

Novation Deed

Date *[insert]*

Novation Deed

Relating to Transferring Asset Agreement(s)

[Insert name of Lessor] (**Lessor**)

and

[Insert name of Operator or Transferring Asset Related Party that is party to the Transferring Asset Agreement] (**Outgoing Party**)

and

[Insert name of entity to whom the Transferring Asset Agreement is being novated] (**Incoming Party**)

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Novation Deed

Parties

- 1 [Lessor] (company number [insert]) (**Lessor**);
- 2 [Insert name of Operator or Transferring Asset Related Party who is party to the Transferring Asset Agreement] (company number [insert]) (**Outgoing Party**); and
- 3 [Insert name of entity to whom the Transferring Asset Agreement is being novated] (**Incoming Party**).

Background

- A The Lessor and the Outgoing Party are party to the Transferring Asset Agreement.
- B The Outgoing Party's rights and obligations under the Transferring Asset Agreement are to be novated to the Incoming Party in accordance with the terms of this Novation Deed.

Operative provisions

1. Interpretation

Definitions

1.1 The following definitions apply in this Novation Deed unless the context requires otherwise:

"Accrued Liabilities" means all obligations and liabilities (whether fixed or unascertained, actual or contingent) of the Outgoing Party under or in connection with the Transferring Asset Agreement to the extent arising prior to, or relating to matters prior to, the Novation Effective Date.

"Business Day" means a day (other than a Saturday, Sunday or public holiday) on which banks are generally open for business in Wellington.

"Claim" means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) whether under or in connection with this Novation Deed, the Transferring Asset Agreement or otherwise at law, under statute or in equity, including in tort (whether for negligence or otherwise), for negligent misrepresentation, for strict liability, for breach or for restitution, including in each case for payment of money (including damages) or for an extension of time.

"GST" means tax chargeable under the GST Act.

"GST Act" means the Goods and Services Tax Act 1985.

"Law" means:

- (a) any statute, regulation or subordinate legislation in force in New Zealand; and
- (b) the common law and principles of equity applied from time to time in New Zealand.

"Loss" means:

- (a) any cost, expense, loss, damage or liability whether direct, indirect or consequential (including pure economic loss), present or future, fixed or unascertained, actual or contingent; and
- (b) without being limited by paragraph (a) and only to the extent not prohibited by applicable Law, any fine or penalty.

"Novation Effective Date" means *[insert - this will be the Transfer Date as defined in the Transfer Agreement unless the novation is being made pursuant to clause 4*

(Novation following Event of Default) of the Lessor Direct Deed, in which case the Novation Effective Date will be the date falling 5 Business Days after the date of this Novation Deed]

"Party" means a party to this Novation Deed.

"Recipient" has the meaning given in clause 8.3.

"Supplier" has the meaning given in clause 8.3.

"Transferring Asset Agreement" means the agreement relating to [*insert description*] made between the Lessor and the Outgoing Party and dated [*insert*].

Rules for interpreting this Novation Deed

- 1.2 The following rules apply unless the context requires otherwise:
- 1.2.1 headings are for convenience only and do not affect interpretation;
 - 1.2.2 the singular includes the plural and conversely;
 - 1.2.3 a gender includes all genders;
 - 1.2.4 if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - 1.2.5 a reference to a person, corporation, trust, partnership, unincorporated body, organisation or other entity includes any of them;
 - 1.2.6 a reference to a clause, Schedule, Annexure or Appendix is a reference to a clause of or a Schedule, Annexure or Appendix to, this Novation Deed, and a reference to a paragraph is to a paragraph of the same clause, Schedule, Annexure or Appendix unless the context requires otherwise;
 - 1.2.7 a reference to an agreement or document (including a reference to Novation Deed) is to the agreement or document as amended, varied or supplemented, novated or replaced, except to the extent prohibited by this Novation Deed or that other agreement or document;
 - 1.2.8 a reference to a person includes that person's successors, permitted substitutes and permitted assigns (and, where applicable, that person's legal personal representatives);
 - 1.2.9 a reference to legislation or a rule or to a provision of legislation or rule includes a modification or re-enactment of it, a legislative provision or rule substituted for it and a regulation or statutory instrument issued under it;

