

**12 October 2020**

Level 1, 22 Salmon Street  
Port Melbourne VIC 3207  
[opticomm.net.au](http://opticomm.net.au)

The Manager  
Markets Announcement Office  
Australian Securities Exchange  
4<sup>th</sup> floor, 20 Bridge Street  
Sydney NSW 2000

**ELECTRONIC LODGEMENT**

Dear Sir or Madam

**OPTICOMM LIMITED – ANNOUNCEMENT RE MATCHING RIGHTS**

I attach an update for immediate release to the market.

Authorised for lodgment by the Board.



**John Phillips**  
**Chief Financial Officer & Company Secretary**

**Investor Relations**  
**Tel:** +61 3 9024 9503; 0418 530 478  
[investors@opticomm.net.au](mailto:investors@opticomm.net.au)

12 October 2020

## Announcement regarding matching rights

### Original Uniti Scheme

On 15 June 2020, OptiComm Ltd (**OptiComm**) announced that it had entered into a Scheme Implementation Deed with Uniti Group Limited (**Uniti**) to acquire OptiComm by way of a Scheme of Arrangement (**Original Uniti Scheme**). The Original Uniti Scheme offered various forms of scheme consideration options at a value of \$5.20 per share (inclusive of a fully franked special dividend of \$0.10 per OPC Share).

### Aware Scheme Proposal

On 8 September 2020, OptiComm announced it had received from Aware Super Pty Ltd as trustee of Aware Super (**Aware Super**, formerly First State Super), a non-binding and conditional competing proposal to acquire all of the OptiComm shares for \$5.85 per OptiComm share (inclusive of a \$0.10 fully franked special dividend, if declared) pursuant to a scheme of arrangement subject to due diligence (**Aware Scheme Proposal**).

### Amended Uniti Scheme

On 15 September 2020, OptiComm announced that it had received a revised binding offer from Uniti at a value of \$5.85 per share and had entered into an amended and restated scheme implementation deed (**Amended and Restated SID**) under which it is proposed that Uniti would acquire all OptiComm shares (other than the shares it owns) pursuant to one fixed consideration offer to all OptiComm shareholders (other than foreign ineligible shareholders who will receive \$5.85 cash per OptiComm share) of:

- \$4.835 cash per OptiComm share (including a fully franked special dividend of \$0.10 per share); and
- 0.80537 Uniti shares per OptiComm share (which implies \$1.015 per OptiComm share calculated on the basis of the closing trading price of Uniti shares on 11 September 2020 of \$1.26 (**Amended Uniti Scheme**)).

### Aware Takeover Proposal

OptiComm advises that on Monday, 12 October 2020, it received a proposal from Aware Super to make an off-market takeover offer for all of the shares in OptiComm for \$6.50 per share (including a fully franked special dividend of \$0.10 per share) (**Aware Takeover Proposal**). The Aware Takeover Proposal is attached to this announcement.

The Aware Takeover proposal is subject to:

- (a) a minimum acceptance condition of 50.1%; and
- (b) customary conditions including there being no material adverse change, prescribed occurrence or regulated event affecting OptiComm.

The consideration offered under the Aware Takeover Proposal represents a 11.11% premium to the consideration offered under the Amended Uniti Scheme.

### Commencement of Matching Rights Process

The OptiComm Board considers the value premium of the consideration offered under the Aware Takeover Proposal relative to the value of the consideration being offered under the Amended Uniti Scheme is sufficient to enable the OptiComm Board to commence the matching right process pursuant to the terms of the Amended and Restated SID. OptiComm has notified Uniti of the receipt of the Aware Takeover Proposal and Uniti now has the right, but not the obligation, to submit a counter proposal for the OptiComm Board to consider at any time during the next 3 business days.

OptiComm notes that under clause 11.6 of the Amended and Restated SID it may not enter into any agreement, arrangement or understanding with respect to a competing proposal until this time has lapsed without Uniti making a counter proposal.

OptiComm also notes that under the Amended and Restated SID, subject to certain conditions, Uniti will be entitled to receive a break fee of \$6.1m from OptiComm in the event that the OptiComm Directors recommend or OptiComm completes a competing proposal instead of the Uniti Scheme.

#### **Postponement of Scheme Meeting**

OptiComm notes that the Scheme Meeting to consider the Amended Uniti Scheme was scheduled to occur tomorrow, being 13 October 2020. In light of the Aware Takeover Proposal, OptiComm intends to seek a Court postponement of the Scheme Meeting to a time and date to be determined.

#### **No change to Directors' recommendation**

In accordance with the process outlined in the Amended and Restated SID, the formal recommendation of OptiComm Directors will not change, if at all, until the completion of the matching right process. In the meantime, the OptiComm Board continues to recommend the Uniti Scheme as announced on 15 September 2020.

For further information contact:

#### **Investor Relations**

**Tel:** +61 3 9024 9503; 0418 530 478  
[investors@opticomm.net.au](mailto:investors@opticomm.net.au)

12 October 2020

Allan Brackin  
Chairman of the Board of Directors  
OptiComm Ltd  
Level 1, 22 Salmon St  
Port Melbourne VIC 3207

Via email

Dear Allan

**Proposal to acquire 100% of OptiComm Ltd (A\$6.50 cash per OptiComm share, inclusive of a dividend in the amount of 10 cents) under a takeover offer with a 50.1% minimum acceptance condition**

Aware Super Pty Ltd as trustee of Aware Super (**Aware Super**) is pleased to provide this proposal for the acquisition of 100% of the shares in OptiComm Ltd (**OptiComm**) on the terms and conditions set forth below (the **Proposal**).

Aware Super considers that the Proposal is superior to the current proposal from Uniti Group Limited (the **Uniti Proposal** and **Uniti** respectively) and further details of the basis for this are set out within.

The Proposal is being made on terms that contemplate the parties entering into a binding bid implementation deed immediately following completion of the matching rights process under the scheme implementation deed entered into to give effect to the Uniti Proposal (the **Uniti Implementation Deed**) subject to the terms and conditions set forth below.

We are pleased to confirm that the Proposal is not subject to any further due diligence requirements.

**1 About Aware Super and Attraction of OptiComm**

Aware Super is one of Australia's largest industry funds managing over \$125 billion in assets and providing superannuation, advice and retirement solutions to more than 1.1 million members around Australia (post-merger with VicSuper which closed on 30 June 2020).<sup>1</sup> Our strategy and motivation centre on delivering the best possible retirement outcomes for members. Our responsibility is to grow the value of our members' superannuation by delivering competitive returns while managing investment risk and volatility. Prior to its rebranding earlier this month, Aware Super was named 'First State Super'. Our new brand name demonstrates our ongoing commitment to action and impact - for our members, their communities and the world we live in.

Aware Super has a strong track record of efficiently making direct investments similar to the Proposal. Aware Super has over A\$8 billion invested in infrastructure assets, spanning sectors such as power, transport, hospitals and convention centres. Aware Super also has a number of significant investments in emerging infrastructure sectors, including the concessions to operate the NSW Land Registry Services

---

<sup>1</sup> As of 31 August 2020.

and Victorian Land Registry Services. Aware Super was a previous investor in LBN Co prior to its sale to Uniti and therefore has a strong understanding of investment in telecom infrastructure.

Aware Super is attracted to OptiComm as the leading private Australian carrier and wholesale network infrastructure operator that designs, builds, operates and maintains networks. OptiComm's strong market position, stability of earnings profile and opportunities for further growth including via acquisitions align with Aware Super's investment parameters. Aware Super has strong financial standing and investment experience and is committed to supporting OptiComm in pursuing continued growth and building market share from NBN Co and other private operators.

Our due diligence process has served to confirm Aware Super's interest in OptiComm and confidence in our ability to work with existing OptiComm management to support OptiComm's continued success, including through both organic growth and further consolidation in the industry.

## 2 Consideration under the Proposal

Subject to the conditions outlined below, Aware Super is offering to acquire 100% of the shares in OptiComm, for 100% cash consideration of A\$6.50 per share, less any dividends or distributions to which OptiComm shareholders become entitled after the date of this letter (the **Offer Price**). Under the Proposal, OptiComm shareholders will be entitled to receive A\$0.54 per OptiComm share more than the closing OptiComm share price on 9 October 2020 of A\$5.96.

We believe the Offer Price represents compelling value for OptiComm shareholders. The Offer Price represents:

- a premium of 8.2% to the implied value of the offer under the Uniti Proposal of A\$6.01 (calculated on the basis of the closing trading price of Uniti shares on 9 October 2020 of A\$1.455);
- a premium of 9.1% to the closing trading price of OptiComm shares on 9 October 2020;
- a premium of 29.5% to the closing price of OptiComm shares on 12 June 2020 of A\$5.02 (being the last trading day before the date the Uniti Proposal was announced);
- a premium of 39.5% to the 30-day volume-weighted average price of OptiComm shares to 12 June 2020 of A\$4.66; and
- a premium of 47.7% to the 60-day volume-weighted average price of OptiComm shares to 12 June 2020 of A\$4.40.

Aware Super is open to permitting OptiComm to pay a special dividend in the amount of 10 cents per OptiComm share in connection with the Proposal (**Agreed Dividend**) to enable Opticom shareholders to receive the benefit of available franking credits. The Offer Price would be reduced by the amount of the Agreed Dividend.

## 3 Transaction Structure, Conditions and Pre-Conditions

Aware Super intends that the transaction to effect the Proposal would be undertaken by way of a recommended off-market takeover offer (the **Takeover Offer**) by Bidder.

The Takeover Offer would be subject to a minimum acceptance condition of 50.1% and a limited number of other defeating conditions outlined in the draft announcement in Attachment A and draft Aware Super BIA (defined below). Further, Aware Super commits to Bidder waiving all outstanding defeating conditions within three business days of satisfaction of the minimum acceptance condition of 50.1% (provided the relevant conditions have not been not breached prior to that date).

Importantly, because the Takeover Offer is only subject to a 50.1% minimum acceptance condition, it is capable of execution and completion notwithstanding the fact that Uniti has an interest in 19.5% of OptiComm shares and irrespective of whether Uniti accepts the Takeover Offer in respect of its shares.

Aware Super has obtained all necessary internal authorisations for the submission of this letter and to proceed with the Takeover Offer.

Aware Super is willing to:

- enter into a binding bid implementation deed in a form acceptable to both parties (the **Aware Super BIA**). A draft Aware Super BIA is attached at Attachment B and has as far as practicable been drafted to reflect the key terms and concepts of the Uniti Scheme Implementation Deed, including the conduct of business, exclusivity and break fee provisions. However, we note that Aware Super has proposed a break fee of A\$2 million only (being materially less than the quantum of the break fee under the Uniti Proposal). We anticipate that we will be able to finalise the Aware Super BIA with you on an expedited basis ahead of the End Time (defined below); and
- subject to entry into the Aware Super BIA, announce its intention to make the Takeover Offer in the form of the announcement at Attachment A,

on satisfaction of the pre-conditions set out below (the **Pre-Conditions**).

Aware Super requires that the Pre-Conditions are satisfied and the Aware Super BIA is executed by no later than 12pm on Thursday 15 October 2020 (the **End Time**). The End Time proposed provides OptiComm with sufficient time to complete the matching rights process under the Uniti Implementation Deed. Aware Super does not contemplate that the Pre-Conditions are to be satisfied before the matching rights process is commenced.

#### *Pre-Conditions*

- A. Aware Super notes the voluntary restriction deeds entered into between OptiComm and OptiComm shareholders (the form of which was announced to ASX on 23 August 2019) (the **Voluntary Restriction Deeds**). Aware Super requires that in respect of all OptiComm shareholders that are subject to Voluntary Restriction Deeds, OptiComm releases all 'Restricted Securities' from the restrictions in clause 2 for the sole purpose of allowing the relevant shareholders to accept into the Takeover Offer or any Competing Proposal (as defined under the Aware Super BIA) that proceeds as a takeover offer, without the need to satisfy the requirement in clause 3.1(b) of the Voluntary Restriction Deed.

This action is required in order to facilitate the Takeover Offer given Uniti has acquired a 19.5% interest in OptiComm. Without this action, the requirement of clause 3.1(b) of the Voluntary Restriction Deed makes any takeover offer for OptiComm practically unviable for so long as Uniti continues to hold its interest.

Aware Super considers that this action serves the interests of OptiComm shareholders, facilitating a proposal that is superior to the Uniti Proposal. We will separately engage with you on the form of waiver that is acceptable for this purpose.

- B. Aware Super notes that the Aware Super BIA includes a reference to a Target Disclosure Letter. Aware Super has not seen a draft of this letter. Aware Super requires that it is provided with a draft prior to entry into the Aware Super BIA and that there is nothing materially adverse in that letter that has not otherwise been disclosed to Aware Super to date.

If you have any comments or queries on the contents of the Aware Super BIA, please contact us to discuss those as soon practicable.

If the Pre-Conditions are not satisfied and the Aware Super BIA executed by the End Time, the Proposal will lapse and is withdrawn.

#### **4 The Uniti Proposal and Comparative Assessment**

Aware Super considers that the Proposal is clearly a Superior Proposal (as that term is defined in the Uniti Implementation Deed). The principal reasons for this are as follows:

- The Offer Price under the Proposal is materially above the implied value of the consideration offered under the Uniti Proposal.
- Aware Super is offering the certainty of all cash consideration. The consideration offered under the Uniti Proposal includes Uniti shares. There is uncertainty as to the future value of Uniti shares and various risks associated with those. OptiComm shareholders have clearly stated a preference for cash, having regard to the results of the indicative election in respect of the first iteration of the Uniti Proposal.
- The Takeover Offer is subject to substantially fewer defeating conditions than are contained in the Uniti Implementation Deed. Importantly, the 50.1% minimum acceptance condition imposes less conditionality than the shareholder approval requirements under the Uniti Proposal.
- Aware Super is a sophisticated counterparty with significant resources and, together with its advisers, has the capability and experience to execute a transaction to give effect to the Proposal efficiently and expeditiously.

