

# GUARANTEE AND INDEMNITY

## 1. Interpretation

In this guarantee:

“guarantor” means .....

of.....

.....

“creditor” means Foamex South Australia Pty Ltd ACN 091 792 095 of 15 Peachey Rd Edinburgh North, SA, 5113;

“debtor” means .....

of .....

.....

“guarantor” includes each guarantor and his, her or their personal representatives and in the case of a firm includes the proprietor or proprietors of that firm and his, her or their successors and where there is more than one guarantor, their liability shall be joint and several. In the event of a guarantor being or becoming a trustee of any trust or trusts, that guarantor shall be jointly and several liable hereunder in his or her own personal capacity and in every capacity as trustee of any such trust or trusts.

“debtor” includes each and every debtor and its or their personal representatives. In the event of the debtor being or becoming a trustee or trustees of any trust or trusts: the guaranteed obligation shall include all obligations of the debtor to the creditor whether in the debtor’s own personal capacity or the capacity as trustee of any such trust.

“creditor” includes all assigns, successors and personal representatives of the creditor and where there is more than one person included in “the creditor”, then it shall include such persons jointly and each of them severally to the intent that the guarantee and indemnity herein contained shall be applicable to each such creditor as well as all of them and may be enforceable by each such creditor or some or all of them.

## 2. Introduction

2.1 The debtor is indebted or may become indebted to the creditor for the goods and service supplied or to be supplied by the creditor to the debtor.

2.2 The guarantor has requested the creditor to extend credit to the debtor from time to time for goods and services supplied by the creditor.

2.3 The creditor has agreed to extend credit to the debtor if this guarantee is given in respect of all monies owed by the debtor to the creditor from time to time.

## 3. Guarantee

The guarantor hereby, for himself or herself and his or her respective heirs successors and assigns, unconditionally guarantees the due and punctual payment by the debtor to the creditor of all and any monies which are now due or which may become due and payable by the debtor to the creditor from time to time or at any time (all of which are hereinafter referred to as “the monies hereby secured”).

## 4. Indemnity

To the extent (if any) that the guarantee herein contained may be void or unenforceable by reason of the fact that the debtor’s indebtedness to the creditor may not be or may cease to be enforceable against the debtor, the guarantor agrees for himself or herself and his or her respective heirs, successors and assigns to indemnify the creditor and keep the creditor indemnified in respect of any loss, damage, costs or expenses suffered by or occasioned to the creditor as a result of any failure by the debtor to pay all or any of the monies hereby secured.

## 5. Liability

5.1 The liability of the guarantor shall not be abrogated, prejudiced or affected by:

5.1.1 the granting of time, credit or any indulgence or other concession to the debtor or to any person liable with the debtor or to any party to any negotiable instrument made, drawn, given, accepted or endorsed by the debtor or the guarantor;

5.1.2 any compounding with the debtor or the said party to any negotiable instrument or by any release and discharge of the debtor or all or any of the said parties to any negotiable instrument from liability under the foregoing instrument or by any compromise, abandonment, waiver, variation, relinquishment, renewal of any securities, documents of title or assets or any of the rights of the creditor or by anything done or omitted or neglected to be done by the creditor in exercise of the authorities powers and discretions vested in it or by any dealing or thing which but for this provision might operate to abrogate, prejudice or affect this deed;