- 1.2.10 a reference to conduct includes an act, omission, statement and undertaking, whether or not in writing;
- 1.2.11 a reference to an agreement includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind;
- 1.2.12 a reference to dollars and \$ is to New Zealand currency;
- 1.2.13 a reference to a month or to a year is to a calendar month or a calendar year;
- 1.2.14 a reference to a right or an obligation of any two or more persons confers that right, or imposes that obligation as the case may be, on each of them severally and all of them jointly; *[Drafting note - depending on the final legal structure of the Operator and Transferring Asset Related Party we may need to tailor these provisions further.]*
- 1.2.15 a reference to a Party is a reference to each of those persons separately;
- 1.2.16 a reference to writing includes an email and any other means of reproducing words in a tangible and permanently visible form;
- 1.2.17 a reference to an asset includes any real or personal, present or future, tangible or intangible, property or asset (including intellectual property rights) and any right, interest, revenue or benefit in, under or derived, from the property or asset;
- 1.2.18 a reference to any governmental department, professional body, committee, council, local authority, council controlled organisation or other body includes the successors to that body or any relevant activity or function of that body;
- 1.2.19 a reference to a liability includes any obligation whether present or future or actual or contingent or as a principal, surety or otherwise;
- 1.2.20 a reference to includes or including or other similar words should be construed without limitation;
- 1.2.21 where the time for performing an obligation or exercising a right is expressed by reference to a period of one or more months before or after a specified date (the **reference date**) that time period will be determined by calculating the number of months specified from the reference date, with the period expiring on the date which is the equivalent date to the

reference date, or if there is no such date in the final month, the last day of that final month;

- 1.2.22 where the time for performing an obligation or exercising a right is expressed as being "immediately" following or after an event or circumstance occurring, it means as soon as reasonably practicable but no later than 24 hours following or after an event or circumstance occurring;
- 1.2.23 a reference to obligations includes indemnities, warranties, representations and undertakings and a reference to breach or breach of obligations includes breach of any indemnities, warranties, representations and undertakings; and
- 1.2.24 if but for this clause 1.2.24 any amount is payable under this Novation Deed on a day which is not a Business Day, that amount shall instead be payable on the next Business Day to occur after that day.

2. Novation and release¹

- 2.1 With effect from the Novation Effective Date:
 - 2.1.1 subject to clause 2.2, the Incoming Party is substituted for the Outgoing Party under the Transferring Asset Agreement as if named as an original party to the Transferring Asset Agreement in place of the Outgoing Party;
 - 2.1.2 the Incoming Party assumes all of the obligations and liabilities of the Outgoing Party under the Transferring Asset Agreement to the extent that such obligations and liabilities first arise on or after the Novation Effective Date;
 - 2.1.3 all of the rights and benefits of the Outgoing Party under the Transferring Asset Agreement are conferred on the Incoming Party and shall be exercisable by the Incoming Party in place of, and to the exclusion of, the Outgoing Party; and
 - 2.1.4 the Lessor releases the Outgoing Party from all its obligations and liabilities under the Transferring Asset Agreement to the extent such obligations and liabilities first arise on or after the Novation Effective Date.

¹ If clause 4.15 of the Lessor Direct Deed applies, this clause 2 will be amended as contemplated by that provision of the Lessor Direct Deed.

- 2.2 Notwithstanding the novation pursuant to clause 2.1, the Outgoing Party shall continue to be responsible for all Accrued Liabilities and nothing in this Novation Deed shall operate as a release by the Lessor of those Accrued Liabilities or to novate or otherwise transfer any Accrued Liabilities to the Incoming Party.

3. Transferring Asset Agreement notice details

- 3.1 With effect on and from the Novation Effective Date until otherwise changed in accordance with the terms of the Transferring Asset Agreement, the address and contact details for service of all notices by the Lessor to the Incoming Party under the Transferring Asset Agreement shall be those provided in respect of the Incoming Party in clause 11 (*Notices*).

4. Construction of Transferring Asset Agreement

- 4.1 Subject to the provisions of this Novation Deed, the Transferring Asset Agreement and this Novation Deed shall be read and construed as one document.
- 4.2 The Lessor and the Incoming Party acknowledge and agree that the Transferring Asset Agreement continues in full force on and from the Novation Effective Date in accordance with its terms as novated by this Novation Deed.

5. Indemnities

Outgoing Party indemnity

- 5.1 The Outgoing Party shall (to the maximum extent permitted by Law) indemnify the Incoming Party (and keep it so indemnified) on demand from and against:
- 5.1.1 any Losses and Claims incurred or suffered by the Incoming Party under or in connection with the Transferring Asset Agreement to the extent such Losses and Claims arise from, or in connection with, or otherwise relate to any act or omission of the Outgoing Party at any time before the Novation Effective Date; and
 - 5.1.2 any Losses and Claims incurred or suffered by the Incoming Party in connection with the Accrued Liabilities.

Incoming Party indemnity

- 5.2 The Incoming Party shall (to the maximum extent permitted by Law) indemnify the Outgoing Party (and keep it so indemnified) on demand from and against any Losses and Claims incurred or suffered by the Outgoing Party under or in connection with the Transferring Asset Agreement to the extent such Losses and Claims arise from, or in connection with, or otherwise relate to any act or omission of the Incoming Party at any time on or after the Novation Effective Date.

