



ASIC

Australian Securities & Investments Commission

[PF 217]

Pro Forma 217

Deed: Authorised audit company run-off insurance cover

Corporations Act 2001 Chapter 9, Part 9.2A

Issued: 14 December 2004

This Pro Forma deed, concerning professional indemnity insurance run-off cover for an authorised audit company, is to be executed by each director of the company as a condition of registration of the authorised audit company (see Condition 4.1 of Pro Forma 216).

This Deed is made the *[insert date]* day of *[insert month and year]*

BY *[insert name the director]* (the “Director”) of *[insert address]*,

in favour of

the Australian Securities and Investments Commission having its office at *[address of regional office of state or territory in which the Company has its registered office]* (“ASIC”);

[insert company name and ACN] (the “Company”); and

each person (collectively “Interested Persons”), other than the Director, that from time to time acts as director of the Company whilst the Company is registered as an authorised audit company.

Recitals

- A. The Director is, as at the date of this Deed, a director of the Company.
- B. The Company is, or has applied to ASIC to be, registered as an authorised audit company.
- C. A company’s registration as an authorised audit company is

subject to certain conditions determined by ASIC for the purposes of paragraph 1299D(1)(c) of the Act. One of these conditions is to the effect that each director of an authorised audit company must give the undertakings concerning run-off cover that are contained in this Deed.

- D. The Director gives the undertakings in this Deed to, and for the benefit of, ASIC, the Company, and the Interested Persons on the terms and conditions contained in this Deed.

OPERATIVE PROVISIONS

1 Definitions and Interpretation

1.1 In this Deed, unless the context otherwise requires:

- (a) **Act** means *Corporations Act 2001*.
- (b) **APRA-regulated insurer** means an entity permitted by the *Insurance Act 1973* to write insurance business in Australia.
- (c) **ASIC** means the Australian Securities and Investments Commission.
- (d) **authorised audit company** means a company registered as an authorised audit company under Part 9.2A of the Act.
- (e) **Company** means [*insert company name and ACN*].
- (f) **Corporations Act audit** means:
 - (i) an audit of a company, registered scheme or disclosing entity under a provision of the Act;
 - (ii) an audit required under a condition of or otherwise conducted to obtain the benefit of ASIC relief in relation to the Act; or
 - (iii) an audit conducted in accordance with the operating rules of a licensed financial market within the meaning of the Act.
- (g) **employee** means a past or present employee of the Company.

- (h) **engagement fee** means the total remuneration payable to the Company for services rendered or to be rendered in relation to a Corporations Act audit.
- (i) **net tangible assets** means in relation to the Company on a particular date, the tangible assets (being monetary assets and assets with physical substance) less all liabilities where the assets and liabilities are determined in accordance with the accounting standards that would have applied to the Company, if the Company was required to report under Chapter 2M of the Act and had a financial year of 12 months ending on that date.
- (j) **officer** means a past or present officer (as defined in s9 of the Act) of the Company.
- (k) **run-off cover** means insurance cover for claims made during the run-off period against the Company in respect of Corporations Act audits conducted by the Company during its period of registration as an authorised audit company.
- (l) **run-off period** means the period commencing on the date on which the Company's registration as an authorised audit company is cancelled and ending on the seventh anniversary of that date.

1.2 In this Deed, unless the context otherwise requires:

- (a) Words importing the singular include the plural (and vice versa).
- (b) References to laws include all laws amending, consolidating or replacing the laws referred to.
- (c) References to any documents (including this Deed) is a reference to that document as varied, reissued, or replaced from time to time.
- (d) Headings are for convenience only and do not form part of this Deed.

2 Nature of Deed

- 2.1 The Director acknowledges that this Deed is executed as a Deed Poll in favour of ASIC, the Company, and the Interested Persons and may be relied on and enforced by ASIC in accordance with its terms, notwithstanding that none of ASIC, the Company, nor the Interested Persons are parties to this Deed.

3 Conditions

- 3.1 The Director has an obligation under clause 5 of this Deed if and only if the Company is registered as an authorised audit company (whether before, on or after the date of this Deed). This obligation continues:
- (a) even if the Company later ceases to be an authorised audit company for any reason; and
 - (b) even if the Director ceases to be a director of the Company for any reason.

