

Director's Access and Indemnity Deed

between

[ORGANISATION]
(Association)

and

[insert]
(Director)

between **[ORGANISATION]** of **[insert]** (Association)

and **[insert]** of **[insert]** (Director)

Recitals

The Association and the Director have agreed to the terms of this Deed in relation to the Director's role as a director of the Association.

Now it is covenanted and agreed as follows:

1 DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

The following definitions apply unless the context requires otherwise:

Access Period means the period beginning after the Appointment Period and ending:

- (a) seven years later; or
- (b) where an Action, or an inquiry or hearing of a Government Agency that the Director is or has a reasonable prospect of being required to appear before, is commenced or threatened prior to the date referred to in paragraph (a), the date of final determination or abandonment of the Action, including any appeals, or the date of final completion of the inquiry or hearing (as the case may be),

whichever last occurs.

Action means any actual or threatened proceeding (whether criminal, civil, administrative or judicial) brought against the Director which could give rise to a Claim.

Appointment Period means the period during which the Director holds the position as a director on the Board of the Association.

Associations Incorporation Act means *Associations Incorporation Act 1985 (SA)*.

Board means the board of directors of the Association.

Board Papers means all existing and future Documents given or made available to the Director in connection with their appointment as a director or tabled at meetings of the Board of the Association during the term of appointment (including periodic board papers, submissions, minutes, letters, board committee and sub-committee papers) and any other Documents in the possession or control of the Association which are referred to in those Documents.

Business Day means a weekday on which banks are open for normal banking business in South Australia.

Claim means a claim for indemnification by the Director under clause 3.1.

Constitution means the Constitution of the Association.

Document includes:

- (a) any paper or other material on which there is writing;

- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; and
- (d) any information stored or recorded by means of a computer.

D&O Policy means an insurance policy provided by and maintained with a reputable insurance company for the benefit of (amongst others) the Director which insures the Director against any Liability.

Government Agency means any government or any governmental, semi governmental or judicial entity or authority. It also includes any self regulatory organisation established under statute or any stock exchange.

Interest Rate means the daily buying rate displayed at or about 10.30am (Sydney time) on the Reuters screen BBSW page for Australian bank bills of a three (3) month duration.

Liability means all costs (including any Tax), charges, losses, damages, expenses, penalties and liabilities of any kind (including, in particular, but without limitation, legal costs incurred in defending any proceeding (whether criminal, civil, administrative or judicial) or appearing before any court, tribunal, Government Agency or other body) incurred by the Director in, or arising out of:

- (a) the conduct of the business or affairs of the Association; or
- (b) any act or omission of the Director in their capacity as a director of the Association.

Liquidation includes receivership or other appointment of a controller, deregistration, amalgamation, administration, deed of arrangement, reconstruction, winding up, dissolution, assignment for the benefit of creditors, arrangement or compromise or composition with creditors, bankruptcy or death.

Notified Claim means a Claim or Action notified by the Director to the Association under clause 4.1(a).

Privileged Documents means documents contained in the Board Papers or Director's Papers over which the Association respectively claims legal professional privilege and to which the Director is granted access under this Deed.

Tax includes any tax, levy, impost, deduction, charge, rate, duty, compulsory loan or withholding which is levied or imposed by a Government Agency, and any related interest, penalty, charge, fee or other amount.

to the relevant extent means:

- (a) to the extent the Association is not precluded by law (from doing so); or
- (b) to the extent and for the amount that the Director is not otherwise entitled to be indemnified and is not actually indemnified by the Association or under any insurance policy of the Association;.

1.2 Interpretations

The following rules apply unless the context requires otherwise.

- (a) A reference to the Association includes a reference to any former structure of the Association as a co-operative;
- (b) Headings are for convenience only and do not affect interpretation.
- (c) The singular includes the plural and conversely.

- (d) A reference to a clause is a reference to a clause of this Deed.
- (e) A reference to an agreement or document (including, without limitation, a reference to this Deed) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by this Deed or that other agreement or document.
- (f) A reference to a party to this Deed or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (g) A reference to conduct includes, without limitation, an omission, statement and undertaking, whether or not in writing.