6. Warranties and representations

6.1 Each Party warrants and represents to each other Party that:

- 6.1.1 **(status)** it is validly existing under the laws of its place of incorporation or registration;
- 6.1.2 **(power)** it has the full power and authority to enter into and perform its obligations under this Novation Deed, to carry out the transactions contemplated by this Novation Deed and to carry on its business as now conducted or contemplated;
- 6.1.3 **(not a trustee)** in entering into this Novation Deed, it is not acting as responsible entity or trustee of any trust or settlement or as an agent on behalf of another entity;
- 6.1.4 **(corporate action)** it has taken all necessary corporate action to authorise the entry into and performance of this Novation Deed and to carry out the transactions contemplated by this Novation Deed;
- 6.1.5 **(valid and binding)** this Novation Deed creates valid and binding obligations against it and is enforceable in accordance with its terms, subject to any necessary stamping and registration, laws generally affecting creditors' rights and general principles of equity;
- 6.1.6 **(no violation)** the execution and performance by it of this Novation Deed and each transaction contemplated by this Novation Deed did not and will not violate in any respect a provision of:
 - (a) any applicable law or authorisation;
 - (b) its constitution or other constituent documents; or
 - (c) any other document or agreement that is binding on it or its assets;
- 6.1.7 **(legal proceedings)** no litigation, arbitration or other proceedings are current, pending or to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect upon it or its ability to perform its obligations under this Novation Deed;
- 6.1.8 **(judgments)** there is no unsatisfied judgment against it which may prejudice its ability to perform its obligations under this Novation Deed; and
- 6.1.9 **(authorisations)** each authorisation that is required in relation to:

- (a) the execution, delivery and performance by it of this Novation Deed and the transactions contemplated by this Novation Deed;
- (b) the validity and enforceability of this Novation Deed; and
- (c) its business as now conducted or contemplated,

has been obtained or effected and remains in full force and effect, it is in compliance with them and it has paid all applicable fees in respect of them.

6.2 The warranties and representations in clause 6.1 are given by the Parties on the date of this Novation Deed and shall be deemed repeated on each day thereafter up to and including the Novation Effective Date.

6.3 Each Party acknowledges that the other Parties enter into this Novation Deed in reliance on the warranties and representations in clause 6.1.

6.4 Each Party shall immediately notify the other Parties in writing upon becoming aware that any warranty or representation given or deemed repeated by it under this clause 6 has become untrue, incorrect or misleading in whole or in part at any time on or prior to the Novation Effective Date.

7. Further assurance

7.1 Each Party agrees to do (within the time periods specified in this Novation Deed, or if not expressly specified, promptly) at its own expense, everything reasonably necessary (including completing, executing, filing and lodging documents) to give full effect to this Novation Deed and any transaction contemplated by it.

7.2 The Parties shall not through their acts or omissions prevent, restrict, frustrate or hinder the novation of the Transferring Asset Agreement as contemplated by this Novation Deed.

8. GST

8.1 In this clause 8 words and phrases defined in the GST Act have the meaning given in the GST Act, unless the context requires otherwise.

8.2 Unless expressly provided to the contrary in this Novation Deed, any consideration payable for a supply made under this Novation Deed is stated before the addition of any GST chargeable on that supply.

8.3 The Parties agree that where GST is chargeable on a supply made by one Party (the "**Supplier**") to another Party (the "**Recipient**") under this Novation Deed, the Supplier shall issue a valid tax invoice to the Recipient and the Recipient shall pay to the Supplier the GST chargeable on that supply, in addition to the consideration

payable for that supply. The Recipient shall pay the GST to the Supplier at the same time as the consideration is paid by the Recipient to the Supplier.

- 8.4 The Supplier shall promptly provide the Recipient with any information reasonably requested by the Recipient in relation to the amount of GST chargeable on a supply made under this Novation Deed and payable by the Recipient.

9. Survival of obligations

- 9.1 The expiry or termination of this Novation Deed shall be without prejudice to the accrued rights, liabilities and obligations of each Party as at the date of such expiry or termination.
- 9.2 All provisions of this Novation Deed excluding clauses 2 (*Novation and release*) and 6 (*Warranties and representations*) shall survive termination or expiry of this Novation Deed.

10. Assignment

- 10.1 The Parties shall not, whether directly or indirectly, assign, novate or otherwise transfer any of their respective rights or obligations under this Novation Deed without the prior written consent of the other Parties.

