insured persons (e.g. wilful breach, or dishonest and fraudulent acts), prospectus liability exclusions, professional services exclusion, bodily injury and property damage exclusion, insolvency exclusion, professional indemnity exclusions, environmental liability exclusion, occupational health and safety exclusion, and exclusions for prior acts which occurred prior to the policy which the insured knew, or ought to have reasonably known, was likely to give rise to the claim.

D&O policies also often contain an ‘insured against insured’ exclusion which is likely to prevent directors from obtaining cover against claims brought by the company against the director.

Australian courts have been generally supportive of policyholders who need their assistance to resolve claims. Ultimately, such resolutions turn on the policy wording. Given D&O insurance policies can vary greatly in terms of coverage, directors should closely review and negotiate the proposed policy to ensure that coverage is adequate (and consistent with the Deed).



Claimants in NSW do not have a right to the defendants' insurance proceeds

Until recently, it was unclear in NSW whether third party claimants could obtain a statutory charge over all the liability insurance policy proceeds of a defendant. New Zealand case law (based on NZ legislation equivalent to the NSW legislation) supports such claimants, thereby allowing claimants to effectively freeze policy proceeds and prevent insurers from advancing defence costs to defend the claims upon which the funds had been frozen.

NSW legislative changes in June 2017 resolved this issue by providing that claimants have a right to claim directly against insurers (subject to pre-conditions), but **excluding** the defence costs payable to the defendant.

This legislative change has preserved an insured's access to the policy proceeds for its defence costs in NSW. It remains to be seen whether the ACT and the Northern Territory (which have equivalent legislation to the former NSW legislation) will enact similar legislative changes.

Overview of components of D&O insurance policies

D&O insurance policies typically include 'Side A' and 'Side B' cover. A brief overview of these covers is set out in the table below.

	'Side A' cover	'Side B' cover	'Side C' cover
Component	Direct cover.	Company reimbursement.	Company securities.
Included?	Usually included in D&O.	Usually included in D&O.	Inclusion in D&O not recommended.
Insured	Director (or officer).	The relevant company.	The relevant ASX-listed company.
Typical coverage	Liabilities incurred in their role as director, and costs from defending claims or representation at certain types of investigation.	Losses arising from indemnities provided to directors and officers.	Liability for claims made in relation to its securities e.g. continuous disclosure, breaches of trade practices legislation, securities market conduct breaches etc.
Excess	Usually none. Side A cover operates where the company can't indemnify the director (e.g. under Side B cover).	Usually has an excess. In practice, most claims against directors are dealt with under Side B.	Cover will reduce the policy limits which are for the benefit of the directors. See further discussion over the page.

For ASX-listed companies, D&O insurance policies can also offer the option of including 'Side C' cover.

We typically strongly recommend **against** including 'Side C' cover in a company's D&O insurance. This is because including 'Side C' cover can quickly reduce the policy limits which are for the benefit of the directors. This can happen when, for instance:

- a. a securities class action reduces the proportion of limit available for individual directors after it consumes part of the combined aggregate limit in defence of the company itself (note that a director's liability is not necessarily extinguished even when claimants settle with the company); and/or
- b. if the company becomes insolvent, liquidators apply to attach and apply the policy proceeds to the company's liabilities, which has the effect of reducing the directors' access to the policy in relation to their personal liabilities.

As discussed earlier in this guide, the number of securities class actions against companies have been increasing recently, making the above concerns a real risk. Given this, we typically recommend (particularly from a director's perspective) that companies purchase 'Side C' cover as a stand-alone policy from its D&O insurance.

Can the company pay the insurance premium?

Companies can pay the D&O insurance premium, but **only if** the underlying insurance policy does not cover liabilities prohibited under the Corporations Act.

Section 199B of the Corporations Act prohibits a company for paying a premium for insurance against directors' liability (other than for legal costs) to a company or a third party where the liability arises out of:

- a. conduct involving a wilful breach of duty in relation to a company; or
- b. a breach of sections 182 or 183 of the Corporations Act, which imposes civil obligations upon directors not to misuse their position or information they have obtained in their capacity as a director.

Note that where there is a single premium for an insurance policy which covers prohibited liabilities, the above statutory prohibition is not necessarily avoided by the directors paying an arbitrary proportion of that single premium (for instance, one per cent of that premium) on the argument that this one per cent payment carves out the 'premium' relating to the prohibited coverage (and the remaining 99 per cent of the premium can therefore be legitimately paid by the company without breaching section 199B).

This argument has never been tested in court, and there is a real risk that a court may find that the premium paid by the company includes or subsidises the prohibited coverage. Instead, it is preferable that the insurer specifies a separate premium for the insurance policy which covers the prohibited liabilities, which the directors can then pay themselves without the company's assistance (and therefore without the company breaching section 199B).

The problem with 'Priority of Payment' provisions

Some D&O insurers include provisions in policies known as 'Priority of Payments' or 'Order of Payments' clauses, which can prioritise the policy proceeds to favour directors and officers over the company when claims are made against both.

However, depending on the drafting, these clauses **do not** necessarily protect policy limits for the benefit of directors. For instance, a claim could be first made against the company (and erode most of the policy limit) before a claim is made against the director. We recommend that you discuss this issue with your broker in connection with the review of your D&O insurance arrangements.



8. Approvals and legal representation

Provided the company's constitution contains the requisite authority and the board considers it reasonable in the circumstances, a company may enter into a Deed without shareholder approval.

Is shareholder approval required to approve a Deed as a financial benefit?

Shareholder approval is not required if the company's constitution authorises the giving of an indemnity to a director, and paying insurance premiums on account of a director. It is common for constitutions in Australia to authorise such matters.

However, if a company's constitution does not authorise such matters, then either the constitution will have to be amended to give the requisite authority, or a general meeting may need to be held to approve such matters.

Is shareholder approval required to approve the Deed as a related party transaction?

Shareholder approval is not required if the company's entry into the Deed is reasonable.

A Deed of Access, Indemnity and Insurance between a company and a director constitutes the company giving a financial benefit to a related party, which would ordinarily require shareholder approval. However, section 212 of the Corporations Act exempts the requirement for shareholder approval if giving the benefit would be reasonable in the circumstances.

In determining whether the company's entry into a Deed is reasonable, the board may consider:⁵

- a. the company's ability to retain and attract high calibre directors;
- b. market practice;
- c. the company's ability to revoke the future operation of the indemnity;
- d. the balance in the Deed;
- e. the constitution (i.e. whether giving an indemnity is permitted);
- f. whether the Deed contains a qualified obligation on the company to pay insurance premiums; and
- g. whether an insurance policy is in place which substantially covers the liabilities which are the subject of the indemnity (e.g. D&O insurance policy, professional indemnity insurance), and/or whether the indemnity only arises to the extent the director's liability is not indemnified by a third party.

Note: It is not relevant whether giving a director access to the company's books is 'reasonable', as such access does not itself amount to a 'financial benefit'.

⁵ Section 212(3) of the Corporations Act sets out the timing for assessing whether a benefit is reasonable, being the circumstances existing:

- if the benefit is given under an agreement – at the time the agreement is made; and
- if the benefit is not given under an agreement – at the time the benefit is given, and disregarding any other financial benefit given or payable to the director by the company.

