

DEED OF GUARANTEE AND INDEMNITY

Date: [insert date]

PARTIES

The Guarantor named below (jointly and severally “the Guarantor” or “you”)

Bank of China (New Zealand) Limited (“the Lender”, “we” or “us”)

Background

The Lender has, at the request of the Guarantor, agreed to make certain financial accommodation available to the Borrower referred to below on the condition (amongst other things) that the Guarantor enters into this deed.

The terms and conditions that apply to this deed are set out below and in the covenants after the signature blocks.

Who is involved?

Lender	<p>Bank of China (New Zealand) Limited</p> <p>We are registered on the Financial Service Providers Register under our legal name above, with registration number FSP409486.</p> <p>Our address is Level 19, 66 Wyndham Street, Auckland CBD 1010. You may send notices to us at the above address.</p> <p>You may also send notices to us at our email address [lendingservices.nz@bankofchina.com]. We consent to receiving notices and other communications at this email address for this purpose.</p> <p>You may obtain further information by phoning us at 09 980 9000 or from our website at www.bankofchina.com/nz.</p>
Guarantor	[Name(s) of Guarantor(s)]
Borrower	[Name of Borrower]

Warning

When you sign this deed as Guarantor, you enter into a binding legal obligation.

- You become liable to us as well as, or instead of, the Borrower, jointly and severally with each other Guarantor.
- You will be liable for all existing and future amounts owed to us by the Borrower to us unless this deed indicates that the liability is limited. This includes:

- amounts owed by the Borrower alone or together with others;
 - any amounts owing to us by the Borrower under any existing or future loan, facility, guarantee or other instrument, including amounts currently owing;
 - interest, fees and other amounts payable in relation to the amounts referred to above; and
 - any amounts that we are able to recover or claim from the Borrower or that we get in a Court judgment against the Borrower.
- If we have agreed to limit the amount of the guarantee, this will be stated below. You may ask for a limit to be included in this guarantee, but we don't have to agree to it being included.
 - We don't have to ask the Borrower to repay any money owing before asking you to pay. We don't have to inform you of any repayment difficulties the Borrower is having before asking you to pay.
 - We can lend the Borrower more money without getting your consent. However, we will keep you informed of any new lending we provide to the Borrower.
 - You cannot revoke this guarantee once you sign this deed.

We strongly recommend that, before you signing this deed:

- you read and make sure you understand this deed; and
- you obtain legal advice from a lawyer who does not act for us or the Borrower.

EXECUTED AND DELIVERED as a deed.

[Insert individual's relationship with the trust], as Guarantor:

in the presence of:

Name:

Occupation:

Address:

COVENANTS

1 INTERPRETATION

1.1 Definitions

In this deed, unless the context otherwise requires:

Guaranteed Indebtedness means all indebtedness of the Borrower to the Lender, whether present or future, and including all interest, costs, taxes, stamp or similar duties or taxes, commissions, charges and expenses (including legal fees) incurred or sustained in any way by the Lender in connection with that indebtedness or the enforcement or attempted enforcement of any Relevant Document;

Guaranteed Obligations means all obligations (whether present or future but other than obligations to pay money) of the Borrower to the Lender, including all such obligations arising under or in connection with a Relevant Document;

Loan Agreement means the Home Loan Agreement – Details; the Home Loan Agreement General Terms and Conditions; the Plus Home Loan Facility Agreement – Details and Plus Home Loan Facility Agreement General Terms and Conditions dated on or about the date of this deed relating to the home loan of \$[Insert total loan amount] made available by the Lender to the Borrower; and

Relevant Documents means this deed, the Loan Agreement and each other agreement, present or future, evidencing or securing the Guaranteed Indebtedness or the Guaranteed Obligations (including any mortgage), or required or contemplated by this deed or that other agreement.

1.2 Definitions, References and Constructions

In this deed, unless the context otherwise requires, words and expressions defined in the Loan Agreement and not otherwise defined or provided for in this deed shall have the same meanings when used in this deed. Any reference to:

an *agreement* also includes a contract, deed, undertaking and other document (in each case whether oral or written) and includes that document as modified, supplemented, novated or substituted from time to time;

the *dissolution* of a person also includes the winding-up or liquidation of that person and an equivalent or analogous procedure under the law of any jurisdiction in which that person is incorporated, domiciled, resident, carries on business or has assets;

indebtedness includes any obligation (whether alone or jointly, or jointly and severally with another person present or future, actual or contingent, secured or unsecured, as principal, surety or otherwise) for the payment or repayment or delivery of money (including expenses), and *debt* is construed accordingly;

a *person* includes an individual, body corporate, an association of persons (whether corporate or not), a trust and a state or agency of a state (in each case, whether or not having separate legal personality);

tax(es) includes a present and future tax, levy, impost, duty, rate charge, fee, deduction or withholding of any nature regardless of where or by whom imposed, levied, collected, withheld or assessed and includes interest, penalties, fines, costs, charges or expenses or other amounts relating to or arising in connection with taxes;

a gender includes each other gender;

the singular includes the plural and vice versa;

a party to this deed or another agreement includes its successors and, in the case of the Lender, its assignees.

