

Please read these Terms and Conditions ("Terms", "Terms and Conditions") carefully before using the <https://www.acumenfinance.com.au> website and the Acumen Finance Lending Application (the "Service") operated by Acumen Finance Pty Ltd ACN 617 819 217 ("us", "we", or "our").

Your access to and use of the Service is conditioned on your acceptance of and compliance with these Terms. By clicking "Accept" you agree to be bound by the *Electronic Transactions Act 1999 (Cth)* and the *Electronic Transactions Act 2000 (NSW)*. These Terms apply to all visitors, users and others who access or use the Service.

By accessing or using the Service you agree to be bound by these Terms. If you disagree with any part of the terms then you may not access the Service.

## REFERENCE SCHEDULE

This Reference Schedule also contains other particulars which have been agreed between the parties.

Words and phrases which have a special meaning when used in this Deed are defined below in this Reference Schedule.

## Defined Terms

**Acumen Finance** Acumen Finance Pty Ltd

**Banking Details**

Bank Of Queensland

BSB: 122701

ACC: 22634491

**Affiliate**

means:

1. each Related Entity of each body corporate who is or is one of the persons who comprise the Borrower or (if applicable) the Guarantor; and
2. each Related Person of each natural person who is or is one of the persons who comprise the Borrower or (if applicable) the Guarantor, and each body corporate in relation to which the natural person is a Related Entity.

**Broking Fee**

The brokerage fee is calculated on the

1. the facility limit proposed or set out in the most recently executed of the Mandate Documents, as increased from time to time;
2. projected gross realization value of the project the subject of the Purpose at the date the Broking Fee becomes payable in accordance with clause 1(f); or
3. aggregate amount of finance advanced at any time.

**Commencement Date**

Meaning the day that the Borrower agrees to the terms and conditions of this form.

**Confidential Information**

Includes:

1. information of and about Private Lenders, including information about any intermediaries via which loans can be obtained from those Private Lenders;
2. information about alternative ways of obtaining the funds which the Borrower requires;
3. information about Acumen and or any of its Related Entities, including about their processes and financial information;
4. any other information about Acumen and or any of its Related Entities and which is not public information, and includes information communicated to the Borrower or the Guarantor in confidence.

**Fee Letter**

means any fee letter between Acumen or any of its Related Entities, any relevant Private Lender or other person and the Borrower dated on or about the date of this Deed.

**Further Agreement**

an agreement which is entered into whether during or after the Term between on the one hand:

1. Acumen and/or one or more of Acumen's Related Entities, and
2. the Borrower and/or one or more of the Borrower's Affiliates.

**GST**

has the meaning attributed thereto in the GST Act.

**GST Act**

*A New System (Goods and Services Tax) 1999 (Cth).*

**Jurisdiction**

New South Wales

**Loan Documents**

means a loan agreement or loan agreements and related documentation (based on the terms set out in the Term Sheet and this Deed) in form and substance satisfactory to the relevant Private Lender for the Purpose, as amended from time to time.

**Mandate Documents**

means this Deed, any Term Sheet, any mandate letter or engagement arrangement letter, any Further Agreement and any Fee Letter.

**PPS Act**

*Personal Property Securities Act 2009 (Cth).*

**Private Lender**

a person, company or other than one of the top 10 Australian Trading Banks based on thier market capitlization (As listed on the Australian Stock Exchange ASX) and can include, without limitation, a high net worth individual, a sophisticated or wholesale investor, or the operator of a managed investment scheme or an international fund manager or investor.

**Purpose**

the project for which the Borrower requires funds as stated to Acumen, including and any further extensions or expansions of that project during the Term.

**Related Entity**

has the meaning attributed thereto in section 9 of the *Corporations Act 2001 (Cth)*.

**Related Person**

has the meaning attributed thereto in the Dictionary in the *Duties Act 1997 (NSW)*.

**Term**

starting on the Commencement Date, for a period of 7 years.

