

Mineral and Energy Resources (Financial Provisioning) Act 2018

Scheme Manager Guideline Forms of Surety

Prepared for the Queensland Government Interdepartmental Committee on Financial Assurance for the Resource Sector

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1.0 About this guideline

1.1 Background

This guideline is made by the scheme manager under s 70 (Guidelines) of the *Mineral and Energy Resources (Financial Provisioning) Act 2018 (Act)*.

The Act establishes a Financial Provisioning Scheme (the **scheme**) to manage the financial risk to the State if environmental authority holders for resource activities do not comply with their environmental management and rehabilitation obligations.

The scheme manager may approve a surety only in the forms provided for in section 56 of the Act—a bank guarantee, an insurance bond, or a payment of a cash amount—and for bank guarantees and insurance bonds, only in the approved form or on terms and conditions approved by the scheme manager and for payment of cash, on the condition that the giver is not entitled to interest on the amount of surety and on terms and conditions approved by the scheme manager.

This guideline should be read in conjunction with the Act and, where relevant, other guidelines made under the Act.

Guidelines are available on the scheme manager's website together with additional information about the scheme.

1.2 Purpose of this guideline

This guideline provides guidance to the scheme manager on the circumstances when sureties should be approved in the approved form for bank guarantees and insurance bonds or in the standard form of cash surety deed for cash sureties and on the circumstances when other terms and conditions may be approved.

1.3 Definitions

Definitions in the dictionary in schedule 3 of the *Act* apply to this Guideline. Other terms used in this guideline are defined in the dictionary in section 3.

2.0 Forms of Surety

2.1 Bank Guarantees and Insurance Bonds

Basic Rule

All bank guarantees and insurance bonds given as surety under section 55 of the Act must be in the approved form.

When the basic rule may not apply

The scheme manager may otherwise approve a bank guarantee or insurance bond as surety if:

- the bank guarantee or insurance bond formed part of a financial assurance to which Part 7 of the Act applies; and
- the scheme manager is satisfied that the terms and conditions of the financial assurance are not materially different to the approved form.

Note: The approved form is at APPENDIX 1.

2.2 Cash

Basic Rule for cash surety amounts equal to, or more than, \$100,000

Payment of a cash amount must be given on the terms in the cash surety deed.

Note: The standard form of the cash surety deed is at APPENDIX 2.

Basic Rule for cash surety amounts less than \$100,000

Payment of a cash amount is not required to be given on the terms in the cash surety deed.

When the basic rule may not apply

The scheme manager may require that a surety of less than \$100,000 is given on the terms in the cash surety deed, if the total value of sureties given as cash by the holder exceeds \$100,000.

3.0 Dictionary

Cash Surety Deed means a deed in the standard form at APPENDIX 2 or a deed on substantially the same terms.

4.0 Appendices

Appendix 1: The approved form of undertaking for the Act sections 56(1)(a)(i) and 56(1)(b)(i).

Appendix 2: Approved terms and conditions for a Cash Surety Deed section 56(1)(c)(ii).

[Place on Financial Institution letterhead]

FINANCIAL INSTITUTION'S UNDERTAKING
IN RESPECT OF
ENVIRONMENTAL AUTHORITY

NUMBER: *[Financial institution to insert reference number (if applicable)]*

ISSUER: [Financial Institution Name] [ACN/ABN] of [Financial Institution Address] ("Financial Institution")

BRANCH: *[Financial institution branch address if applicable: see notes below.]*

BENEFICIARY: Scheme Manager (from time to time) under the Mineral and Energy Resources (Financial Provisioning) Act 2018 ("Scheme Manager")

APPLICANT: [Company/Business Name] [ACN/ABN] of [Company/Business Address] ("Holder/s")

MAXIMUM AMOUNT: [Amount in words] in Australian dollars (A\$[Amount in figures])

UNDERTAKING

The Financial Institution unconditionally undertakes and agrees as follows:

