

## DEED OF GUARANTEE & INDEMNITY ( 'Deed' )

Between  
THE GUARANTOR named below ("Guarantor")  
and  
KIRBY HVAC&R PTY LTD ABN 42 624 910 041 ("Kirby")

### Guarantor details:

Guarantor Name: \_\_\_\_\_

Address: \_\_\_\_\_

Email: \_\_\_\_\_

Phone: \_\_\_\_\_

Position of Guarantor: \_\_\_\_\_ (eg: Director, Shareholder)

Guarantor Date of Birth: \_\_\_\_\_

### Customer details:

(must match details on the Application Form completed by Customer)

Customer Name: \_\_\_\_\_

ACN/ABN (or sole trader): \_\_\_\_\_

Address: \_\_\_\_\_

Kirby and the Guarantor acknowledge that the Customer and Kirby are parties to a contract formed by the Kirby Customer Application Form and accompanying Kirby Conditions of Sale (together, "Conditions"). In consideration of the agreement by Kirby to provide goods and services and (if applicable) extend credit to the Customer on the terms of the Conditions, the Guarantor agrees to accept and comply with the Conditions and to guarantee the obligations of the Customer under them, on the terms of this Deed.

### Signed, Sealed and Delivered by the Guarantor

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

Guarantor Signature: \_\_\_\_\_

Witness Signature: \_\_\_\_\_

Full name of witness: \_\_\_\_\_

Address of witness: \_\_\_\_\_

**Signed, Sealed and Delivered by the Customer**

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

Customer Signature: \_\_\_\_\_

Witness Signature: \_\_\_\_\_

Full name of witness: \_\_\_\_\_

Address of witness: \_\_\_\_\_

**A. Guarantee and Indemnity**

1. The Guarantor guarantees to Kirby the due and punctual payment and performance by the Customer of all Guaranteed Monies and Guaranteed Obligations.
2. Kirby may exercise its right against the Guarantor under this Deed at any time irrespective of the default of the Customer to pay and without notice to the Customer, as if the primary liability for any Guaranteed Money owing was the Guarantor's own. The Guarantor(s) shall immediately pay to Kirby the amount of Guaranteed Money owing, or immediately comply with the relevant Guaranteed Obligation, upon receiving a written notice from Kirby requiring the Guarantor to so pay or comply. Kirby shall have the right to proceed against the Guarantor despite the fact that Kirby shall have not exercised or exhausted its legal rights against the Customer in relation to the recovery or enforceability of the Guaranteed Monies or Guaranteed Obligations.
3. Where this Deed has been executed by two or more Guarantors, the terms of this Deed are jointly and severally binding on each and every Guarantor. Guarantors may execute in counterpart. This Deed binds each Guarantor from the date of execution by that Guarantor, whether or not any other intended Guarantor has executed this Deed or this Deed has been held to be ineffective or unenforceable against another Guarantor. Kirby shall be entitled to seek payment in full from one Guarantor without seeking payment from another Guarantor.
4. If a Guarantor is not a director of the Customer, they certify that they have obtained independent commercial, financial and legal advice in relation to the terms of this Deed.
5. The Guarantors unconditionally indemnify Kirby against and must pay Kirby on demand the amount of, any losses or expenses whatsoever directly or indirectly suffered by Kirby arising from, or by virtue of and in respect of, any default whatsoever on the part of the Customer with respect to the Guaranteed Obligations and Guaranteed Monies.
6. This Deed shall be a continuing guarantee to Kirby for all debts and obligations whatsoever and whenever contracted with the Customer in respect of goods or services supplied, and will continue until such time as Kirby releases the Guarantor in writing from their obligations under this Deed. This Deed shall not be revocable by the Guarantor notwithstanding the fact that the Guarantor is no longer a director, shareholder or owner of the Customer.
7. This Deed is without prejudice to and shall not be affected by nor shall the right or remedies of Kirby against the Guarantor be in any way prejudiced or affected by:
  - a. any other security taken by Kirby from the Customer or from any other person;
  - b. any waiver or indulgence, whether as to time or otherwise, given to the Customer or to the Guarantors; or

- c. by any other act or thing which under the law relating to sureties would affect such right or remedies.
8. No cheque, bill of exchange or promissory note received by Kirby on account of any indebtedness of the Customer to Kirby shall be regarded as satisfaction or part satisfaction of the obligation in respect of which it is given unless and until the same shall have been met.
9. The Guarantor agrees that if Kirby approves the Customer's application for commercial credit, this Deed remains in force until the commercial credit facility covered by the Customer's application ceases.
10. The Guarantor agrees that any statement of indebtedness to Kirby, from the Customer or the Guarantor is binding and conclusive, except in the event of manifest error.

**B. Right of subrogation**

11. In the event of any Guarantor making any payment in respect of a Guaranteed Money or Guaranteed Obligation, the Guarantor shall not exercise any rights of subrogation against any other Guarantor or the Customer unless and until Kirby has been paid in full.

**C. Insolvency of the customer**

12. All dividends and payments received from the Customer or from a receiver or liquidator of the Customer or otherwise shall be applied as payments in gross and the Guarantors shall not be entitled to prove in the receivership or liquidation until Kirby has received the full amount of its claims against the Customer and/or the Guarantor and this Deed shall be security for the payment of any ultimate balance that may remain due to Kirby.