- 5.1.3 the creditor obtaining a judgment against the debtor in any court of competent jurisdiction for payment of the whole or any part or amounts from time to time owing by the debtor;
- 5.1.4 the creditor assenting to any assignment by the debtor for the benefit of creditors or to any deed or scheme of arrangement or deed of composition under the bankruptcy laws or the acceptance by the creditor of any dividend or sum of money thereunder;
- 5.1.5 any other person or corporation giving a guarantee of or security for the debtor's indebtedness to the creditor;
- 5.1.6 the failure of the debtor or the guarantor to provide security which has been agreed to be provided to the creditor;
- 5.1.7 any security held or taken by the creditor to secure the debtor's or the guarantor's indebtedness being or becoming void, defective or informal;
- 5.1.8 the insolvency, death or supervening contractual incapacity of the debtor or the guarantor;
- 5.1.9 if there is more than one guarantor, the fact that one or more of them shall fail to execute or execute properly this guarantee and indemnity and in such an event, all persons who do execute this guarantee and indemnity shall be a guarantor and shall be jointly and severally liable under this deed to the creditor and to the exclusion of such persons who fail to execute or execute properly this guarantee and indemnity;
- 5.1.10 the fact that this guarantee may be unenforceable for any reason whatsoever against any guarantor in which event all other guarantors (to the exclusion of the guarantor against whom this guarantee is unenforceable) shall be jointly and severally liable under this instrument; or
- 5.1.11 the fact that any provision or provisions of the guarantee shall not be fully enforceable against any guarantor in which even all other provisions shall be enforceable against the guarantor and all other guarantors shall be fully liable under all provisions.
- 5.2 The guarantee herein contained is to be an continuing guarantee and accordingly shall be irrevocable and shall remain in force until all the monies hereby secured have been paid to the creditor.
- 5.3 The guarantee hereby given shall be a principal obligation and shall not be treated as ancillary or collateral with any other obligation howsoever created and in particular shall be independent of any other security to the intent that the guarantee shall be enforceable against the guarantor without first taking any steps or proceedings against the debtor and notwithstanding the loss by the creditor of any security and notwithstanding any laches, acts or omissions on the part of the creditor.
- 5.4 This guarantee shall continue to be binding notwithstanding that the debtor's indebtedness may be assigned or transferred to any other person or company and the benefit hereof may be assigned or transferred to any such person or company either at the time of or subsequent to the first mentioned assignment or transfer and the guarantor hereby agrees to waive each and all of his or her rights whether legal, equitable or statutory or otherwise as surety which may at any time be inconsistent with the provisions of this guarantee or in any way restrict the rights, remedies or recourse of the creditor.
- 5.5 In the event of a liquidation or bankruptcy of the debtor, the guarantor hereby authorises the creditor to prove for all monies owing to him or her by the debtor and not paid and to retain and carry through to a suspense account and at the discretion of the creditor to appropriate amounts received in respect thereof until the creditor shall have received one hundred cents in the dollar in respect of such monies owing to it by the debtor.
- 5.6 The guarantor waives in favour of the creditor all rights whatsoever against the creditor and the debtor and any other person and their estate or other assets so far as necessary to give effect to anything in this guarantee contained.
- 5.7 No delay in exercising or omission to exercise any right power or remedy exercisable by the creditor under this deed shall impair any such right or power or be construed to be a waiver thereof or an acquiescence in any default nor shall any action of the creditor in respect of any default or any acquiescence in any default affect or impair any right, power or remedy of the creditor in respect of any other subsequent default.
- 5.8 The creditor may determine from time to time when it shall enforce or refrain from enforcing this guarantee.
- 5.9 To better secure the creditor in respect of any unpaid monies hereby secured owing by the debtor to the creditor, the guarantor hereby grants a charge in favour of the creditor over all of the guarantors interests (from time to time) in any real property holdings. Should any of the monies hereby secured be outstanding for more than 60 days after the date of the account, the guarantor acknowledges that the creditor is irrevocably and unconditionally entitled to lodge a caveat against such real property as valid security for all monies hereby secured. The creditor will release any caveat promptly upon payment of all monies hereby secured and the creditor ceasing to provide goods or services to the debtor.
- 5.10 This guarantee shall not prejudicially affect nor be prejudicially affected by any other security or guarantee now or hereafter held by the creditor for any monies in respect of which this guarantee has been given but such other security or guarantee shall be deemed to be collateral herewith. The guarantor shall not as against the creditor in any way claim the benefit or seek the transfer of any security or any part thereof.
- 5.11 The liability of the guarantor hereunder shall extend to all amounts for which the creditor has been paid by the debtor but which the creditor is obliged to repay on the grounds of preference or otherwise.

5.12 The provisions of any Act, Regulation or Proclamation now or hereafter to be in force providing for the postponement of payment or debts or affecting the exercise of the rights of creditors are hereby expressly excluded from and shall not apply to this guarantee.

5.13 A demand on the guarantor may be made by the creditor and shall be good and sufficient although as against the debtor the indebtedness hereby guaranteed may be barred by some Act or Statute or Limitations.

**6. Costs**

The guarantor shall pay or reimburse the creditor on demand for any stamp duty payable on this guarantee.

**7. General**

7.1 The guarantor authorises the creditor or its servant or agent to complete any parts left blank by the guarantor in this guarantee after it has been signed and delivered by the guarantor to the creditor by inserting any information which the creditor believes is true and correct and without limiting the generality of the foregoing:

7.1.1 to insert any name and address of the guarantor which is known to the creditor; and

7.1.2 to insert the date on which the guarantee is delivered to the creditor by the guarantor or his or her servant or agent as the date on which the guarantee has been executed.

7.2 Any demand on or notice or letter given to any guarantor shall be deemed to be duly made or given if the same be in writing signed by the creditor or any director, manager or secretary of the creditor or by or on behalf of the solicitors for the creditor and left at or sent through the post in a pre-paid envelope or wrapper to the guarantor's address herein shown (or subsequently notified in writing) and any such demand or notice or letter shall be deemed to have been received by and come to the knowledge of the guarantor to whom it is addressed on the day of being so left or if sent through the post on the date following that on which the envelope or wrapper containing such demand, notice or letter was posted provided however that the making of a demand shall not be a condition precedent to the liability of any guarantor hereunder.

7.3 The proper law of this guarantee shall be the law of the State of South Australia and the guarantor hereby submits to the jurisdiction of the Courts of or in the State of South Australia and any courts of appeal therefrom.

7.4 In this deed, words denoting one gender shall include all other genders and words denoting the singular shall include the plural and vice versa; a reference to a person includes a corporation.

SIGNED SEALED AND DELIVERED by the guarantor as a deed on

**SIGNATURE:**



**PRINT NAME:**



**DATED:**

in the presence of:

**SIGNATURE:**

**PRINT NAME:**

SIGNED SEALED AND DELIVERED by the guarantor as a deed on

**SIGNATURE:**

**PRINT NAME:**

**DATED:**

in the presence of:

**SIGNATURE:**

**PRINT NAME:**