1. To pay to the Scheme Manager on written demand [made at the Branch, or any other branch or office of the Financial Institution in Australia], accompanied by this original undertaking, any sum or sums which may from time to time be demanded by the Scheme Manager to a maximum aggregate sum up to the Maximum Amount. Payment may be effected by bank cheque or by transfer to the bank account nominated in writing by the Scheme Manager.
2. Upon the receipt of a written demand from the Scheme Manager for a sum or sums less than the Maximum Amount, the Financial Institution will issue to the Scheme Manager a new Undertaking for the balance of the Maximum Amount then remaining at the same time that payment by the Financial Institution of the amount demanded by the Scheme Manager is made and in exchange for this original Undertaking.
3. This Undertaking will remain in full force and effect until the first to occur of:
 - (a) payment by the Financial Institution of the Maximum Amount to the Scheme Manager in accordance with this Undertaking; or
 - (b) the Financial Institution is notified in writing by the Scheme Manager that the Undertaking is no longer required; or
 - (c) this Undertaking is returned to the Financial Institution,at which time the liability of the Financial Institution hereunder shall immediately cease.
In the event that clause 3(a) or 3(b) applies, the Scheme Manager will return this original Undertaking to the Financial Institution.
4. This Undertaking is not to be regarded as a contract of surety and the liability of the Financial Institution is a primary liability, and not a secondary obligation, which will remain in effect notwithstanding any event affecting the relationship between the Holder and the Financial Institution including, without limiting this, those set out in clause 5.

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5. Any payment or payments demanded by the Scheme Manager in accordance with the terms of this Undertaking will be paid forthwith:
- (a) without reference to the Holder (even if the Holder has given the Financial Institution notice not to make the payment);
 - (b) without regard to the performance or non-performance of the Holder or Scheme Manager in relation to the Environmental Authority, or to any dispute between the Scheme Manager and the Holder, and without regard to the terms and conditions of such Environmental Authority or that such Environmental Authority may be varied;
 - (c) without the Scheme Manager first being required to exhaust any remedy it may have against the Holder or to enforce any other guarantee or security it may hold;
 - (d) without making any further enquiry, including as to the authority of any person signing for or on behalf of the Scheme Manager, unless the Financial Institution has reasonable grounds to form the view that such person is not duly authorised; and
 - (e) notwithstanding the grant of any time or other indulgence to the Holder or any other circumstance, act or omission.
6. The Financial Institution may at any time without being required to do so pay to the Scheme Manager:
- (a) an amount equal to the Maximum Amount less any amounts it may previously have paid under this Undertaking; or
 - (b) such lesser sum as the Scheme Manager may require;
- and upon receipt of such amount by the Scheme Manager the liability of the Financial Institution hereunder shall immediately cease.
7. The Financial Institution acknowledges that this Undertaking is for the benefit of the Scheme Manager under the [Mineral and Energy Resources (Financial Provisioning) Act 2018] from time to time, and continues in full force and effect notwithstanding any change to the identity of the holder of that office. The benefit of this Undertaking is not otherwise able to be assigned, transferred, charged or dealt with by the Scheme Manager.
8. This Undertaking is governed by the laws of the State of Queensland and all actions between the Financial Institution and the Scheme Manager including any and all payments made by the Financial Institution to the Scheme Manager pursuant to this Undertaking shall be undertaken in Australia.

DATED at.....this.....day of.....20.....

[insert signature block]

Appendix 2

Cash Surety Deed

Scheme Manager under the the Mineral and Energy Resources (Financial Provisioning) Act 2018

and

[Name of Holder]

Ait[ABN/ACN/ARBN] [number]

Environmental Authority number [●]

[Date]

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CONSULTATION DRAFT

THIS DEED is made on

BETWEEN:

- (1) Scheme Manager (from time to time) under the Financial Provisioning Act [for itself and on behalf of the State] (**Scheme Manager**); and
- (2) **[Name of Party] Alt[ABN/ACN/ARBN] [number] (Holder)**. *[Details of the relevant Holder to be inserted]*

RECITALS:

- (A) The Holder is the holder of the **Alt[EA / Tenure]**. It is a condition of the **Alt[EA / Tenure]** that the Holder gives a Surety under the Financial Provisioning Act. *[To select applicable option depending on whether the Surety is given in respect of an EA or Small Scale Mining Tenure]*
- (B) The Holder has asked to provide a Surety in the form of a payment of a cash amount.
- (C) The Scheme Manager approves the Surety in respect of the **Alt[EA / Tenure]** being provided on the terms set out in this document.