**D. Costs**

13. Kirby is at liberty from time to time to charge the Customer and/or the Guarantor with the costs, charges, expenses, legal or otherwise incurred by Kirby in connection with:
  - a. the performance of this Deed;
  - b. the performance of any and all security arrangement under this Deed; or the exercise or attempted exercise of any right, power or remedy of Kirby as contained in or by virtue of this Deed, andfor the avoidance of doubt the above shall be part of the monies secured by this Deed.
14. Notwithstanding the above, the Guarantor agrees to pay all of Kirby's direct and indirect costs and disbursements in recovering the Guaranteed Monies which shall include collection fees costs, legal costs and any other costs (on a full indemnity basis).

**E. Assignment and variation and severance**

15. Kirby shall be entitled to assign its rights under this Deed to its successors, nominated transferors, or assignees and its terms and conditions of sale without notice to the Guarantors, and this Deed shall not be in any way affected or discharged pursuant to such assignment or variation, even if such assignment or variation has the effect of increasing the Guarantor's liability under this Deed.
16. If any provision of this Deed is not enforceable in accordance with its terms, other provisions continue to be enforceable in accordance with their terms.

**F. Security Charge**

17. To secure the payment of all and any amounts owing by this Deed and the Conditions, the Customer and the Guarantor each grant to Kirby a Security Interest over all of their PPS

Property and a charge over all of their Non-PPS Property including any real property that the Customer or the Guarantor (as applicable) currently holds or may hold in the future. Whenever requested by Kirby, the Customer and the Guarantor must promptly do or cause to be done, anything which Kirby considers necessary or desirable to more fully secure the rights, remedies and powers of Kirby under this clause or to enable Kirby to exercise those rights, remedies and powers, including (without limitation) obtaining consents and signing and producing documents in connection with the registration of any Security Interest on the PPSR or to lodge a caveat on any real property. To the extent that Chapter 4 of the PPSA would otherwise apply to an enforcement by Kirby of the Security Interests in the PPS Property granted pursuant to this clause 17, Kirby, the Guarantor agrees that the following provisions of the PPSA do not apply:

- a. to the extent that section 115(1) of the PPSA allows them to be excluded: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 138B(4), 142 and 143; and
  - b. in addition, to the extent that section 115(7) of the PPSA allows them to be excluded: sections 127, 129(2) and (3), 132, 133(1)(b) (insofar as it relates to a Security Interest of the Secured Party), 134(2), 135, 136(3), 136(4), 136(5) and 137.
- 18 Each party agrees not to disclose information of the kind mentioned in section 275(1) of the PPSA, except in the circumstances required by sections 275(7)(b) to (e) of the PPSA. The Customer agrees that it will only authorise the disclosure of information under section 275(7)(c) or request information under section 275(7)(d), if Kirby approves.
- 19 Nothing in clause 18 will prevent any disclosure by Kirby that it believes is necessary to comply with its other obligations under the PPSA or under any other applicable law.
- 20 To the extent consistent with clauses 17 and 18 above constituting a "confidentiality agreement" for the purposes of section 275(6)(a) of the PPSA, the Customer agrees that Kirby may disclose information of the kind mentioned in section 275(1) of the PPSA to the extent that Kirby is not doing so in response to a request by an "interested person" (as defined in section 275(9) of the PPSA) pursuant to section 275(1) of the PPSA.

### **G. Privacy and Credit Check**

- 21 The Guarantor agrees to Kirby collecting, using and disclosing personal information of the Guarantor and persons associated with the Guarantor for conducting credit checks and for the purposes set out in the Conditions, this Deed and in Kirby's Privacy Policy and Privacy Collection Notice, available on the Kirby website. Kirby may disclose information to and receive information from credit agencies such as Equifax and Creditorwatch for any purpose associated with this Deed and the Conditions. In doing so, Kirby agrees to comply with the Privacy Act 1988 (Cth) and our Privacy Policy and Privacy Collection Notice.

### **H. Jurisdiction**

- 22 This Deed shall be governed by the law of the State of New South Wales in the Commonwealth of Australia.
- 23 The parties to this Deed submit to the non-exclusive jurisdiction of the courts of New South Wales and the relevant federal courts and courts competent to hear appeals from those courts and waive any rights they may have to claim that those courts are an inconvenient forum.

### **I. Definitions**

**"Guaranteed Money"** means all money (including damages) that is payable, owing but not yet payable, or that otherwise remain unpaid by the Customer to Kirby under the Conditions or on any account at any time, under or in connection with the provision of the supply of goods or services by Kirby, under terms of credit including, without limitation, whether:

- a) present or future, actual or contingent;
- b) originally contemplated by the Guarantors, Kirby or the Customer or not; and
- c) Kirby is the original person in whose favour any of the above amounts were owing or

an assignee and, if Kirby is an assignee:

- i) whether or not the Customer or the Guarantors consented to or knew of the assignment;
- ii) no matter when the assignment occurred; and
- iii) whether or not the entitlements of the assignor were assigned to Kirby.

**“Guaranteed Obligations”** means the obligations of the Customer to pay the Guaranteed Money and all of the Customer’s other obligations to Kirby (monetary or non-monetary, present or future, actual or contingent).

**“PPSA”** means the Personal Property Securities Act 2009 (Cth).

**“PPSR”** means the Personal Property Securities Register established pursuant to the PPSA.

**“PPS Property”** means all personal property present and after-acquired property in relation to which a person can be a grantor of a Security Interest under the PPSA, whether or not a person has title to the property.

**“Security Interest”** means an interest in personal property provided for by a transaction that, in substance, secures payment of money or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property), and also includes a transaction which the PPSA treats as a security interest whether or not the transaction concerned, in substance, secures payment or performance of an obligation.