Can a director of a public company vote on his or her Deed?

While directors of public companies generally must not vote on matters in which they have a material personal interest, section 191(2) of the Corporations Act exempts interests which relate to a D&O insurance policy (provided the contract does not make the company or related body corporate the insurer), or which relate to any lawful indemnity to a director.

Does a director need to obtain separate legal representation?

There is an inherent tension or conflict between the interests of the directors and the interests of the company in providing a Deed. Consideration should be given as to whether the company and the individual directors (or the board collectively) should be separately represented during the drafting, negotiation and approval of the Deed.

However, this is not strictly a necessity and depends on the approach adopted. In our view, the company should strive to strike a reasonable and fair balance between its interests and those of the directors.





9. Conclusion

Deeds of access, indemnity and insurance are commonly used in Australia to appropriately protect directors against the significant risks of personal liability. In determining whether to enter into such Deeds (and the scope of such Deeds), companies and directors should carefully consider the issues discussed in this guide and seek appropriate professional advice as required.

Companies and directors should also regularly review such Deeds and the company's D&O insurance policy together with the company's constitution to identify any inconsistencies or gaps in coverage, and to ensure the Deed and D&O policy reflects current and best market practice. In particular, D&O insurance policy wordings should be carefully negotiated to minimise the risk of any future disputes or uncertainty around coverage, and to ensure that the terms of the Deed are not in conflict or inconsistent with the D&O insurance policy.

If you have any questions on any of the issues discussed in this guide, please feel free to reach out to us.

Appendix: A sample Deed of Access, Indemnity and Insurance

Introductory Explanatory Notes

This sample Deed has been prepared with the view that directors who fulfil their roles honestly, in good faith and for a proper purpose should be appropriately protected by the companies which they serve.

As such, the sample Deed attached is unashamedly 'director friendly'. Companies and directors may use the sample Deed as a starting point to consider the issues of access, indemnity and insurance with a view to manage the significant liabilities which directors assume.

This sample Deed also includes footnotes to highlight particular clauses or issues which may attract greater consideration on whether to include alternative or additional provisions.

Directors and companies should carefully consider whether the provisions of this sample Deed are suitable or appropriate in the context of their specific circumstances prior to using any part of it and ensure the terms align with the D&O insurance policy. Directors should seek independent legal advice as appropriate.

Note that while this guide does not specifically discuss the rights of company officers other than directors, the company may also enter into a Deed of Access, Indemnity and Insurance with other company officers and senior executives. Indeed, the sample Deed contemplates that the company secretary and/or public officer may also be a counterparty to the Deed. These individuals are likely to find it attractive to enter into such a Deed, particularly since the rights of directors do not always extend to other officers of the company, and a Deed allows such rights to be formally granted.

Overview

Under the sample Deed, the company:

- grants wider access rights than contained at common law or under the Corporations Act;
- indemnifies the relevant counterparty officer; and
- agrees to obtain D&O insurance to cover the relevant counterparty officer.

A sample Deed of Access, Indemnity and Insurance has been included to supplement the material in this guide.

This sample Deed is provided for illustrative purposes only and legal advice should be sought before using any part of the sample Deed.

An overview of the key provisions is set out below.

Key terms	Overview	Clause
Access		
Purpose	The officer may access company books for the purpose of dealing with an investigation or inquiry by an authority or external administrator.	2.1
Manner	Specifies where/when access will be granted (e.g. during business hours).	2.2
Confidentiality	Imposes confidentiality obligation on the officer, with specified carve outs	2.6
Privilege	The company must notify the officer of any privileged records. The officer must not cause such privilege to be waived.	2.7 to 2.9
Indemnity		
Period covered	Unlimited. NB: if the company has insufficient funds or is deregistered, this will impact on the indemnity's enforceability.	3
Monetary cap	None.	3
For liabilities	The company indemnifies the officer against liabilities (other than legal costs) to the maximum extent permitted by law.	3.1
For legal costs	The company indemnifies the officer for legal costs to the maximum extent permitted by law, including where the outcome of an action is not yet known, but excluding costs incurred where the outcome of certain litigation is unfavourable.	3.2
Limitations	No double cover: indemnity only applies to the extent the officer is not actually indemnified by a third party (including an insurer). Conduct obligations: indemnity is limited to the extent that the officer has not complied with certain notification/conduct obligations. No indemnity or loan: for actions between the company/subsidiary and the officer.	3.3
Obligations	The officer has notification, mitigation and reasonable assistance obligations.	3.5
Disputed claim	The company will pay for legal costs in connection with proceedings brought by the officer against the D&O insurer where the insurer disputes that claim.	5.1
Payment	The company must pay amounts due on demand by the officer.	6.1
Enforcement	No expense/payment needs to be incurred/made before the officer enforces the indemnity.	6.3
Advancement	Pending the final outcome of the claim (and whether the officer may be indemnified under the Deed), the company must cover the reasonable legal costs incurred by the officer in defending proceedings.	6.5
Repayment	An officer must repay costs for which he is not entitled to be indemnified.	6.5
Advice	An officer may obtain independent professional advice to support his or her duties to the company, and the company must pay the reasonable costs of such advice.	7
Insurance		
Period covered	From time of appointment until 7 years after vacating office.	4.1(a)
Disclosure	The company must provide a copy of the D&O insurance policy and other relevant documents on the officer's request.	4.2
Officer's reimbursement entitlements	Insurance premiums and related costs (including, as an option, the officer's own D&O insurance). Legal costs in connection with proceedings against a D&O insurer where the insurer disputes a claim made by the officer.	4.1(a)(iv) 4.3(c) 5.1

A Sample Deed of Access, Indemnity And Insurance

For illustrative purposes only.

For demonstrative purposes only

Date

[Insert Date]

Parties

Name [insert name of company]
 ACN [insert ACN]
 Description **Company**
 Notice details [insert address of company]
 Email: [insert details]
 Attention: [insert details]

Name [insert name of Officer]
 Description **Officer**
 Notice details [insert address of Officer]
 Email: [insert details]

Background

- A. The Officer has agreed to act as a director, secretary and/or public officer (as applicable) of the Company and the Relevant Subsidiaries.
- B. The Company wishes, amongst other things, to give the Officer access to certain documents and indemnify and insure the Officer on the terms of this Deed.
- C. To the extent that the benefits given to the Officer under this Deed are financial benefits, the parties consider them to be reasonable in the circumstances of the Company.⁶
- D. Nothing in this Deed is intended to replace or reduce the Officer's duties to the Company or a Relevant Subsidiary under any law.

⁶ See section 8 of this guide for further discussion on this point.

This Deed Witnesses

1. Definitions and interpretation

1.1. Definitions

In this Deed, unless the context requires otherwise:

Access Period means the time on and from the Appointment Date and ending on the later of:

- (a) seven years after the Cessation Date; or
- (b) where an Action is commenced prior to the date referred to in paragraph (a), the date of final determination of the Action.