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following definitions apply in this document.

ADI means an 'Authorised Deposit-taking Institution' under the *Banking Act 1959* (Cth).

Amendment Demand has the same meaning as when used in the PPSA.

Business Days means any day other than a Saturday, Sunday or public holiday observed by businesses in Brisbane.

Cash Surety Account means a bank account held with an ADI in the name of the Scheme Manager and is the 'cash surety account' for the purposes of the Financial Provisioning Act.

EA means Environmental Authority number [insert]. *[To be deleted if the Surety is given in respect of a Small Scale Mining Tenure]*

EP Act means the *Environmental Protection Act 1994* (Qld).

Financial Provisioning Act means the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld).

Funds means the sum of \$[insert], being the amount of Surety required to be paid by the Holder to the Scheme Manager [as at the date of this document] under Part 3, Subdivision 2 of the Financial Provisioning Act.

PPSA means the *Personal Property Securities Act 2009* (Cth).

PPSR means the Personal Property Securities Register established under the PPSA.

Security Interest has the same meaning as when used in the PPSA.

Surety has the same meaning as when used in the Financial Provisioning Act.

Tenure means [insert details of the relevant small scale mining tenure]. *[Drafting note: To be deleted if the Surety is given in respect of an environmental authority]*

1.2 Interpretation

In this document:

- (a) headings and bold type are for convenience only and do not affect the interpretation of this document;
- (b) the singular includes the plural and the plural includes the singular;
- (c) an agreement, representation, or warranty by two or more persons binds them jointly and severally;
- (d) words of any gender include all genders;
- (e) other parts of speech and grammatical forms of a word or phrase defined in this document have a corresponding meaning;
- (f) an expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency as well as an individual;
- (g) a reference to any thing (including any right) includes a part of that thing but nothing in this clause 1.2(g) implies that performance of part of an obligation constitutes performance of the obligation;
- (h) a reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, this document;
- (i) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them;
- (j) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (k) a reference to a party to a document includes that party's successors and permitted assignees;
- (l) a reference to an agreement other than this document includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing;
- (m) a reference to property or an asset includes any real or personal, present or future, tangible or intangible property, asset or undertaking and any right, benefit, interest or revenue in, under or derived from the property or asset;
- (n) a reference to a document includes any agreement in writing, or any certificate, notice, deed, instrument or other document of any kind;
- (o) no provision of this document will be construed adversely to a party because that party was responsible for the preparation of this document or that provision;
- (p) a reference to any law or statute is a reference to any law or statute which replaces it or which substantially succeeds to its subject matter and content;

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- (q) to the fullest extent permitted by law, a reference to a body (including an institute, association or authority), whether statutory or not:
 - (i) which ceases to exist; or
 - (ii) whose powers or functions are transferred to another body,is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (r) references to time are to the time in Brisbane, Queensland; and
- (s) where this document confers any power or authority on a person that power or authority may be exercised by that person acting personally or through an agent or attorney.

1.3 Interpretation of inclusive expressions

Specifying anything in this document after the words 'including' or 'for example' or similar expressions does not limit what else is included unless there is express wording to the contrary.

2. APPROVAL OF SURETY

The Scheme Manager approves a Surety in respect of the **Alt[EA / Tenure]** being provided in the form of a payment of the Funds by the Holder to the Scheme Manager, subject to the Scheme Manager being satisfied that it has received each of the following:

- (a) evidence that all Security Interests registered on the PPSR over property of the Holder in so far as those Security Interests relate to the Funds and the Cash Surety Account has been released, on terms satisfactory to the Scheme Manager in its absolute discretion;
- (b) a counterpart of this document duly executed by the Holder;
- (c) evidence that a PPSR registration has been made naming the Scheme Manager as secured party in respect of the Funds and the Cash Surety Account effective to perfect any Security Interest arising under this document;
- (d) written confirmation and agreement from the ADI with whom the Cash Surety Account is held, on terms satisfactory to the Scheme Manager in its absolute discretion, that the ADI will not exercise set-off rights or assert a Security Interest in relation to the Funds or the Cash Surety Account in priority to the Scheme Manager's interest or Security Interest in the Funds or Cash Surety Account; and
- (e) evidence satisfactory to the Scheme Manager in its absolute discretion that:
 - (i) the Scheme Manager will have the full and absolute benefit of the Funds and the Cash Surety Account as Surety in respect of the **Alt[EA / Tenure]**; and
 - (ii) the Funds can be applied and realised by the Scheme Manager as Surety in respect of the **Alt[EA / Tenure]**.

The Scheme Manager will notify the Holder following satisfaction of the conditions set out in this paragraph 2.

3. THE SCHEME MANAGER'S RIGHTS

3.1 Dealing with the Funds by the Scheme Manager

The Scheme Manager will:

- (a) deposit the Funds on receipt in a Cash Surety Account;
- (b) retain the Funds as Surety in accordance with the Financial Provisioning Act;
- (c) not make any claims on or realisations of the Funds, except in accordance with section 25 of the Financial Provisioning Act; and
- (d) release part or all of the Funds from time to time in accordance with section 58 of the Financial Provisioning Act, and subject to the rights, considerations and discretions it contains.

3.2 No obligation to invest the Funds

Notwithstanding clause 3.1, the Scheme Manager may:

- (a) in its absolute discretion, but is not obliged to, hold part or all of the Funds on investment with an ADI from time to time, or otherwise in accordance with section 25(5) of the Financial Provisioning Act; and
- (b) recover all costs, charges and expenses incurred by it in connection with the administering of this document and the holding of the Surety out of the Funds, whether from capital or income as the Scheme Manager may determine.

For the avoidance of doubt, this clause does not limit the Holder's obligations under section 61 of the Financial Provisioning Act (if applicable).

3.3 Preservation of other rights and powers

The rights and powers of the Scheme Manager under this document:

- (a) are in addition to, and do not prejudice, any rights and powers the Scheme Manager has in respect of Sureties under any applicable law, including the Financial Provisioning Act and the EP Act;
- (b) are not prejudiced by any other rights and powers the Scheme Manager has in respect of the Funds or the Cash Surety Account; and
- (c) continue and remain in full force and effect unless and until the whole of the Funds are released in accordance with clause 3.1(d) despite:
 - (i) any claims or realisations by the Scheme Manager in respect of the Funds or the Cash Surety Account;
 - (ii) any partial release or realisation of the Funds as Surety; or
 - (iii) anything else.

3.4 Consent of the Scheme Manager

- (a) Whenever the doing of any thing by the Holder is dependent on the consent of the Scheme Manager, the Scheme Manager may withhold its consent or give it conditionally or unconditionally in its absolute discretion, unless otherwise provided for in an applicable law.

- (b) Any conditions imposed by the Scheme Manager in relation to the giving of its consent must be complied with by the Holder.

3.5 Limitation of liability

The Scheme Manager:

- (a) is not subject to any duties, liabilities or obligations in respect of the Funds or the Cash Surety Account, except as expressly provided for in this document, the Financial Provisioning Act and the EP Act; and
- (b) is not liable to the Holder or any other person on any basis whatsoever for acting in accordance with this document, the Financial Provisioning Act and the EP Act.

3.6 Increase or decrease in the Funds

If the amount of the Surety is increased or decreased in accordance with the Financial Provisioning Act, the parties acknowledge and agree that:

- (a) a reference in this document to the Funds will be a reference to:
 - (i) the Funds as increased or decreased; and
 - (ii) the increased or decreased Funds in the Cash Surety Account;
- (b) any Security Interest in the Funds and the Cash Surety Account granted in favour of the Scheme Manager will extend to and include the Funds and the Cash Surety Account as increased or decreased; and
- (c) a reference in this document to the rights and powers of the Scheme Manager in respect of the Funds and the Cash Surety Account will be a reference to the Funds and the Cash Surety Account as increased or decreased.