1.3 **Headings**

Headings are to be ignored in interpreting this deed.

1.4 **More than one Guarantor**

If there is more than one person named as Guarantor in this deed, the term "Guarantor" means and refers to each of them individually and each of them together unless the context otherwise requires, and the obligations and agreements on the part of the Guarantor contained in this deed binds them jointly and severally.

1.5 **More than one Borrower**

If there is more than one person named as Borrower in this deed, the term "Borrower" means and refers to each of them individually and each of them together unless the context otherwise requires, and the Guarantor guarantees the obligations of each of them in accordance with this deed.

2 **GUARANTEE AND INDEMNITY**

2.1 **Guarantee**

The Guarantor unconditionally and irrevocably guarantees to the Lender the due payment by the Borrower (in the same currency and to the same place of payment) of the Guaranteed Indebtedness when due and the due performance of and compliance by the Borrower with the Guaranteed Obligations.

2.2 **Payment**

If the Borrower does not pay any of its Guaranteed Indebtedness to the Lender on or before its due date the Guarantor shall, without the need for demand by the Lender, pay that Guaranteed Indebtedness to the Lender, whether or not demand for payment has been made on the Borrower, any Guarantor on any other person.

2.3 **Unenforceability of Obligations**

As a separate continuing primary obligation, the Guarantor undertakes to indemnify the Lender on demand against each loss, claim and expense incurred by the Lender should any of the Guaranteed Indebtedness not be recoverable from the Borrower, the Guarantor or any other person for any reason whatsoever including (but not limited to) any Relevant Document being or becoming void, voidable, unenforceable or otherwise invalid or illegal in any respect, whether or not that reason is known to the Lender. In this clause, the expression "Guaranteed Indebtedness" includes any Indebtedness which would have been included in that expression but for anything referred to in this clause.

2.4 **Suspense Account**

Any moneys from time to time received by the Lender in respect of the Guaranteed Indebtedness from or on account of the Guarantor may be placed in a suspense account with a view to preserving the rights of the Lender to recover from the Borrower or preserve intact the liability of any other person or to prove for the whole of the Guaranteed Indebtedness in the event of dissolution or reorganisation of the Borrower or any other person.

2.5 **Interest on Overdue Amounts**

If the Lender does not receive, when due, any amount payable to it under this deed then the Guarantor is to pay interest on the overdue amount (including interest payable under this clause) from the due date to the time of its receipt by the Lender (both before and after judgment) payable and

compounded at intervals selected by the Lender at its discretion. This obligation to pay interest is to arise without the need for a notice or demand. The rate of interest will be five percent (5%) per annum above the rate from time to time certified by the Lender to be its cost of funding the overdue amount. The Guarantor will not however be liable to pay such interest on amounts of Guaranteed Indebtedness which bear ordinary interest and default interest independently of this deed.

3 NATURE OF GUARANTEE AND INDEMNITY OBLIGATIONS

3.1 Liability as Principal Borrower

As between the Guarantor and the Lender (but without affecting the obligations of the Borrower) the Guarantor is liable under this deed as a sole and principal Borrower and not as a surety. The Guarantor's liability will not be discharged or impaired by:

- (a) any time, indulgence or waiver given to the Borrower or another person; or
- (b) any amendment to a Relevant Document or any security or other agreement (whether or not that amendment increases the liability of the Guarantor); or
- (c) the existence or validity of, or the enforcement of or failure to enforce, or the release of or any person from, or the failure of a person to execute or otherwise be bound by, a Relevant Document or another security, guarantee, or other agreement; or
- (d) any other matter or thing whatsoever, which could operate to impair or discharge the Guarantor's liability.

The Lender will have no liability to the Guarantor in respect of any of these matters, even if the Guarantor's rights are prejudiced as a result.

3.2 Continuing Guarantee

The Guarantor's obligations under this deed are by way of continuing security, are in addition to any other security or guarantee held at any time by any person and may be enforced without the Lender having first to take any steps against the Borrower, any other person or any security.

