



## CONFIDENTIALITY DEED

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**Date:**                      **day of**                      **20**

### **Parties**

1.     **The Party** nominated in Schedule 1 below (**Discloser**)
2.     **The Party** nominated in Schedule 2 below (**Recipient**).

### **Recitals:**

- A.     The Discloser and the Recipient desire to begin discussions regarding the illiquid/Tough-to-Trade assets specified in Schedule 3 owned by the Discloser (**Business Purpose**).
- B.     In connection with such discussions, the Discloser proposes to deliver certain Confidential Information (as defined below) to the Recipient, to be used only for the Business Purpose.
- C.     The Recipient has agreed to keep strictly confidential all Confidential Information (as defined below) disclosed to it by the Discloser, except where otherwise provided for in this Deed, and to protect such confidential information from unauthorised use and disclosure.

### **It is agreed**

#### **1.     Definitions and interpretation**

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##### **1.1   Definitions**

In this Deed, unless the contrary intention appears:

**Authorised Persons** means in respect of the Recipient the:

- (a)     Officers, employees, advisors and agents of the Recipient; and
  - (b)     Related Bodies Corporate of the Recipient, their respective employees, advisors, agents and officers
- who, in the case of each of (a) and (b):
- (c)     Have a need to know Confidential Information (and only to the extent that they have a need to know); and
  - (d)     Have been made aware by the Recipient that Confidential Information must be kept confidential.

**Business Purpose** has the meaning assigned to that term in Recital A;

**Confidential Information** means, subject to clause 3.2, the following, whether or not in material form:

- (a) The fact that the Recipient undertakes or proposes to undertake the Business Purpose;
- (b) All information (including commercially sensitive information and technical know-how and information of the Discloser and/or a Related Body Corporate of the Discloser) directly or indirectly disclosed or made available by or on behalf of the Discloser to the Recipient pursuant to this Deed;
- (c) All notes and other records prepared by the Recipient or any Authorised Person based on or incorporating the information referred to in paragraphs (a) and (b); and
- (d) All copies of the information and those parts of the notes and other records referred to in paragraphs (b) and (c);

**Effective Date** means the date on which the last party signs this Deed;

**Officers** has the meaning given to it in section 9 of the *Corporations Act 2001*; and

**Related Body Corporate** has the meaning given to it in sections 9 and 50 of the *Corporations Act 2001*.

## 1.2 Interpretation

In this Deed, unless the contrary intention appears:

- (a) Headings are for ease of reference only and do not affect the meaning of this Deed;
- (b) The singular includes the plural and vice versa and words importing a gender include other genders;
- (c) Other grammatical forms of defined words or expressions have corresponding meanings;
- (d) A reference to a document or agreement, including this Deed, includes a reference to that document or agreement as altered or replaced from time to time;
- (e) A reference to a party includes the party's executors, administrators and successors; and
- (f) Words and expressions importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies, and vice versa.

## 2. Duration of covenants

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2.1 Notwithstanding the completion of the Business Purpose, the obligations of the parties under this Deed continue in full force and effect until the earlier of the following to occur:

- (a) Where the parties agree in writing that their obligations under this Deed have come to an end;
- (b) Where the Confidential Information is lawfully generally available to the public other than as a result of a breach of this Deed;

- (c) Two years from the Effective Date; or
- (d) Such date as otherwise agreed in writing by the parties.

### **3. Disclosure and use of confidential information**

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- 3.1 In consideration of the Discloser agreeing to disclose Confidential Information to the Recipient, the Recipient agrees for the benefit of the Discloser:
- (a) To use all Confidential Information solely for the Purpose;
  - (b) Subject to clauses 3.1(a), 3.2 and 3.3, to keep confidential all Confidential Information; and
  - (c) Not to disclose the Confidential Information (otherwise than in accordance with this Deed) without the prior written consent of the Discloser, which consent may be granted or refused in the Discloser's discretion.
- 3.2 The obligations of confidentiality under this Deed do not extend to Confidential Information that (whether before or after this Deed is executed):
- (a) Is rightfully known or in the possession or control of the Recipient and is not subject to an obligation of confidence (including an obligation under this Deed) on the Recipient to the Discloser;
  - (b) Is lawfully generally available to the public, other than as a result of a breach of this Deed; or
  - (c) The Recipient is required by law or by order of a court of competent jurisdiction to disclose.
- 3.3 The Recipient shall, whenever practicable and permitted by law, prior to making any disclosure permitted by clause 3.2(c), advise the Discloser of the form and content of the proposed disclosure and will provide the Discloser with a reasonable opportunity to comment on the proposed disclosure.
- 3.4 The Recipient may disclose Confidential Information only to the Recipient's Authorised Persons with the prior written consent of the Discloser, which shall not be unreasonably withheld.
- 3.5 The Recipient must, at its own expense:
- (a) Ensure that, at all times, each of the Authorised Persons to whom Confidential Information is disclosed, keeps confidential the Confidential Information;
  - (b) Notify the Discloser immediately if it becomes aware of any suspected or actual unauthorised use, copying or disclosure of Confidential Information;
  - (c) Immediately take all steps to prevent or stop the suspected or actual unauthorised use, copying or disclosure of Confidential Information; and
  - (d) Comply with any reasonable direction issued by the Discloser from time to time regarding enforcement of this Deed or the obligations of confidentiality under this

Deed (including but not limited to, starting, conducting and settling enforcement proceedings).