3.7 Interest on Cash Surety Account

The Holder acknowledges and agrees that:

- (a) the Scheme Manager is solely entitled to all amounts earned as interest on the Cash Surety Account, and that the Holder is not entitled to any such amounts; and
- (b) the Scheme Manager may deposit any amounts earned as interest on the Cash Surety Account into the scheme fund (as defined in the Financial Provisioning Act), in accordance with section 25(4) of the Financial Provisioning Act.

4. HOLDER WARRANTIES, REPRESENTATIONS AND OBLIGATIONS

4.1 Warranties and representations by the Holder

- (a) The Holder irrevocably warrants and represents that:
 - (i) the Holder is the sole legal and beneficial owner of the Funds paid to the Scheme Manager as Surety in respect of the **Alt[EA / Tenure]**;
 - (ii) the Holder will hold the **Alt[EA / Tenure]** as the sole legal and beneficial holder of the **Alt[EA / Tenure]**; and

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- (iii) no person other than the Scheme Manager has the benefit of any right, interest or Security Interest in the Funds;
- (iv) any Security Interest arising in favour of the Scheme Manager in respect of the Funds and the Cash Surety Account will have first priority;
- (v) there is no interest, right, agreement, filing or registration that would or may in the future enable any other person to claim or obtain priority to the Funds ahead of the Scheme Manager; and
- (vi) except for the approval provided for in this document, the Holder has obtained all consents and authorisations necessary to permit the Holder to:
 - (A) provide the Funds as Surety in respect of the **Alt[EA / Tenure]**;
 - (B) grant a Security Interest in respect of the Funds and the Cash Surety Account; and
 - (C) enter into this document.
- (b) The Holder agrees and acknowledges that the Scheme Manager has relied on the warranties and representations contained in this clause 4.1 in entering into this document and giving the approval contained in clause 2.

4.2 Purported dealings with the Funds by the Holder

- (a) For the avoidance of doubt, the rights of the Holder in respect of the Funds and the Cash Surety Account are limited to the rights of a Holder under the Financial Provisioning Act and the EP Act in respect of Surety it has provided.
- (b) Without limiting clause 4.2(a), the Holder must not:
 - (i) assert any rights of a fiduciary nature against the Scheme Manager in respect of the Funds or the Cash Surety Account; or
 - (ii) otherwise assert any rights against the Scheme Manager, except to the extent that those rights are provided for by the Financial Provisioning Act or the EP Act.
- (c) The Holder must not do, or agree to do, any of the following:
 - (i) purport to create or allow any interest or Security Interest in the Funds or the Cash Surety Account in favour of any third party; or
 - (ii) purport to dispose, assign, transfer, charge, grant a Security Interest, encumber or part with any purported rights of the Holder in respect of the Funds or the Cash Surety Account, except as expressly permitted under this document.

4.3 Assistance in claims and realisation

If the Scheme Manager seeks to make any claims on or realisations of the Funds in accordance with section 25 of the Financial Provisioning Act, then the Holder must take all action required by the Scheme Manager to assist in those claims and realisations, including:

- (a) executing all transfers, conveyances, assignments, consents, approvals and assurances required by the Scheme Manager;
- (b) doing anything necessary or desirable under the law in force in respect of the Funds and the Cash Surety Account; and

- (c) giving all notices, orders, directions and consents which the Scheme Manager considers prudent or expedient.

4.4 Irrevocable authority of Holder

The Holder irrevocably authorises the Scheme Manager to deal with the Funds and the Cash Surety Account in accordance with this document.

5. FURTHER ASSURANCES

5.1 General

The Holder must do anything (including obtaining consents, signing and producing documents, and getting any documents completed and signed by third parties) requested by the Scheme Manager from time to time to:

- (a) ensure that the Scheme Manager's rights in respect of the Funds and the Cash Surety Account are enforceable, perfected, and otherwise effective with first priority;
- (b) provide more effective rights to the Scheme Manager in respect of the Funds as Surety and the Cash Surety Account, including granting any legal security or further rights over the Funds and the Cash Surety Account to the Scheme Manager;
- (c) enable the Scheme Manager to apply for any registration, or give any notification in connection with its rights in relation to the Funds and the Cash Surety Account; and/or
- (d) enable the Scheme Manager to exercise its rights in respect of the Funds and the Cash Surety Account.