Aware Super has set out a proposed indicative process and timeline below, contemplated to facilitate the Proposal and allow OptiComm to comply with its existing obligations under the Uniti Implementation Deed.

#### **5 Financing**

Aware Super has cash available to finance the acquisition. The Proposal is not subject to any condition that financing be obtained.

#### **6 Next Steps and Process**

To assist OptiComm in its planning and demonstrate Aware Super's commitment to proceed with and execute the Proposal expeditiously, Aware Super has prepared the indicative timeline below which sets out a basis on which Aware Super intends that the Proposal would proceed.

<b>Event</b>	<b>Expected Date</b>
Proposal received from Aware Super, including offer to enter into Aware Super BIA	Before 10am on Monday, 12 October
<i>OptiComm raises any queries it has of Aware Super, in respect of the Aware Super BIA or the Pre-Conditions</i>	
Entry into Aware Super BIA (after satisfaction of Pre-Conditions)	No later than 12pm on Thursday, 15 October

Event	Expected Date
Bidder's Statement lodged with OptiComm, ASIC and ASX (Aware Super will share a draft with OptiComm as soon as practicable following entry into the Aware Super BIA)	Monday, 19 October
Bidder's Statement sent to shareholders (OptiComm directors to consent to early dispatch) <i>Offer opens. Aware Super will explore accelerating payment terms to the extent practical once the offer is unconditional</i>	Wednesday, 21 October
<i>Aware Super waives all outstanding conditions and offer is unconditional within 3 business days of 50.1% acceptances being received</i>	
Target's Statement sent to shareholders	Friday, 6 November
Offer Period ends (unless extended)	Monday, 23 November

## 7 Nature of the Proposal

For the avoidance of doubt, this letter is not, and cannot be considered to be, a public proposal by Aware Super to make a takeover offer for the purposes of section 631 of the Corporations Act. It is a condition precedent to any such proposal that the Pre-Conditions are satisfied.

## 8 Contact Persons

Aware Super has appointed ICA Partners as its financial adviser and Allens as its legal adviser in relation to the Proposal. The principal contact persons in relation to this letter, together with their contact details are:

**Damien Webb**  
Aware Super  
Damien.Webb@aware.com.au  
+61 411 796 777

**Mark Hector**  
Aware Super  
Mark.Hector@aware.com.au  
+61 402 858 158

**Michael Siede**  
ICA Partners  
msiede@icapartners.com.au  
+61 417 392 065

**Aaron Simcock**  
ICA Partners  
asimcock@icapartners.com.au  
+61 411 074 258

**Chris Blane**  
Allens  
Chris.Blane@allens.com.au  
+61 421 848 819

**Jeremy Low**  
Allens  
Jeremy.Low@allens.com.au  
+61 404 056 479

Aware Super believes the Proposal is in the best interests of OptiComm shareholders and is committed to working together with OptiComm on its implementation.

We look forward to your response.



Yours sincerely

For and on behalf of **Aware Super Pty Ltd** as  
trustee for **Aware Super**



---

Attorney Signature

Ian Pendleton

---

Print Name



---

Attorney Signature

Damian Graham

---

Print Name

Attachments:

- Attachment A - Draft Aware Super Announcement for Takeover
- Attachment B - Aware Super BIA

## Attachment A

## Attachment B

Aware Super Pty Ltd as trustee of Aware Super  
Opticomm Ltd

## Bid Implementation Deed

Deutsche Bank Place  
Corner Hunter and Phillip Streets  
Sydney NSW 2000 Australia  
T +61 2 9230 4000  
F +61 2 9230 5333  
[www.allens.com.au](http://www.allens.com.au)

© Allens Australia 2020

## Contents

<b>1</b>	<b>Definitions and Interpretation</b>	<b>1</b>
1.1	Definitions	1
1.2	Interpretation	7
1.3	Awareness	8
<b>2</b>	<b>Offer</b>	<b>8</b>
2.1	Offer by Bidder	8
2.2	Consideration	8
2.3	Conditions of the Offer	8
2.4	Early despatch of Offers	9
2.5	Offer Period	9
2.6	Conduct of Bid	9
2.7	Notification	9
<b>3</b>	<b>Documentation</b>	<b>9</b>
3.1	Timetable	9
3.2	Bidder's obligations to prepare documentation	10
3.3	Target's obligations to prepare documentation	10
3.4	Provision of information	10
<b>4</b>	<b>Performance Rights and Agreed Dividend</b>	<b>11</b>
4.1	Treatment of Target Performance Rights	11
4.2	Payment of Agreed Dividend and internal payments	11
<b>5</b>	<b>Board Recommendation</b>	<b>12</b>
5.1	Recommendation	12
5.2	Confirmation	12
5.3	Withdrawal or modification of Recommendation and Intention	12
5.4	Notification	12
<b>6</b>	<b>Conduct of Business</b>	<b>13</b>
6.1	Conduct of Target business	13
6.2	Target Permitted Activities	13
6.3	Target expenses	13
6.4	Access to Target	13
6.5	Implementation Planning Committee	14
6.6	Change of control	15
6.7	Existing financing and security	15
6.8	Provision of register information	15
<b>7</b>	<b>Undertakings by Target</b>	<b>16</b>
7.1	Reconstitution of the Target Board	16
7.2	De-listing of Target	16
<b>8</b>	<b>Representations and Warranties</b>	<b>16</b>
8.1	Bidder representations and warranties	16
8.2	Target representations and warranties	17
8.3	Qualifications on the Target Warranties	19
8.4	Survival of representations	19
8.5	Survival of indemnities	19
8.6	Timing of representations and warranties	19
8.7	No representation or reliance	19
<b>9</b>	<b>Public Announcements</b>	<b>19</b>

9.1	Public announcement of Bid	19
9.2	Public announcements	20
9.3	Required disclosure and procedural matters	20
<b>10</b>	<b>Exclusivity</b>	<b>20</b>
10.1	No current arrangement or discussions	20
10.2	No-shop	21
10.3	No-talk	21
10.4	No due diligence restriction	21
10.5	Notification of approaches	22
10.6	Matching right	23
10.7	Fiduciary out	24
10.8	Exceptions	24
<b>11</b>	<b>Break Fee and Reverse Break Fee</b>	<b>24</b>
11.1	Background	24
11.2	Payment of Break Fee	25
11.3	Payment of Reverse Break Fee	26
11.4	No payment if Offers become unconditional	26
11.5	Break Fee payable once	26
11.6	Other claims	26
11.7	Compliance with law	27
11.8	Regulatory Intervention	28
<b>12</b>	<b>Termination</b>	<b>28</b>
12.1	Termination by notice	28
12.2	Termination by Target	28
12.3	Termination by Bidder	29
12.4	Effect of termination	29
<b>13</b>	<b>Releases</b>	<b>30</b>
13.1	Target and Target directors and officers	30
13.2	Bidder and Bidder directors and officers	30
13.3	Deeds of indemnity	30
13.4	Directors' and officers' insurance	31
13.5	Obligations in relation to directors' and officers' insurance	31
<b>14</b>	<b>Confidentiality</b>	<b>31</b>
<b>15</b>	<b>Notices</b>	<b>31</b>
15.1	Service of notices	31
15.2	Effective on receipt	32
<b>16</b>	<b>General</b>	<b>33</b>
16.1	Further acts	33
16.2	Payments	33
16.3	Consents or approvals	33
16.4	GST	33
16.5	Stamp duty	34
16.6	Expenses	34
16.7	Amendments	34
16.8	Assignment	34
16.9	Waiver	34
16.10	Entire agreement	35

16.11	Relationship of the parties	35
16.12	No merger	35
16.13	Invalidity and enforceability	35
16.14	Remedies cumulative	35
16.15	Severability	35
16.16	Governing law	35
16.17	Counterparts	36
16.18	Capacity of Trustee	36
<b>Schedule 1</b>		<b>37</b>
	Indicative Timetable	37
<b>Schedule 2</b>		<b>38</b>
	Target Capital Structure	38
<b>Schedule 3</b>		<b>39</b>
	Target Material Adverse Change, Prescribed Occurrence and Regulated Event	39

**This Deed** is made on

## Parties

- 1 **Aware Super Pty Ltd** as trustee for **Aware Super** (ABN 53 226 460 365) of Level 28, 388 George Street, Sydney, NSW 2000 (**Bidder**).
- 2 **OptiComm Ltd** (ACN 117 414 776) of Level 1, 22 Salmon Street, Port Melbourne, VIC 3207 (**Target**).

## Recitals

- A Bidder is proposing to acquire all of the Target Shares by way of the Bid.
- B Target and Bidder have agreed to co-operate with each other in relation to the Bid on the terms of this deed.
- C The Target Directors are proposing to recommend the Bid to Target Shareholders on the terms of this deed.

**It is agreed** as follows.

## 1 Definitions and Interpretation

### 1.1 Definitions

In this deed, the following words and phrases have the following meanings unless the context indicates otherwise:

**Accounting Standards** means:

- (a) the accounting standards made by the Australian Accounting Standards Board in accordance with the Corporations Act, and the requirements of that Act relating to the preparation and content of accounts; and
- (b) generally accepted accounting principles that are consistently applied in Australia, except those inconsistent with the standards or requirements referred to in paragraph (a).

**Adviser** means any person who is engaged to provide professional advice of any type (including legal, accounting, consulting or financial advice) to Target or Bidder.

**Agreed Dividend** means a dividend of \$[0.10] per Target Share, which, if paid, must be paid in accordance with clause 4.2(a)(i).

**Agreed Dividend Record Date** has the meaning given in clause 4.2(b)(i)(A).

**Announcement Date** means:

- (a) the date on which this deed is executed; or
- (b) if this deed is executed on a day that is not a Business Day, the first Business Day immediately following the day of execution.

**ASIC** means the Australian Securities and Investments Commission.

**Associate** has the meaning given in Division 2 of Part 1.2 of the Corporations Act.

**ASX** means ASX Limited (ACN 008 624 691) or, if the context requires, the financial market operated by it.

**Authorised Person** means, in respect of a person:

- (a) a director, officer, contractor, agent or employee of the person;



- (b) an Adviser of the person; and
- (c) a director, officer or employee of an Adviser of the person.

**Bid** means the off-market takeover bid by Bidder for all of the Target Shares to be implemented in accordance with Chapter 6 of the Corporations Act.

**Bidder Announcement** means a public announcement concerning the Bid in the form initialled or agreed by the parties (or on behalf of a party by its legal advisers) prior to the execution of this deed.

**Bidder Constitution** means the constitution of Bidder.

**Bidder Group** means Bidder and its Related Entities (each of which is a **Bidder Group Member**).

**Bidder Indemnified Parties** means Bidder, its Related Entities and their respective directors, officers and employees.

**Bidder Offer Registry** means the share registry provider to be appointed by Bidder for the purposes of performing shareholder registration functions in connection with the Offer.

**Bidder Warranties** means the representations and warranties of Bidder set out in clause 8.1.

**Bidder's Statement** means the bidder's statement to be issued by Bidder in respect of the Bid, as amended and supplemented from time to time.

**Break Fee** means \$[ ], inclusive of GST.

**Business Day** means any day that is each of the following:

- (a) a 'Trading Day' within the meaning given in the Listing Rules; and
- (b) a day that is not a Saturday, Sunday or a public holiday or bank holiday in Melbourne, Victoria or Sydney, New South Wales.

**Change of Control** occurs when the Offer becomes, or is declared, free of all Conditions and Bidder has a Relevant Interest in at least 50.1% of all Target Shares on issue.

**Change of Control Requirements** has the meaning given to that term in clause 6.6.

**Claim** means a claim, notice, demand, action, proceeding, litigation, prosecution, arbitration, investigation, judgment, award, damage, loss, cost, expense or liability however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort or statute.

**Competing Proposal** means any offer, proposal, agreement, arrangement or transaction, by a third party (other than Bidder or its Related Entities) whether arising on or after the date of this deed, which, if completed, would mean that a person other than Bidder or its Related Entities would:

- (a) directly or indirectly acquire Voting Power in, or have a right to acquire a legal, beneficial or economic interest in, or control of, more than 20% of the securities in any entity in the Target Group;
- (b) acquire Control of Target or any entity in the Target Group;
- (c) directly or indirectly acquire or become the holder of, or otherwise acquire or have a right to acquire a legal, beneficial or economic interest in, or control of, all or substantially all or a material part of Target's business or assets of the Target Group; or
- (d) otherwise directly or indirectly acquire, be stapled with or merge with, Target or any Target Group Member,

whether by way of a takeover bid, scheme of arrangement, shareholder approved acquisition, capital reduction, buy back, sale, lease or purchase of shares, other securities or assets, assignment of assets or liabilities, joint venture, dual listed company, deed of company arrangements, any debt for equity arrangement or other transaction or arrangement. Each successive material modification or variation of any proposal, offer or transaction in relation to a Competing Proposal will constitute a new Competing Proposal.

**Conditions** means the defeating conditions set out in clause 2.3, to the extent that they have not been freed or fulfilled as at the relevant date.

**Confidentiality Agreement** means the confidentiality agreement between Target and Bidder dated 8 September 2020.

**Control** has the meaning given under section 50AA of the Corporations Act.

**Control Date** means the date on which the Change of Control occurs.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Exclusivity Period** means the period commencing on the date of this deed and ending on the earliest of:

- (a) 6 months after the date of this deed;
- (b) the termination of this deed in accordance with its terms;
- (c) Bidder withdrawing the Bid; and
- (d) the end of the Offer Period (except, in circumstances where compulsory acquisition is available, the date of completion of the compulsory acquisition process under Chapter 6A of the Corporations Act).