Action means any actual, threatened or reasonably apprehended action, claim, demand, proceeding, investigation, inquiry, examination, subpoena, notice to produce a document, notice requiring disclosure of information or hearing (whether criminal, civil, administrative or judicial), writ, summons, application or other originating legal or arbitral process, cross claim or counterclaim (or any procedural step preceding or otherwise related to the foregoing) arising out of or in any way connected to any act or omission of the Officer, or involving or likely to involve the Officer as a party (including where the Officer is called to appear or give evidence) because the Officer is or was a director, secretary and/or public officer (as applicable) of the Company or a Relevant Subsidiary.

[Additional D&O Insurance has the meaning given in clause 4.3.]

Appointment Date means:

- (a) when used in relation to the Company, the earliest date of appointment of the Officer as a director, secretary or public officer (as applicable) of the Company; and
- (b) when used in relation to a Relevant Subsidiary, the earliest date of appointment of the Officer as a director, secretary or public officer (as applicable) of the Relevant Subsidiary.

Appointment Period means the period on and from the Appointment Date to the Cessation Date.

APRA means the Australian Prudential Regulation Authority.

ASIC means the Australian Securities and Investments Commission.

ASX means ASX Limited (ACN 008 624 691) or the securities market which it operates, as the case may be.

Authority means:

- (a) ASIC, APRA and ASX; and
- (b) any Government Agency;
- (c) an instrumentality agent or appointee of the Crown in right of the Commonwealth, in right of a State or in right of a Territory or the equivalent of any of them in any other jurisdiction; and
- (d) any other body exercising statutory or prerogative power.

Board means the board of directors of the Company or a Relevant Subsidiary, as applicable.

Board Papers means all documents given or made available to the Board or tabled at meetings of the Board (including board papers, submissions, minutes, letters, board committee and sub-committee papers, advices and reports) and any other documents in the possession of the Company or a Relevant Subsidiary, as applicable, which are referred to (directly or by implication) in those documents.

Business Day means a day that is not a Saturday, Sunday, a public holiday or bank holiday in [Sydney/Melbourne/specify other].

Cessation Date means:

- (a) when used in relation to the Company, the latest date on which the Officer ceases to be a director, secretary or public officer (as applicable) of the Company; and
- (b) when used in relation to a Relevant Subsidiary, the latest date on which, the Officer ceases to be a director, secretary or public officer (as applicable) of the Relevant Subsidiary.

Company Books means registers, financial reports and records, documents and other records of information of the Company or a Relevant Subsidiary, as applicable, and Board Papers.

Constitution means the constitution of the Company or a Relevant Subsidiary, as applicable.

Controller has the meaning given in the Corporations Act.

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

D&O Insurance means:

- (a) the insurance policy provided by and maintained with a reputable insurer for the benefit of (amongst others) the Officer, and reasonably acceptable to the Officer, which insures the Officer against Liability for acts or omissions of the Officer in the Officer's capacity (or, as the case may be, former capacity) as a director, secretary or public officer (as applicable) of the Company and each Relevant Subsidiary other than an Excluded Liability;
- (b) [any Additional D&O Insurance;] and
- (c) each contract of insurance which is a renewal or replacement of the policy in paragraph[s] (a) [and (b)], whether with the same insurer or a replacement insurer.

Deed means this deed of access, indemnity and insurance.

Excluded Liability means a Liability which the Company is prohibited by law (including section 199B of the Corporations Act) from insuring against.

External Administrator means a liquidator, provisional liquidator, Controller or an administrator.

Government Agency means, whether domestic or foreign:

- (a) a government, whether federal, state, territorial or local or a department, office or minister of a government acting in that capacity; or
- (b) a commission, delegate, instrumentality, agency, board, or other government, semi government, judicial, administrative, monetary or fiscal body, department, tribunal, entity or authority, whether statutory or not, and includes any self-regulatory organisation established under statute or any stock exchange.

GST means "GST" as defined in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Liability means a liability of whatsoever nature and howsoever and whensoever arising, whether actual or contingent, present or future, quantified or unquantified.

Legal Costs means a Liability comprising legal costs or expenses, and may include any other reasonable and necessary fees and expenses incurred by the Officer with the consent (such consent not to be unreasonably withheld or delayed) of the Company.⁷

Related Body Corporate has the meaning given in the Corporations Act.

Relevant Subsidiary means each Subsidiary [and Related Body Corporate] of the Company of which the Officer is or has been a director, secretary or public officer (as applicable).⁸

[Shareholders Agreement means the shareholders agreement dated [insert] between [insert] and [insert] in relation to the shares in the Company.]⁹

Subsidiary has the meaning given in the Corporations Act. For the purposes of this Deed, a body corporate is also a Subsidiary of the Company if the Company is the ultimate holding company of that body corporate.

Tax means:

- (a) a tax, levy, charge, impost, deduction, withholding or duty of any nature (including stamp and transaction duty and GST) at any time imposed or levied by any Government Agency or required to be remitted to, or collected, withheld or assessed by, any Government Agency; and

⁷ Alternatively, the Company may prefer Legal Costs to be defined as all reasonable costs and expenses (including legal) which are agreed in writing by the Company (such consent not to be unreasonably withheld).

⁸ Note this definition assumes that the obligations of the deed should extend to all group entities. This definition should be refined if it is intended that only certain group members are to be bound by this deed.

⁹ This is referred to in clause 2.6(a)(iv). Delete if there is no Shareholders Agreement.

(b) any related interest, expense, fine, penalty or other charge on those amounts, and includes any amount that a person is required to pay to another person on account of that other person's liability for Tax.

Third Party means a person other than the Company or a Relevant Subsidiary and includes an insurer.

1.2. Interpretation

In this Deed, headings and boldings are for convenience only and do not affect the interpretation of this Deed and, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of a word or phrase defined in this Deed have a corresponding meaning;
- (d) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency;
- (e) no provision of this Deed will be construed adversely to a party solely on the ground that the party was responsible for the preparation of this Deed or that provision;
- (f) when the day on which something must be done is not a Business Day, that thing must be done on the [following/preceding] Business Day;
- (g) in determining the time of day where relevant to this Deed, the relevant time of day is the time of day in the place where the party required to perform the obligation is located; and
- (h) a reference to:
 - (i) any thing (including any right) includes a part of that thing but nothing in this clause 1.2 implies that performance of part of an obligation constitutes performance of the obligation;
 - (ii) a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this Deed and a reference to this Deed includes any annexure, exhibit and schedule;
 - (iii) a statute, regulation, proclamation, ordinance or by law includes all statutes, regulations, proclamations, ordinances or by laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by laws issued under that statute;
 - (iv) a document includes all amendments or supplements to, or replacements or novations of, that document;
 - (v) a party to a document includes that party's successors and permitted assigns;¹⁰
 - (vi) an agreement other than this Deed includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
 - (vii) proceedings includes litigation, arbitration and investigation;
 - (viii) time is to [Sydney/Melbourne/specify other] time;
 - (ix) "business hours" is to the hours during which the Company is open for business, being at least [9:00am to 5:30pm] on Business Days;
 - (x) a document includes any agreement in writing, or any certificate, notice, instrument or other document of any kind;
 - (xi) "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
 - (xii) "law" includes legislation, the rules of the general law, including common law and equity, and any judgment order or decree, declaration or ruling of a court of competent jurisdiction or Government Agency binding on a person or the assets of that person; and

¹⁰ Remember that whether an assign of a party or its successor is bound by a document, will be a matter of law or contract and cannot be affected by this interpretation provision.