**Term Sheet**

means the term sheet proposed to one or more Private Lenders by Acumen in connection with the Purpose

**Operative Terms****APPOINTMENT**

## 1. Appointment

- a. The Borrower appoints Acumen as the exclusive arranger of any loan related to the Purpose. This is by default unless its agreed in writing between the parties that exclusivity doesn't apply to some or all of the properties used as security or parties associated with the transaction and or the project or purpose. A confirmation email from one of the directors of Acumen Finance must be uploaded confirming the waiver of these terms or cut and paste from the original email with a time stamp and directors details into the comments section of this form. Otherwise Acumen is the exclusive lead arranger for the term.
- b. From the date of this Deed and for the Term, the Borrower will not, and will ensure that none of its Affiliates, announce, enter into discussions to raise, raise or attempt to raise any other finance or further finance in relation to the Purpose in the international or domestic local market without the prior written consent of Acumen (which may be withheld at its absolute discretion).
- c. Acumen offers, on the terms set out in this Deed, to use its reasonable endeavours to procure a loan offer to the Borrower on terms acceptable to the Borrower, and the Borrower accepts Acumen's offer.
- d. Acumen's offer to use its reasonable endeavours during the Term to procure a loan is made on the terms of the Mandate Documents and is subject to the following conditions:
  - i. the conditions set out in clause 2;
  - ii. the preparation, execution and delivery of the Loan Documents by no later than 3 months of the date of this Deed;
  - iii. the relevant Private Lender obtaining credit committee and all other relevant internal approvals with respect to the Borrower and the loan;
  - iv. the Borrower obtaining all necessary regulatory approvals in connection with the loan from any relevant authorities in any relevant jurisdictions.
- e. Upon signing this Deed, a non-refundable engagement fee is payable as per the following table based on the size of the loan applied for.

<b>Loan Application Amount</b>	<b>Fees Payable Amount</b>
Less than \$1,000,000	\$2750.00 on Engagement
More than \$1,000,000	\$3750.00 on Engagement
More than \$3,000,000	\$4750.00 on Engagement
More than \$10,000,000	\$7500.00 on Engagement

- f. The Borrower agrees that the Maximum Brokerage Fee of 3.00 % (or lesser percentage as agreed in writing at time of conditional offer as agreed in writing from time to time) is payable on
  - i. date the Loan Documents are executed or amended to increase the loan facility amount (in respect of the increased amount); and
  - ii. in respect of sub paragraph (b) of the definition of Broking Fee, the date the project the subject of the Purpose reaches [final completion]; or
  - iii. the first date on which Acumen sends the Borrower a notice that Acumen has become aware that the Borrower has breached clause 1(b), clause 1(g) or clause 2 in any material respect, as determined by Acumen, in its absolute discretion. If Acumen sends a notice of the type referred to in this sub paragraph (iii), the Broking Fee will be payable on the basis of sub paragraph a) of the definition Broking Fee, unless a Development Application in respect of any project the subject of the Purpose has been approved, in which case the Broking Fee will be based on the paragraph b) of the definition of Broking Fee.
  - iv. and in respect of any transaction (whether for the Purpose, Project or otherwise) completed during the Term between the Borrower or any of its Related Entities and any Private Lender introduced to the Borrower by Acumen, on the same basis and at the same time as the fee would have been payable had the loan or transaction occurred in respect of the Purpose.

A fee or increased fee will be payable on each date referred to in this paragraph (h), unless Acumen relies on sub paragraph (iii) in which case no further fees will be payable.

- g. If Acumen makes the Borrower aware of a particular lender or lenders, or arranges a loan from a group of lenders, the Borrower must not circumvent its obligations to pay Acumen the Broking Fee by directly or indirectly approaching that lender or those lenders in connection with the Purpose during the Term.
- h. The Borrower and the Guarantor acknowledge and agree that the performance of an obligation on the part of Acumen contained in this Deed by a Related Entity of Acumen will constitute performance of that obligation by Acumen.