2 ACCESS TO BOARD PAPERS AND DIRECTOR'S PAPERS

2.1 Retention of Board Papers and Director's Papers

The Association must ensure that a complete set of all Board Papers is kept during the Appointment Period, and for the duration of the Access Period, in an appropriate and secure manner.

2.2 Right to access and copy Board Papers and Director's Papers

Subject to clause 2.3, during the Appointment Period and the Access Period, the Association, on receiving reasonable notice from the Director, must without charge:

- (a) permit the Director access during business hours to inspect those Board Papers which relate to the Appointment Period; and
- (b) provide a copy to the Director of such Board Papers, or any part of them, on request by the Director.

2.3 Circumstances in which access permitted

Unless the Association and the Director agree otherwise, during the Access Period, the Director will only have access to, and the right to take copies of, Board Papers under clause 2.2:

- (a) where the Director is defending, or there is a reasonable prospect that the Director will be defending, legal proceedings which relate to an act or omission of the Director in performing the Director's duties relating to their appointment as a director or to the conduct of the Association during the Appointment Period; or
- (b) where the Director is required to appear before, or there is a reasonable prospect that the Director will be required to appear before, an inquiry or hearing of a Government Agency relating to an act or omission of the Director in performing the Director's duties relating to their appointment as a director during the Appointment Period, and

for the sole purpose of the Director conducting those legal proceedings, or appearing before or preparing to appear before that hearing or inquiry. This includes the right of the Director to disclose such Board Papers to third parties (such as the Director's legal advisers) where such disclosure is necessary for the sole purpose of conducting those legal proceedings or appearing before or preparing to appear before that hearing or inquiry.

2.4 No limitation on rights under law

Nothing in this clause 2 limits the rights of an Director under the Associations Incorporation Act to access Board Papers or Director's Papers.

2.5 Privileged Documents

The Association and the Director agree that the granting of access to Board Papers may include access to Privileged Documents which form part of those papers, but that such access does not constitute an express or implied waiver by the Association of its claim to legal professional privilege against persons other than the Director.

3 INDEMNITY

3.1 Obligation to indemnify

Subject to section 39B of the Associations Incorporation Act and only to the relevant extent, the Association indemnifies the Director against any Liability incurred by the Director (whether in respect of any Action or otherwise) in respect of the Appointment Period.

3.2 Association to reimburse

- (a) The Association must reimburse the Director in respect of all reasonable costs, charges and expenses incurred by the Director in defending any Action, upon receiving such satisfactory evidence of the liability as the Association may require.
- (b) Such reimbursements will only be made to the extent required by clause 6.4.

4 ACTIONS AND POTENTIAL CLAIMS

4.1 Obligations in relation to Actions and potential claims

The Director must (to the extent permitted by law and by the terms of any applicable contract of insurance):

- (a) give notice to the Association promptly after becoming aware of any Action or circumstances which could give rise to a Claim;
- (b) take all reasonable steps to enforce the Director's rights against an insurer or any other person who may be liable to indemnify the Director in respect of events which could give rise to a Claim;
- (c) take any action that the Association reasonably requests to avoid or mitigate any Liability which could give rise to a Claim;
- (d) not admit liability in respect of or settle any Action without the prior written consent of the Association, which consent must not be unreasonably withheld;
- (e) subject to clause 4.2 and clause 4.4, upon request by the Association, provide all reasonable assistance and co operation to the Association or its insurers in connection with any Action (including, without limitation, providing the Association or its insurers with any documents, authorities or directions that the Association or its insurers reasonably require for the prosecution of any claim in connection with an Action); and
- (f) upon request by the Association, provide all reasonable assistance to enable the Association or its insurers (so far as it is possible) to be subrogated to and enjoy the benefit of the Director's rights against any third party (including an insurer) in relation to an Action or any claim in connection with an Action.