**Fairly Disclosed** means, in reference to a party, disclosed to any of that party or any of its Authorised Persons in good faith and in sufficient detail so as to enable a reasonable and sophisticated buyer (or one of its Authorised Persons) experienced in transactions similar to the Transaction and experienced in a business similar to any business conducted by the Target Group to identify the nature and scope of the relevant change, event, circumstance, occurrence or matter.

**Government Agency** means any government or representative of a government or any governmental, semi-governmental, administrative, fiscal, regulatory or judicial body, department, commission, authority, tribunal, agency, competition authority or entity and includes any minister, ASIC, ASX, the Takeovers Panel and any regulatory organisation established under statute or any stock exchange.

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

**Implementation Planning Committee** has the meaning given to that term in clause 6.5 of this deed.

**Independent Expert** means an expert, independent of the parties, engaged by Target in good faith to opine on whether the Bid is fair and reasonable to Target Shareholders.

**Independent Expert's Report** means the report from the Independent Expert commissioned by Target for inclusion in the Target's Statement, which includes a statement by the Independent Expert on whether, in its opinion, the Bid is fair and reasonable to Target Shareholders, and includes any update of that report by the Independent Expert.

**Insolvency Event** means in relation to a person:

- (a) **insolvency official**: the appointment of a liquidator, provisional liquidator, administrator, statutory manager, controller, receiver, receiver and manager or other insolvency official

(whether under an Australian law or a foreign law) to the person or to the whole or a substantial part of the property or assets of the person and the action is not stayed, withdrawn or dismissed within 14 days;

- (b) **arrangements**: the entry by the person into a compromise or arrangement with its creditors generally;
- (c) **winding up**: the calling of a meeting to consider, or the passing of, a resolution to wind up the person (other than where the resolution is frivolous or cannot reasonably be considered to be likely to lead to the actual winding up of the person) or the making of an application or order for the winding up or deregistration of the person other than where the application or order (as the case may be) is set aside or withdrawn within 14 days;
- (d) **suspends payments**: the person suspends or threatens to suspend payment of its debts as and when they become due;
- (e) **ceasing business**: the person ceases or threatens to cease to carry on business;
- (f) **insolvency**: the person is or becomes unable to pay its debts when they fall due within the meaning of the Corporations Act or is otherwise presumed to be insolvent under the Corporations Act;
- (g) **deregistration**: the person being deregistered as a company or otherwise dissolved other than on a solvent basis;
- (h) **deed of company arrangement**: the person executing a deed of company arrangement;
- (i) **person as trustee or partner**: the person incurs a liability while acting or purporting to act as trustee (or co-trustee) or general partner of a trust or partnership (including a limited partnership) and the person:
  - (i) is not entitled to be fully indemnified against the liability out of the trust or partnership assets (or the trust or partnership assets are insufficient to discharge the liability); and
  - (ii) is unable to discharge the liability out of any other assets (including the proceeds of any insurance claim); or
- (j) **analogous events**: anything analogous to those set out in any of paragraphs (a) to (i) inclusive occurs in relation to the person under the laws of a foreign jurisdiction,

and a person shall be Insolvent if any event specified in paragraphs (a) to (j) inclusive occurs in respect of that person.

**Intention** has the meaning given in clause 5.2(b).

**Listing Rules** means the official listing rules of ASX as amended from time to time.

**Minimum Acceptance Condition** means the Condition in clause 2.3(a)(i).

**Offer** means each offer to acquire Target Shares (including any Target Shares issued during the Offer Period) to be made by Bidder to each Target Shareholder under the Bid on terms consistent with this deed.

**Offer Period** means the period specified in clause 2.4, during which the Offers are open for acceptance.

**Offer Price** has the meaning given in clause 2.2.

**Policy** has the meaning given in clause 13.4(a).

**PPSR** means the register of security interests maintained in accordance with the *Personal Property Securities Act 2009* (Cth).

**Recommendation** has the meaning given to that term in clause 5.2(a).

**Register Date** means the date set by the Bidder under section 633(2) of the Corporations Act.

**Regulatory Approval** means:

- (a) any approval, consent, authorisation, registration, filing, lodgement, permit, franchise, agreement, notarisation, certificate, permission, licence, direction, declaration, authority, waiver, modification or exemption from, by or with a Government Agency; or
- (b) in relation to anything that would be fully or partly prohibited or restricted by law if a Government Agency intervened or acted in any way within a specified period after lodgement, filing, registration or notification, the expiry of that period without intervention or action.

**Related Entity** means in relation to an entity (the **first entity**):

- (a) a subsidiary of the first entity;
- (b) an entity of which the first entity is a subsidiary; or
- (c) a subsidiary of another entity of which the first entity is also a subsidiary,

where, for the purposes of this definition, **subsidiary** has the meaning given in the Corporations Act, but an entity will also be taken to be a subsidiary of an entity if it is controlled by that entity (as defined in section 50AA of the Corporations Act) and:

- (a) a trust may be a subsidiary, for the purpose of which a unit or other beneficial interest will be regarded as a share;
- (b) an entity may be a subsidiary of a trust if it would have been a subsidiary if that trust were a body corporate; and
- (c) section 48(2) of the Corporations Act is disregarded.

**Relevant Interest** has the meaning given to that term in sections 608 and 609 of the Corporations Act.

**Reverse Break Fee** means \$[\*], inclusive of GST.

**RG 55** means Regulatory Guide 55 issued by ASIC

**Specified Right** means a right or power of a third party under any agreement, arrangement or understanding with a Target Group Member that arises and is able to be exercised solely as a result of the announcement of, or the entry into or performance of, this deed or the transactions contemplated by it.

**Subsidiary** has the meaning given to that term in Division 6 of Part 1.2 of the Corporations Act.

**Superior Proposal** means a bona fide Competing Proposal which the Target Board determines, acting in good faith and in order to satisfy what the Target Board reasonably considers to be its fiduciary or statutory duties, would, if completed substantially in accordance with its terms, be likely to result in a transaction more favourable to Target Shareholders as a whole than the Transaction having regard to matters including, but not limited to, type of consideration offered, the actual or implied premium of the purchase price, conditionality, funding, certainty and timing.

**Takeovers Panel** means the Takeovers Panel constituted under the *Australian Securities and Investments Commission Act 2001* (Cth).

**Target Announcement** means a public announcement concerning the Bid in the form initialled or agreed by the parties (or on behalf of a party by its legal advisers) prior to the execution of this deed.

**Target Board** means the board of Target Directors or any committee of the board of Target

Directors constituted to consider the Transaction on behalf of Target.

**Target Director** means a director of Target.

**Target Disclosure Letter** means the letter so entitled from Target provided to Bidder on the date of this deed and countersigned by Bidder.

**Target Disclosure Materials** means the Target Due Diligence Materials and the Target Disclosure Letter.

**Target Due Diligence Materials** means the information disclosed by or on behalf of the Target Group (including management presentations and in response to requests for information) to Bidder or any of its Authorised Persons on or prior to the date of this deed.

**Target Group** means Target and its Subsidiaries (each of which is a **Target Group Member**).

**Target Incentive Plan** means Target's long term incentive plan adopted on 15 July 2019.

**Target Indemnified Parties** means Target, its Subsidiaries and their respective directors, officers and employees.

**Target Material Adverse Change** has the meaning given in Schedule 3.

**Target Performance Right** means a right to be issued a Target Share under the Target Incentive Plan.

**Target Performance Right Holder** means a holder of a Target Performance Right.

**Target Permitted Activities** means any change, event, circumstance, occurrence or matter:

- (a) required by law or a Government Agency;
- (b) expressly permitted to be done, or required to be done or procured, by Target pursuant to this deed;
- (c) that results from or in connection with the exercise of a Specified Right, provided and to the extent that the Specified Right was Fairly Disclosed in the Target Due Diligence Materials;
- (d) Fairly Disclosed to Bidder in the Target Disclosure Materials;
- (e) Fairly Disclosed in any filings of Target with the ASX prior to the date of this deed; or
- (f) consented to in writing by Bidder.

**Target Prescribed Occurrence** has the meaning given in Schedule 3.

**Target Regulated Event** has the meaning given in Schedule 3.

**Target Share** means a fully paid ordinary share in the capital of Target, including:

- (a) all Target Shares in existence as at the Register Date; and
- (b) all Target Shares that are issued during the Offer Period due to the conversion of Target Performance Rights in existence as at the Register Date.

**Target Share Register** means the register of members of Target maintained by or on behalf of Target in accordance with section 168(1) of the Corporations Act.

**Target Shareholder** means each person who is registered in the Target Share Register as a holder of Target Shares.

**Target's Statement** means the target's statement to be issued by Target in respect of the Bid, as amended and supplemented from time to time.

**Target Warranties** means the representations and warranties of Target set out in clause 8.2.

**Third Party** means any of the following:

- (a) a person other than any Bidder Group Member or any Target Group Member; or
- (b) a consortium, partnership, limited partnership, syndicate or other group in which no Bidder Group Member has agreed to be a participant.

**Timetable** means the indicative timetable in relation to the Transaction set out in Schedule 1, with such modifications as may be agreed in writing by the parties.

**Transaction** means the proposed acquisition by Bidder, in accordance with the terms and conditions of this deed, of the Target Shares through the Bid.

**TUAs** means all telecommunications utility agreements entered into between the Target and property developers for the supply, construction, installation, maintenance and support of telecommunications and/or integrated communications networks required for the provision of telecommunications and connectivity services before the date of this deed.

**Voting Power** has the meaning given to that term in section 610 of the Corporations Act.

## 1.2 Interpretation

In this deed, the following rules of interpretation apply unless the contrary intention appears:

- (a) a term or expression starting with a capital letter:
  - (i) which is defined in clause 1.1 has the meaning given to it in clause 1.1;
  - (ii) which is defined in the Corporations Act, but is not defined in the clause 1.1, has the meaning given to it in the Corporations Act; and
  - (iii) which is defined in the GST Act, but is not defined in clause 1.1 or the Corporations Act, has the meaning given to it in the GST Act.
- (b) headings are for convenience only and do not affect the interpretation of this deed;
- (c) the singular includes the plural and vice versa;
- (d) words that are gender neutral or gender specific include each gender;
- (e) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (f) the words 'include' and 'including' and similar expressions are not words of limitation and do not limit what else might be included;
- (g) a reference to:
  - (i) a person includes a natural person, estate of a natural person, partnership, joint venture, Government Agency, association, corporation, trust or other body corporate or entity (as that term is defined in section 64A of the Corporations Act);
  - (ii) a thing (including a chose in action or other right) includes a part of that thing;
  - (iii) a party includes its agents, successors and permitted assigns;
  - (iv) a document includes all amendments or supplements to that document;
  - (v) a clause, term, party, schedule or attachment is a reference to a clause or term of, or a party, schedule or attachment to this deed (as applicable);
  - (vi) this deed includes all schedules and attachments to it;

- (vii) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity or a Listing Rule and is a reference to that law as amended, consolidated or replaced;
- (viii) a statute includes any regulation, ordinance, by-law or other subordinate legislation made under it;
- (ix) an agreement, other than this deed, includes an undertaking, or legally enforceable arrangement or understanding, whether or not in writing;
- (x) a monetary amount is in Australian dollars; and
- (xi) time is to Melbourne, Australia time;
- (h) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day; and
- (i) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this deed or any part of it.

### 1.3 Awareness

Where a representation or warranty is given by Target so far as it is 'aware' or with a similar qualification as to awareness or knowledge, the awareness or knowledge of Target is limited to and deemed only to comprise those facts, matters or circumstances of which:

- (a) John Phillips; and / or
- (b) Paul Cross,

is aware, or ought reasonably to be aware, as at the date of this deed.

## 2 Offer

### 2.1 Offer by Bidder

- (a) Bidder must, by no later than one month after the Announcement Date (or such other date agreed in writing by the parties), and in any event as soon as reasonably practicable following the date of this deed, make Offers to all Target Shareholders in respect of all of their Target Shares on the terms of this deed and otherwise in accordance with all applicable provisions of the Corporations Act.
- (b) Bidder may satisfy its obligation under clause 2.1(a), and related obligations under this deed, by causing a Related Entity of Bidder to perform the obligations referred to in clause 2.1(a) and related obligations under this deed, in which case references in this deed to Bidder making the Offer (and undertaking related matters) are taken to be references to Bidder having a primary obligation to procure that entity making the Offer (and undertaking related matters).

### 2.2 Consideration

The offer price for each Target Share under the Offers will be a cash payment equal to \$[1] (the **Offer Price**). The Offer will not provide for any reduction in respect of the Agreed Dividend.

### 2.3 Conditions of the Offer

- (a) The Offer and any contract which results from its acceptance will be subject to the following Conditions:
  - (i) **Minimum acceptance:** during, or at the end of, the Offer Period, the number of Target Shares in which Bidder has relevant interests is at least 50.1% of all the Target Shares (on a fully diluted basis);



- (ii) **No restraints:** between the date of this deed and the end of the Offer Period, there is not in effect any temporary or final order, decision or decree issued by any court of competent jurisdiction or Government Agency which restrains, prohibits, or otherwise materially adversely impacts upon, the Bid;
  - (iii) **No Target Prescribed Occurrence:** no Target Prescribed Occurrence occurs between (and including) the date of this deed and the end of the Offer Period;
  - (iv) **No Target Regulated Event:** no Target Regulated Event occurs between (and including) the date of this deed and the end of the Offer Period; and
  - (v) **No Target Material Adverse Change:** no Target Material Adverse Change occurs between the date of this deed and the end of the Offer Period.
- (b) Each party must, to the extent within its power, use all reasonable endeavours to satisfy the Conditions.
  - (c) From the date of this deed until the Offer becomes unconditional, Target must ensure that each Target Group Member does not, without the prior written consent of Bidder, take any action or omit to do anything that will, or is likely to, result in the Conditions in paragraphs (a)(iii), (a)(iv) or (a)(v) being breached prior to the end of the Offer Period.

