

**Workers Compensation  
Claims and Policy Services**

**DATE**

**2005**

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**Schedule 12 – Performance  
Guarantee**

**Nominal Insurer**

**And**

**«CoName»**

## Schedule 12 – Performance Guarantee

### TABLE OF CONTENTS

DEED OF GUARANTEE AND INDEMNITY .....	3
BACKGROUND .....	4
1.    Definitions and interpretation .....	5
OPERATIVE PART .....	5
2.    Guarantee of Obligations .....	9
3.    Guarantee of Guaranteed Money .....	9
4.    Principal debtor .....	9
5.    Indemnity.....	10
6.    No requirement to commence proceedings.....	10
7.    Continuing security .....	11
8.    Rights unaffected .....	11
9.    Restrictions on guarantor .....	12
10.   Void payments .....	12
11.   Nominal Insurer’s expenses and interest .....	13
12.   Interest.....	13
13.   Payment in gross.....	14
14.   No representations by Nominal Insurer .....	14
15.   Warranties .....	14
16.   General .....	15
OPERATIVE PROVISIONS .....	9

## Schedule 12 – Performance Guarantee

### DEED OF GUARANTEE AND INDEMNITY

**Date** .....

**Parties** .....

**Name** NOMINAL INSURER as established by the *Workers Compensation Amendment (Insurance Reform) Act 2003* (“**Nominal Insurer**”)

**Address** .....

**Fax Number** .....

**Email Address** .....

**Contact** .....

**Name** ..... (“**Guarantor**”)

**Address** .....

**Fax Number** .....

**Email Address** .....

**Contact** .....

## Schedule 12 – Performance Guarantee

### BACKGROUND

- A. At the request of the Guarantor, the Nominal Insurer proposes to enter into the Scheme Agent Contract.
  
- B. The Guarantor has agreed to guarantee the:
  - (a) performance by the Scheme Agent of its obligations under or in connection with the Scheme Agent Contract; and
  - (b) the payment of the Guaranteed Money to the Nominal Insurer,and indemnify the Nominal Insurer against all loss and liability associated with the Scheme Agent's failure to perform its obligations under the Scheme Agent Contract or failure to pay the Guaranteed Money, on the terms and conditions of this Deed.

# Schedule 12 – Performance Guarantee

## OPERATIVE PART

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions

In this document unless the context requires otherwise:

**Agency** means

- (a) A department of state;
- (b) A body corporate or an unincorporated body or office established or constituted for a public purpose by Commonwealth State or Territory Law, or an instrument made under that authority (including a local authority);
- (c) A body established by the Governor-General, a State Governor, or by a Minister of State of the Commonwealth, a State or Territory or
- (d) An unincorporated company over which the Commonwealth, a State or Territory exercises control.

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays.

**Damages** means all liabilities, losses, damages, costs, claims and expenses, including legal fees (on a solicitor and own client basis) and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties.

**Deed** means the contractual relationship between the parties constituted by this Deed.

**Default Rate** means the Interest Rate plus [2] %.

**Interest Rate** means the “Indicator Rate” rate (expressed as a percentage per annum charged by Westpac Banking Corporation from time to time, as published in the Australian Financial Review.

**Guaranteed Money** means, at any time, all amounts then due for payment or which will or may become due for payment or which remain unpaid, by the Scheme Agent to the Nominal Insurer (for its own account or for the account of another person) arising under or in connection with the Scheme Agent Contract.

**Guaranteed Obligations** means all obligations, undertakings, representations and warranties of the Scheme Agent arising under or in connection with the Scheme Agent Contract.

## Schedule 12 – Performance Guarantee

**Law** includes:

- (a) any statute, regulation, by-law, ordinance or subordinate legislation in force in Australia, whether made by a State, Territory, Commonwealth, or a local government;
- (b) any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued thereunder; and
- (c) common law and the principles of equity;
- (d) any approval, including any condition or requirement under it; and
- (e) any fees and charges payable in connection with the things referred to in paragraphs (a) to (d);

as applicable from time to time.