4.2 Defence of Notified Claim

- (a) Subject to clause 4.4 and clause 4.5, where there is a Notified Claim, the Association may, or may allow its insurers to:

- (i) assume the conduct of the defence of the Notified Claim under its sole management, control and cost;
 - (ii) institute legal proceedings, including any cross-claim or counter-claim to the Notified Claim, in the name of the Director as part of that defence;
 - (iii) subject to clause 4.3, settle or compromise the Notified Claim;
 - (iv) agree to any form of alternative dispute resolution in relation to the Notified Claim; and
 - (v) subject to clause 4.4 retain lawyers to act on behalf of both the Association and the Director in relation to the Notified Claim.
- (b) The Association must (or must ensure that its insurers) notify the Director as soon as reasonably practicable if it intends to take any action permitted by this clause 4.2.

4.3 Settlement of a Claim

- (a) Before the Association or its insurers settle or compromise a Notified Claim, the Association must (or must ensure that its insurers):
- (i) give the Director notice of its intention to do so;
 - (ii) provide to the Director the proposed terms of settlement or compromise; and
 - (iii) allow the Director a reasonable period (to be specified in the notice) in which the Director may object to the proposed terms of settlement or compromise and declare the Director's intention to assume conduct of the Claim.
- (b) If, within the period allowed under clause 4.3(a) in respect of a Notified Claim, the Director gives notice that the Director intends to assume conduct of a Notified Claim, the Association must (or must ensure that its insurers) relinquish to the Director the control of the conduct of the Notified Claim (to the extent that it relates to the Director) and the liability of the Association under this Deed in respect of that Notified Claim will not exceed the amount for which the Notified Claim could have been compromised or settled at the time notice was given to the Director under clause 4.3(a) in respect of that Notified Claim together with costs and expenses reasonably incurred by the Director up to that time.

4.4 Legal representation

Nothing in this clause 4 prevents the Director from obtaining independent legal advice or engaging separate legal or other representation in connection with the conduct of a Notified Claim but any costs or expenses incurred by the Director in so doing will be paid or reimbursed by the Association only to the extent that those expenses are otherwise payable by the Association under this Deed and:

- (a) incurred prior to the Association (or its insurers) assuming conduct of the Notified Claim;
- (b) incurred with the prior written authority of the Association (which must not be unreasonably withheld); or
- (c) reasonable and incurred in circumstances where there is a reasonable likelihood that the interests of the Director and the Association would conflict were the same lawyers to act on behalf of both the Association and the Director.

4.5 Extent of obligations

- (a) Nothing in clause 4.1 or clause 4.2 permits the Association, or requires the Director, to take any action or do any thing (including giving any consent) in respect of a Notified Claim that would be likely to cause significant harm to the reputation of the Director,

except where the Association determines in good faith and on reasonable grounds that the interests of the Association or the conduct of that Claim would be materially prejudiced unless the Association or the Director (as the case may be) takes that action or does that thing.

- (b) Clause 4.1 and clause 4.2 do not apply where:
- (i) the Notified Claim arises from a claim by the Association against the Director; or
 - (ii) where each of the Director and the Association are defendants or respondents to a Claim and in the reasonable opinion of the Director's lawyers there is an actual or potential conflict of interest between the Director and the Association in respect of the conduct of the Claim.

4.6 **Director's compliance may be a condition to payment**

Subject to clause 4.5, the making of any payment or the provision of any other benefit under this Deed may be reduced to the extent that the Association is prejudiced if the Director does not comply with this clause 4.

5 NATURE OF INDEMNITY

5.1 **Indemnity unaffected by other events**

Subject to clause 5.2, neither this Deed nor the obligations of the Association under clause 3 will be affected by anything which but for this provision might operate to release, prejudicially affect or discharge the Association or in any way relieve the Association from any obligation including, without limitation:

- (a) the grant to any person of any time, waiver or other indulgence, or the discharge or release of any person;
- (b) any transaction or arrangement that may take place between the Director and any person;
- (c) any amendment or alteration to the constitution of the Association, which takes effect after the date of this Deed;
- (d) the Liquidation of the Association;
- (e) the Director becoming a party to or bound by any compromise, assignment of property or composition of debts;
- (f) the Director ceasing to hold their appointment as a director; or
- (g) any legal limitation, disability, incapacity or other circumstance relating to any person,

whether with or without the consent or knowledge of the Association. None of the above paragraphs limits the generality of any other.