## 2.4 Early despatch of Offers

Target agrees that the Bidder's Statement may be despatched to Target Shareholders on the date that is three Business Days after Bidder has sent the Bidder's Statement to Target in accordance with Item 3 section 633(1), or such other date agreed by the parties, being a date that is earlier than the date for sending the Bidder's Statement under Item 6 of section 633(1) of the Corporations Act.

## 2.5 Offer Period

The Offer Period will end one month after the date of the Offer, unless extended by Bidder at its discretion or automatically, in each case in accordance with the Corporations Act.

## 2.6 Conduct of Bid

Within three Business Days after the Condition in clause 2.3(a)(i) is satisfied, Bidder will waive all Conditions other than any Condition in respect of which Bidder has publicly announced a breach or suspected breach before that time.

## 2.7 Notification

Each of the parties must:

- (a) keep the other promptly and reasonably informed of the steps it has taken and of its progress towards satisfaction of the Conditions;
- (b) promptly notify the other in writing if it becomes aware that any Condition has been satisfied; and
- (c) promptly notify the other in writing if it becomes aware that any Condition is or has become incapable of being satisfied.

## 3 Documentation

### 3.1 Timetable

- (a) Each party agrees to use its reasonable endeavours to perform their respective obligations in accordance with Timetable.



- (b) The parties acknowledge that the Timetable is an indicative timetable and will consult with each other regularly in relation to performing their respective obligations in accordance with the Timetable.

### 3.2 Bidder's obligations to prepare documentation

- (a) Bidder will prepare:
  - (i) the Bidder's Statement; and
  - (ii) an acceptance form for the Offer,
 in each case consistent with clause 2. The Bidder's Statement must not contain any material statement which is misleading or deceptive nor contain any material omission having regard to applicable disclosure requirements and must comply in all material respects with the requirements of the Corporations Act, the Listing Rules, and all relevant regulatory guides, practice notes and other guidelines and requirements of ASIC.
- (b) Bidder agrees to do and to procure its officers to do the things that are reasonably necessary to prepare the Bidder's Statement, its lodgement with ASIC and despatch to Target Shareholders in accordance with the Timetable, subject to Target granting any necessary consents and ASIC granting any necessary modifications.

### 3.3 Target's obligations to prepare documentation

- (a) Target must prepare the Target's Statement in response to the Offer in accordance with the Corporations Act. The Target's Statement must not contain any material statement which is misleading or deceptive nor contain any material omission having regard to applicable disclosure requirements and will comply in all material respects with the requirements of the Corporations Act, the Listing Rules and all relevant regulatory guides, practice notes and other guidelines and requirements of ASIC.
- (b) Target agrees to do and to procure its officers to do the things that are reasonably necessary to prepare the Target's Statement, its lodgement with ASIC and despatch to Target Shareholders in accordance with the Timetable.

### 3.4 Provision of information

- (a) Each party agrees that:
  - (i) it will provide to the other party information (subject to the Confidentiality Agreement and the terms of this deed) that is reasonably required by the other party in order to enable the other party to fulfil its obligations under this agreement, including, but not limited to, the preparation of the Bidder's Statement and Target's Statement; and
  - (ii) it will consent to the inclusion of information on it (and the form and context in which it is included) in the other parties' Bidder's Statement or Target's Statement, as applicable.
- (b) Target must:
  - (i) give Bidder a reasonable opportunity (and, in any event, no less than 2 Business Days) to review an advanced draft of the Target's Statement prior to lodgement of the Target's Statement with ASIC; and
  - (ii) (acting in good faith) consider any comments provided by or on behalf of Bidder.

## 4 Performance Rights and Agreed Dividend

### 4.1 Treatment of Target Performance Rights

Target agrees to procure that, as soon as practicable following the Control Date, the Target Board will exercise its discretion under the terms of the Target Incentive Plan to ensure that 220,336 Target Shares will be issued promptly, and in any event, within the lesser of 2 Business Days of the Control Date or any shorter period ending at 5.00pm on the Business Day before the end of the Offer Period, as a result of the automatic exercise of the Target Performance Rights.

### 4.2 Payment of Agreed Dividend and internal payments

- (a) Despite any other provision of this deed, Target may declare and pay the Agreed Dividend to Target Shareholders, provided that the Agreed Dividend:
  - (i) is to be declared within the lesser of 2 Business Days of the Control Date or any shorter period ending at 5.00pm on the Business Day before the end of the Offer Period;
  - (ii) does not breach the Benchmark Rule of section 203-25 of the *Income Tax Assessment Act 1997* (Cth);
  - (iii) must be in compliance with Part 2H.5 of the Corporations Act;
  - (iv) will be franked to the maximum extent possible, subject to the franking account of Target not being in deficit after the payment of the Agreed Dividend or prior to the declaration of or resolution to pay the Agreed Dividend; and
  - (v) is to be paid from accumulated profits, retained earnings or distributable reserves (or a combination of all or some of them) of the Target Group existing immediately prior to the declaration of the Agreed Dividend.
- (b) Where the Agreed Dividend is declared in accordance with clause 4.2(a):
  - (i) Target will announce to ASX the Agreed Dividend on the basis that:
    - (A) the record date for the Agreed Dividend (**Agreed Dividend Record Date**) is 4 Business Days after the date on which the Agreed Dividend is announced; and
    - (B) payment of the Agreed Dividend is to be made not more than 10 Business Days after the Agreed Dividend Record Date; and
  - (ii) Bidder must not process, and must procure that the Bidder Offer Registry does not process, any acceptances of its Offer until after the Agreed Dividend Record Date.
- (c) If Bidder or any of its Associates acquire Target Shares under the Bid on or before the Agreed Dividend Record Date, then the terms of the Offers must provide that Bidder is not entitled to any Agreed Dividend and that any Agreed Dividend paid on those shares is held on trust for the Target Shareholder from whom they acquired the Target Shares.
- (d) Target must provide Bidder with supporting documents evidencing (to Bidder's reasonable satisfaction) that:
  - (i) the franking account of Target will not be in deficit after the payment of the Agreed Dividend;
  - (ii) the Agreed Dividend does not breach the Benchmark Rule of section 203-25 of the *Income Tax Assessment Act 1997* (Cth); and

- (iii) there are sufficient accumulated profits, retained earnings or distributable reserves to satisfy the requirements of clause 4.2(a)(v).
- (e) Despite any other provision of this deed, Target may make any intra group distributions and payments between members of the Target Group, in order to be able to declare and pay the Agreed Dividend in accordance with clause 4.2(a).

## 5 Board Recommendation

### 5.1 Recommendation

Target must procure that, subject to:

- (a) clause 5.2; and
- (b) there being no requirement or request of a court or Government Agency that a Target Director abstain or withdraw from recommending that Target Shareholders accept the Offer,

each Target Director will recommend that Target Shareholders accept the Offer, qualified only by the words to the effect of 'in the absence of a superior proposal and subject to the independent expert concluding and continuing to conclude that the takeover bid is fair and reasonable'.

### 5.2 Confirmation

Target represents and warrants to Bidder that, as at the date of this deed, each Target Director has confirmed that:

- (a) his or her recommendation in respect of the Bid is that Target Shareholders accept the Offer (**Recommendation**); and
- (b) he or she intends to accept, and cause to be accepted, the Offer in respect of all Target Shares in which he or she has a Relevant Interest (**Intention**),

in each case subject to:

- (c) no Superior Proposal emerging; and
- (d) the Independent Expert concluding in the Independent Expert's Report (and continuing to conclude) that the Bid is fair and reasonable.

### 5.3 Withdrawal or modification of Recommendation and Intention

Target must use reasonable endeavours to procure that each Target Director does not change, withdraw or modify his or her Recommendation or Intention unless:

- (a) Target receives a Competing Proposal and the relevant Target Director determines that the Competing Proposal constitutes a Superior Proposal; or
- (b) the Independent Expert concludes in the Independent Expert's Report that the Bid is not fair and reasonable or the Independent Expert concludes in the Independent Expert's Report that the Bid is fair and reasonable but then changes, qualifies or publicly withdraws this conclusion prior to the Control Date; or
- (c) the change, withdrawal or modification of his or her Recommendation occurs because of a requirement or request of a court or Government Agency that the Target Director abstain or withdraw from recommending that Target Shareholders accept the Offer.

### 5.4 Notification

Subject to the Listing Rules and all applicable laws and regulations, if any fact, matter or circumstance arises (including receipt or the expected receipt of an unfavourable report) from the

Independent Expert's Report, (including any supplementary or replacement report) which may lead to a Target Director changing, withdrawing or modifying his or her Recommendation or Acceptance Intentions, Target must immediately notify Bidder of this fact.

## **6 Conduct of Business**

### **6.1 Conduct of Target business**

Subject to clause 6.2, during the period from the date of this deed to the earlier of the end of the Offer Period or the date this deed is terminated, Target must conduct its business and must cause each of its Subsidiaries to conduct their businesses, in the ordinary and usual course of business and:

- (a) consistent with past practice, in generally the same manner as conducted in the 12 months prior to the date of this deed;
- (b) in accordance with all applicable laws and regulations;
- (c) use reasonable endeavours to preserve their relationships with customers, suppliers, landlords, licensors, licensees and others having material business dealings with them, and to retain the services of all key employees;
- (d) use reasonable endeavours to ensure that all assets are maintained in the normal course consistent with past practice;
- (e) use reasonable endeavours to comply in all material respects with all material contracts to which a Target Group Member is a party, and with laws, authorisations and licenses applicable to each Target Group Member;
- (f) ensure no Target Regulated Event or Target Prescribed Occurrence occurs;
- (g) not take or fail to take any action that would, or would be likely to, prevent a Condition being satisfied or result in a Condition not being satisfied;
- (h) maintain existing policies of insurance as disclosed in the Target Due Diligence Materials; and
- (i) ensure that no Target Group Member, settles, compromises or otherwise deals with any tax or duty audits, reviews or investigations or tax demands without the prior written consent of Bidder (not to be unreasonably withheld or delayed).

### **6.2 Target Permitted Activities**

The obligations of Target under clause 6.1 do not apply in respect of any Target Permitted Activities.

### **6.3 Target expenses**

The Target undertakes to the Bidder that it will not incur expenses in relation to the Bid in excess of the amounts disclosed in the Target Disclosure Materials.

### **6.4 Access to Target**

- (a) Between the date of this deed and the end of the Offer Period, Target must procure that Bidder is provided with reasonable access during normal business hours and on reasonable notice to information, documents, records, premises and senior executives of any Target Group Member, reasonably requested by Bidder solely for the purposes of:
  - (i) implementation of the Transaction;
  - (ii) obtaining an understanding, or furthering its understanding, of the Target Group or its business, financial position, prospects or assets in order to allow Bidder to

- develop, finalise and implement its plans for the Target Group following implementation of the Transaction;
  - (iii) finalisation of Bidder's structuring arrangements for the Transaction;
  - (iv) keeping Bidder informed of material developments relating to the Target Group (including any material correspondence received from or provided to a Government Agency); or
  - (v) any other purpose agreed between the parties,
- and reasonably consider Bidder views about material developments in the business of the Target Group, provided that compliance with any such request would not, in the reasonable opinion of Target (acting in good faith), result in undue disruption to the Target Group's business.
- (b) The obligations in clause 6.4(a) do not require Target to:
- (i) do anything which would cause undue disruption to the operation of its business in the ordinary course;
  - (ii) require a Target Group Member to take any action that would reasonably be expected to conflict with or violate the entity's constituent documents or any law;
  - (iii) require a Target Group Member to take any action that would breach an obligation to any person (including any confidentiality obligations);
  - (iv) provide information to Bidder concerning the Target Directors' and management's consideration of the Bid; or
  - (v) provide any confidential or privileged information where the provision of such information is reasonably likely to cause prejudice to the legal interests of the Target Group taken as a whole, or would be reasonably likely to jeopardise any attorney-client, work product or other legal privilege.
- (c) Bidder will provide reasonable assistance to Target for the purpose of satisfying Target's obligations under this clause 6.2.

## 6.5 Implementation Planning Committee

- (a) As soon as reasonably practicable after the date of this deed, the parties must establish an Implementation Planning Committee as set out in this clause 6.5.
- (b) Without limiting clause 6.4, between (and including) the date of this deed and the end of the Offer Period, the Implementation Planning Committee will act as a forum for consultation and planning by the parties to implement the Bid.
- (c) For the avoidance of doubt, the Implementation Planning Committee will be a consultative body only that will make recommendations to the parties and to the extent any document or other information is to be provided to the Implementation Planning Committee, the arrangements set out in clause 6.4(b) with respect to confidential or privileged information shall apply.
- (d) The parties will use reasonable endeavours to procure that the Implementation Planning Committee meets fortnightly, commencing on the one month anniversary of the date of this deed.
- (e) A representative nominated by Bidder will act as Chair of meetings of the Implementation Planning Committee and Bidder will establish an agenda for each meeting.
- (f) Subject to this deed, nothing in this clause 6.5 requires either party to act at the direction of the other. The business of each party will continue to operate independently from the

other until the Implementation Date. The parties agree that nothing in this deed constitutes the relationship of a partnership or joint venture between the parties.

## 6.6 Change of control

- (a) As soon as practicable after the date of this deed, Target must:
  - (i) seek to identify any change of control or unilateral termination rights in any material contract (including any lease or any contractual arrangement with respect to existing debt of the Target that is not to be repaid in accordance with clause 6.7) to which a Target Group Member is party which may be triggered by the implementation of the Transaction (**Change of Control Requirements**); and
  - (ii) use all reasonable endeavours to agree a proposed strategy to obtain any consents required in accordance with the terms of any identified Change of Control Requirements, and to then expeditiously seek those consents in accordance with the agreed strategy.
- (b) Bidder must cooperate with, and provide all reasonable assistance to, Target to obtain such consents or confirmations in relation to any identified Change of Control Requirements, including by promptly providing any information reasonably required by counterparties.