11. Notices

- 11.1 Any notice required to be given in relation to this Novation Deed will, except where otherwise expressly provided, be in writing and in English and delivered to the relevant addressee in accordance with clause 11.3.
- 11.2 This clause 11.2 is subject to clause 11.4. A notice may be:
- 11.2.1 personally delivered, in which case it will be deemed to be given upon delivery at the relevant address; or
 - 11.2.2 if sent from and to places within New Zealand, sent by fast pre- paid post, in which case it will be deemed to have been given 2 Business Days after the date of posting; or
 - 11.2.3 if sent from or to any place outside New Zealand, sent by pre-paid priority airmail, in which case it will be deemed to have been given 10 Business Days after the date of posting; or
 - 11.2.4 sent by email, in which case it will be deemed to have been given at the time at which it arrives in the recipient's information system, provided that if there is any dispute as to when an email has been received, the email shall be deemed to have been received at the time at which the email was

sent as evidenced by a printed copy of the email provided by the sender which evidences that the email was sent to the correct email address of the recipient; or

11.2.5 delivered by courier requiring signature as proof of receipt to the relevant address, in which case it will be deemed to have been given when signed for.

11.3 The initial addressee, addresses and other relevant details of each Party are set out below:

[insert notice details of each Party including nominated recipient's name or job title]

A Party may provide written notice to the other Parties of any change to the addressee, address or other relevant details, provided that such notification will only be effective on the date specified in such notice or 5 Business Days after the notice is given, whichever is the later.

11.4 Where any notice is deemed given pursuant to clause 11.2:

11.4.1 before 9.00 am or after 5.30 pm (local time) at the place of receipt; or

11.4.2 on a day which is a Saturday, Sunday or a public holiday in the place of receipt,

then such notice will be deemed given at 9.00 am (local time) on the next day at the place of receipt which is not a Saturday, Sunday or public holiday. For the purposes of this clause 11.4 the place of receipt of a notice is the applicable postal address for the receiving Party in accordance with clause 11.3, irrespective of whether the notice is communicated by email or otherwise.

12. Entire Agreement and amendments

12.1 This Novation Deed contains the entire agreement between the Parties with respect to its subject matter and supersedes any earlier agreements or understandings between the Parties in connection with its subject matter.

12.2 This Novation Deed may only be amended by way of a written agreement duly executed by each of the Parties.

13. No waiver

13.1 No waiver of any breach of, or failure to enforce any provision of, this Novation Deed, nor any delay in exercising any right, power or remedy by a Party in any way affects, limits or waives the right of such Party thereafter to enforce and compel strict compliance with the provision of this Novation Deed. A single or partial exercise of

any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

13.2 No waiver by a Party of any part of this Novation Deed is binding unless it is made in writing by the Party granting that waiver.

14. Contract and Commercial Law Act 2017

14.1 This Novation Deed is not intended to create any obligation enforceable at the suit of any person who is not a Party to this Novation Deed.

14.2 A person who is not a Party to this Novation Deed shall have no right under the Contract and Commercial Law Act 2017 to enforce any term of this Novation Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

15. Rights cumulative

15.1 Subject to any express provision in this Novation Deed to the contrary, the rights, powers and remedies of a Party under this Novation Deed are cumulative and are in addition to, and do not exclude or limit any right, power or remedy provided by law or equity or by any agreement.

16. No merger

16.1 The rights and obligations of the Parties shall not merge on the completion of any transaction contemplated by Novation Deed. The rights and obligations of the Parties will survive the execution and delivery of any assignment or other document entered into for the purposes of implementing any such transaction.

17. Costs and expenses

17.1 Subject to clause 17.2 and any other express provision to the contrary in this Novation Deed, each Party shall bear its own costs and expenses relating directly or indirectly to the negotiation, preparation, execution of and performance of its obligations under this Novation Deed.

17.2 The Incoming Party shall pay all registration, filing and other fees and duties (including fines and penalties) which may be payable in relation to the transactions contemplated by this Novation Deed.

18. Severability of provisions

18.1 The illegality, invalidity or unenforceability at any time of any provision of this Novation Deed under any law will not affect the legality, validity or enforceability of

the remaining provisions of this Novation Deed nor the legality, validity or enforceability of those provisions under any other law.

19. Governing law

19.1 This Novation Deed and the transactions contemplated by this Novation Deed are governed by and are to be construed in accordance with New Zealand law and the Parties irrevocably submit to the non-exclusive jurisdiction of the courts of New Zealand.

20. Operation of indemnities

- 20.1 No indemnity in this Novation Deed limits the effect or operation of any other indemnity in this Novation Deed.
- 20.2 Unless expressly provided otherwise, each indemnity in this Novation Deed is a continuing obligation, separate and independent from the other obligations of the Parties.
- 20.3 Each indemnity in this Novation Deed survives the expiry or termination of this Novation Deed.
- 20.4 A Party may recover a payment under an indemnity in this Novation Deed before it makes the payment in respect of which the indemnity is given.

21. Counterparts

21.1 This Novation Deed may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

Execution

Date:

[Note - Execution blocks to be inserted as necessary to provide for due execution by each of the Parties as a deed]