(xiii) a monetary amount is a reference to **[Australian Dollars]**.

- (i) If there is any conflict or inconsistency between the provisions of this Deed and the terms of engagement of the Officer as a director, secretary and/or public officer (as applicable) of the Company or a Relevant Subsidiary, this Deed prevails to the extent of the conflict or inconsistency.

2. Company Books¹¹

2.1. Right of access

- (a) The Company acknowledges the Officer's rights to access and make copies of the Company Books under the Corporations Act and agrees to extend those rights by extending the authorised purposes of those rights during the Access Period to:
- (i) the purpose of any investigation or inquiry by any Authority or External Administrator:
 - (A) into the affairs of the Company or a Relevant Subsidiary during the time that the Officer is or was an director, secretary or public officer (as applicable) of the Company or a Relevant Subsidiary; or
 - (B) relating to, arising out of or in any way connected to an Action;
 - (ii) any purpose which is in connection to an Action; or
 - (iii) any other proper purpose relevant to the Officer's present or former capacity as a director, secretary or public officer (as applicable) of the Company or a Relevant Subsidiary and approved by the Board.
- (b) Nothing in this Deed limits or restricts any other rights of access to Company Books that the Officer may have independently of this Deed (including under the Corporations Act).
- (c) The Company acknowledges that monetary damages alone would not be adequate compensation to the Officer for the Company's breach of its obligations under this clause 2 and that, accordingly, specific performance of those obligations is an appropriate remedy.

2.2. Access to Company Books

- (a) Subject to clause **[s 2.3 and]** 2.4, during the Access Period, the Company must:
- (i) upon receiving reasonable notice from the Officer (specifying the reason for the request), allow the Officer and/or any person nominated in writing by the Officer, at no cost to the Officer, access to those Company Books that relate to the Officer's Appointment Period:
 - (A) as soon as practicable at any time during business hours (or otherwise outside business hours as agreed between the Company and the Officer); and
 - (B) at the Company's registered office (or otherwise at a place agreed between the Company and the Officer);
 - (ii) at the Officer's reasonable request, provide to the Officer, at no charge and as soon as practicable, copies of those Company Books that relate to the Officer's Appointment Period; and
 - (iii) procure each Relevant Subsidiary to do what is required under clauses 2.2(a)(i) and 2.2(a)(ii).
- (b) If the Officer is not resident where the Company's registered office is located, the Company must use all reasonable endeavours to provide any requested Company Books to the Director electronically or physically in the place where the Officer is resident (and procure that each Relevant Subsidiary does the same in respect of the Company Books of that Relevant Subsidiary).

¹¹ It is important that the Officer has a clear right to access company documents, as these can provide the Officer with evidence required to defend themselves.

That said, if the Company prefers to have greater control over the access rights, further clauses may be included which entitle the Company to refuse or impose conditions on such access e.g. where the board determines that:

- the purpose for the access is other than for a permitted purpose;
- access could reasonably be expected to jeopardise the company's ability to claim legal privilege; and/or
- access would cause the company to breach an obligation of confidentiality etc.

The Company may also wish to include provisions which prescribe the manner and content of an Officer's inspection request e.g. such request must be in writing and state the reasons for the request.

- (c) The Company must comply with an access request from the Officer made during the Access Period in accordance with clause 2.2(a) even if the inspection or copies only become possible or available after expiry of the Access Period.
- (d) Access by an Officer's nominated person under clause 2.1(a)(i) is subject to that person agreeing to maintain confidentiality in a manner acceptable to the Company.

2.3. [Access after Cessation Date]¹²

Despite anything to the contrary in this Deed and unless the Board agrees otherwise, during the Access Period and after the Cessation Date, the Officer will have the right to access, and take copies of, the Company Books in accordance with clause 2.2 only if:

- (a) the Officer is, or is likely to be, defending or appearing in an Action; and
- (b) the Officer requests access to the Company Books solely for the purpose of obtaining advice for, defending or preparing to defend, or appearing or preparing to appear in that Action.]

2.4. Obligation to retain

During the Access Period, the Company must keep (and must procure each Relevant Subsidiary to keep):

- (a) a complete set of Board Papers that relate to the Appointment Period in both hard copy and electronic form (in a commonly used electronic form); and
- (b) the Company Books other than Board Papers in accordance with the ordinary course document management policies of the Company or the Relevant Subsidiary, as applicable.

2.5. Maintenance of Company Books

The Company must, and must procure each Relevant Subsidiary to:

- (a) store or file the Company Books in a secure place and in a systematic and organised manner;
- (b) have document management policies in place and ensure compliance with such policies; and
- (c) on the Officer's written request, inform the Officer about the document management policies and system of the Company or the Relevant Subsidiary, as applicable.

2.6. Confidentiality undertakings by the Officer

The Officer must:

- (a) keep the Company Books confidential except that the Officer may, subject to clause 2.8, disclose:
 - (i) those parts of the Company Books which are relevant to an Action in relation to which the Officer was given access to the Company Books;
 - (ii) the Company Books as required by law, or the rules of any stock exchange or any order of a court;
 - (iii) the Company Books to discharge their duties as director, secretary or public officer (as applicable) of the Company;
 - (iv) information in the Company Books that is [permitted to be disclosed under the Shareholders Agreement, or] available publicly otherwise than because the Officer contravened this Deed or any other obligation of confidentiality;
 - (v) the Company Books to the Officer's insurers in connection with effecting, maintaining or complying with the terms of an insurance policy, where the recipient has agreed prior to receipt of the Company Books to maintain confidentiality in a manner acceptable to the Company (acting reasonably); and
 - (vi) information in the Company Books that was made known to the Officer, prior to any disclosure by the Officer, by a person other than a Company or any of its Relevant Subsidiaries, so long as the Officer reasonably believes that the person did not acquire or disclose the information in or by a breach of obligation of confidentiality owed to a Company or any of its Relevant Subsidiaries; and
- (b) use the Company Books to which access has been given only for the requested purpose.

¹² The Officer may prefer to delete this clause 2.3.

2.7. Notification of privileged documents

If access is given under this clause 2, in respect of any Company Books which are the subject of legal professional privilege in favour of the Company or a Relevant Subsidiary, the Company must promptly notify the Officer:

- (a) that a document to which the Officer is to be given or has been given access is the subject of legal professional privilege in favour of the Company or a Relevant Subsidiary; and
- (b) of the general nature of acts, omissions or conduct that could cause that privilege to be waived, extinguished or lost.