## 6.7 Existing financing and security

Target must cooperate with, and undertake all steps reasonably required or requested by Bidder in connection with any repayment of existing debt of the Target Group as may be required in connection with the Scheme, including:

- (a) liaising with Bidder in good faith in relation to the use of the existing cash reserves of Target for this purpose;
- (b) issuing prepayment notices in relation to existing Target Group debt facilities; and
- (c) using all reasonable endeavours to procure deeds of release, discharges of real property mortgages and registrations on the PPSR from secured parties in relation to any security interest granted by a Target Group Member in favour of that party and procuring the return of any title documents held by a secured party,

subject always to Target not being required to actually effect such repayment until the Control Date.

## 6.8 Provision of register information

In addition to Target's obligations under the Corporations Act, during the period from the date of this deed to the end of the Offer Period, Target must provide all information, or procure that the share registry of Target provide all information, to Bidder about Target Shareholders and Target Performance Right Holders (including the results of directions by Target to Target Shareholders under Part 6C.2 of the Corporations Act) that Bidder requires (acting reasonably), in each case in the time and manner reasonably requested by Bidder, which Bidder reasonably requires in order to:

- (a) determine the identity of Target Shareholders;
- (b) send Offers and accompanying documents to solicit acceptances of Offers by Target Shareholders;
- (c) discuss the Bid with Target Shareholders; or

- (d) facilitate the provision by Bidder of the consideration under the Bid (including the proceeds from any Agreed Dividend held on trust for a Target Shareholder under clause 4.2(c)).

## 7 Undertakings by Target

### 7.1 Reconstitution of the Target Board

As soon as practicable after the Control Date and for so long as Bidder and its Associates together have relevant interests in at least 50.1% of all the Target Shares (on a fully diluted basis), Target must use its best endeavours to:

- (a) procure that each Target Director designated by Bidder in writing, and each director of any Subsidiary of Target designated by Bidder in writing, resigns their office; and
- (b) cause the appointment to the Target Board, and to the boards of each Subsidiary of Target, of such persons as nominated by Bidder in writing, subject to those persons having provided a consent to act as directors of the relevant company or companies.

### 7.2 De-listing of Target

As soon as practicable after the Bidder acquires a relevant interest in at least 75.01% of all of the Target Shares (on a fully diluted basis), on written direction from the Bidder the Target must:

- (a) make a formal request to ASX for termination of official quotation of Target Shares on ASX and the removal of Target from the official list of ASX, expressed to be subject only to any conditions imposed by ASX and requested to be effective immediately following the satisfaction of any such conditions (**Removal Request**);
- (b) as soon as practicable after the Removal Request is lodged, make an ASX announcement regarding the lodgement of the Removal Request in the manner contemplated in section 2.4 of Guidance Note 33;
- (c) not withdraw or adversely amend the Removal Request, or take any steps intended to frustrate the termination of official quotation of Target Shares on ASX and the removal of Target from the official list of ASX; and
- (d) in consultation with the Bidder, use its best endeavours to promptly comply with any conditions required by ASX in connection with the Removal Request to give effect to the Removal Request.

## 8 Representations and Warranties

### 8.1 Bidder representations and warranties

Bidder represents and warrants to Target that:

- (a) **validly existing**: Bidder is a validly existing corporation registered under the laws of its place of incorporation;
- (b) **authority and power**: the execution and delivery of this deed has been properly authorised by all necessary corporate action and Bidder has full corporate power and lawful authority to execute and deliver this deed and to perform or cause to be performed its obligations under this deed;
- (c) **no default**: this deed constitutes legal, valid and binding obligations on it and this deed does not result in a breach of or default under any provision of Bidder Constitution or any deed or any writ, order or injunction, rule or regulation to which Bidder is a party or is bound and Bidder is not otherwise bound by any agreement that would prevent or restrict it from entering into or performing this deed;



- (d) **deed binding:** this deed is a valid and binding obligation of Bidder, enforceable in accordance with its terms;
- (e) **sufficient cash amounts:** Bidder has a reasonable basis to expect that it will have available to it sufficient cash amounts (whether from internal cash resources or external funding arrangements (including debt and equity financing) or a combination of both) to fund the Offers to be made by Bidder to Target Shareholders in accordance with its obligations under this deed;
- (f) **Independent Expert:** all information provided by or on behalf of Bidder to the Independent Expert to enable the Independent Expert's Report to be included in the Target's Statement to be prepared and completed will not be misleading or deceptive in any material respect (whether by omission or otherwise) when read as a whole and will be provided in good faith and on the understanding that the Independent Expert will rely upon that information for the purposes of preparing the Independent Expert's Report for inclusion in the Target's Statement; and
- (g) **Insolvency Event or regulatory action:** no Insolvency Event has occurred in relation to Bidder, nor has any regulatory action of any nature been taken that would prevent or restrict its ability to fulfil its obligations under this deed,

(the **Bidder Warranties**).

## 8.2 Target representations and warranties

Target represents and warrants to the Bidder that:

- (a) **validly existing:** Target is a validly existing corporation registered under the laws of its place of incorporation;
- (b) **authority and power:** the execution and delivery of this deed by Target has been properly authorised by all necessary corporate action and Target has full corporate power and lawful authority to execute and deliver this deed and to perform or cause to be performed its obligations under this deed;
- (c) **no default:** this deed constitutes legal, valid and binding obligations on it and this deed does not result in a breach of or default under any provision of Target's constitution or any deed or any writ, order or injunction, rule or regulation to which Target is a party or is bound and Target is not otherwise bound by any agreement that would prevent or restrict it from entering into or performing this deed;
- (d) **deed binding:** this deed is a valid and binding obligation of Target, enforceable in accordance with its terms;
- (e) **no Target Prescribed Occurrence:** no Target Prescribed Occurrence has occurred;
- (f) **Target Information:** as at the date the Target's Statement is despatched to Target Shareholders, the Target Information contained in the Target's Statement:
  - (i) will be prepared and included in the Target's Statement in good faith; and
  - (ii) will comply in all material respects with the requirements of the Corporations Act, Corporations Regulations, Listing Rules and RG 55;
- (g) **not misleading or deceptive:** as at the date the Target's Statement is despatched to Target Shareholders, the Target's Statement will not be misleading or deceptive in any material respect (whether by omission or otherwise);



- (h) **due diligence information:** the Target Disclosure Materials were provided or made available to Bidder in good faith and Target is not aware of any material misleading or deceptive statement in, or material omission from, any of the Target Disclosure Materials;
- (i) **continuous disclosure:** as at the date of this deed, Target is not in breach of its continuous disclosure obligations under the Listing Rules and is not relying on the exclusion in Listing Rule 3.1A to withhold any information from disclosure (other than in relation to the Transaction or as disclosed in writing to Bidder on or before the date of this deed);
- (j) **issued capital:** the issued capital and performance rights of Target as of the date of this deed is set out in Schedule 2 and there are no other Target options, shares, warrants, convertible notes, instruments or other securities (or offers or agreements to issue any of the foregoing) that may convert into Target Shares;
- (k) **financial statements:** Target's financial statements as disclosed to the ASX have been prepared in accordance with the Accounting Standards on a basis consistent with past practice financial statements and, so far as Target is aware, there has not been any event, change, effect or development which would require Target to restate its financial statements as disclosed to the ASX;
- (l) **issue of securities:** no Target Group Member has issued, or agreed to issue, any other securities or instruments which may convert into Target Shares or any other securities in Target except as disclosed in writing to Bidder on or before the date of this deed;
- (m) **Independent Expert:** all information provided by or on behalf of Target to the Independent Expert to enable the Independent Expert's Report to be included in the Target's Statement to be prepared and completed will not be misleading or deceptive in any material respect (whether by omission or otherwise) when read as a whole and will be provided in good faith and on the understanding that the Independent Expert will rely upon that information for the purposes of preparing the Independent Expert's Report for inclusion in the Target's Statement;
- (n) **Insolvency Event or regulatory action:** no Insolvency Event has occurred in relation to Target or any other Target Group Member, nor has any regulatory action of any nature been taken that would prevent or restrict its ability to fulfil its obligations under this deed;
- (o) **Target assets:** the Target Group owns, or has the right to use, all of the assets, real property, information technology and intellectual property that are material for the conduct of the business of the Target Group, and will continue to do so upon and immediately following the end of the Offer Period;
- (p) **Target debt:** the Target Group does not have any third party finance facilities other than as disclosed in the Target Disclosure Materials;
- (q) **TUAs:** none of the TUAs contain:
  - (i) a provision to allow any party to terminate for convenience (that is, terminate in the absence of a breach of the TUA or insolvency of the other party); or
  - (ii) a provision which requires the Target to obtain consent from the relevant counterparty to a change of control or ownership of the Target;
- (r) **developer contributions:** each of the TUAs includes a contractual commitment for the relevant developer to pay the relevant development contributions in instalments with the final instalment payable on practical completion, for the aggregate total amount as disclosed in the Target Disclosure Materials; and

- (s) **compliance:** the Target Group has materially complied with all applicable laws and regulations in the conduct of its business,  
(the **Target Warranties**).

### 8.3 Qualifications on the Target Warranties

Each of the Target Warranties in clause 8.2 are subject to the Target Permitted Activities.

### 8.4 Survival of representations

Each representation and warranty in clauses 8.1 and 8.2:

- (a) is severable;
- (b) will survive the termination of this deed; and
- (c) is given with the intent that liability thereunder will not be confined to breaches which are discovered prior to the date of termination of this deed.

### 8.5 Survival of indemnities

Each indemnity in this deed will:

- (a) be severable;
- (b) be a continuing obligation;
- (c) constitute a separate and independent obligation of the party giving the indemnity from any other obligations of that party under this deed; and
- (d) survive the termination of this deed.

### 8.6 Timing of representations and warranties

Each Bidder Warranty and Target Warranty is given at the date of this deed, at the date the Bidder's Statement and the Target's Statement are despatched to Target Shareholders and immediately prior to the Control Date unless that representation or warranty is expressed to be given only at a particular time, in which case it is given only at that time.

### 8.7 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on its behalf) has made any representation or other inducement to it to enter into this deed, except for representations or inducements expressly set out in this deed and (to the maximum extent permitted by law) all other representations, warranties and conditions implied by statute or otherwise in relation to any matter relating to this deed, the circumstances surrounding the parties' entry into it and the transactions contemplated by it are expressly excluded.
- (b) Each party acknowledges and confirms that it does not enter into this deed in reliance on any representation or other inducement by or on behalf of any other party, except for any representations or inducement expressly set out in this deed.

## 9 Public Announcements

### 9.1 Public announcement of Bid

Immediately after the date of this deed:

- (a) Bidder must procure the issue of the Bidder Announcement; and
- (b) Target must procure the issue of the Target Announcement.

## 9.2 Public announcements

- (a) Subject to clause 9.3, no public announcement or public disclosure of or relating to:
  - (i) the Transaction; or
  - (ii) any other transaction the subject of this deed,
 may be made other than in a form approved by each party in writing (acting reasonably), provided that:
  - (iii) each party must use all reasonable endeavours to provide such approval as soon as practicable; and
  - (iv) neither party will be required to consult with the other in relation to any public announcement relating to termination of this deed or any Competing Proposal.
- (b) Target must ensure that each Target Director Recommendation and Voting Intention, which has not been changed, withdrawn or modified, is included in each ASX announcement referencing the Bid made by Target from the date of this deed until the date of the end of the Offer Period.

## 9.3 Required disclosure and procedural matters

- (a) Where a party is required by applicable law or the Listing Rules to make any announcement or to make any disclosure in connection with the Transaction or any other transaction the subject of this deed, it must use all reasonable endeavours, to the extent practicable in the circumstances, to consult with the other party prior to making the relevant disclosure and take account of any reasonable comments received from the other party in relation to the form and content of the announcement or disclosure.
- (b) Notwithstanding clause 9.2, Bidder does not require Target approval to issue any public disclosures if the content of those disclosures is limited to procedural matters (including notices extending the Offer Period, varying the Offer, freeing the Offer from Conditions or any notices required to be issued to complete the compulsory acquisition process under Chapter 6A of the Corporations Act) or information that has previously been disclosed to Target Shareholders through the Bidder's Statement or an ASX announcement provided that Bidder gives Target prior notice that it proposes to make a public disclosure without Target's prior approval in reliance on this clause.
- (c) Notwithstanding clause 9.2, Target does not require approval from Bidder to issue any public disclosures if the content of those disclosures is limited to procedural matters or information that has previously been disclosed to Target Shareholders through the Target's Statement or an ASX announcement provided that the Target gives Bidder prior notice that it proposes to make a public disclosure without Bidder's prior approval in reliance on the this clause.

## 10 Exclusivity

### 10.1 No current arrangement or discussions

Target represents and warrants to Bidder that, as at the date of this deed, Target Group and any of its Authorised Persons:

- (a) is not a party to any agreement or arrangement with a third party entered into for the purpose of facilitating, or that concern or could reasonably be expected to lead to, a Competing Proposal; and

- (b) is not, directly or indirectly, participating in any discussions or negotiations with a third party for the purpose of facilitating, or that concern or could reasonably be expected to lead to, a Competing Proposal.

## 10.2 No-shop

During the Exclusivity Period, Target must not, and must ensure that its Authorised Persons and Related Entities, and their respective Authorised Persons do not, directly or indirectly:

- (a) solicit, invite, initiate or encourage any Competing Proposal;
- (b) solicit, invite, initiate or encourage any enquiries, expressions of interest, proposals, discussions or negotiations in relation to, or which may reasonably be expected to lead to, a Competing Proposal;
- (c) communicate to any person any intention to do any of the things referred to in clauses 10.2(a) or 10.2(b); or
- (d) encourage any person to do any of the things referred to in clauses 10.2(a) or 10.2(b) on their behalf.