## **2. Supply of Information and Documents**

- a. The Borrower must use its best endeavours to promptly provide to Acumen such information and documents which Acumen may reasonably request from the Borrower.
- b. The Borrower represents and warrants to Acumen that:
  - i. any factual information which the Borrower advises or provides to Acumen by or on behalf of it, or any of its Related Entities, ("**Information**") is true, complete and accurate in all material respects as at the date it is provided or as at the date (if any) at which it is stated;
  - ii. nothing has occurred or been omitted and no information has been given or withheld that results in the Information being untrue or misleading in any material respect;
  - iii. any financial projections contained in the Information have been prepared in good faith on the basis of recent historical information and on the basis of reasonable assumptions; and
  - iv. all documents which the Borrower provides to Acumen are complete and are either the original documents or true copies of the original documents.
- c. The representations and warranties set out in clause 2(b), are deemed to be made by the Borrower daily by reference to the facts and circumstances then existing commencing on the date of this Deed and continuing until the date the Loan Documents are signed.
- d. The Borrower must immediately notify Acumen in writing if any representation or warranty set out in clause 2(b) is incorrect, misleading and agrees to supplement the Information promptly from time to time to ensure that such representation and warranty is correct when made.
- e. The obligations of Acumen and the relevant Private Lender under the Mandate Documents are subject to the absence, in their respective reasonable opinions, of any event(s) or circumstance(s) (including any material adverse change or the continuation of any circumstance(s) which, in their respective opinions, have adversely affected or could adversely affect:
  - i. the business, condition (financial or otherwise), operations, performance, assets or prospects of the Borrower since the date as at which its latest consolidated audited financial statements were prepared;
  - ii. the ability of the Borrower to perform its obligations under the Mandate Documents or Loan Documents; or
  - iii. the international or any relevant domestic loan markets, during the Term.

## **4. Where Acumen Proposes an Alternative Way to the Borrower**

- a. The Borrower acknowledges that nothing in this clause 4 limits or otherwise affects the obligations of the Borrower and the Guarantor under clause 6.
- b. The Borrower acknowledges that Acumen's knowledge about how to procure funds by way of loan and or equity for purposes which include the Purpose is a valuable asset of Acumen's business.
- c. The Borrower acknowledges and agrees that in lieu of, or in addition to, Acumen procuring a loan offer from a Private Lender(s), Acumen may propose to the Borrower an alternative way in which the Borrower may obtain funds for the Purpose.
- d. In the event that Acumen proposes to the Borrower an alternative way of obtaining funds, and the Borrower obtains the funds in, or substantially in, that alternative way, whether or not from a lender introduced by Acumen or otherwise with the assistance of Acumen, then the Borrower agrees to pay to Acumen, upon demand in writing from Acumen, a fee equal to the Broking Fee.

## 5. Payments

All payments to be made under the Mandate Documents:

1. shall be paid in the currency of the invoice and in immediately available, freely transferable cleared funds to such account(s) with such bank(s) as Acumen notifies the Borrower;
2. shall be paid without any deduction or withholding for or on account of tax (a "**Tax Deduction**") unless a Tax Deduction is required by law. If a Tax Deduction is required by law to be made, the amount of the payment due shall be increased to an amount which (after making any Tax Deduction) leave an amount equal to the payment which would have been due if no Tax Deduction had been required; and
3. are exclusive of any GST.

## Confidentiality

### 5. When Information is taken to be or have been disclosed in confidence

The Borrower and the Guarantor acknowledge and agree that information will be taken to be or have been (as the case may be) disclosed in confidence by Acumen unless:

- a. the information is uncompiled publicly available information; or
- b. at, or before the time that disclosure is made, the Disclosing Party states in writing that the information is not being disclosed in confidence.