2.8. Legal professional privilege

- (a) The Officer's right to access and take copies of the Company Books under this Deed extends to documents and information to which legal professional privilege attaches in respect of the Company or a Relevant Subsidiary, except for advice obtained by the Company or a Relevant Subsidiary in relation to an Action brought by or made by:
 - (i) the Company or a Relevant Subsidiary against the Officer; or
 - (ii) the Officer against the Company or a Relevant Subsidiary.
- (b) Where any Company Book contains documents or information to which legal professional privilege in respect of the Company or a Relevant Subsidiary attaches, the disclosure of such documents or information to the Officer is not a waiver of such legal professional privilege.
- (c) The Officer must not do anything to waive the legal professional privilege in respect of the Company or a Relevant Subsidiary which attaches to any document or information in any Company Books, or cause it to be waived, without the prior written consent of the Company or a Relevant Subsidiary, as applicable.

2.9. Return of documents

On request from the Company at any time after the permitted purpose for accessing or copying the Company Books ceases, the Officer must return (and must procure that their legal advisers return) to the Company all copies of Company Books provided to or made by the Officer or their legal advisers for that permitted purpose.

2.10. Access to Company Books on winding up

If:

- (a) an External Administrator has been appointed to the Company (or any of its Relevant Subsidiaries); and
- (b) the Officer has a legitimate concern as to the ability of the Company (or that Relevant Subsidiary) or the External Administrator to continue to observe the Company's obligations under this clause 2,

the Officer may make a request in writing to the External Administrator for a copy of the Company Books of the Company (or any of its Relevant Subsidiaries) to be retained by the Officer.

3. Officer's indemnity

3.1. Liabilities other than Legal Costs

The Company must indemnify the Officer against any Liability (other than Legal Costs, which are dealt with in clause 3.2) in connection with their role as director, secretary or public officer (as applicable) of the Company or a Relevant Subsidiary, other than any Excluded Liability.

3.2. Legal Costs

- (a) The Company must indemnify the Officer against Legal Costs, not limited to taxed costs, incurred by the Officer as a director, secretary or public officer (as applicable) of the Company or a Relevant Subsidiary,¹³ including Legal Costs incurred:
 - (i) in defending or resisting an Action where the outcome of the Action is not yet known; and
 - (ii) in responding to actions taken by an Authority or an External Administrator as part of an investigation before commencing an Action for a court order,

¹³ Where the Officer and/or the Company intend this indemnity to cover a broad range of scenarios or specific actions, consider setting out these situations or actions in which an Officer should be deemed to be acting in his or her capacity as an Officer. See the earlier discussion of *NRMA v Whitlam* [2007] NSWCA 81 in section 6 of this guide.

but excluding Legal Costs which the Company is precluded by law from indemnifying the Officer.

- (b) For the purposes of this clause 3.2, the outcome of an Action is the outcome of the Action and any appeal in relation to the Action.

3.3. Limitations

- (a) **Excess only:** Despite any other provisions of this clause 3, the indemnities in this clause 3 will only apply to the extent that the Officer is not entitled to be indemnified by a Third Party and is not actually indemnified by a Third Party.¹⁴
- (b) **Reporting and conduct obligations:** The indemnities in this clause 3 will be limited to the extent that the Officer has not complied [in a material respect] with the Officer's obligations under clause 3.5 [and has not taken action as soon as reasonably practicable to rectify the breach following written notice from the Company alleging the breach].¹⁵
- (c) **Prior agreement:** Where the Officer intends to instigate or has instigated an Action, payment for costs referred to in clause 3.2 will only be made where:
- (i) the Officer has given the Company reasonable details of the proposed Action;
 - (ii) subject to clauses 3.3(d) and 3.7, the Company acting reasonably and in good faith has first agreed in writing to the instigation of the Action (such agreement not to be unreasonably delayed); and
 - (iii) any reasonable terms and conditions notified by the Company to the Officer in relation to the Action, or the conduct of it, have been complied with by the Officer.
- (d) **Bona fide response by Officer:** The Company may not deny payment for costs for a failure to agree in writing to the instigation of an Action under clause 3.3(c)(ii) where the Officer has instigated or intends to instigate an Action (including any counterclaim) in bona fide response to, or in connection with, an Action against the Officer. For the avoidance of doubt, an instigation by the Officer (including any counterclaim) which is in bona fide response to, or in connection with, an Action against the Officer is deemed to be an action done in the Officer's capacity as an Officer for the purpose of this Deed.
- (e) **Related party Actions:** Nothing in this Deed obliges the Company to indemnify the Officer or to make an advance or loan in respect of a liability for Legal Costs incurred by the Officer in defending or resisting an Action brought or made:
- (i) by the Company or a Relevant Subsidiary against the Officer; or
 - (ii) by the Officer against the Company or a Relevant Subsidiary.

3.4. Nature of indemnity

- (a) Subject to clauses 3.5 to 3.8, the indemnities in this clause 3:
- (i) are continuing obligations of the Company, separate and independent from its other obligations and survive the termination of this Deed;
 - (ii) are irrevocable, principal absolute and unconditional obligations which are not affected by anything that might have the effect of prejudicing, releasing, discharging or affecting in any other way the liability of the Company, including the settlement of any dispute between the Officer and the Company or the occurrence of any thing;
 - (iii) indemnify the Officer despite the Officer ceasing to hold any position in the Company or a Relevant Subsidiary;
 - (iv) apply even if the Liability or Legal Costs for which the Officer is entitled to be indemnified were incurred, or arise out of an act or events, matters or circumstances that occurred, before the date of this Deed.
- (b) The indemnities in this clause 3 are in addition to any indemnity contained in the Constitution and if there is any inconsistency between the indemnities in this clause 3 and any indemnity contained in the Constitution, the indemnities in this clause 3 prevail to the extent of any inconsistency.

¹⁴ The Company may also wish to include provisions requiring the Officer to take all reasonable steps to enforce its right to be indemnified by the Third Party and to keep the Company reasonably informed of his progress.

¹⁵ The Company may also wish to include provisions carving out the Company's liability where the Officer fails to comply with their obligations under this deed (rather than limiting the failure to comply to just clause 3.5). However, this restriction may be undesirable as it is less attractive for directors (and potential directors).

3.5. Obligations of the Officer¹⁶

The Officer must:

- (a) give notice to the Company promptly after becoming aware of any Action or circumstances that could give rise to a claim under this clause 3;
- (b) take all reasonable steps (except commencing litigation) to enforce the Officer's rights against any insurer or any other person who may be liable to indemnify the Officer in respect of any matter which could give rise to a claim under this clause 3;
- (c) take any action that the Company reasonably requests to avoid or mitigate any Liability which could give rise to a claim under this clause 3;
- (d) not admit Liability in respect of or settle any Action which may give rise to claim under this clause 3, without the prior written consent of the Company, which consent must not be unreasonably withheld or delayed;
- (e) notify the Company promptly of any offer of settlement or compromise received from a person in connection with any Action which could give rise to a claim under this clause 3;
- (f) upon request by the Company, provide all reasonable assistance and co-operation to the Company or a Relevant Subsidiary, as applicable, or their respective insurers in connection with any Action (including providing the Company or the Relevant Subsidiary or their respective insurers with any documents, authorities or directions that the Company or the Relevant Subsidiary or their respective insurers reasonably require for the prosecution of any claim in connection with an Action); and
- (g) upon request by the Company, provide all reasonable assistance to enable the Company or a Relevant Subsidiary, as applicable, or their respective insurers (so far as it is possible) to be subrogated to and enjoy the benefit of the Officer's rights against any Third Party in relation to an Action or any claim in connection with an Action.