## 10.3 No-talk

Subject to clause 10.7, during the Exclusivity Period, Target must not, and must ensure that its Authorised Persons and Related Entities, and their respective Authorised Persons do not, directly or indirectly, except with the prior written consent of Bidder:

- (a) participate in or continue any negotiations or discussions with respect to any:
  - (i) inquiry, expression of interest, offer, proposal or discussion by any person to make, or which would reasonably be expected to encourage or lead to the making of, an actual, proposed or potential Competing Proposal; or
  - (ii) actual, proposed or potential Competing Proposal;
- (b) negotiate, accept or enter into, or offer or agree to negotiate, accept or enter into, any agreement, arrangement or understanding regarding an actual, proposed or potential Competing Proposal;
- (c) communicate to any person an intention to do anything referred to in the preceding paragraphs of this clause 10.3, including by disclosing or otherwise providing any Non-Public Information about the business or affairs of the Target Group to a third party (other than a Government Agency); or
- (d) encourage any person to do anything referred to in the preceding paragraphs of this clause 10.3 on their behalf.

## 10.4 No due diligence restriction

- (a) Subject to clause 10.7, during the Exclusivity Period, Target must not, and must ensure that its Authorised Persons and Related Entities, and their respective Authorised Persons do not, directly or indirectly:
  - (i) solicit, initiate, facilitate, encourage or invite any person (other than Bidder, its affiliates or its Authorised Persons) to undertake due diligence investigations in respect of:
    - (A) Target; or
    - (B) any Target Group Member; or
    - (C) any of their respective businesses and operations,

- in connection with such person formulating, developing or finalising, or assisting in the formulation, development or finalisation of, a Competing Proposal;
- (ii) make available to any person (other than Bidder, its affiliates or its Authorised Persons) or permit any such person to receive, other than in the ordinary course of business or as required by law or the rules of any prescribed financial market, any Non-Public Information relating to:
  - (A) Target;
  - (B) any Target Group Member; or
  - (C) any of their respective businesses and operations;
 with a view to obtaining or which may reasonably be expected to lead to a Competing Proposal;
- (iii) make available to any person (other than Bidder, its affiliates or its Authorised Persons) or permit any such person to have, access to:
  - (A) any premises used, leased, licensed or owned by any Target Group Member; or
  - (B) any Authorised Persons of any Target Group Member,
 with a view to obtaining or which may reasonably be expected to lead to a Competing Proposal.
- (b) During the Exclusivity Period, Target must promptly provide the Bidder with any material Non-Public Information relating to the Target Group, or any of their respective businesses and operations made available to any person by Target, in connection with such person formulating, developing or finalising, or assisting in the formulation, development or finalisation of, a Competing Proposal and the substance of which has not previously been provided to Bidder.

## 10.5 Notification of approaches

- (a) During the Exclusivity Period, Target must notify Bidder in writing as soon as practicable but in any event within 24 hours:
  - (i) if Target Group or any of Target's Authorised Persons is approached by any person in relation to an actual or potential Competing Proposal, with such notice to set out reasonable details of the approach in accordance with clause 10.5(b); or
  - (ii) of any request made by a third party for any information in relation to Target Group or any of its respective businesses or operations, that the Target Board has reasonable grounds to suspect may be in connection with such third party formulating, developing or finalising, or assisting in the formulation of a Competing Proposal,
 (each, a **Notifiable Proposal**).
- (b) The notice referred to above must set out the material terms of the Notifiable Proposal, including (as the case may be):
  - (i) subject to clause 10.7, the identity of the third party that made the Notifiable Proposal; and
  - (ii) the material terms and conditions (including price, conditions precedent, timetable and any break fee) of any Competing Proposal or any proposed Competing Proposal,

and Bidder agrees that:

- (iii) any such information received will be confidential and subject to clause 14; and
- (iv) it will not, and it will ensure that its Authorised Persons will not, contact the third party that made the Notifiable Proposal for any purpose relating to the Transaction, the Competing Proposal or any similar transaction.

## 10.6 Matching right

- (a) Target must:
  - (i) not, and must procure that its Authorised Persons and Related Entities, and their respective Authorised Persons do not:
    - (A) enter into any legally binding agreement, arrangement or understanding in relation to a Competing Proposal; or
    - (B) publicly recommend, support or endorse a Competing Proposal; and
  - (ii) direct each Target Director not to withdraw, change or modify his or her Recommendation or Intention in response to a Competing Proposal, or publicly recommend, support or endorse a Competing Proposal,

unless:

  - (iii) the Competing Proposal is a Superior Proposal;
  - (iv) Target has provided Bidder with the material terms and conditions of the Competing Proposal, including the identity of any person making the Competing Proposal (subject to clause 10.7), the price, conditions and proposed timing of the proposal;
  - (v) Target has given Bidder at least 3 Business Days after provision of all of the information referred to in clause 10.6(a)(iv) to provide a proposal that is no less favourable to Target Shareholders or is superior to the Competing Proposal (**Updated Bidder Proposal**); and
  - (vi) Bidder has not provided, by the expiry of the period referred to in clause 10.6(a)(v), an Updated Bidder Proposal which the Target Directors determine (acting reasonably and in good faith) would be reasonably likely to provide an outcome for Target Shareholders that is no less favourable or more favourable to Target Shareholders as a whole, than the relevant Competing Proposal (having regard to matters including, but not limited to, consideration, conditionality, funding, certainty and timing).
- (b) Target's obligations under clause 10.6(a) apply in respect of each new Competing Proposal and any material variation or amendment to a Competing Proposal.
- (c) The Target Directors must consider the Updated Bidder Proposal and if they determine, acting in good faith, that the Updated Bidder Proposal would provide an outcome that is no less favourable or more favourable to Target Shareholders as a whole than the relevant Competing Proposal (having regard to matters including, but not limited to, consideration, conditionality, funding, certainty and timing), then Target must cease discussions with any person(s) making the Competing Proposal and the parties must use their best endeavours to agree any amendments to this deed and the contents of any amendment to, or supplementary, Announcement or any other documents which are reasonably necessary to reflect the Updated Bidder Proposal, and once agreed:

- (i) the parties must enter into an appropriate amending deed to this deed to give effect to those agreed amendments; and
- (ii) Target must implement the Updated Bidder Proposal in accordance with the terms of this amended deed,

in each case as soon as reasonably practicable.

## 10.7 Fiduciary out

Clauses 10.3, 10.4, 10.5(b)(i) and 10.6(a)(iv) do not apply to the extent that they restrict Target or any Target Director from taking or refusing to take any action with respect to a Competing Proposal (in relation to which there has been no contravention of this clause 10) provided that the Target Board has determined in good faith:

- (a) after consultation with Target's financial and legal advisers, that the Competing Proposal, approach, inquiry, proposal or request for information (as the case may be) is or may be reasonably expected to lead to a Superior Proposal; and
- (b) after receiving written legal advice from Target's external legal advisers (who must be reputable legal advisers, practicing in the area of corporate law and experienced in transactions of this nature), that failing to take the action or refusing to take the action (as the case may be) with respect to the Competing Proposal would be reasonably likely to constitute, a breach of any of the fiduciary or statutory duties of the directors of Target,

and for the avoidance of doubt, the evaluation of a Competing Proposal for the purposes of this clause 10.7 is not a breach of this clause 10.

## 10.8 Exceptions

Nothing in this clause 10 prevents Target from:

- (a) engaging with Target Shareholders (in their capacity as a Target Shareholders) in relation to Target, provided that such engagement does not relate to Target soliciting, inviting or initiating an actual, proposed or potential Competing Proposal;
- (b) continuing to make presentations to, and to respond to enquiries from, brokers, portfolio investors, analysts and institutional lenders in the ordinary course in relation to its business generally or promoting the merits of the Transaction;
- (c) providing information to or instructing or receiving advice from its Authorised Persons; or
- (d) providing information required to be provided by law, rule, regulation, or legal, judicial or administrative process (including an order of a court, a Government Agency, judicial body, or the rules of a financial market), including to fulfil its continuous disclosure requirements.

## 11 Break Fee and Reverse Break Fee

### 11.1 Background

- (a) This clause 11 has been agreed to in circumstances which:
  - (i) each party believes it and, in the case of Target, the Target Shareholders, will derive significant benefits from the implementation of the Bid;
  - (ii) each party has incurred and will further incur significant costs, with the Bid, which will include significant opportunity costs if the Bid is not implemented;



- (iii) each party has requested that provision be made for the payment outlined in clause 11.2 or 11.3 (as applicable), and neither of them would have entered into this deed had such provision not been made;
  - (iv) each party believes that it is reasonable and appropriate to agree to pay the Break Fee or the Reverse Break Fee (as applicable) to secure the other party's entry into this deed; and
  - (v) each party has received advice from their Advisers in relation to this deed and this clause 11.
- (b) The parties acknowledge and agree that the costs referred to in clause 11.1(a)(ii) are of such a nature that they cannot be precisely quantified, but that the amount payable by Bidder (in respect of the Reverse Break Fee) and the amount payable by Target (in respect of the Break Fee):
- (i) is in each case to be purely and strictly compensatory in nature; and
  - (ii) represents a genuine and reasonable estimate of the compensation so as to compensate Target (in respect of the Reverse Break Fee) and Bidder (in respect of the Break Fee) for the following:
    - (A) legal, financial and other professional advice in planning and implementing the Transaction (excluding success fees);
    - (B) reasonable opportunity costs incurred in engaging in the Transaction or in not engaging in other alternative transactions or strategic initiatives;
    - (C) costs of management and directors' time in planning and implementing the Transaction;
    - (D) out of pocket expenses incurred:
      - (1) directly by Bidder or by other Bidder Indemnified Parties and their advisors and agents in planning and implementing the Transaction (in respect of the Break Fee); and
      - (2) directly by Target or by other Target Indemnified Parties and their advisors and agents in planning and implementing the Transaction (in respect of the Reverse Break Fee);
    - (E) costs associated with the financing arrangements in respect of the Transaction; and
    - (F) any damage to reputation associated with a failed transaction.

## 11.2 Payment of Break Fee

- (a) Subject to clauses 11.4, 11.5 and 11.7, Target must pay the Break Fee to Bidder, without set-off or withholding and within 5 Business Days after receipt of a written demand from Bidder stating the circumstances which give rise to the demand, if:
  - (i) during the Exclusivity Period any Target Director withdraws or adversely revises their Recommendation or Intention or makes any public statement that is inconsistent with their Recommendation or Intention unless:
    - (A) the Independent Expert concludes in the Independent Expert's Report (or any update of, revision or amendment or addendum to, that report) that the Bid is not fair and reasonable, provided that the reasons for the Independent Expert's conclusions do not include the existence of a Competing Proposal; or



- (B) the Target Director is permitted to do so under clause 5.3(c); or
  - (C) Target is entitled to terminate this deed pursuant to clause 12.1 and has given the appropriate termination notice to Bidder;
- (ii) a Competing Proposal is announced prior to the Control Date (whether or not such proposal is stated to be subject to any preconditions) and, within 12 months of the date of such announcement, the party that proposed the Competing Proposal:
  - (A) completes the Competing Proposal; or
  - (B) acquires a Relevant Interest in more than 50% of the Target Shares under a transaction that is or has become wholly unconditional or otherwise comes to Control Target or acquires substantially all of the assets of Target;
- (iii) subject to clause 11.2(b):
  - (A) Bidder has terminated this deed under clause 12.1(a) or clause 12.3(d) or
  - (B) Bidder has terminated this deed under clause 12.3(c) as a result of a Target Material Adverse Change occurring and that Target Material Adverse Change arose directly as a result of an action or inaction of Target,

and the Control Date has not occurred prior to the date of termination.
- (b) The Break Fee is not payable to Bidder in respect of a termination by Bidder of this deed under clause 12.3(d) in circumstances where the Independent Expert does not conclude that the Bid is fair and reasonable.

### 11.3 Payment of Reverse Break Fee

Subject to clauses 11.4, 11.5 and 11.7, the Bidder must pay Target the Reverse Break Fee, without set-off or withholding and within 5 Business Days after receipt of a written demand from Target stating the circumstances which give rise to the demand, if Target has terminated this deed under clause 12.1(a) and the Offer has not been made prior to the date of termination.

### 11.4 No payment if Offers become unconditional

- (a) Notwithstanding the occurrence of any event described in clause 11.2 or 11.3, no amount will be payable under this clause 11 if a Control of Control occurs.
- (b) To the extent that any amount has already been paid under this clause 11 and a Control of Control subsequently occurs, such amount must be immediately refunded by the payee to the payor.

### 11.5 Break Fee payable once

Any amount payable by Target or Bidder (as applicable) under this clause 11 is only payable once.

### 11.6 Other claims

- (a) Notwithstanding any other provision of this deed, each party acknowledges and agrees that:
  - (i) the payment of the Break Fee by Target to Bidder is Bidder's sole and exclusive remedy in respect of the matter giving rise to the payment of the Break Fee and otherwise in respect of this deed and the Bid and no further damages, fees,

expenses or reimbursements of any kind will be payable by Target in respect of such matter or otherwise in connection with the Bid or this deed; and

- (ii) the maximum aggregate amount which Target may be required to pay in relation to this deed and the Bid (including any breach of this deed by Target) is the Break Fee, and in no event will the aggregate liability of Target under or in connection with this deed exceed the Break Fee,

provided that the Break Fee shall not be in lieu of damages, fees, expenses or reimbursements or any other payment or remedy available, and shall not operate to limit Target's liability, in the event of any wilful or intentional breach by Target of a material term of this deed.

- (b) Notwithstanding any other provision of this deed, each party acknowledges and agrees that:

- (i) the payment of the Reverse Break Fee by Bidder to Target is Target's sole and exclusive remedy in respect of the matter giving rise to the payment of the Reverse Break Fee and otherwise in respect of this deed and the Bid and no further damages, fees, expenses or reimbursements of any kind will be payable by Bidder in respect of such matter or otherwise in connection with the Bid or connection with this deed;
- (ii) the maximum aggregate amount which Bidder may be required to pay in relation to this deed and the Bid (including any breach of this deed by Bidder) is the Reverse Break Fee, and in no event will the aggregate liability of Bidder under or in connection with this deed exceed the Reverse Break Fee,

provided that the Reverse Break Fee shall not be in lieu of damages fees, expenses or reimbursements or any other payment or remedy available, and shall not operate to limit Bidder's liability, in the event of any wilful or intentional breach by Bidder of a material term of this deed.

