



Superannuation Industry (Supervision) (approved guarantee) determination No 1 of 2006

Superannuation Industry (Supervision) Act 1993

I, Brandon Kong Leong Khoo, a delegate of APRA, under paragraph 11E(1)(a) of the *Superannuation Industry (Supervision) Act 1993* and for the purposes of subparagraphs 123(1)(b)(ii) and 123(1)(b)(iii) of the Act, DETERMINE that the requirements relating to an approved guarantee given by an ADI are:

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

This Determination comes into force upon registration of this instrument on the Federal Register of Legislative Instruments.

Dated 26 October 2006

[Signed]

Brandon Khoo
Executive General Manager
Specialised Institutions Division

Interpretation

In this Determination

APRA means the Australian Prudential Regulation Authority.

ADI has the meaning given in section 10 of the Act

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

Federal Register of Legislative Instruments means the register established under section 20 of the *Legislative Instruments Act 2003*.

Note 1 Under subsection 11E(2) of the Act, this Determination is a disallowable instrument and as a consequence, is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Schedule- approved guarantee

DEED OF GUARANTEE

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

THE COVENANTS IN THIS Guarantee are given for the joint and several benefit of

- (1) all trustees of all superannuation entities in respect of which the Custodian is at any time during this Guarantee, or has been at any time prior to this Guarantee, the custodian (referred to collectively as the Trustees and in the singular, a Trustee); and
- (2) the Custodian.

WHEREAS:

- A. The Guarantor is an authorised deposit taking institution as defined in section 10 of the *Superannuation Industry (Supervision) Act 1993* (the Act).
- B. <<enter name of body corporate>> (the Custodian) is a body corporate and is desirous of meeting the requirements for eligibility to be a custodian of superannuation entities under subparagraph <<123(1)(b)(ii)>><<123(1)(b)(iii)>> of the Act.
- C. The Custodian may be the custodian of a superannuation entity pursuant to a custodian agreement.
- D. This Guarantee is in the form of the approved guarantee in accordance with section 11E of the Act.
- E. The Guarantor accordingly undertakes the obligations specified in this Guarantee.

NOW THIS GUARANTEE WITNESSES:

Interpretation

1. In this Guarantee:

- (a) **agreed amount** means <<five million dollars>> Australian currency.<<insert amount where the Custodian is complying with subsection 123(1)(b)(iii) of the Act.>>
- (b) **beneficiary** has the meaning given in section 10 of the Act.
- (c) **custodian** has the meaning given in section 10 of the Act.
- (d) **custodian agreement** means a written agreement pursuant to which the Custodian acts or has acted as custodian in respect of a superannuation entity.

- (e) **liability** means either:
- (i) an amount payable by the Custodian pursuant to a judgment or order of any court or tribunal; or
 - (ii) an amount which the Custodian has agreed in writing to pay,
- in respect of a failure to perform the duties or obligations (express or implied) arising under or pursuant to a custodian agreement;
- (f) **principal contract** means any agreement or arrangement between the Guarantor and the Custodian which secures or is intended to secure this Guarantee.
- (g) **RSE licence** has the meaning given in section 10 of the Act.
- (h) **security** means any mortgage, charge, assignment, title retention arrangement, or other interest, agreement or arrangement the purpose of which is to secure the meeting of a liability, and includes a guarantee or indemnity given in relation to a liability.
- (i) **superannuation entity** includes a **superannuation entity** and a **registrable superannuation entity** as respectively defined in section 10 of the Act.
- (k) **superannuation fund** has the meaning given in section 10 of the Act.
- (l) **trustee** has the meaning given in section 10 of the Act.

Guarantee

2. The Guarantor unconditionally guarantees to pay
- (i) all liabilities of the Custodian; and
 - (ii) all written demands for payment under this Guarantee made by the Custodian,

up to the agreed amount in the aggregate, and the Guarantor must pay upon demand made in accordance with Clause 5 of this Guarantee.

No requirement to proceed

3. A Trustee is not required to claim or enforce any remedies it may have against the Custodian or any other person in relation to a liability of the Custodian under a custodian agreement.

Term of the Guarantee

4. Except as provided in Clause 10 below, this Guarantee shall be for a period of five years commencing on the date this Guarantee is signed.

Written demand and time for payment

5. Written demand under this Guarantee must be made during the term of this Guarantee (whether or not the liability arose during the term of this Guarantee) and the Guarantor shall make cash payment under this Guarantee without set-off, whether legal or equitable, counter claims, conditions, deductions or withholdings, no later than 30 days after such demand is made:
 - (a) by a Trustee of a superannuation entity in respect of which there is a liability; or
 - (b) by any acting trustee or other trustee appointed in place of a Trustee referred to in paragraph (a), pursuant to the general law or to the provisions of the Act or the Regulations, or of any law of the Commonwealth or of any State or Territory; or
 - (c) by any receiver or receiver and manager or administrator or liquidator or provisional liquidator of a Trustee or superannuation entity referred to in paragraph (a), appointed pursuant to any law of the Commonwealth or of any State or Territory; or
 - (d) by the Custodian,

and such written demand shall:

- (i) in the case of a demand made by any of the persons referred to in paragraphs (a), (b) or (c), attach as proof of the liability a certified copy of the judgment or order or the Custodian's written agreement to pay as the case may be;
- (ii) in the case of a demand by the Custodian, be a certificate signed by a director, secretary or any officer whose title of office is or includes the name "Manager" or "Executive" of the Custodian, or under seal of the Custodian. The demand must state that the demand is made under this Guarantee and state the amount.

Demand to be conclusive

6. The attachment provided under clause 5(i) of this Guarantee will be conclusive evidence of the liability and the Guarantor will not be obliged to make any enquiry.

Interest on money due

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

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

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

- (k) the commencement of the winding up of the Custodian, a Trustee or the Guarantor;
- (l) any reorganisation or reconstitution of the Custodian or in a Trustee or the business of a Trustee including the entry by a Trustee into a partnership, joint venture or other joint enterprise or commercial relationship with any person;
- (m) any material change in circumstances affecting the Custodian or a Trustee or any transaction, agreement, arrangement or matter which is the subject of the guarantee or of any other covenant in this Guarantee;
- (n) the suspension or removal of a Trustee under Part 17 of the Act;
- (o) the Custodian ceasing to be eligible to be a custodian under section 123 of the Act or otherwise;
- (p) the disqualification of a responsible officer of the Custodian or the Custodian under the Act;
- (q) the winding up or dissolution or both of any superannuation entity of which a Trustee is trustee, under section 142 of the Act or otherwise;
- (r) any other fact, matter, circumstance or thing whatsoever which, but for this paragraph, would or might operate to prejudice, release, discharge, reduce or otherwise affect the Guarantor's obligations under this Guarantee (the preceding paragraphs of this clause not limiting by implication the scope of this paragraph).

Indemnity

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

Termination and revocation

10. This Guarantee shall terminate on the expiration of the term provided for in clause 4 and this Guarantee shall not otherwise be revoked except with the written consent of APRA (and where the Custodian is the holder of an Australian Financial Services Licence, with the written consent of ASIC), and only in such manner and subject to such conditions as APRA in writing allows,

provided always that the Guarantor shall remain liable in respect of any rights that have fully or contingently accrued during the term of this Guarantee.

Warranty of capacity to enter into and comply with Guarantee

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

Warranty that representations and promises have not been relied on

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

Jurisdiction

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

Notices

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

Dated

SIGNED

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

.....
Director

.....
Director/Secretary

OR

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

.....
.....

Director

Director/ Secretary

OR

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

>.....

<<signatory>>