3.6. Notification of an Action

The Company must promptly:

- (a) notify the Officer of any Action against the Company or a Relevant Subsidiary, if the Action may involve the Officer or result in a claim against the Officer; and
- (b) provide the Officer with a copy of any documentation in the possession of the Company or a Subsidiary of the Company that relates to an Action referred to in clause 3.6(a), unless doing so may be against the Company's or the Subsidiary's interests.

3.7. Conduct of an Action

- (a) If the Officer has given notice to the Company under clause 3.5(a) and the Company admits liability to indemnify the Officer under this clause 3, the Company:
 - (i) must manage (or, as applicable, must procure that its Relevant Subsidiary, or the Company's or the Relevant Subsidiary's insurer, manages) the conduct or defence of that Action (including settling the Action) subject to the Officer's written consent¹⁷; and
 - (ii) subject to clause 3.7(c), may instigate (or, as applicable, may cause the Relevant Subsidiary to instigate) proceedings in the Officer's name as part of the defence of that Action.
- (b) In managing the conduct or defence of any Action under clause 3.7(a), the Company must (or, as applicable, must procure the Relevant Subsidiary):
 - (i) do so at the cost of the Company or the Relevant Subsidiary, as applicable, or its insurers;
 - (ii) keep the Officer fully informed of any actual or proposed developments, including providing the Officer with copies of all material correspondence and documentation relation to the Action, and other such assistance and access as the Officer reasonably requests;

¹⁶ The Company may consider imposing more prescriptive conduct obligations as appropriate for its circumstances.

¹⁷ The current drafting provides that the conduct, defence and settlement of the Action are subject to the Officer's absolute discretion. Alternatively, the Company may prefer to have provisions which:

- allow the Company to control of the defence of an Action subject to certain requirements (e.g. the Company must have regard for potential to an Officer's reputation); and/or
- sets out a dispute resolution process in the event that there is a dispute as to whether a matter should be settled.

- (iii) take reasonable steps to protect the reputation of the Officer to the extent practicable; and
 - (iv) instruct its legal advisers on behalf of both the Company or the Relevant Subsidiary, as applicable, and the Officer.
- (c) If there is a reasonable likelihood that the interests of the Officer and the Company (or a Relevant Subsidiary) will conflict to an extent that is materially prejudicial to the Officer, or there is a reasonable likelihood that the interests of the Officer and the Company (or a Relevant Subsidiary) will differ to an extent that is materially prejudicial to the Officer if the claim were to be under the management or control of the Company (or the Relevant Subsidiary, or their respective insurers), the Officer may retain conduct or defence of the Action and the conduct or defence of the Action will be under the management and control of the Officer.

3.8. Separate legal representation

The Officer may engage separate legal representation and participate in an Action against the Officer which is in connection with or arising from being a director, secretary or public officer (as applicable) of the Company or the Relevant Subsidiary. The Company must pay any expenses incurred by the Officer in relation to that representation only to the extent that those expenses are reasonable and incurred in circumstances where they:

- (a) were incurred prior to the Company (or the Relevant Subsidiary, or their respective insurers) assuming conduct or defence of that Action;
- (b) were incurred with the prior written consent of the Company (which was not unreasonably withheld or delayed); or
- (c) are reasonable and incurred in circumstances where:
 - (i) the Company has refused to authorise representation or participation by lawyers other than lawyers acting also for the Company (or the Relevant Subsidiary); or
 - (ii) there is a reasonable likelihood that the interests of the Officer and of the Company (or the Relevant Subsidiary) would conflict if the same lawyers were to act on behalf of both the Officer and the Company (or the Relevant Subsidiary).

3.9. Shareholder approval

If the approval of the shareholders of the Company (or a Relevant Subsidiary) is required by law or the rules of any stock exchange for any payment under the indemnities given in this Deed, then the Company (or the Relevant Subsidiary) must:

- (a) use reasonable endeavours to obtain that shareholder approval as soon as practicable; and
- (b) make the payment within 10 Business Days after obtaining that shareholder approval.

4. Insurance

4.1. General

- (a) The Company must:
 - (i) if no D&O insurance is already in place at the date of this Deed, procure D&O Insurance on terms reasonably acceptable to the Officer;
 - (ii) keep the D&O Insurance valid and subsisting for the duration of the Access Period;
 - (iii) ensure that the Officer is included as one of the insured persons under the D&O Insurance document, to the extent that the document does not automatically do so under the definition in the D&O Insurance document of “Insured Person”;
 - (iv) pay all premiums for the D&O Insurance on time;¹⁸ and

¹⁸ See section 7 of this guide for a discussion on whether the Company can pay the premium.

- (v) ensure that, for the Access Period, the D&O Insurance is:
- (A) at least as comprehensive as those available from reputable and financially secure insurance companies containing the kind of terms, conditions, exclusions and additional cover commonly included in the same industry as the Company that have a comparable market capitalisation (if applicable), size and nature of operations and a similar financial status to the Company and having a desire to protect its officers and former officers to the maximum extent that is reasonable in the circumstances; and
 - (B) from the Cessation Date of the Officer, not materially less favourable to the Officer than the terms of the D&O Insurance in place at the end of the Appointment Period and at least as comprehensive as the directors and officers insurance policy effected for the benefit of the existing [directors/ secretary/public officer] of the Company from time to time during the Access Period.¹⁹
- (b) If the Company does not pay a premium for the D&O Insurance, the Officer may pay the premium. The Company must reimburse the Officer for the payment of the premium and any costs related to such payment immediately after provision by the Officer of satisfactory evidence of making such payment and/or incurring such costs.
- (c) Without limiting clause 4.1(a), if the Company [(or a Relevant Subsidiary)] is to be sold, or all or substantially all of its assets transferred to another entity, and the Officer is to cease to be a director, secretary or public officer (as applicable) of the Company [(or the Relevant Subsidiary, as applicable)] at or in connection with the completion of that transaction (Sale Completion), the Company must, prior to the Sale Completion, purchase a seven year run-off directors and officers insurance policy for the benefit of the Officer.

4.2. Details of D&O Insurance

If requested by the Officer, the Company must, as soon as practicable following receipt by the Company, provide the Officer with a copy of:

- (a) each certificate of currency in respect of the D&O Insurance issued from time to time by the Company's insurer or broker;
- (b) the D&O Insurance document; and
- (c) any other document relating to the D&O Insurance.