## 11.7 Compliance with law

If it is finally determined following the exhaustion of all reasonable avenues of appeal to the Takeovers Panel or a court that all or any part of the Break Fee required to be paid under clause 11.2 (**Break Fee Impugned Amount**) or the Reverse Break Fee required to be paid under clause 11.3 (**Reverse Break Fee Impugned Amount**):

- (a) is unlawful;
  - (b) involves a breach of directors' duties and, in the case of Bidder, its duties as trustee of the Aware Super; or
  - (c) constitutes unacceptable circumstances or breaches an order of the Takeovers Panel,
- then:
- (d) the requirement to pay:
    - (i) the Break Fee does not apply to the extent of the Break Fee Impugned Amount; and
    - (ii) the Reverse Break Fee does not apply to the extent of the Reverse Break Fee Impugned Amount; and
  - (e) if Bidder has received the Break Fee Impugned Amount, it must refund it within five Business Days of the final determination being made; and

- (f) if Target has received the Reverse Break Fee Impugned Amount, it must refund it within five Business Days of the final determination being made.

## 11.8 Regulatory Intervention

If any regulatory body (including ASIC or the Takeovers Panel) or a court requires any modification (including requiring such modification as a condition of not opposing the Transaction) to the Break Fee or the Reverse Break Fee, including as to the amount or circumstances in which it is to be paid, then:

- (a) the parties will accept this determination and amend this deed to that extent; and
- (b) it will not result in a breach of this deed or termination of the transactions contemplated by it.

## 12 Termination

### 12.1 Termination by notice

A party may terminate this deed by written notice to the other party, at any time before the Control Date:

- (a) other than in respect of a breach of a Target Warranty (which is dealt with in clause 12.3(d)), if the other party has breached this deed (including in relation to an exclusivity provision in clause 10) in a manner which is material in the context of the Bid taken as a whole, if:
  - (i) the party entitled to terminate has given written notice to the party in breach of this deed setting out:
    - (A) the relevant circumstances; and
    - (B) stating an intention to terminate this deed, and
  - (ii) the party in breach has failed to remedy the breach, or the effects of the breach are not otherwise mitigated:
    - (A) within 5 Business Days; or
    - (B) any shorter period ending at 5.00pm on the Business Day before the end of the Offer Period;

after the date on which the notice is given under clause 12.1(a)(i);
- (b) if a court or another Government Agency has taken any action permanently restraining or otherwise prohibiting or preventing the Transaction, or has refused to do anything necessary to permit the Transaction, and the action or refusal has become final and cannot be appealed or reviewed; or
- (c) if the Offer has not become unconditional before the end of the Offer Period.

### 12.2 Termination by Target

Without limiting Target's obligations under clause 5.1 and clause 10.6, Target may, by notice in writing to Bidder, terminate this deed at any time prior to the Control Date if a majority of the Target Directors change, withdraw or modify their Recommendation as permitted under clause 5.3.

### 12.3 Termination by Bidder

Bidder may, by notice in writing to Target, terminate this deed at any time prior to the Control Date:

- (a) if a Target Director (other than a Target Director who has withdrawn a recommendation that Target Shareholders accept the Offer solely because of a requirement or request of a court or Government Agency):
  - (i) withdraws or adversely revises his or her Recommendation or Intention; or
  - (ii) makes any public statement that is inconsistent with the Recommendation or Intention; or
  - (iii) recommends, endorses or supports any Competing Proposal; or
- (b) if a Competing Proposal in respect of Target is announced or made and is publicly recommended, supported or endorsed by a majority of the Target Board; or
- (c) if a Target Material Adverse Change occurs; or
- (d) if:
  - (i) Target materially breaches a Target Warranty set out in clause 8.2 and such breach results in a Target Material Adverse Change; or
  - (ii) a Target Prescribed Occurrence occurs; or
  - (iii) a Target Regulated Event occurs,
 and:
  - (iv) Bidder has given written notice to Target:
    - (A) setting out the relevant circumstances; and
    - (B) stating an intention to terminate; and
  - (v) the relevant breach continues to exist, or the effects of which are not otherwise mitigated:
    - (A) 5 Business Days; or
    - (B) any shorter period ending at 5.00pm on the Business Day before the end of the Offer Period,

after the date on which the notice is given under clause 12.3(d)(iv).

### 12.4 Effect of termination

In the event of termination of this deed in accordance with clauses 12.1, 12.2 or 12.3 of this deed will cease to have force and effect without any liability or obligation on the part of any party, except that:

- (a) this deed will become void and have no effect, except that the provisions of this clause 12.4 and clauses 1, 7.2, 11, 13, 14, 15 and 16 survive termination; and
- (b) each party will retain the rights it has or may have against the other parties in respect of any prior breach of this deed; and
- (c) in all other respects, all future obligations of the parties under this deed will immediately terminate and be of no further force and effect including any further obligations in respect of the Bid.

## **13 Releases**

### **13.1 Target and Target directors and officers**

- (a) Bidder releases its rights, and agrees with Target that neither it nor any of its Subsidiaries as at the date of this deed and from time to time will make a Claim, against any Target Indemnified Party or Adviser to the Target other than Target and its Related Entities as at the date of this deed and from time to time in connection with:
  - (i) any breach of any representations and warranties of Target or any other Target Group Member in this deed; or
  - (ii) any disclosures containing any statement which is false or misleading whether in content or by omission,

whether current or future, known or unknown, arising at common law, in equity, under statute or otherwise, except where the Target Indemnified Party has engaged in wilful misconduct or fraud. For the avoidance of doubt, nothing in this clause 13.1 limits Bidder's rights to terminate this deed under clause 12.3(c) or clause 12.3(d).
- (b) Target receives and holds the benefit of this clause 13.1 to the extent it relates to each Target Indemnified Party or Adviser to the Target as trustee for each of them.

### **13.2 Bidder and Bidder directors and officers**

- (a) Target releases its rights, and agrees with Bidder that it will not make a Claim, against any Bidder Indemnified Party or Adviser to the Bidder other than Bidder and its Related Entities as at the date of this deed and from time to time in connection with:
  - (i) any breach of any representations and warranties of Bidder in this deed; or
  - (ii) any disclosure containing any statement which is false or misleading whether in content or by omission,

whether current or future, known or unknown, arising at common law, in equity, under statute or otherwise, except where the Bidder Indemnified Party has engaged in wilful misconduct or fraud.
- (b) Bidder receives and holds the benefit of this clause 13.2 to the extent it relates to each Bidder Indemnified Party or Adviser to the Bidder as trustee for each of them.

### **13.3 Deeds of indemnity**

- (a) Subject to a Change of Control occurring, Bidder undertakes in favour of Target and each other person who is a Target Indemnified Party that it will:
  - (i) subject to clause 13.3(d), for 7 years from the Control Date, ensure that the constitutions of Target and each other Target Group Member continue to contain such rules as are contained in those constitutions at the date of this deed that provide for each company to indemnify each of its directors and officers against any liability incurred by that person in his or her capacity as a director or officer of the company to any person other than a Target Group Member; and
  - (ii) procure that Target and each other Target Group Member complies with any deeds of indemnity, access and insurance made by them in favour of their respective directors and officers from time to time.
- (b) The undertakings contained in clause 13.3(a) are subject to any Corporations Act restriction, or any restriction in the law of a jurisdiction in which an entity is incorporated, and will be read down accordingly.

- (c) Target receives and holds for the benefit of clause 13.3(a), to the extent it relates to the other Target Indemnified Parties, as trustee for them.
- (d) The undertakings contained in clause 13.3(a) are given:
  - (i) in the case of clause 13.3(a)(i), until the earlier of 7 years from the Control Date and the relevant Target Group Member ceasing to be part of Bidder Group; or
  - (ii) in the case of clause 13.3(a)(ii), until the earlier of 7 years from the retirement of each director and officer and the relevant Target Group Member ceasing to be part of Bidder Group.

#### 13.4 Directors' and officers' insurance

Bidder acknowledges that Target will in respect of Target and all other members of the Target Group:

- (a) prior to the Control Date, if required by Target, arrange for the cover currently provided under the directors' and officers' insurance policy for Target and all other members of the Target Group disclosed in the Target Disclosure Materials (**Policy**) to be extended for a further 12 months; and
- (b) by no later than the Control Date, to the extent practicable at normal commercial rates, arrange for the cover provided under the Policy to be amended so as to provide run off cover in accordance with the terms of the Policy for 7 years from the end of the term of the Policy, and pay all premiums required so as to ensure that insurance cover is provided under the Policy on those terms until that date.

#### 13.5 Obligations in relation to directors' and officers' insurance

- (a) From the Control Date, Target must not:
  - (i) vary or cancel the Policy; or
  - (ii) unless required under the Policy, commit any act or omission that may prejudice any claim by a director or officer of Target under the Policy as extended under clause 13.4(b) above.
  - (iii) Nothing in clause 13.4 or 13.5 shall require Bidder or Target to incur any additional premium after the Control Date or require Target to not fulfil its contractual obligations under the Policy.

### 14 Confidentiality

The parties acknowledge that they continue to be bound by the Confidentiality Agreement after the date of this deed on the terms of that Confidentiality Agreement, provided that this deed prevails to the extent of any inconsistency. For the avoidance of doubt, the rights and obligations of the parties under the Confidentiality Agreement survive termination of this deed.

### 15 Notices

#### 15.1 Service of notices

- (a) A notice, consent or other communication under this deed (**Notice**) is only effective if:
  - (i) it is in writing, signed by or on behalf of the party giving it; and

- (ii) it is directed to the recipient's address for notices as follows:

**Bidder**

Address: Level 28, 388 George Street,  
Sydney NSW 2000

E-mail: [Mark.Hector@aware.com.au](mailto:Mark.Hector@aware.com.au)

Attn: Mark Hector

with copies to:

Address: Level 28, 388 George Street,  
Sydney NSW 2000

E-mail: [Maria.Donnelly@aware.com.au](mailto:Maria.Donnelly@aware.com.au)

Attn: Maria Donnelly

and Allens:

Address: Level 28, 126 Phillip Street  
Sydney NSW 2000

E-mail: [Chris.Blane@allens.com.au](mailto:Chris.Blane@allens.com.au) and [Jeremy.Low@allens.com.au](mailto:Jeremy.Low@allens.com.au)

Attn: Chris Blane and Jeremy Low

**Target**

Address: Level 1, 22 Salmon Street,  
Port Melbourne VIC 3207

E-mail: [jphillips@opticomm.net.au](mailto:jphillips@opticomm.net.au)

Attn: John Phillips

with copies to:

Address: Level 1, 22 Salmon Street,  
Port Melbourne VIC 3207

E-mail: [allan@allanbrackin.com](mailto:allan@allanbrackin.com)

Attn: Allan Brackin

and Talbot Sayer:

Address: Level 27, 123 Eagle Street  
Brisbane VIC 4001

E-mail: [tim.sayer@talbotsayer.com.au](mailto:tim.sayer@talbotsayer.com.au)

Attn: Tim Sayer

- (b) If a party changes address and fails to notify the other parties of this change and the new address, delivery of Notices to a new address, or otherwise brought to the attention of the addressee, are deemed compliance with the notice obligations under this clause 15.1.

## 15.2 Effective on receipt

A Notice given in accordance with clause 15.1 takes effect when received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;

- (b) if sent by prepaid post, on the third Business Day after the date of posting; or
- (c) if sent by email:
  - (i) when the email (including the attachment) comes to the attention of the recipient party or a person acting on its behalf; or
  - (ii) when the sender receives an automated message from the intended recipient's information system confirming delivery of the email,

but if the deemed time of receipt under clause 15.2(a), 15.2(b) or 15.2(c) is:

- (d) not on a Business Day or after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the following Business Day; or
- (e) before 9.00am on a Business Day, the Notice is taken to be received at 9:00am on that Business Day,

where references to time are to time in the place the recipient is located.

## 16 General

### 16.1 Further acts

Each party will promptly do all things necessary to give full effect to this deed and the matters contemplated by it.

### 16.2 Payments

Unless otherwise expressly provided in this deed, where an amount is required to be paid to a party (the **Receiving Party**) by another party under this deed, that amount shall be paid:

- (a) in immediately available and irrevocable funds by electronic transfer to a bank account or accounts notified by the Receiving Party in writing on or before the due date for payment, or in other such immediately payable funds as the parties may agree; and
- (b) without deduction, withholding or set-off, unless required by law.

### 16.3 Consents or approvals

- (a) Unless expressly required by the terms of this deed, a party is not required to act reasonably in giving or withholding any consent or approval or exercising any other right, power, authority, discretion or remedy, under or in connection with this deed.
- (b) A party may (without any requirement to act reasonably) impose conditions on the grant by it of any consent or approval, or any waiver of any right, power, authority, discretion or remedy, under or in connection with this deed. Any conditions must be complied with by the party relying on the consent, approval or waiver.

### 16.4 GST

- (a) Any reference in this clause 16.4 to a term defined or used in the GST Act is, unless the context indicates otherwise, a reference to that term as defined or used in the GST Act.
- (b) Unless expressly included, the consideration for any supply under or in connection with this deed does not include GST.
- (c) To the extent that any supply made by a party (**Supplier**) to another party (**Recipient**) under or in connection with this deed is a taxable supply, the Recipient must pay to the Supplier, in addition to the consideration to be provided under this deed but for the application of this clause 16.4(c) for that supply (**GST Exclusive Consideration**), an amount equal to the amount of the GST Exclusive Consideration (or its GST exclusive



market value) multiplied by the rate at which GST is imposed in respect of the supply. This clause 16.4(c) does not apply to any taxable supply under or in connection with this deed that is expressly stated to include GST.