### 6. Limitation on Use and Disclosure

The Borrower and the Guarantor must only use any Confidential Information disclosed to the Borrower and or the Guarantor for the purpose of considering whether to accept a loan offer procured by Acumen and or, if applicable, whether to obtain the funds in, or substantially in, an alternative way if any is proposed by Acumen.

## Non-Circumvention, indemnity, guarantee, security

### 7. Guarantee

In the event that an Affiliate of any of the Borrower or the Guarantor does any act or thing, or omits to do any act or thing, which if done or not done, by the Borrower would constitute a breach of an obligation of the Borrower contained in this Deed and would give rise to a liability on the part of the Borrower to make a payment to Acumen, then the Guarantor acknowledges and agrees that the Guarantor will respectively be taken to have committed that breach and/or to be liable to make that payment to Acumen as if it were its original obligation.

The Guarantor acknowledges and agrees that this Guarantee is a continuing guarantee and shall not be released or otherwise affected by:

the death of the Guarantor (or if the Guarantor is comprised of more than one person, of any one of them) or of any person comprising the Borrower;

the appointment of a receiver or other controller, administrator or liquidator or trustee to the Borrower or to any of their respective assets, as applicable;

Acumen granting or giving to the Borrower any indulgence or concession, or the compounding, compromise, release, abandonment, waiver, variation, relinquishment, or renewal of any right which accrues to Acumen under any Mandate Document or which Acumen otherwise has against the Borrower, or by any failure, whether negligent, intentional or otherwise, by Acumen to enforce any such right against the Borrower; and

the termination of this Deed, or any variation to this Deed (including without limitation to a provision by which the Borrower promises to make a promised payment),

with the intent that the Guarantee shall be absolute and unconditional in any and all circumstances and shall continue until all of the promised payments have been made in full to Acumen and the other obligations on the part of each of the Borrower and the Guarantor under this Deed have been fully performed.

## 8. Indemnity and Liability

This clause applies whether or not the Loan Documents are signed, or a Private Lender agrees to provide the Borrower a loan. The Borrower(s), and if more than one, then jointly and severally, agree to indemnify Acumen and its Related Entities for and in respect of any loss, cost, expense (including legal costs on a solicitor and own client basis), liability incurred or awarded against Acumen and its Related Entities, in each case arising out of, or in connection with, any action, claim, investigation or proceeding commenced or threatened (including, without limitation, any action, claim, investigation or proceeding to preserve or enforce rights) in relation to:

the use of the loan monies by the Borrower;

any Mandate Document or Loan Document (including any default by the Borrower in making any payment which the Borrower is required to make or any breach by the Borrower or the Guarantor); and/or

arranging a loan for the Borrower.

The Borrower shall indemnify Acumen and its Related Entities within [three] Business Days of demand.

The Borrower agrees that Acumen and its Related Entities shall have no liability (whether direct or indirect, in contract or tort or otherwise) to the Borrower or any of its Affiliates for, or in connection with, anything referred to in clause 8(a) except, following the Borrower's agreement to the Mandate Documents for any such cost, expense, loss or liability incurred by the Borrower that results directly from that breach by Acumen and its Related Entities or any Mandate or any Loan Document which is in each case finally judicially determined to have resulted directly from the gross negligence or wilful misconduct of Acumen and its Related Entities.

Notwithstanding the above, Acumen and its Related Entities shall not be responsible for, nor have any liability to the Borrower or its Affiliates or anyone else for consequential losses or damages (whether arising in contract or tort (including negligence) or otherwise).

The Borrower represents to Acumen and its Related Entities that:

it is acting for its own account and that it has made its own independent decisions to enter into the transactions contemplated in the Mandate Documents (the **Transaction**) and as to whether the Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it has deemed necessary;

it is not relying on any communication (written or oral) from any or all of Acumen and its Related Entities as investment advice or as a recommendation to enter into the Transaction, it being understood that information and explanations related to the terms and conditions of the Transaction shall not be considered investment advice nor a recommendation to enter into the Transaction. No communication (written or oral) received from any or all of Acumen and its Related Entities shall be deemed to be an assurance or guarantee as to the expected results of the Transaction; and

it is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms and conditions and risks of the Transaction. It is also capable of assuming, and assumes, the risks of the Transaction.