**Related Body Corporate** has the meaning given to that term in section 9 of the *Corporations Act 2001* (Cth).

**Scheme Agent** means «CoName».

**Scheme Agent Contract** means the deed between the Scheme Agent and the Nominal Insurer for policy and claims services dated [REDACTED].

### 1.2 Interpretation

In this Deed except where the context otherwise requires:

- (a) a reference to this Deed includes any variation, and includes where the Deed has been assigned, novated, or otherwise transferred, in accordance with this Deed;
- (b) a reference to any Law will be deemed to extend to include a reference to all Laws amending, consolidating, replacing or overruling that Law from time to time;
- (c) the singular includes the plural and vice versa;
- (d) a reference to one gender includes every other gender;
- (e) persons will be taken to include any natural or legal person;
- (f) 'include' 'includes' and 'including' means 'including without limitation';
- (g) "absolute" means absolute and unfettered;

## Schedule 12 – Performance Guarantee

- (h) the headings and index in this Deed are for convenience only and do not affect the interpretation of this Deed;
- (i) in the construction and interpretation of this Deed, no rule of construction applies to the disadvantage of the Nominal Insurer on the basis that the Nominal Insurer initiated or drafted the Deed or any part of it;
- (j) direction(s) and requirements given by the Nominal Insurer are not to be construed as the Nominal Insurer participating in the supervision or control of the Guarantor and do not infer any release of Guarantor obligations to appropriately carry out supervision and control function;
- (k) any approval given by the Nominal Insurer does not release the Guarantor from performing its obligations in accordance with this Deed;
- (l) a reference to a person which has ceased to exist or has been reconstituted, amalgamated or merged, or other functions of which have become exercisable any other person or body in its place, must be taken to refer to the person or body established or constituted in its place by which its said functions have become exercisable;
- (m) any time limit under this Deed falls on a non-Business Day then that time limit will be deemed to have expired on the next Business Day;
- (n) a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Australia even if the obligation is to be performed elsewhere;
- (o) where a word or phrase is given a defined meaning in this Deed, any other part of speech or other grammatical form in respect of such word or phrase will have a corresponding meaning;
- (p) where a reference occurs to the doing of anything by the Nominal Insurer including giving any notice, approval, direction or waiver, this may be done by a duly authorised officer of the Nominal Insurer;
- (q) where there is a reference to WorkCover that reference is to WorkCover in its capacity as acting for the Nominal Insurer only, unless expressly stated otherwise;
- (r) where the Guarantor is comprised of more than one person, each obligation of the Guarantor will bind those persons jointly and severally and will be enforceable against them jointly and severally;

## **Schedule 12 – Performance Guarantee**

- (s) a reference to a group of persons is a reference to all of them collectively and to any two or more of them collectively and to each of them individually;
- (t) a reference to a body (including an institute, association or Agency) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (u) a reference to dollars or \$ is to Australian currency.



# Schedule 12 – Performance Guarantee

## OPERATIVE PROVISIONS

### 2. GUARANTEE OF OBLIGATIONS

- 2.1 The Guarantor unconditionally and irrevocably guarantees to the Nominal Insurer on demand, the due and punctual performance and observance by the Scheme Agent of the Guaranteed Obligations.
- 2.2 If the Scheme Agent does not comply with any of the Guaranteed Obligations on time and in accordance with the Scheme Agent contract, the Guarantor must comply with those obligations on demand from the Nominal Insurer. A demand may be made at any time and from time to time and whether or not the Nominal Insurer has made demand on the Scheme Agent.

### 3. GUARANTEE OF GUARANTEED MONEY

- 3.1 The Guarantor unconditionally and irrevocably guarantees payment to the Nominal Insurer of the Guaranteed Money.
- 3.2 If the Scheme Agent does not pay the Guaranteed Money on time then the Guarantor must pay the Guaranteed Money to the Nominal Insurer on demand from the Nominal Insurer. A demand may be made at any time and from time to time and whether or not the Nominal Insurer has made demand on the Scheme Agent.