- (d) The amount on account of GST payable in accordance with this clause 16.4 will be paid at the same time and in the same manner as the consideration otherwise payable for the supply is provided and the Supplier must provide the Recipient with a Tax Invoice as a pre-condition to payment of the GST payable.
- (e) Any reference in the calculation of any consideration or of any indemnity, reimbursement or similar amount to a cost, expense or liability incurred by a person (**Relevant Expense**) is a reference to the relevant expense reduced by an amount equal to any input tax credit entitlement of that person (or of the representative member of any GST group to which the person belongs) in relation to the Relevant Expense. A party will be assumed to have an entitlement to a full input tax credit unless it demonstrates otherwise prior to the date on which the relevant payment or consideration must be provided.
- (f) Unless expressly included, any monetary thresholds specified in this deed are exclusive of GST.

## 16.5 Stamp duty

Bidder must pay all stamp duties (if any) and any fines and penalties with respect to stamp duty in respect of this deed or the Bid or the steps to be taken under this deed or the Bid (including the acquisition or transfer of Target Shares pursuant to the Offer).

## 16.6 Expenses

Except as otherwise provided in this deed, each party will pay its own costs and expenses in connection with the negotiation, preparation, execution, and performance of this deed and the Bidder's Statement and the Target's Statement and the proposed, attempted or actual implementation of this deed and the Bid.

## 16.7 Amendments

No variation of this deed is effective unless made in writing and signed by each party.

## 16.8 Assignment

- (a) Subject to clause 16.8(b), a party must not assign or novate this deed or otherwise deal with the benefit of it or a right under it, or purport to do so, without the prior written consent of the other parties, which consent may be withheld at the absolute discretion of the party or parties from whom consent is sought.
- (b) Bidder may assign, grant a security interest over, novate or otherwise transfer by way of security, any of its rights under this deed to a financier or financiers (or a security agent or security trustee thereof) without the prior consent of Target solely for the purpose of obtaining finance or providing security in connection with the Transaction provided that no assignment to any such financier or financiers shall affect Bidder's obligations under this deed or increase Target's obligations under this deed.

## 16.9 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this deed by any party will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this deed.

- (b) Any waiver or consent given by any party under this deed will only be effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of any term of this deed will operate as a waiver of another breach of that term or of a breach of any other term of this deed.
- (d) Nothing in this deed obliges a party to exercise a right to waive any conditional term of this deed that may be in its power.

#### **16.10 Entire agreement**

- (a) This deed is the entire agreement between the parties about its subject matter and replaces all previous agreements, understandings, representations and warranties about that subject matter (other than the Confidentiality Agreement).
- (b) Each party represents and warrants that it has not relied on any representations or warranties about the subject matter of this deed except as expressly provided in this deed.

#### **16.11 Relationship of the parties**

Except as expressly provided in this deed:

- (a) nothing in this deed is intended to constitute a fiduciary relationship, employment relationship or an agency, partnership or trust; and
- (b) no party has authority to bind any other party.

#### **16.12 No merger**

The rights and obligations of the parties will not merge on completion of any transaction under this deed. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing any transaction.

#### **16.13 Invalidity and enforceability**

- (a) If any provision of this deed is invalid under the law of any jurisdiction the provision is enforceable in that jurisdiction to the extent that it is not invalid, whether it is in severable terms or not.
- (b) Clause 16.13(a) does not apply where enforcement of the provision of this deed in accordance with clause 16.13(a) would materially affect the nature or effect of the parties' obligations under this deed.

#### **16.14 Remedies cumulative**

Except as provided in this deed and permitted by law, the rights, powers and remedies provided in this deed are cumulative with, and not exclusive of, the rights, powers and remedies provided by law independently of this deed.

#### **16.15 Severability**

Any term of this deed which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this deed is not affected.

#### **16.16 Governing law**

- (a) this deed is governed by and will be construed according to the laws of Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and of the courts competent to determine appeals from those courts.

### 16.17 Counterparts

- (a) This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the agreement of each party who has executed and delivered that counterpart. Each counterpart is an original but the counterparts together are one and the same agreement.
- (b) This deed is binding on the parties on the exchange of duly executed counterparts.
- (c) The parties agree that a copy of an original executed counterpart sent by email to the email address of the other parties specified in clause 15, instead of the original, is sufficient evidence of the execution of the original and may be produced in evidence for all purposes in place of the original.

### 16.18 Capacity of Trustee

- (a) Subject to clause 16.18(b):
  - (i) Aware Super Pty Ltd (the **Trustee**) is entering into this deed in its capacity as trustee of Aware Super (the **Fund**);
  - (ii) Target will not sue the Trustee in any other capacity or (except in respect of property of the Fund) seek to appoint a receiver, liquidator, administrator (or person performing a similar function) or prove in any liquidation, administration or arrangement of or affecting the Trustee;
  - (iii) the Trustee's liability (despite any other clause to the contrary) under this deed (or in any way connected with any related representation, warranty, conduct, act, omission, agreement or transaction) is limited to the amount which the Trustee is entitled to, and does receive or pay out of assets of the Fund in the exercise of its right of indemnity against the assets of the Fund;
  - (iv) Target waives all rights and releases the Trustee from all other liability (including, but not limited to, personal liability); and
  - (v) the Trustee has no obligation to meet any liability under this deed out of any assets held by the Trustee in its own right nor in any circumstances out of assets held by it in any other capacity.
- (b) Despite anything else in this clause, the Trustee is liable under this deed to the extent that the Trustee's own dishonesty or intentional or reckless failure to exercise due care precludes the Trustee from being indemnified out of the assets of the Fund in respect of that liability or limits the amount of such an indemnity.

## Schedule 1

### Indicative Timetable

Event	Date
Announcement Date	The date of this deed (or the next Business Day)
Bidder lodges the Bidder's Statement with ASIC	[Monday, 19 October 2020]
Bidder's Statement sent to Target Shareholders	[no later than Wednesday, 21 October 2020]
Target dispatches Target's Statement to Target Shareholders	[no later than Friday, 6 November 2020]
Offer Period ends (unless extended)	[7pm, Monday, 23 November 2020]

## Schedule 2

### Target Capital Structure

Type of Security	Number
Target Shares	104,074,986
Target Performance Rights	220,336

### Schedule 3

#### Target Material Adverse Change, Prescribed Occurrence and Regulated Event

**Target Material Adverse Change** means a change, event, circumstance, occurrence or matter that occurs, is announced, is disclosed or otherwise becomes known to Bidder or the Target Board in each case after the date of this deed (whether it becomes public or not) which (whether individually or when aggregated with all such changes, events, circumstances, occurrences or matters) has had or is reasonably likely to have:

- (a) the effect of a diminution in the value of the consolidated net tangible assets of the Target Group as at 30 June 2021 (**Target Group Net Tangible Assets**), taken as a whole, of at least \$15,000,000 against what it would reasonably be expected to have been but for that change, event, circumstance, occurrence or matter; or
- (b) the effect of a diminution in the normalised consolidated earnings before interest, tax, depreciation and amortisation of the Target Group, taken as a whole, of at least \$5,000,000 for the financial year ending 30 June 2021 against what it would reasonably be expected to have been but for that change, event, circumstance, occurrence or matter,

provided that:

- (c) the impact of the relevant change, event, circumstance, occurrence or matter on the:
  - (i) value of the Target Group Net Tangible Assets; or
  - (ii) normalised consolidated earnings before interest, tax, depreciation and amortisation of the Target Group for the financial year ending 30 June 2021 (**Target Group EBITDA**),

must be determined after taking into account any matters that are of a same or substantially similar nature which offset, or are reasonably likely to offset, the impact of the first change, event, circumstance, occurrence or matter on the:

  - (iii) value of the Target Group Net Tangible Assets; or
  - (iv) Target Group EBITDA; and
- (d) any change, event, circumstance, occurrence or matter which has a negative effect on the:
  - (i) value of the Target Group Net Tangible Assets; or
  - (ii) Target Group EBITDA, will be disregarded:
  - (iii) if it is a Target Permitted Activity; or
  - (iv) if it results from or in connection with:
    - (A) any actual or proposed change in any applicable law, Accounting Standard, or policy of a Government Agency after the date of this deed; or
    - (B) general economic, business or political conditions or changes in such conditions (including disruptions to, or fluctuations in financial markets, changes in interest rates or commodity prices and acts of terrorism, war (whether declared or not), natural disaster or the like),

in each case, other than such changes, events, circumstances, occurrences, or matters, that have a disproportionate effect on the Target Group, taken as a whole, as compared to other participants in the industries in which the Target Group operates.

**Target Prescribed Occurrence** means the occurrence of any of the following on or after the date of this deed and before the end of the Offer Period:

- (a) Target converts all or any of its shares into a larger or smaller number of shares (under section 254H of the Corporations Act);
- (b) any Target Group Member resolves to reduce its share capital in any way;
- (c) any Target Group Member:
  - (i) enters into a buy-back agreement; or
  - (ii) resolves to approve the terms of a buy-back agreement under subsections 257C(1) or 257D(1) of the Corporations Act;
- (d) any Target Group Member issues shares, or grants a performance right, a phantom performance right, or an option or other incentive right over its shares, or agrees to make such an issue or grant such a performance right, phantom performance right or an option or other incentive right (other than to a directly or indirectly wholly owned Subsidiary of Target);
- (e) any Target Group Member issues, or agrees to issue, securities convertible into shares or debt securities;
- (f) an Insolvency Event occurs in relation to any Target Group Member,

provided that a Target Prescribed Occurrence will not include any Target Permitted Activities.

**Target Regulated Event** means the occurrence of any of the following:

- (a) a Target Group Member reclassifying, combining, splitting or redeeming or repurchasing directly or indirectly any of its shares;
- (b) any Target Group Member declaring, paying, distributing or incurring any liability to make or pay any dividend, bonus or other share of its profits or assets or returning or agreeing to return any capital to its members other than the Agreed Dividend;
- (c) Target amending the terms of the Target Incentive Plan or establishing another incentive plan;
- (d) a Target Group Member making any change to its constitution;
- (e) any Target Group Member ceasing or threatening to cease, the whole or a material part of its business;
- (f) any Target Group Member:
  - (i) acquiring or disposing of;
  - (ii) agreeing to acquire or dispose of; or
  - (iii) offering to, proposing to, announcing a bid to, or tendering for, the acquisition or disposal of,
 

any business or property (excluding in respect of any lease) of any business, assets or entity (whether by way of a single transaction or series of related transactions) the value of which exceeds \$2,500,000 individually, or in related transactions that are entered into contemporaneously, and \$10,000,000 in aggregate;
- (g) any Target Group Member creating, granting or agreeing to any Encumbrance over any of the assets of any Target Group Member, other than a lien which arises by operation of law, legislation or arises in the ordinary course of the Target Group's business;
- (h) a Target Group Member entering into any contract or commitment, excluding in respect of any new financial indebtedness, requiring payments by the Target Group in excess of \$2,500,000 per annum individually or \$5,000,000 per annum in aggregate, other than any payment required by law, excluding developer contracts entered into in the ordinary course of business;

- (i) a Target Group Member entering into any contract or commitment in respect of any new finance facilities;
- (j) a Target Group Member providing financial accommodation other than to members of the Target Group or trade debtors in the ordinary course (irrespective of what form that accommodation takes) in excess of \$2,500,000 per annum individually or \$5,000,000 per annum in aggregate;
- (k) a Target Group Member entering into any agreement, arrangement or transaction with respect to derivative instruments (including, but not limited to, swaps, futures contracts, forward commitments, commodity derivatives or options) or similar instruments;
- (l) a Target Group Member materially altering, varying or amending any of its contracts in a manner that is not in the best interests of Target and/or Target Shareholders;
- (m) a Target Group Member entering into, or resolving to enter into, or varying, or resolving to vary, a transaction with any related party of Target (other than a related party which is a Target Group Member), as defined in section 228 of the Corporations Act;
- (n) a Target Group Member entering into or materially altering, varying or amending any employment, consulting, severance or similar agreement or arrangement with one or more of its officers, directors, other executives or employees with a base salary of greater than \$250,000, or accelerating or otherwise materially increasing compensation or benefits for any of the above;
- (o) a Target Group Member entering into an employment agreement with a new employee with a base salary of greater than \$250,000;
- (p) a Target Group Member paying any of its directors or employees a termination or retention payment, or bonus or other payment in connection with the Transaction, other than:
  - (i) contractual entitlements existing at the date of this deed, to the extent such a payment and/or bonus relates to a director or an employee of the Target with a base salary of greater than \$250,000 and the contractual entitlement is disclosed in the Target Disclosure Materials; or
  - (ii) statutory entitlements;
- (q) a Target Group Member entering into any enterprise bargaining agreement;
- (r) a Target Group Member changing any accounting policy applied by them to report their financial position other than any change in policy required by a change in Accounting Standards;
- (s) a Target Group Member settling any legal proceedings, disputed claim, investigation, arbitration or other like proceeding where the settlement amount payable by any Target Group Member exceeds \$500,000;
- (t) Target Shares cease to be quoted on ASX;
- (u) any Target Group Member authorises, agrees, offers, commits or resolves to do any of the matters set out in the above definition, whether conditionally or otherwise,

other than Target Permitted Activities.



**Executed and delivered as a Deed.**

**Signed Sealed and Delivered** for **Aware Super Pty Ltd** as trustee of **Aware Super** by its attorneys:

---

Witness Signature

---

Print Name

---

Witness Signature

---

Print Name

---

Attorney Signature

---

Print Name

---

Attorney Signature

---

Print Name

**Executed** as a deed in accordance with section 127 of the *Corporations Act 2001* by **Opticomm Ltd**:

---

Director Signature

---

Print Name

---

Director/Secretary Signature

---

Print Name