## 10. Grant of Security interest

- a. With effect from the Commencement Date, each of the persons who respectively comprise the Borrower, any of its related parties or affiliates, and the Guarantor (each being a "**Grantor**") grants a security interest (**Security Interest**) over all of his, her or its, as the case may be, present and after acquired real and personal property of whatever nature and over its undertaking (such property and undertaking being "**Secured Property**") to Acumen to secure to Acumen the performance respectively of the Borrower's and the Guarantor's obligations to Acumen under this Deed.
- b. Each Grantor acknowledges that:
  - i. to the extent that the Secured Property is comprised of real property, that Acumen is entitled to lodge a caveat on the title to that real property; and
  - ii. this Deed constitutes a Security Agreement for the purposes of the PPS Act.
- c. The Security Interest is a charge. If for any reason it is necessary to determine the nature of this charge, it is a fixed charge affecting the Secured Property (except that it is a floating charge over any personal property that is a circulating asset for the purposes of the PPS Act).
- d. Each Grantor will do anything reasonably required by a Secured Party to enable a Secured Party to register its Security Interests and to maintain the registration.

- e. The Security Interests arising under this Deed attach to the Secured Property when the Grantor has rights in the Secured Property, or the power to transfer rights in the Secured Property to a Secured Party, and the parties confirm that they have not agreed that any Security Interest arising under this Deed attaches at any later time.
- f. Each Grantor acknowledges that a Secured Party may perfect its Security Interests by lodging a Financing Statement (as defined in the PPS Act) on the Personal Property Securities Register established under the PPS Act.
- g. All of the enforcement provisions of Chapter 4 of the PPS Act apply to all of the Security Interests created under or referred to in this Deed.
- h. The parties agree that neither party will disclose to an "interested person" (as defined in section 275(9) of the PPS Act) or any other person, any information of the kind described in section 275(1) of the PPS Act. Each Grantor will not authorise the disclosure of any information of the kind described in section 275(1) of the PPS Act.

## **Privacy waiver / consent**

### **11. Privacy Waiver / Consent**

- a. Acumen and its Related Entities are allowed to give a credit reporting agency or a proposed lender or other proposed counterparty (to a transaction pursuant to which that counterparty will provide or procure the provision of funds which the Borrower requires) personal and business information about the Borrower and the Guarantor. The information which may be given includes:
  - i. particulars of the identity of the Borrower;
  - ii. particulars of the identity of the Guarantor;
  - iii. the fact that the Borrower has applied for credit and the credit amount;
  - iv. the fact that the Guarantor has agreed to guarantee the Borrower's obligations in relation to the credit applied for by the Borrower;
  - v. the fact that Acumen is providing credit assistance to the Borrower;
  - vi. where on more than one occasion cheques drawn by the Borrower or by the Guarantor or any of their Affiliates in favour of Acumen or of any other counterparty have bounced - of the fact that those cheques have bounced; and/or
  - vii. that in the opinion of Acumen, the Borrower or the Guarantor has committed a serious credit infringement.
- b. If Acumen considers it relevant to assess the financial position of the Borrower and or the Guarantor for commercial credit, the Borrower and the Guarantor (as applicable) agree to Acumen obtaining a report about the Borrower's and the Guarantor's (as applicable) commercial activities or commercial credit worthiness from a business which provides information about the commercial worthiness of persons.
- c. Each of the Borrower and the Guarantor acknowledges that Acumen or its Affiliates may, and are authorised by each of the Borrower and the Guarantor to, record all telephone (or any similar electronic means of communication) conversations between them.