### 4. PRINCIPAL DEBTOR

- 4.1 If the Guaranteed Obligations (or obligations that would be Guaranteed Obligations if not unenforceable, invalid or illegal) or the payment of the Guaranteed Money are not fully enforceable against, or not fully recoverable from, the Scheme Agent as debtor or from the Guarantor as surety for any reason, including:
- (a) any legal limitation, disability, or lack of capacity, power or authority affecting the Scheme Agent or the Guarantor or an improper exercise of power or authority by any person;
  - (b) any provision of the Scheme Agent Contract, or any transaction relating to the Guaranteed Obligations or Guaranteed Money, being or becoming void, voidable, unenforceable or time-barred; or
  - (c) any winding-up, scheme of arrangement with creditors, reconstruction, reorganisation, administration, dissolution, liquidation, bankruptcy, merger, consolidation, bankruptcy, reorganisation, amalgamation or similar event or circumstance in any jurisdiction affecting the Scheme Agent or Guarantor ;

## Schedule 12 – Performance Guarantee

- (d) the Guaranteed Obligations or the payment of the Guaranteed Money (as the case may be):
  - i. are recoverable from, or enforceable against, the Guarantor as though they had been incurred and owing by the Guarantor and the Guarantor was the sole and principal debtor in respect of the Guaranteed Obligations or Guaranteed Money; and
  - ii. must be paid or performed by the Guarantor on demand by the Nominal Insurer.

### 5. INDEMNITY

5.1 As a separate undertaking, the Guarantor indemnifies the Nominal Insurer against any Damages that may be brought against, incurred, sustained or suffered by the Nominal Insurer and which arises directly or indirectly or as a result or consequence of:

- (a) the Scheme Agent's breach of the Scheme Agent Contract or failure to perform or observe any of the Guaranteed Obligations or pay the Guaranteed Money;
- (b) any liability to perform the Guaranteed Obligations (or any part of them) or pay the Guaranteed Money, not being enforceable against the Guarantor or the Scheme Agent for any reason, except where the nature of the Guaranteed Obligations themselves, or any part of them, are contrary to law, and whether or not any matter or fact was or ought to have been within the Nominal Insurer's knowledge; or
- (c) the Guarantor breaching any of its obligations under this Deed.

5.2 The indemnity contained in clause 5.1 is a separate and distinct obligation and will not be restrictively interpreted by reason of the guarantee given under clauses 2.1 and 3.1 or otherwise.

5.3 It is not necessary for the Nominal Insurer to incur expense or make payment before enforcing its right of indemnity under clause 5.1.

5.4 Guarantor's liability under clause 5.1 is that of principal debtor.

5.5 This clause survives the expiry or termination of this Deed.

### 6. NO REQUIREMENT TO COMMENCE PROCEEDINGS

6.1 The Guarantor waives any right it may have of first requiring the Nominal Insurer to commence proceedings or enforce any other right against the Scheme Agent or any other person before claiming under this guarantee and indemnity.

## Schedule 12 – Performance Guarantee

### 7. CONTINUING SECURITY

7.1 This guarantee and indemnity:

- (a) extends to cover this Deed as amended, varied or replaced;
- (b) is a continuing security;
- (c) is not discharged by any one payment or performance of any other obligation; and
- (d) will remain in full force and effect for so long as the Scheme Agent has any liability or obligation under the Scheme Agent Contract and until all of the Guaranteed Obligations are satisfied or the Guaranteed Money is paid in full.

7.2 The Nominal Insurer must release the Guarantor from this Deed if:

- (a) the Nominal Insurer is satisfied that the Scheme Agent has fully performed and discharged all of its obligations under the Scheme Agent Contract;
- (b) 12 months after the expiration or termination of the Scheme Agent Contract has passed and the Nominal Insurer has given written notice to the Guarantor that in its reasonable opinion:
  - (i) there is no prospect that money or damages will become owing (whether actually or contingently) by the Scheme Agent to the Nominal Insurer.
  - (ii) no payment by the Scheme Agent or the Guarantor is likely to be void, voidable or refundable under any law, including any law relating to insolvency.