#### **4. Security and control**

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- 4.1 The Recipient must, and must ensure that the Authorised Persons to whom Confidential Information is disclosed, at its expense:
- (a) Establish and maintain effective security measures to safeguard Confidential Information from access or use not authorised by this Deed; and
  - (b) Keep Confidential Information under its control.
- 4.2 The Recipient must provide, and must ensure that each of its Authorised Persons provides, the assistance reasonably requested by the Discloser in relation to any proceedings the Discloser may take against any person for unauthorised use, copying or disclosure of Confidential Information.

#### **5. Acknowledgment and indemnity**

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- 5.1 The Recipient acknowledges for itself and for each of its Authorised Persons that:
- (a) It is aware that any breach of this Deed will result in the Discloser suffering damage, for which damages may not be an adequate remedy; and
  - (b) In the event of a suspected or actual breach of this Deed or any obligation of confidentiality under this Deed, the Discloser is entitled to seek and obtain injunctive relief.
- 5.2 The Recipient indemnifies and covenants to keep indemnified the Discloser from and against all losses, damages, expenses and legal costs that the Discloser reasonably sustains or incurs directly as a result of any breach of this Deed by the Recipient.

#### **6. Ownership**

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- 6.1 The parties acknowledge that this Deed does not convey any interest of a proprietary nature, and in particular but without limitation, does not transfer any interest in any intellectual property (including Confidential Information) to the Recipient.
- 6.2 All Confidential Information is and will remain at all times the property of the Discloser.
- 6.3 Nothing in this Deed is to be treated as granting to the Recipient or to any other person any licence or other right (whether or not of a proprietary nature) in connection with any Confidential Information except to use the Confidential Information solely for the Business Purpose and strictly in accordance with the provisions of this Deed.

#### **7. Assignment**

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- 7.1 The Recipient may not assign or otherwise transfer any of its rights arising under this Deed.
- 7.2 On the Discloser giving notice to the Recipient, the right to use the Confidential Information ceases and the Recipient must, and must procure that all of its Authorised Persons, immediately (at the Discloser's option):

- (a) Return to the Discloser;
- (b) Destroy and certify in writing to the Discloser the destruction of; or
- (c) Destroy and permit a representative of the Discloser to witness the destruction of,

the Confidential Information in the Recipient's possession or control. Notwithstanding the foregoing, where the return or destruction of the Confidential Information is impossible or impractical, including those Confidential Information that are automatically stored in back-up computer files, the obligation of the Receiver to keep confidential such Confidential Information shall continue until the later of:

- (d) One (1) year from the date of such Confidential Information should have been returned or destroyed; or
- (e) A date determined in accordance with clause 2.1.

7.3 The return of Confidential Information under clause 7.2 does not affect any accrued rights or remedies that the Discloser may have against the Recipient.

## **8. Quality of information and release**

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- 8.1 The Discloser does not make or give any representation, assurance or warranty, express or implied that the Confidential Information or any part of the Confidential Information is or will be complete or accurate and the Recipient agrees that it must make its own assessment of the Confidential Information.
- 8.2 The Recipient releases the Discloser to the fullest extent permitted by law, from and against all claims, actions, damages, remedies and matters arising from or which may arise from or in connection with the provision of, or any purported reliance on, the Confidential Information.
- 8.3 The Discloser is under no obligation to notify the Recipient or provide any further information to the Recipient if it becomes aware of any inaccuracy, incompleteness or change in the Confidential Information, nor is it under any other obligation or duty in relation to the Confidential Information.

## **9. Notices**

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- 9.1 A party giving notice or notifying under this Deed must do so in writing:
  - (a) Directed to the recipient's address specified in this clause, as varied by any notice; and
  - (b) Hand delivered, sent by prepaid post or emailed to that address.
- 9.2 The addresses for the Discloser and the Recipient are as set out in Schedules 1 and 2 respectively.
- 9.3 A notice given in accordance with this clause is taken to be received:
  - (a) If hand delivered, on delivery; or
  - (b) If sent by prepaid express post, or international courier, 7 days after the date of despatch; or

- (c) if sent by email, is taken to be given or made:
- (1) When the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
  - (2) When the Notice enters an information system controlled by the recipient; or
  - (3) When the Notice is first opened or read by the recipient,
- whichever occurs first.

## **10. General**

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- 10.1 This Deed may be executed in counterparts.
- 10.2 This Deed is governed by the laws of New South Wales and each party unconditionally and irrevocably submits to the non-exclusive jurisdiction of the courts of that State.
- 10.3 The failure of a party at any time to insist on performance of any provision of this Deed is not a waiver of its right at any later time to insist on performance of that or any other provision of this Deed.
- 10.4 Any consideration to be paid or provided for a supply made under or in connection with this Deed, does not include an amount of goods and services tax. If a party makes a supply under or in connection with this Deed on which goods and services tax is imposed, the consideration payable or to be provided for that supply under this Deed, but for the application of this clause, is increased by, and the other party must also pay on demand an amount equal to, the goods and services tax payable on that supply, if any.
- 10.5 A variation to this Deed shall only be effective if in writing and signed by both parties.

**Schedule 1**

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**Name of Discloser:** .....

**ACN:** .....

**Address:** .....

**Name of Authorised Signatory:** .....

**Email:** .....

**Tel:** .....

**Schedule 2**

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**Name of Recipient:** .....

**ACN:** .....

**Address:** .....

**Name of Authorised Signatory:** .....

**Email:** .....

**Tel:** .....

**Schedule 3**

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**Description of Asset:** .....

**Execution**

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**For and on behalf of the Discloser by Its Authorised Signatory**

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**For and on behalf of the Recipient by its Authorised Signatory**