4.3. [Additional D&O Insurance]

- (a) Subject to clause 4.4, the Officer may obtain the Officer's own D&O Insurance (Additional D&O Insurance).
- (b) The Officer must:
 - (i) notify the Company in writing as to whether the Officer will obtain the Additional D&O Insurance or will require the Company to do so; and
- (c) if the Officer obtains Additional D&O Insurance, provide the Company with a copy of the Additional D&O Insurance document. [If requested by the Officer, the Company must advance funds to the Officer to enable the Officer to pay a premium under the Officer's own D&O Insurance within seven days after provision by the Officer of satisfactory evidence of the obligation to pay the premium. If the Officer has already paid the premium, the Company must immediately reimburse the Officer for the payment of the premium.]²⁰

4.4. Company's and Officer's obligations

- (a) The Company must:
 - (i) not do or permit to be done anything within its control (and must procure that each Relevant Subsidiary does not do or permit anything within its control) which prejudices or is likely to prejudice, and promptly rectify anything within its control which might prejudice, cover under the D&O Insurance (other than by making a claim under the D&O Insurance);
 - (ii) notify the Officer if, for any reason, the D&O Insurance is cancelled or not renewed, or if the insurer alleges in writing that the policy is void, voidable or otherwise unenforceable; and

¹⁹ The Company may prefer to soften the wording of this obligation to a "reasonable endeavours" obligation, and an acknowledgement from the Officer that negotiation of the D&O Insurance may involve the insurer varying the terms of the policy offered which may provide coverage on less favourable terms.

²⁰ This clause is generally not customary and is particularly Officer-friendly. The Officer may wish to seek additional cover above and beyond the scope of the Company's D&O policy, particularly if there are issues with the Company's policy. The Company should consider if it is appropriate for the Company to cover the cost of such additional insurance policy.

(iii) give the Officer a reasonable opportunity to pay the premium for the Excluded Liability if insurance for the Excluded Liability is otherwise available under the insurance policy, the premium which relates to the Excluded Liability is expressly identified as such, and it is lawful for the Officer to pay the premium.²¹

(b) The Officer must:

- (i) do anything the Company reasonably requires to enable the Company to take out and maintain the D&O Insurance at the Company's expense;
- (ii) comply at all times with the Officer's obligations under the D&O Insurance, including reporting claims, and circumstances which could give rise to a claim; and
- (iii) if the insurance policy provides cover for an Excluded Liability and it is lawful for the Officer to do so, comply with a request from the Company to pay that part of the premium under the D&O Insurance which expressly relates to the Excluded Liability.

5. Payment of Legal Costs for proceedings against D&O insurer

5.1. Payment of Legal Costs

Subject to clauses 5.2 and 5.3, the Company must indemnify the Officer, on an unsecured basis, against any Legal Costs reasonably incurred by the Officer in connection with proceedings brought by the Officer against the insurer under any D&O Insurance obtained or maintained pursuant to clause 4, in respect of a claim made by the Officer under the D&O Insurance, where the insurer disputes that claim [on such terms as the Company reasonably requires].

5.2. Officer's obligations

In order to be entitled to the indemnity under clause 5.1, the Officer must:

- (a) before seeking payment of Legal Costs under clause 5.1:
 - (i) give the Company prior written notice that the Officer is bringing the proceedings; and
 - (ii) obtain written advice from a senior counsel, that the proceedings may be pursued with reasonable prospects of success and provide that advice to the Company;
- (b) give the Company all reasonable details of the claim and the proceedings, in relation to which cover under the D&O Insurance is being sought;
- (c) keep the Company reasonably informed at all times about the conduct of the proceedings (including any negotiations to settle it);
- (d) give the Company any document or information relating to the claim or the proceedings requested by the Company;
- (e) do anything reasonably requested by the Company in relation to the conduct of the proceedings;
- (f) immediately notify the Company of any offer of settlement of the proceedings received from or on behalf of the insurer; and
- (g) so far as practical, comply with clause 5.2(d) in relation to any counterclaim or cross-claim by the insurer.

5.3. Review of commitment

The Company may at any time during the course of proceedings referred to in clause 5.1 obtain a reassessment of the merits of the proceedings from the solicitors or counsel who are conducting the proceedings. If the prospects of the Officer succeeding against the insurer are assessed by the solicitors or counsel (as the case may be) to have substantially deteriorated, the Company may compromise the proceedings upon such terms as the solicitors or counsel reasonably recommend, subject to first notifying the Officer of its proposed actions and indemnifying the Officer in respect of any adverse costs order.

²¹ See section 7 of this guide for a discussion on whether the Company can pay the premium.

6. Payments

6.1. Payment on demand²²

The Company must pay an amount due under this Deed on demand from time to time to the Officer [on an unsecured basis and] within [10] Business Days of the date which the Officer provides reasonable evidence to the Company of:

- (a) the Liability or Legal Cost;
- (b) the fact that the amount is due and payable within [10] Business Days; and
- (c) the Officer's entitlement to be indemnified or paid under this Deed for that amount.

To the extent reasonably practicable, the Company must make any advances under this clause 6.1 in sufficient time so that the Officer can satisfy the relevant payment obligation(s).

6.2. No deduction or withholding

The Company must pay all money payable by it under this Deed unconditionally and in full without demand, set off, withholding, counterclaim or deduction.

6.3. Indemnity before expense incurred

Despite anything to the contrary in this Deed, it is not necessary for the Officer to incur an expense or make payment before enforcing a right of indemnity under this Deed.

6.4. Method of payment

The Company must make all payments to the Officer under this Deed:

- (a) not later than 4.00pm on the due date for payment; and
 - (b) to the account specified by the Officer;
- or in any other manner as the Officer may notify the Company.

6.5. Legal Costs

- (a) Until it is determined whether the Officer is entitled to be indemnified under this Deed, pending the final outcome of an Action, at the Officer's request the Company must either, at its election:²³
 - (i) pay on behalf of the Officer; or
 - (ii) lend to the Officer,

from time to time and interest free,²⁴ the amount necessary to meet reasonable Legal Costs as incurred by the Officer in defending or otherwise being represented in connection with an Action.
- (b) If the Company has advanced an amount for Legal Costs under clause 6.5, the amount of the advance will be in part satisfaction of the Company's obligation to indemnify the Officer and will cease to be repayable unless repayment is required under clause 6.6.

6.6. Repayment of amounts paid²⁵

Where the Company has paid any amount under clauses 3 or 6.5 to or on behalf of the Officer in connection with a Liability, the Officer must repay that amount within [20] Business Days after receiving a written request from the Company specifying the amount to be repaid, to the extent that:

- (a) a court of competent jurisdiction determines that the Officer is not entitled to be indemnified by the Company for the Liability;

²² The Company may wish to impose conditions on its payment obligation (e.g. imposing conduct obligations on the Officer similar to those in clause 5.2 of this sample deed, or any other obligations, such as requiring the Officer to accept a proposal to settle the claim etc.).

²³ It is important that officers are able to have legal costs advanced to them, as it often takes a long time for such costs to be advanced under the D&O insurance policy and officers need to seek potentially costly legal advice immediately in order to defend themselves when legal proceedings commence. The officers may then be required to repay legal costs as set out in clause 6.6.

²⁴ Alternatively, the Company may wish to impose interest.

²⁵ The Company may also consider including a clause providing that the Company is subrogated to the extent of any payment it makes to all the Officer's rights of recovery.

- (b) the Officer is not entitled to be indemnified for the Liability or Legal Costs under the Corporations Act or any other Australian statute; or
- (c) the Officer is reimbursed by a Third Party for the Liability, or a Third Party satisfies the Liability directly.