### 8. RIGHTS UNAFFECTED

8.1 The liability of the Guarantor under this Deed as a guarantor, indemnifier or principal debtor and the rights of the Nominal Insurer under this Deed are not affected by anything that might otherwise affect them at Law including anyone or more of the following:

- (a) the Nominal Insurer granting waiver, consideration, concession, discharge, time or other indulgence to, compounding or compromising with or releasing the Scheme Agent;
- (b) any act or omission of WorkCover acting on behalf of the Nominal Insurer;
- (c) any laches, acquiescence, delay, acts, omissions or mistakes on the part of, or suffered by the Nominal Insurer;

## **Schedule 12 – Performance Guarantee**

- (d) any transfer, assignment or charging of a right of the Nominal Insurer;
- (e) the termination, rescission, variation or assignment of the Scheme Agent Contract;
- (f) the exercise of any right of step in or any remedy by the Nominal Insurer;
- (g) the invalidity or unenforceability of an obligation or liability of a person other than the Guarantor;
- (h) the Guarantor not executing or not executing effectively this guarantee and indemnity;
- (i) any impossibility or illegality or performance of the Scheme Agent Contract or any Guaranteed Obligation or payment of the Guaranteed Money; or
- (j) the functions of the Nominal Insurer being transferred in part or whole to any other entity.

### **9. RESTRICTIONS ON GUARANTOR**

9.1 Until all moneys payable to the Nominal Insurer in connection with this Deed are paid in full, all of the Guaranteed Money is paid in full and all of the Guaranteed Obligations have been performed, the Guarantor must not, without Nominal Insurer's prior written consent:

- (a) raise a set-off or counterclaim available to it, or the Scheme Agent against the Nominal Insurer, in reduction of its liability under this Deed;
- (b) claim to be entitled by way of contribution, indemnity, subrogation, marshalling or otherwise to the benefit of any security or guarantee held by the Nominal Insurer in connection with this Deed;
- (c) make a claim or enforce a right against the Scheme Agent or its property; or
- (d) prove in competition with the Nominal Insurer if a liquidator, provisional liquidator, receiver, administrator or trustee in bankruptcy is appointed for the Scheme Agent or the Scheme Agent is otherwise unable to pay its debts when they fall due.

### **10. VOID PAYMENTS**

10.1 If a claim that a payment to the Nominal Insurer in connection with the Scheme Agent Contract or under this Deed is void or voidable (including a claim under Laws relating to liquidation, administration,

## Schedule 12 – Performance Guarantee

insolvency or protection of creditors) is upheld, conceded or compromised, then the Nominal Insurer is entitled immediately as against the Guarantor to the rights to which it would have been entitled under this Deed if the payment had not occurred.

### 11. NOMINAL INSURER'S EXPENSES AND INTEREST

- 11.1 The Guarantor agrees to pay or reimburse the Nominal Insurer on demand for the Nominal Insurer's costs, charges and expenses incurred by the Nominal Insurer in making, enforcing and doing anything in connection with this Deed on a solicitor and own client basis, taxes, stamp duty and registration fees, except for legal costs incurred by the Nominal Insurer in connection with the preparation of this Deed.
- 11.2 Money paid to the Nominal Insurer by the Guarantor must be applied first against payment of costs, charges and expenses under clause 11.1 then against other obligations under this Deed.

### 12. INTEREST

#### 12.1 Obligation to pay interest

The Guarantor agrees to pay interest at the Default Rate on:

- (a) any part of the Guaranteed Money which is due for payment but which is not otherwise incurring interest; and
- (b) any amount under this guarantee and indemnity (other than under clauses 2.1 and 3.1 which is not paid on the due date for payment).

The interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days.

The Guarantor agrees to pay interest under this clause on demand from the Nominal Insurer.

#### 12.2 Interest following judgment

If a liability becomes merged in a judgment, the Guarantor agrees to pay interest on the amount of that liability as an independent obligation. This interest:

- (a) accrues daily from (and including) the date the liability becomes due for payment both before and after the judgment up to (but excluding) the date the liability is paid; and
- (b) is calculated at the judgment rate or the Default Rate (whichever is higher).

## **Schedule 12 – Performance Guarantee**

The Guarantor agrees to pay interest under this clause on demand from the Nominal Insurer.