5.2 PPSA

- (a) Without limiting clause 5.1, the Holder:
 - (i) agrees and acknowledges that the Scheme Manager may, but is not obliged to, apply for any registration or give any notification it considers appropriate in respect of the Funds, the Cash Surety Account and this document, including to register and perfect any Security Interest arising under or in respect of the same on the PPSR;
 - (ii) consents to any such applications, registrations and notifications and, without limiting the foregoing, may not make any Amendment Demand in respect of the same;
 - (iii) must promptly do all things and sign all such documents as may be required by the Scheme Manager from time to time to perfect, register and file any Security Interest in respect of the Funds, the Cash Surety Account and this document asserted by the Scheme Manager, and to ensure the Scheme Manager's enforceability, validity, perfection and first priority against all other persons; and
 - (iv) must promptly:
 - (A) disclose to the Scheme Manager any Security Interests granted by the Holder in respect of the Funds or the Cash Surety Account; and
 - (B) upon request provide to the Scheme Manager a copy of any document in respect of such Security Interest granted by the Holder.

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- (b) Whenever the Scheme Manager requires that any Security Interest in respect of the Funds or the Cash Surety Account that it asserts to be perfected in a particular way, the Holder must ensure that the Security Interest is perfected in that way.

6. PPSA EXCLUSIONS

To the extent that any right, power or interest of the Scheme Manager in respect of the Funds constitutes a Security Interest, and to the fullest extent permitted by law:

- (a) for the purposes of sections 115(1) of the PPSA:
- (i) the Scheme Manager need not comply with sections 95, 118, 121(4), 125, 130, 132(3)(d) or 132(4); and
 - (ii) sections 142 and 143 are excluded;
- (b) for the purposes of section 115(7) of the PPSA, the Scheme Manager need not comply with sections 132 and 137(3);
- (c) the Holder waives the right to receive any notice under the PPSA (including notice of a verification statement) unless, but subject to clause **Error! Reference source not found.**, the notice is required by the PPSA and cannot be excluded;
- (d) if the PPSA is amended after the date of this document to permit the Holder and the Scheme Manager to agree to not comply with or to exclude other provisions of the PPSA:
- (i) the Scheme Manager may notify the Holder that any of those provisions are excluded or that the Scheme Manager need not comply with any of those provisions as notified to the Holder by the Scheme Manager; and
 - (ii) the parties agree that such notification takes effect as an agreement between the Holder and the Scheme Manager in respect of those provisions; and
- (e) the Holder agrees not to exercise its rights to:
- (i) make any request of the Scheme Manager under section 275 of the PPSA;
 - (ii) authorise the disclosure of any information under that section; or
 - (iii) waive any duty of confidence that would otherwise permit non-disclosure under that section.

7. COSTS

On demand, the Holder must reimburse the Scheme Manager for all costs and expenses in relation to the preparation, execution and completion of this document, including legal costs and expenses (including in-house lawyers charged at their usual rates, and registration of any financing statements on the PPSR) on a full indemnity basis.

8. GENERAL

8.1 Continuation of warranties, representations and restrictions

Each of the following continue in full force and effect unless and until the whole of the Funds are released in accordance with clause 3.1(d):

- (a) the warranties and representations given by the Holder under this document; and

- (b) each of the Holder's obligations under clauses 4.2(b), 4.2(c), 4.3, 5.1, 5.2 and 8.2 of this document.

8.2 Confidential information

The Holder must not disclose any information in respect of this document except:

- (a) for the purpose of enforcing this document;
- (b) for the purpose of obtaining legal or tax advice in relation to this document;
- (c) as required by law;
- (d) where the information to be disclosed is already in the public domain; or
- (e) with the prior written consent of the Scheme Manager, which may be given or withheld in the Scheme Manager's absolute discretion.