3.3 Dealings not to Affect Guarantee

The Lender may (without the Guarantor's consent and without affecting this deed or the liability of the Guarantor under this deed):

- (a) vary the terms of any Guaranteed Indebtedness;
- (b) compound with or grant time or other indulgences to the Borrower or to any other person; or
- (c) deal with, exchange, release, modify, or not perfect or enforce any encumbrance, security or right which the Lender now has or may in the future have against any Guarantor or any other person.

4 NO COMPETITION WITH LENDER

4.1 No competition

Each Guarantor will not, without the written consent of the Lender:

- (a) take, accept or hold any security from any other Guarantor, or in relation to Guaranteed Indebtedness, from another person; or

- (b) take steps to recover (whether directly or by set-off, counterclaim or otherwise) or accept money or other property, or exercise or enforce rights in respect of, Indebtedness of any Guarantor to any other Guarantor or, in relation to Guaranteed Indebtedness, Indebtedness of another person to any Guarantor; or
- (c) claim, prove or accept payment in composition by, or a dissolution of, any Guarantor or, in relation to Guaranteed Indebtedness, another person, except if required to do so by the Lender; or
- (d) exercise any right or remedy in respect of any amount paid under this deed.

Each Guarantor waives all rights of subrogation to which it would otherwise be entitled by reason of performance of its obligations under this deed, until such time as the Guaranteed Indebtedness has been fully paid and the Guaranteed Obligations have been fully satisfied. If, notwithstanding this clause, any Guarantor holds or receives any such security, money or property, that Guarantor is to pay or transfer it to the Lender immediately and, pending that payment or transfer, will hold it on trust for the Lender.

4.2 Proof of Guarantor

If the Guarantor (whether required by the Lender or otherwise) proves in its own name in the dissolution of the Borrower, any Guarantor or of any other person who has given any security to the Lender for any Guaranteed Indebtedness, for all or any part of any Indebtedness due from the Borrower, any Guarantor or such other person to the Guarantor, the Guarantor shall pay to the Lender all amounts received by it in relation to any such proof (and all interest accruing on such amounts). Pending such payment, the Guarantor shall hold the benefit of that proof and all such amounts and interest on trust for the Lender.

4.3 Attorney

The Guarantor irrevocably appoints the Lender to be its attorney (*Attorney*) (with full power to delegate its powers to any person for any period and to revoke a delegation) on behalf of the Guarantor, in its name or otherwise, to do anything which, in the Attorney's or delegate's opinion, is necessary to give effect to this *clause 4*. The Guarantor ratifies anything done by the Attorney or any delegate in accordance with this *clause 4.3*.

5 REPRESENTATIONS AND WARRANTIES

The Guarantor represents and warrants that:

- 5.1 it has the power and authority to enter into, and to comply with its obligation under, this deed; and
- 5.2 this deed constitutes legal, valid and binding obligations of the Guarantor enforceable in accordance with their respective terms.

6 PAYMENTS

6.1 Payment

Any Guaranteed Indebtedness received by the Lender shall not satisfy the Guarantor's obligation to pay such sums until it is cleared and immediately available to the Lender.

6.2 Payments Without Deduction

Each payment by the Guarantor to the Lender under a Relevant Document is to be made on the due date:

- (a) free of any restriction or condition; and
- (b) in full, without any deduction or withholding whatsoever (whether in respect of set-off, counterclaim, charges, taxes (of any type, present or future) or otherwise) unless such deduction or withholding is required by law in which event the Guarantor will pay to the Lender an additional amount so that the net amount (after the deduction or withholding) actually received by the Lender on the due date equals the full amount which it would have received had no deduction or withholding been made.

7 SET-OFF

The Guarantor irrevocably authorises the Lender to apply (without prior notice or demand) any credit balance of the Guarantor on any account in any currency and at any of the Lender's offices in or towards satisfaction of Guaranteed Indebtedness then due to the Lender under a Relevant Document and unpaid. If at any time an amount is contingently due or an amount due is not quantified, the Lender may retain and withhold repayment of any such credit balance and the payment of interest or other moneys pending that amount becoming due and/or being quantified and may set off the maximum liability which may at any time be or become owing to the Lender by the Guarantor (or partly the one and partly the other) and in each case without prior notice or demand. For these purposes, the Lender:

- (a) may use any credit balance to buy other currencies and may break any term deposit to effect that application; and
- (b) need not exercise its rights under this sub-clause, which are without prejudice and in addition to the rights of the Lender under any other agreement and any right of set-off, combination of accounts, lien or other right to which it is at any time otherwise entitled (whether by operation of law, contract or otherwise).

8 RELEASE AND REINSTATEMENT

8.1 Release

The Lender shall not be obliged to sign or deliver a release (or partial release) of this deed unless it is satisfied that:

- (a) it has received all Guaranteed Indebtedness; and
- (b) no payment received, or to be received, by the Lender may be avoided, or required to be repaid by the Lender, under any law relating to insolvency.

