Project Bank Account Deed of Release and Priority Deed Poll

(July 2019)

PRIORITY DEED POLL

THIS DEED is made on this ………day of …..…..……………... 20.....… by:

1. **[FULL NAME OF FINANCE PROVIDER (OR OTHER ENTITY) WITH SECURITY INTEREST OR SECURITY TRUSTEE IF SYNDICATED/CLUB FINANCING] (ABN: [ABN] )**, of [address] (the **SECOND CREDITOR**)

in favour of

1. Each **FIRST CREDITOR** (as defined below).

Whereas:

1. The Contractor has or will enter into a contract with the Corporation, a statutory body corporate created by the *Water Corporation Act 1995* (WA), for the carrying out and completion of works.
2. It is a requirement of the contract that the Contractor and its Subcontractors participate in arrangements required by the Corporation to effect 'project bank accounts' pursuant to a PBA Trust Deed Poll and a PBA Agreement.
3. The Second Creditor has agreed to enter into this deed poll to acknowledge that the Securities will have the priority set out in this document.

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Operative Provisions

# Definitions and Interpretation

The meanings of the terms used in this deed are set out below:

|  |  |
| --- | --- |
| **Bank** | means a bank (operating in Australia). |
| Contractor | means [*insert name of Contractor*.]. |
| **Creditor** | means the First Creditor or the Second Creditor. |
| **First Creditor** | means each 'Beneficiary' as defined under the PBA Trust Deed Poll. |
| **Government Agency** | means any government or governmental, semi-governmental, administrative, public, regulatory or judicial entity, body, department, commission, agency or authority. |
| **PBA Agreement** | means the agreement entered into between the Contractor, the Principal and the Bank which establishes the Project Bank Account. |
| **PBA Trust Deed Poll** | means the document of that name executed by the Contractor and which is also executed by the Principal in connection with the Contract, on or around the date of the Contract, pursuant to which the Accounts are to be established and moneys due to the Contractor under the Contract are to be paid and held on trust. |
| **Personal Property** | means all Secured Property which is 'personal property' (as defined in the PPSA). |
| **Power** | means, in respect of a Creditor, any right, power, discretion or remedy of that Creditor under any of its Security or applicable law. |
| **PPS Law** | means:   1. the PPSA and any regulation made at any time under the PPSA, including the PPS Regulations (each as amended from time to time); and 2. any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a). |
| **PPS Regulations** | means the *Personal Property Securities Regulations 2010* (Cth). |
| **PPSA** | means the *Personal Property Securities Act 2009* (Cth). |
| Receiver | means any person or persons appointed as a receiver or receiver and manager pursuant to a Security. |
| Released Property | means:   1. the bank account (established as a trust account) pursuant to the PBA Trust Deed Poll; 2. all moneys standing to the credit of that bank account from time-to-time;   rights held in trust for the beneficiaries pursuant to the PBA Trust Deed Poll and the PBA Agreement being an agreement facilitating the above mentioned bank account. |
| Secured Amounts | means, in respect of a Security at any time, all monetary liabilities and obligations and amounts which are secured by that Security at that time. |
| Secured Property | means all property and assets the subject of both a Security of the First Creditor and a Security of the Second Creditor, as described in Schedule 1. |
| Security | means, in respect of a Creditor:   1. each Security Interest of that Creditor described in Schedule 1; and 2. any other present or future Security Interest of that Creditor to the extent that it affects the Secured Property. |
| Security Interest | means any:   1. 'security interest' as defined in the PPS Law; 2. security for payment of money, performance of obligations or protection against default (including a mortgage, bill of sale, charge, lien, pledge, trust, power or title retention arrangement, right of set-off, assignment of income, garnishee order or monetary claim and flawed deposit arrangements); or 3. thing or preferential interest or arrangement of any kind giving a person priority or preference over claims of other persons or creditors with respect to any property or asset,   and any agreement to create any of them or allow them to exist. |

# Interpretation

In this deed the following rules apply unless the context expressly requires otherwise:

* + 1. a reference to a person includes a company, partnership, joint venture, association, corporation or other body corporate and any governmental agency;
    2. includes and including are not words of limitation;
    3. a reference to legislative requirements includes all amendments, re-enactments and replacements to legislative requirements;
    4. if a word is defined, another part of speech or grammatical form of that word has a corresponding meaning;
    5. words in the singular include the plural and words in the plural include the singular, according to the requirements of the context;
    6. words importing a gender include every gender;
    7. the clause headings in the deed are for convenience only and do not affect interpretation of the deed;
    8. if the time for giving any Notice, making any payment or doing any other act required or permitted by the deed, falls on a day which is not a Business Day, then the time for giving the Notice, making the payment or doing the other act shall be deemed to be on the next Business Day;
    9. unless otherwise provided, prices are in Australian dollars;
    10. communications between the Principal and the Consultant shall be in the English language;
    11. the Principal may exercise the rights conferred by the deed in addition to any other rights or remedies that the Principal is or may be entitled to against the Consultant, whether at law or under the deed;
    12. the rights, duties and remedies granted or imposed under the terms of the deed operate to the extent not excluded by law;
    13. in the interpretation of the deed, no rule of construction applies to the disadvantage of one Party on the basis that that Party put forward or drafted the deed or any provision in it; and
    14. a reference to a part, clause, Party, Schedule or Annexure is a reference to a part, clause, Party, Schedule or Annexure to the deed and a reference to the deed includes any Schedule or Annexure.

Unless the context requires otherwise, a reference in this document to:

* + 1. a party to any document includes that person's successors and permitted substitutes and assigns;
    2. an agreement includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;
    3. a document or agreement includes that document or agreement as novated, altered, supplemented or replaced from time to time;
    4. any thing includes any part of it and a reference to a group of things or persons includes each thing or person in that group;
    5. clauses, schedules and annexures are to those in this document, and a reference to this document includes any schedule and annexure;
    6. a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
    7. time is to Perth, Western Australia time unless otherwise stated;
    8. legislation or other law or a provision of them includes regulations and other instruments under them, and any consolidation, amendment, re-enactment or replacement;
    9. property or an asset includes any real or personal, present or future, tangible or intangible property or asset and any right, interest, revenue or benefit in, under or derived from the property or asset; and
    10. amendment demand, attachment, financing change statement, financing statement and perfection have the meaning given in the PPSA.

# Creditor obligations

A Creditor's obligations under this document are several, and no Creditor is responsible for the obligations of another Creditor. A Creditor's failure to perform an obligation does not relieve another Creditor or the Security Provider of its obligations.

# Priority arrangements

## Consent

Each Creditor consents to the other Creditor's Security and agrees that the creation and existence of the other Creditor's Security is not a breach of, or default under, its Security or this document.

## Order of priority

In respect of all Secured Property, the First Creditor's Security has priority over, and ranks ahead of, the Second Creditor's Security for all Secured Amounts under the First Creditor's Security.

## Application of money and proceeds

All money and proceeds received or recovered from the disposal of, or other dealing with, the Secured Property (including any insurance or compensation proceeds for loss or damage to the Secured Property payable to a Creditor) must be applied in accordance with the priority set out in clause 4.2, whether or not arising from the enforcement of any Security.

## Contingent liabilities

If a Security secures a contingent liability owed to a Creditor, until that Creditor is satisfied that the contingent liability has been extinguished, that Creditor may retain from the proceeds of the exercise of any Power an amount consistent with the priority established under clause 4.2 which it reasonably estimates to be the amount of the contingent liability.

## Priority arrangements paramount

This document and the priority arrangements in it apply despite anything which might otherwise affect them, including:

* + 1. anything contained in any Security;
    2. the order of creation, execution, attachment, perfection, filing for registration or registration of any Security;
    3. the order in which any Secured Amounts secured by any Security was made available or came into existence;
    4. an increase or decrease in the amount secured by any Security for any reason;
    5. the order in which any Powers are exercised (including the appointment of a Receiver), whether under a Security or any other document relating to any Secured Amounts secured by any Security;
    6. any partial discharge or release of any Security or Secured Property;
    7. any notice received by a Creditor pursuant to a Security, or of a Security Interest; or
    8. any law, rule of equity or order or decision of any Government Agency to the contrary.