8.3 Governing law and jurisdiction

- (a) This document is governed by the laws of Queensland.
- (b) Without limiting clause 8.3(a), for the purposes of section 237 of the PPSA where applicable, the law of the Commonwealth of Australia as that law applies in the jurisdiction specified in clause 8.3(a) governs all Security Interests arising under this document to the extent it is permitted to apply under that section.
- (c) The Holder irrevocably submits to the non-exclusive jurisdiction of the courts of Queensland and irrevocably waives any objection to the venue of any legal process on the basis that the process has been brought in an inconvenient forum.

8.4 Prohibition and enforceability

- (a) Any provision of, or the application of any provision of, this document which is prohibited in any jurisdiction is, in that jurisdiction, ineffective only to the extent of that prohibition.
- (b) Any provision of, or the application of any provision of, this document which is void, illegal or unenforceable in any jurisdiction does not affect the validity, legality or enforceability of that provision in any other jurisdiction or of the remaining provisions in that or any other jurisdiction.
- (c) Where any right, power, authority, discretion or remedy conferred on the Scheme Manager by this document is inconsistent with the powers conferred by applicable law then, to the extent not prohibited by that law, those powers conferred by applicable law are regarded as negated or varied to the extent of the inconsistency.

8.5 Waivers

- (a) Waiver of any right arising from a breach of this document or of any power arising under this document must be in writing and signed by the party granting the waiver.
- (b) A failure or delay in exercise, or partial exercise, of any right or power in respect of this document does not result in a waiver of that right or power.
- (c) A party is not entitled to rely on:
 - (i) a delay in the exercise or non-exercise of a right or power in respect of this document as constituting a waiver of that right or power; or

- (ii) any conduct of another party as a defence to exercise of a right or power in respect of this document by that other party.

(d) This clause may not itself be waived except by writing.

8.6 Variation

A variation of any term of this document must be in writing and signed by the parties.

8.7 Survival of representations and warranties

The representations and warranties in clause 4:

- (a) survive the execution of this document; and
- (b) are repeated on the last day of each month with respect of the facts and circumstances then subsisting.

8.8 Notices

- (a) A notice must be in writing. It may be served on a party:
 - (i) by giving it to the party personally; or
 - (ii) by leaving at or posting it to or faxing it to the party's registered office or business address last known to the other party.
- (b) A notice may be executed under seal by the party or signed on behalf of the party, by the duly appointed attorney or attorneys of the party or by the delegate, manager, managing agent, secretary or solicitor of the party.

8.9 Time of delivery

A notice is taken to be served:

- (a) if delivered, at the time of delivery;
- (b) if posted, on the third Business Day after posting; or
- (c) if faxed, at the time stated on a transmission report showing the transmission has been completed, but if a notice is given after 5pm in the circumstances in paragraph (a) or (c):
- (d) it will be treated as served at 9am on the next Business Day; and
- (e) if two notices are deemed under paragraph (d) to have been served at the same time, they are deemed to have been served in the order in which they were actually received.

8.10 Assignment

- (a) The Scheme Manager may assign its rights under this document, the Funds, the Cash Surety Account and the Scheme Manager's Security Interest to any permitted assignee without the consent of any other party to this document.
- (b) The Holder may not assign any of their respective rights under this document without the consent of the Scheme Manager which may be given or withheld in the absolute discretion of the Scheme Manager.

- (c) The Holder may not assign its rights in the Funds without the consent of the Scheme Manager which may be given or withheld in the absolute discretion of the Scheme Manager.

8.11 Counterparts

- (a) This document may be executed in any number of counterparts and all counterparts taken together, constitute one instrument.
- (b) A party may execute this document by signing any counterpart and may exchange a counterpart of this document by electronic facsimile, including by email.

CONSULTATION DRAFT

EXECUTED as a deed.

Each person who executes this document on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

Scheme Manager

[Execution block of the Scheme Manager to be inserted]

Holder

EXECUTED by [NAME OF HOLDER]:

Signature of director

Signature of director/secretary

Name

Name

CONSULTATION DRAFT