4 Variation and termination

- 4.1 Subject to clauses 4.3 and 4.4, this Deed may not be varied or revoked except with ASIC's prior written consent.
- 4.2 If this Deed is varied or revoked in accordance with clause 4.1 or clause 4.3 then in addition and without prejudice to any other rights, powers or remedies available to ASIC and the Company:
- (a) In the case of a variation—the Director's obligations under this Deed are varied in accordance with the variation from the date of the variation; and
 - (b) In the case of a revocation—the Director is released, from the date of revocation, from his or her obligations under this Deed; and
 - (c) In any case—ASIC, the Company and the Interested Persons retain any rights each has against the Director in respect of any breach that occurred before the variation or revocation of this Deed.

4.3 This Deed ceases to have effect to the extent of any inconsistency with:

- (a) any amendments to the Act; or
- (b) any regulations made under the Act dealing with the matters specified in clause 5 of this Deed, for so long as those regulations are in force.

5 Run-off Cover

5.1 The Director must use best endeavours to cause the Company to hold run-off cover at all times throughout the run-off period, being run-off cover that:

- (a) covers claims made during the run-off period in respect of Corporations Act audits conducted by the Company, its officers and employees;
- (b) unless ASIC otherwise agrees, is issued by an APRA-regulated insurer;
- (c) has an insured amount that is reasonable given the number, nature, scale and complexity of Corporations Act audits performed by the Company and, in any case, is not less than the insured amount required by the conditions on registration imposed on the Company during the final year before it ceased to be registered as an authorised audit company;
- (d) does not have an excess or deductible exceeding the value of the net tangible assets of the Company on the date the run-off cover is entered into, provided that any such excess or deductible is not greater than the smallest excess or deductible which applied under any insurance policy held by the Company, in accordance with the conditions on registration of the Company as an authorised audit company, during the final year before it ceased to be so registered;
- (e) covers costs and expenses incurred by the Company, its officers and employees when defending and settling claims against the Company in relation to Corporations Act audits conducted during the period of registration as an authorised audit company, including legal costs and expenses of investigation;

- (f) covers fraud by officers or employees of the Company relating to a Corporations Act audit conducted during the period of registration as an authorised audit company;
 - (g) is not cancellable by the insurer solely because of an innocent non-disclosure or misrepresentation by the Company, its officers or employees; and
 - (h) subject to this clause, is on ordinary commercial terms offered by insurers for run-off cover of that type at the time the relevant cover is entered into, including only being subject to exclusions and conditions standard or usual for insurance of that type.
- 5.2 The Director is jointly and severally liable, with each Interested Person:
- (a) to pay the premium in respect of the run-off cover in the event that the Company does not pay this premium as it falls due; and
 - (b) to pay any excess or deductible in respect of a claim made against the Company under the run-off cover in the event that the Company does not pay this excess or deductible as it falls due.

6 Acknowledgement

6.1 The Director acknowledges that:

- (a) the obligations under this Deed continue notwithstanding that the Director may cease to be a director of the Company; and
- (b) this Deed does not extinguish any personal liability that the Director may have relating to a Corporations Act audit conducted during the period that the Company was registered as an authorised audit company.

7 Stamp Duty

7.1 The Director must pay all stamp duty imposed in relation to this Deed and on any instrument or other document executed to give effect to this Deed.

8 General

- 8.1 The rights, powers and remedies of ASIC under this Deed are cumulative with the rights, powers or remedies provided by law independently of this Deed.
- 8.2 This Deed is governed by the law in force in *[insert name of state or territory in which the Company has its registered office]* and the Director agrees to submit to the non-exclusive jurisdiction of the courts of that state or territory and any other court that hears appeals from those courts.
- 8.4 The rights and obligations of a person under this Deed are personal. They cannot be assigned, charged or otherwise dealt with, and no person shall attempt or purport to do so.

EXECUTED as a Deed Poll

SIGNED, SEALED and DELIVERED by the Director on *[insert date]* in the presence of:

Signature of Director
[Insert name of Director]

Signature of Witness
[Insert name of Witness]