8.2 Reinstatement

If any payment received or recovered by the Lender, or any other person on behalf of the Lender, is, or in the Lender's opinion may be, avoided by law:

- (a) such payment shall be deemed not to have affected or discharged the liability of the Guarantor under this deed or any other security given by the Guarantor in favour of the Lender, and the Lender and the Guarantor shall be restored to the position in which each would have been of such payment had not been received or recovered; and
- (b) the Lender shall be entitled to exercise all its rights under this deed and any other security given by the Guarantor in favour of the Lender which it would have been entitled to exercise of such payment had not been received or recovered.

This *clause 8.2* applies even if the Lender has signed a release pursuant to *clause 8.1*.

9 ASSIGNMENT

9.1 Benefit and Burden of this Deed

This deed is binding upon and endures for the benefit of the parties and their respective successors and, in the case of the Lender, its assignees.

9.2 The Lender

The Lender may assign or transfer all or part of its rights, powers, discretions, remedies and obligations under this deed without the consent of the Guarantor. Each assignee or transferee is to have the same rights, powers, discretions and remedies (as applicable) against the Guarantor under this deed (or a proportion if it is the assignee or transferee of part only) as if named in this deed as the Lender.

9.3 The Guarantor

The Guarantor may not assign or transfer all or part of its rights or obligations under this deed.

9.4 Disclosure of Information

The Lender may disclose, on a confidential basis, to a potential assignee, transferee or other person with whom contractual relations in connection with this deed are contemplated, any information (including personal information) about the Guarantor whether or not that information was obtained in confidence and whether or not that information is publicly available. Any assignee or transferee may use such information for the purposes and in the same manner as the Lender.

10 NOTICES

10.1 Addresses and References

Each notice or other communication under this deed is to be made in writing and sent by email, personal delivery or by post to the addressee at the email or other address, and marked for the attention of the person or office holder (if any) from time to time designated for the purpose by the addressee to the other party.

The Guarantor agrees to receive notices, disclosure (including for the purposes of the Credit Contracts and Consumer Finance Act 2003) and other communications from us by email to any email address the Guarantor has provided to us (whether as part of an account opening process or otherwise).

10.2 Deemed Delivery

No communication shall be effective until received. Communication to the Guarantor, however, will be deemed to be received (unless otherwise required by law):

- (a) in the case of an email, on the business day on which it is despatched or, if despatched after 5.00 p.m. (in the place of receipt) on a business day or on a non-business day, on the next business day after the date of despatch (provided that no delivery failure notification is received within 24 hours of sending such email);
- (b) in the case of a notice or demand that is delivered, on the day of delivery; and
- (c) in the case of a notice or demand by post, on the third business day after posting.

11 EXPENSES AND STAMP DUTY

11.1 Initial and On-going Expenses

The Guarantor will pay all costs and expenses (including all legal expenses on a solicitor and own client basis and taxes) sustained or incurred by the Lender in connection with:

- (a) the preparation, negotiation, entry into and registration of, each Relevant Document and each other transaction required or contemplated thereby; and
- (b) each amendment to, or waiver in respect of a Relevant Document or another transaction required or contemplated by a Relevant Document,

in all cases on a full indemnity basis.

11.2 Enforcement Expenses

The Guarantor will pay all costs and expenses (including all legal expenses on a solicitor and own client basis and taxes) sustained or incurred by the Lender as a result of the exercise of, or in protecting or enforcing or otherwise in connection with, its rights under a Relevant Document or another transaction required or contemplated by a Relevant Document, in all cases on a full indemnity basis.

12 MISCELLANEOUS

12.1 Exercise of Rights and Waivers

No failure to exercise, and no delay in exercising, a right of the Lender under this deed will operate as a waiver of that right, nor will a single or partial exercise of a right preclude another or further exercise of that right or the exercise of another right.

12.2 Partial Invalidity

The illegality, invalidity or unenforceability of a provision of this deed under any law is not to affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of another provision.

12.3 Certificates Conclusive

A certificate by the Lender of an amount payable under this deed is in the absence of manifest error to be conclusive evidence for all purposes including for any proceedings.

12.4 Counterparts

This deed may be executed in any number of counterparts. Once a Guarantor has executed a counterpart, and the Lender has received a copy of the signed counterpart (whether by facsimile or otherwise), that counterpart shall be deemed to be as valid and binding on the party executing it as if it had been executed by all the parties.

12.5 Governing Law

This deed is governed by and to be construed in accordance with New Zealand law.