### **13. PAYMENT IN GROSS**

- 13.1 The Guarantor has no right to set off or otherwise deduct or withhold any money payable by the Guarantor under this Deed. All moneys payable by Guarantor under this Deed must be paid in full and be free and clear of any present or future taxes, deduction or withholding of any kind.

### **14. NO REPRESENTATIONS BY NOMINAL INSURER**

- 14.1 The Guarantor acknowledges that, except as expressly set out in this Deed, it has not entered into obligations under this Deed in reliance upon, as a result of or by reason of any promise, representation, warranty, involvement or information of any nature given to it by or on behalf of the Nominal Insurer, its agents, or WorkCover (in any capacity) or any Agency.

### **15. WARRANTIES**

- 15.1 The Guarantor represents and warrants that as at the date of this Deed and at all times during the term of this Deed:
- (a) the execution and delivery of this Deed has been properly authorised;
  - (b) it has full corporate power to execute, deliver and perform its obligations under this Deed;
  - (c) this Deed constitutes a legal, valid and binding obligation of it enforceable in accordance with its terms by appropriate legal remedy except that enforceability thereof may be limited by bankruptcy, insolvency, reorganisation, moratorium or other laws affecting creditors' rights generally;
  - (d) this Deed does not conflict with or result in the breach of or default under any provision of its constitution, or any material term or provision of any Law or regulation to which it is a party or a subject or by which it is bound;
  - (e) there are no actions, claims, proceedings, or investigations pending or threatened against it or by it of which it is aware, and which may have a material effect on the subject matter of this Deed;
  - (f) the signing, delivery and performance of this Deed will not constitute:

## Schedule 12 – Performance Guarantee

- i. a violation of any judgment, order or decree by which it is bound;
  - ii. a material default under any material contract by which it or any of its assets are bound; or
  - iii. an event that would, with notice or lapse of time, or both, constitute such a default;
- (g) it has and will continue to have all licences, authorisations, consents, approval and permits required by all applicable Laws and regulations in order to perform its obligations under this Deed, and otherwise complies and will continue to comply with all Laws and regulations applicable to the performance of those obligations;
- (h) it has appointed a local Australian process agent under or in connection with this Deed on terms which are acceptable to Nominal Insurer and which cannot be revoked without Nominal Insurer's consent; and
- (i) it has obtained the process agent's consent to the appointment referred to in clause 15.1 (h).

### 16. GENERAL

#### NOTICE

16.1 A notice, consent, or other communication under this Deed must be in writing and must be either:

- (a) left at the property address of the Nominal Insurer:

The property address for the Nominal Insurer is:

92-100 Donnison Street, Gosford NSW 2250

Tel:

Fax:

The identity and address of the Guarantor's representative to accept process in connection with this Deed:

**[insert address, Tel and Fax details]**; or

- (b) sent by prepaid ordinary post (airmail if posted to or from a place outside Australia) to the property address of the addressee, or
- (c) sent by facsimile machine to the facsimile number of the addressee, or if the addressee notifies another address or facsimile number, then to that address or facsimile number; or
- (d) hand delivered.

## **Schedule 12 – Performance Guarantee**

- (e) Unless a later time is specified in it, a notice, demand, consent, or other communication takes effect from the time it is received.
- 16.2 A notice, demand, consent, or other communication is taken to be received:
- (a) if left at the property address, on the first Business Day after leaving it;
  - (b) if posted, on the second (seventh if posted to or from a place outside Australia) Business Day after posting;
  - (c) if sent by a facsimile machine, on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient notified for the purpose of this Sub-clause 16.2; and
  - (d) if given or served by hand, at the time of delivery.

### **WRITING**

- 16.3 All amendments to this Deed and all consents, approvals, ratifications, waivers, and variations made under or pursuant to this Deed must be in writing.

### **PERFECTION OF RIGHTS**

- 16.4 The Guarantor must execute all documents and do all acts and things required, at its cost (unless otherwise agreed), for the purposes of giving effect to the provisions of this Deed.

### **CONSENTS**

- 16.5 A party may give its consent or approval conditionally or unconditionally or may withhold its consent or approval, in its absolute discretion, unless this Deed specifically provides otherwise.