5.2 **Continuing indemnity**

The indemnity provided under clause 3:

- (a) is an unlimited and continuing indemnity;
- (b) indemnifies the Director despite the Director ceasing to hold their appointment as a director of the Association; and

- (c) is not to be taken to be wholly or partially discharged by the payment at any time of any amount payable under this Deed in respect of the indemnity or by any settlement of account or other matter or thing.

6 PAYMENTS PURSUANT TO INDEMNITY

6.1 Payment due on demand by Director

On demand from time to time by the Director under clause 3, the Association must pay the amount then due and payable under that clause.

6.2 Payments only due on a Business Day

If any payment under this clause is due on a day which is not a Business Day, the due date will be the next Business Day.

6.3 Increase in payment due to liability to Tax

If for any reason the Director incurs a Liability under any law relating to Tax in respect of a payment received by the Director under this Deed, then the payment due to the Director is increased by the amount of that Liability and the amount of any further Liability incurred under any law relating to Tax applicable to the increased payment under this clause.

6.4 Repayment by Director where not entitled to payment

- (a) Where the Association has paid a Claim under clause 3.1 or advanced money under clause 3.2 and it is subsequently found that the Director is not entitled to the benefit of the indemnity (either wholly or in part) then, to the extent that the Director is not entitled, the Director must repay to the Association the Refund Amount together with interest (calculated on a daily basis from and including the date of payment or advance to the date of repayment) on such amount at the Interest Rate on the date on which the payment or advance is made, or at any lesser rate determined by the Association.
- (b) In clause 6.4(a), Refund Amount means:
- (i) the amount of the relevant payment made under clause 3.1 or advanced under clause 3.2 (**Primary Amount**) in respect of which the Director is not entitled to the indemnity (other than any additional amount paid in respect of that payment or advance in accordance with clause 6.3); plus
 - (ii) any additional amount paid in respect of the Primary Amount under clause 6.3 (**Tax Amount**) to the extent that the Director has received or will receive a refund of Tax paid to which the Tax Amount relates, or, if there is or will be no refund, any Tax relief in the form of a Tax deduction, offset, rebate or similar credit in relation to the repayment of the Primary Amount.

7 DIRECTORS AND OFFICERS INSURANCE

7.1 Obligation to maintain D&O insurance

Subject to clause 7.4, the Association must maintain a D&O Policy during the Appointment Period and during the Access Period for the Director which complies with this clause 7.

7.2 Terms of the D&O insurance

The D&O Policy must:

- (a) be for an amount and on terms and conditions (including premium, insuring clauses, exclusions and excess amounts) as are appropriate and available in the market for a reasonably prudent organisation in the Association's circumstances acting fairly;
- (b) without limiting clause 7.2(a), during the Appointment Period, be on terms and conditions that, taken as a whole, are not materially less favourable to the Director than the terms of the D&O Policy applicable to the other directors of the Association during the Appointment Period for the Director.
- (c) without limiting clause 7.2(a) or 7.2(b), during the Access Period, be on terms and conditions that, taken as a whole, are not materially less favourable to the Director than:
 - (i) the terms of the D&O Policy applicable to the Director at the end of the Appointment Period; and
 - (ii) the terms of the D&O Policy applicable to the directors of the Association during the Access Period for the Director.

7.3 **Right to a copy of a certificate of currency and the policy**

The Association must provide the Director with a copy of each certificate of currency in respect of the D&O Policy issued from time to time by the Association's insurance company within seven days of any request from the Director. The Association must also provide the Director with a copy of the D&O Policy within 30 days of any request from the Director.