## Continuation

The priority arrangements in this document will continue until:

* + 1. there is no longer any Secured Property; or
    2. agreed otherwise by the Creditors in writing.

## Other property

Nothing in this document affects the operation of a Security to the extent it secures property or assets other than the Secured Property.

# PPS Law

## Effect of this deed on PPSR

* + 1. The Released Property is released from any Security Interest held by the Second Creditor on the date of this deed.
    2. The Second Creditor undertakes to amend the registration of any Security Interest in accordance with PPS Law, if amendment is necessary to give effect to the release contemplated in clause 5.1(a)
    3. Nothing in this deed releases, terminates or otherwise affects and debts or liabilities on the Contractor or any other person secured by any Security Interest held by the Second Creditor to the extent such debts or liabilities remain outstanding at the date of this deed or arise after the date of this deed.

## Section 61

In respect of the Personal Property, this document is an agreement to subordinate security interests for the purposes of section 61 of the PPSA.

## Notices under Chapter 4

The Creditors contract out of the Second Creditor's right to receive any notice from the First Creditor under Chapter 4 of the PPSA.

## Amounts under section 127(6)

The Creditors contract out of the Second Creditor's right to receive any amount from the First Creditor under section 127(6) of the PPSA.

# Dealings between Creditors

## Distribution

If a Creditor (**Recipient**) receives or recovers an amount pursuant to its Security which the other Creditor (**Claimant**) has a right to receive pursuant to this document, the Recipient must:

* + 1. promptly notify the Claimant of the amount received or recovered; and
    2. promptly pay an equivalent amount (net of its reasonable enforcement and costs incurred in obtaining the amount) to, or as directed by, the Claimant.

On the Claimant's receipt of the Recipient's payment under paragraph (b), the Security Provider acknowledges that the Recipient will be taken to not have received the relevant amount, and the Security Provider's liability to the Recipient will not be reduced or discharged by that amount.

## Dealing with a Security

The Second Creditor must not transfer, assign or otherwise deal with any of its Security except:

* + 1. for the purpose of enforcement of the Security in accordance with this document;
    2. where any person taking a transfer or assignment of that Security first enters into a deed with the other parties to this document on the same terms as this document; or
    3. where the First Creditor first agrees in writing.

## Exercise of Powers and enforcement

* + 1. The Second Creditor must obtain the consent of the First Creditor before:
       1. taking steps to exercise any Power in connection with enforcement of its Security in relation to the Secured Property; or
       2. making, or permitting a Receiver to make, any application under section 420B of the *Corporations Act 2001* (Cth) in relation to any Secured Property.

# General provisions

## Governing law and jurisdiction

This document is governed by the laws of Western Australia. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of that place (and any court of appeal) and waives any right to object to an action being brought in those courts, including on the basis of an inconvenient forum or those courts not having jurisdiction.

## Irrevocable

This deed poll cannot be revoked or otherwise modified without the prior written consent of each of the First Creditors.

## Enforceability

This document operates as a deed poll and is enforceable against the Second Creditor in accordance with its terms by the First Creditor, despite the First Creditors not being parties to this deed poll.

Execution Page

**EXECUTED AS A DEED POLL**

Signed for and on behalf of

**[SECOND CREDITOR] (ABN )** by its duly authorised representative:

|  |  |  |
| --- | --- | --- |
|  |  |  |
| Authorised Representative |  | Signature of Witness |
| Print Name |  | Witness Print Name |
| Title |  | Witness Title |
| Date |  | Date |

Schedule 1   
Securities and Secured Property

**First Creditor’s Securities**:

1. Each Security Interest granted in favour of or vesting in a First Creditor in respect of the property described under the heading 'Secured Property' below pursuant to the PBA Trust Deed Poll and the PBA Agreement.

**Second Creditor’s Securities**

1. [Fully describe, e.g. Deed titled 'Fixed and Floating Charge/General security deed' by [    ] in favour of the Second Creditor dated on or about the date of this document].

**Secured Property**

1. The bank account (being a trust account) in the name of the Contractor effected pursuant to the PBA Trust Deed Poll and the PBA Agreement (**PBA Account**).
2. Each First Creditor's legal and beneficial interest in and to the trust moneys standing to the credit of the PBA Account from time-to-time.