## **General**

### **12. Where a Party is Comprised of More than One Person or Entity**

- a. Where an obligation is owed by two or more persons, that obligation is owed by them jointly and severally.
- b. Where two or more persons are owed an obligation, that obligation may be enforced by any of such persons for the benefit of all of them.

### **13. No Waiver**

- a. A right of one party (first party) to demand strict compliance by another party with one or more of the terms of this Deed may only be waived in writing signed by the first party.
- b. A waiver by one party (first party) of another party's strict compliance with one or more of the terms of this Deed on one or more occasions shall not constitute a waiver by the first party of its right to demand strict compliance at any time thereafter.

- c. A failure by one party (first party) to exercise, or a delay by the first party in exercising, or a waiver by the first party of any of its rights arising upon a default by the other party does not affect or impair the first party's rights in relation to that default or any later default of the same or of a similar nature.

#### **14. Fiduciary Duties Excluded**

- a. Nothing in this Deed shall constitute either party the principal, agent or partner of the other or impose any fiduciary duty on Acumen.
- b. Neither party shall have the authority to enter into an agreement or other arrangement on behalf of the other, and neither party must represent or hold itself out as having that authority.

#### **15. Goods & Services Tax**

- a. Words or expressions used in this clause have the same meaning as is attributed to those words or expressions in the GST Law.
- b. Except where expressly stated as including GST, any consideration stated in this Deed does not include GST.
- c. If a party is liable for GST in respect of any taxable supply made by that party under or in connection with this Deed, any consideration payable or to be provided by the recipient for the taxable supply will be increased by an amount calculated by application of the following formula:

**A x R**

Where:

**A** is the amount of the GST exclusive consideration expressed to be payable in this Deed by the recipient of the taxable supply; and

**R** is the applicable rate of GST.

- d. Each party shall do all things necessary or reasonably desirable to ensure that the other party can claim input tax credits or refunds in respect of payments or set-offs made pursuant to this Deed.

#### **16. Courts**

The parties will submit exclusively to the Courts of the Jurisdiction. The parties agree that proceedings in the Federal Court of Australia must be brought in Sydney.

#### **17. Rules for interpreting this Deed:**

In the interpretation of this Deed:

- a. The laws of the Jurisdiction shall apply.
- b. Any provision which but for this clause would be taken by any law to be part of the agreement between the parties even though it is not written in this document is hereby expressly excluded to the fullest extent lawfully permitted.
- c. Any headings or marginal notes are for guidance only and are to be ignored.
- d. The rule of contra proferentem shall not apply.
- e. Words expressed in the singular include the plural and vice versa.
- f. A reference to a person includes:
  - i. a natural person, a partnership, a body corporate, an unincorporated association, or an Authority, as the case may be; and
  - ii. his, her or its executors, administrators, successors, and permitted assigns (as applicable).



- g. A reference to one gender includes a reference to the other or neutral gender and to each of them.
- h. The words "include", "includes", "included" and "including" shall where appearing be construed as if the words "without limitation" appeared immediately thereafter unless a contrary intention is expressed (e.g. where the word "only" precedes the word "include").
- i. A reference to a legislative instrument or a document is a reference to that legislative instrument or document as amended, consolidated or replaced (irrespective of whether the change occurred before or after the date of this Deed).
- j. A reference to a body other than a party (whether government or private and whatever its entity type) ("the first body") that changes its name or its entity type, or ceases to carry on a part or the whole of its operations in a relevant way or merges with another body, shall as applicable be taken to be a reference to the renamed body or to the new or merged body or to that body which has taken over the relevant operations formerly carried on by the first body.

#### **18. When Parties are taken to have entered into this Deed**

- a. The parties agree that –
- b. this Deed will be taken to have been entered into on –
  - i. where the Borrower or someone authorised on the Borrower's behalf clicks acceptance of the [www.acumenfinance.com.au](http://www.acumenfinance.com.au) web finance application terms and conditions