7.4 **No obligation where contravention of law**

The Association is not obliged to maintain a D&O Policy where to do so would contravene any law (including the Applicable Overseas Laws), but the Association must give reasonable notice to the Director of its intention to terminate any D&O Policy under this clause.

8 DISCLOSURE

8.1 **Obligation to disclose conflicts of interest**

During the Appointment Period, the Director must promptly disclose to the Board the holding of any office or the possession of property in respect of which the Director has, or may have, an interest or duty that may create (directly or indirectly) a conflict with the Director's duties as a director of the Association.

8.2 **Regulatory requirements**

During the Appointment Period, the Director must disclose to the Association all information required to enable the Association to comply with the requirements of the relevant regulatory body.

8.3 **Content and timing of disclosure**

- (a) Any disclosure made by the Director under clause 8.1 must:
 - (i) include full details of the nature, character and extent of; and
 - (ii) be made as soon as the Director becomes aware of,

the conflict or potential conflict.
- (b) Any disclosure made by the Director under clause 8.2 must be made as soon as the Director becomes aware of the information..

8.4 Lodgement of information with regulatory body

- (a) The Director authorises the Association to provide to the relevant regulatory body the information disclosed under clause 8.2.
- (b) The Association undertakes that, to the extent that the Director is obliged by law to lodge with a regulatory body the information disclosed under clause 8.2, the Association will lodge the information provided by the Director within the period required by law.

9 NO LIMITATIONS ON OTHER DUTIES OR RIGHTS

- (a) Nothing in this Deed is intended to replace or reduce the duties or rights applicable to the Director's appointment under any law (including any, statute, common law or equitable rule).
- (b) In particular, and without limitation to clause 9(a), but subject to clause 2.3, the Director acknowledges the Director's duties to the Association in relation to the use of any Board Papers, including the duty to maintain the confidentiality of the Association's Documents after the Appointment Period.

10 GST

10.1 GST to be added to amounts payable

If GST is payable on a Taxable Supply made in connection with this Agreement, the party providing the Consideration for that Taxable Supply must also pay the amount of GST payable in respect of that Taxable Supply as additional Consideration.

10.2 Liability net of GST

Any reference to a Liability incurred by a party will exclude the amount of any Input Tax Credit entitlement of that party in relation to the Liability. A party will be deemed to have an entitlement to a full Input Tax Credit unless it demonstrates otherwise prior to the date on which the Consideration must be provided.

10.3 Definitions

For the purposes of this clause, "GST", "Taxable Supply", "Input Tax Credit", and "Consideration" have the meanings given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

11 ENTIRE AGREEMENT

11.1 Entire agreement

Subject to clause 11.2, this Deed contains the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with it.

11.2 Relationship with Constitution

Nothing in this Deed limits or affects, or will be limited or affected by, any indemnity in the Association's Constitution, except as expressly provided in the Constitution or this Deed. This Deed will prevail to the extent of any inconsistency.

12 ASSIGNMENT

The Director's rights and obligations under this Deed are personal. They cannot be assigned, encumbered or otherwise dealt with and the Director may not attempt, or purport, to do so without the prior consent of the Association.

13 NO WAIVER

No failure to exercise nor any delay in exercising any right, power or remedy by a party operates as a waiver. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

14 COSTS AND STAMP DUTY

The Association must bear the costs arising out of the negotiation, preparation and execution of this Deed. All stamp duty (including fines, penalties and interest) that may be payable on or in connection with this Deed and any instrument executed under this Deed must be borne by the Association.

15 SEVERABILITY OF PROVISIONS

Any provision of this Deed which is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this Deed nor affect the validity or enforceability of that provision in any other jurisdiction.

16 GOVERNING LAW AND JURISDICTION

This Deed is governed by the laws of South Australia. Each party submits to the non exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Deed.

17 COUNTERPARTS

This Deed may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

EXECUTED as a Deed

The common seal of [ORGANISATION] was affixed in the presence of:

Director

Director

Date: / /

Signed by [Insert Director]

in the presence of:

Witness

Date: / /