### **NON-WAIVER**

- 16.6 No failure or delay by a party in exercising any right, power or remedy under this Deed and no course of dealing or grant by that party of any time or other consideration, will operate as a waiver of a default by the other party. Any waiver of a default of this Deed must be in writing and will not be construed as a waiver of any further breach of the same or any other provision.

### **RELATIONSHIP**

- 16.7 Nothing in this Deed creates a partnership, joint venture or contract of employment.



## **Schedule 12 – Performance Guarantee**

- 16.8 The Nominal Insurer may freely transfer this Deed to any Agency where it is necessary or convenient to do so in order to implement any change to the structure, functions or operations of the Nominal Insurer or any other Agency made by Law.
- 16.9 The Guarantor must not assign, novate or transfer the whole or part of this Deed or any payment or other right benefit or interest under this Deed without obtaining the prior approval of the Nominal Insurer, which may be denied or given in its absolute discretion.

### **SURVIVAL**

- 16.10 Without limiting any other provision of this Deed relating to survival, the following Clauses survive any termination or expiration of this Deed:
- (a) Clause 2 Guarantee of Obligations;
  - (b) Clause 3 Guarantee of Guaranteed Money;
  - (c) Clause 5 Indemnity;
  - (d) Clause 7 Continuing Security;
  - (e) Clause 15 Warranties; and
  - (f) any other provision of this Deed which contemplates performance or observance following any termination or expiration of this Deed.

### **COUNTERPARTS**

- 16.11 This Deed may be executed in any number of counterparts. All counterparts taken together constitute one instrument. All parties acknowledge that this Deed is of no force or effect until the signed counterparts are exchanged.

### **LEGAL EXPENSES, STAMP DUTY AND TAXES**

- 16.12 The Scheme Agent must pay its own legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this Deed.
- 16.13 The Scheme Agent must pay all stamp duty, tax or duty assessed on or in relation to this Deed and any instrument or transaction required by or necessary to give effect to this Deed.

### **INVALIDITY**

- 16.14 A word or provision must be read down if:
- (a) this Deed is void, voidable, or unenforceable if it is not read down;

## **Schedule 12 – Performance Guarantee**

- (b) this Deed will not be void, voidable or unenforceable if it is read down; and
- (c) the provision is capable of being read down.
- (d) A word or provision must be severed if:
  - i. despite the operation of clause 16.14, the provision is void, voidable or unenforceable if it is not severed; and
  - ii. the Deed will be void, voidable or unenforceable if it is not severed.
- (e) The remainder of this Deed has full effect even if clause (d)i or ii applies.

### **ENTIRE AGREEMENT**

16.15 This Deed and the Scheme Agent Contract constitutes the entire agreement and understanding between the parties as to the subject matter of this Deed. Any prior arrangements, agreements, representations or undertakings as to the subject matter of this Deed are superseded.

### **APPLICABLE LAW**

16.16 This Deed is governed by, and must be construed in accordance with, the Laws applicable in force in the State of New South Wales.

### **GOVERNING JURISDICTION**

16.17 Each party submits to the exclusive jurisdiction of the courts exercising jurisdiction in the State of New South Wales and the courts of appeal therefrom.

# Schedule 12 – Performance Guarantee

## Executed as a deed

The COMMON SEAL of .....

.....  
*(insert name of Guarantor)*

A.C.N: .....  
*(insert Guarantor's A.C.N.)*

was duly affixed hereto at .....  
*(insert name of City/ Town)*

in the State of .....  
*(insert name of State / Territory)*

)

)

(Corporate Seal)

.....  
*(signature of Director)*

in the presence of .....  
*(insert name of Secretary or other permanent officer)*

)

)

)

.....  
*(signature of Secretary or other permanent officer)*

## Schedule 12 – Performance Guarantee

**SIGNED FOR AND ON** )  
**BEHALF OF THE WORKERS** )  
**COMPENSATION NOMINAL** )  
**INSURER** by the Chief )  
Executive Officer of ) .....  
WorkCover [or authorised )  
person with delegation )  
authorised to sign on behalf of )  
the Nominal Insurer] in the )  
presence of: )

.....  
Witness Signature

.....  
Print Full Name of Witness

.....  
Position