7. Independent professional advice²⁶

The Officer is, in connection with the Officer's duties to the Company and any Relevant Subsidiary, entitled to obtain independent professional advice, and the Company must pay the reasonable costs of such advice if that advice is obtained:

- (a) in bona fide furtherance of, or in connection with, the Officer's duties to the Company or the Relevant Subsidiary; or
- (b) in accordance with the guidelines adopted by the Board from time to time, or the Board has given prior approval to the obtaining of the advice.

8. Confidentiality

The Company must not release to any Third Party, or otherwise publish, details of the nature of the Liabilities and Legal Costs for which the Company must indemnify the Officer under this Deed without the prior written consent of the Officer. This obligation does not apply:

- (a) to the extent that publication in a prospectus or other public document to be issued by the Company is considered by the Company to be appropriate;
- (b) to the extent that publication is required by law, or the rules of any stock exchange or any order of a court; or
- (c) where the Company is not liable to indemnify the Officer or make payments under this Deed.

9. Notices

9.1. Requirements

All notices must be:

- (a) in legible writing and in English;
- (b) addressed to the recipient at the address or email address set out in the Parties details of this Deed; and
- (c) sent to the recipient by hand, prepaid post (airmail if to or from a place outside Australia) or email.

9.2. Receipt

Without limiting any other means by which a party may be able to prove that a notice has been received by the other party, a notice will be considered to have been received:

- (a) if sent by hand, when left at the address of the recipient;
- (b) if sent by prepaid post, three Business Days (if posted within Australia to an address in the same State or Territory in Australia) or six Business Days (if posted within Australia to an address in a different State or Territory in Australia) or 10 days (if posted from one country to another) after the date of posting; or
- (c) if sent by email, on the date of transmission, provided that the sender's email software from which the email was sent records a successful transaction.

but if a notice is served by hand, received by post, or sent by email on a day that is not a Business Day, or after 5.00 pm (recipient's local time) on a Business Day, the notice will be considered to have been received by the recipient at 9.00 am (recipient's local time) on the next Business Day.

10. Tax and GST

10.1. Tax

- (a) If any Tax is or would be imposed on the Officer in respect of any sum paid or payable to or at the direction of the Officer under this Deed (Indemnity Payment), then the Company must pay to the Officer any

²⁶ This right can be important where a conflict of interest may arise between the Officer and the relevant company.

additional amount required to ensure that the total amount retained by the Officer (after allowing for the amount of the Tax and after taking into account any Tax deduction or Tax benefit available to the Officer that is attributable to the Liability or Defence Costs to which the Indemnity Payment relates or to Tax paid or payable in relation to the Indemnity Payment) is equal to the amount that would have been retained by the Officer if the Tax was not imposed in respect of the Indemnity Payment.

- (b) The Officer must provide the Company with all information and assistance reasonably required to enable the Company to calculate any additional amount payable under this clause.

10.2. GST

- (a) In this clause 10.2, the expressions adjustment note, consideration, GST, supply, tax invoice, supplier, recipient and taxable supply have the meanings given to those expressions in the GST Act. For the avoidance of doubt, "GST" excludes any penalties or additional tax imposed in relation to the GST.
- (b) Despite any other provision in this Deed, if GST is imposed on any supply made under this Deed, the recipient must pay to the supplier an amount equal to the GST payable on the supply. The recipient must pay the amount referred to in this clause 10.2(b) in addition to and at the same time as payment for the supply is required to be made under this Deed.
- (c) If either party is required to pay, reimburse or indemnify the other for the whole or any part of any cost, expense, loss, liability or other amount that the other party has incurred or will incur in connection with this Deed, the amount must be reduced by the amount for which the other party (or representative member if this is not the other party) can claim an input tax credit, partial input tax credit, or other like offset.
- (d) The supplier will be responsible for any GST penalties, interest or additional tax imposed on the supplier and attributable to its act or omission.

10.3. Tax invoice

If a supply is made to which GST applies or is varied under this Deed, the supplier must provide to the recipient of the supply a valid tax invoice or adjustment note at or before the time of payment or variation.

10.4. Adjustment

If the amount of GST paid or payable by the supplier on any supply made under this Deed differs from the amount of GST paid by the recipient, because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the supplier or the supplier to the recipient, as the case requires.

11. General provisions

11.1. Costs

The Company must pay the costs and expenses in relation to preparation, negotiation and execution of this Deed [as well as costs of its interpretation or enforcement].

11.2. Entire agreement

- (a) Subject to clause 11.2(b), this Deed and any other documents referred to in this Deed or executed in connection with this Deed constitute the entire agreement of the parties about the subject matter of this Deed. No party has entered into this Deed relying on any representations made by or on behalf of the other, other than those expressly made in this Deed.
- (b) Notwithstanding clause 11.2(a):
 - (i) any separate deeds of indemnity entered into by the Company for the benefit of the Officer in relation to a particular transaction or role of the Officer will not be in any way affected by this Deed; and
 - (ii) the Company acknowledges that any previous deed of indemnity entered into between the Company and the Officer remains enforceable in accordance with its terms in relation to any Action made or undertaken before the date of this Deed.

11.3. Further assurances

Each party must, at its own expense, whenever reasonably requested by the other party, promptly do or arrange for others to do everything reasonably necessary or desirable to give full effect to this Deed.

11.4. Assignment

A party must not assign or otherwise transfer, create any charge, trust or other interest in, or otherwise deal in any other way with any of its rights under this Deed without the prior written consent of the other party.

11.5. Invalid or unenforceable provisions

If a provision of this Deed is invalid or unenforceable in a jurisdiction:

- (a) it is to be read down or severed in that jurisdiction to the extent of the invalidity or unenforceability; and
- (b) that fact does not affect the validity or enforceability of that provision in another jurisdiction or the remaining provisions.

11.6. Waiver and exercise of rights

- (a) A waiver by a party of a provision of or a right under this Deed is binding on the party granting the waiver only if it is given in writing and is signed by the party or an officer of the party granting the waiver.
- (b) A waiver is effective only in the specific instance and for the specific purpose for which it is given.
- (c) A single or partial exercise of a right by a party does not preclude another exercise of that right or the exercise of another right.
- (d) Failure by a party to exercise or delay in exercising a right does not prevent its exercise or operate as a waiver.

11.7. Amendment

This Deed may be amended only by a document signed by all parties.

11.8. Counterparts

This Deed may be signed in counterparts and all counterparts taken together constitute one document.

11.9. Rights cumulative

The rights, remedies and powers of the parties under this Deed are cumulative and do not exclude any other rights, remedies or powers.

11.10. Governing law

This Deed is governed by the laws of [New South Wales/Victoria/insert other jurisdiction].

11.11. Jurisdiction

Each party irrevocably and unconditionally:

- (a) submits to the non-exclusive jurisdiction of the courts of [New South Wales/Victoria/insert other jurisdiction]; and
- (b) waives, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum.

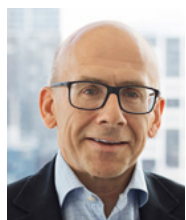
Signing Page

Executed as a Deed

[Insert signing blocks]

For demonstrative purposes only

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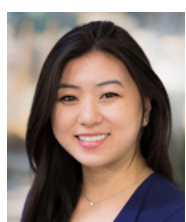
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