

Trustee Guidance Resolutions fact sheet

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Guidance on Trustee Resolutions

Part 1: Changes

What has been happening with trustee resolutions up to now?

In previous years, it was the exception rather than the rule for trustees to resolve to distribute the income of a trust at or before 30 June (except where the trust deed specifies a different date).

When making resolutions to distribute the income of a trust after 30 June, trustees and practitioners relied on an administrative concession provided by the ATO in **Income Tax Rulings IT 328 and 329**. The concession was that a payment or application of income under a trust resolution made within **two months** of the end of an income year could give rise to a 'present entitlement' for tax purposes as at the end of that income year.

What has changed and why?

The ATO withdrew IT 328 and 329 with effect from 1 September 2011, so the administrative concession no longer applies.

The ATO emphasised the point about trust resolutions needing to be made by 30 June in **Draft Taxation Determination TD 2012/D2** and in its recent factsheet titled *Trustee resolutions must be made no later than 30 June*¹.

This has arisen as a result of the ATO's reconsidering its administrative approach to trusts following a string of court cases about the taxation of trusts and the operation of Division 6 of the 1936 Act, including the decision of the High Court in *Bamford*² and of the Federal Court in *Colonial First State*³.

Will the ATO be carrying out any compliance activity to ensure that trustee resolutions are made by 30 June?

Yes. Initially, the ATO will be sending letters to trustees requesting copies of resolutions prepared for the 2012 income year, and some will be reviewed to ensure they are effective and were made by 30 June 2012. CPA Australia expects this compliance activity to continue in the future.

What happens if the trustee doesn't resolve to distribute the trust income by 30 June?

If a valid trustee resolution distributing the trust's income is not made by 30 June, any later resolution will be ineffective, giving rise to these unintended consequences:

- Under the trust deed, the trust's default beneficiary/beneficiaries become 'presently entitled' to the income of the trust and are taxed on it — even if the income is not paid to them or it cannot be paid to them because the cash has already been distributed to other beneficiaries.
- No beneficiary will be presently entitled to the income of the trust as at 30 June, resulting in the trustee being assessed on *the income under section 99A at the top marginal tax rate*.

What happens for previous years that the trustee did not resolve to distribute the trust's income by 30 June?

If the ATO's administrative practice was relied on, CPA Australia expects there to be no adverse consequences for trustees from an ATO compliance point of view.

However, distributions of trust income that are not in accordance with the terms of the trust deed may have adverse consequences in some cases, including:

- in a tax audit, where the validity of a trust distribution is being considered by the ATO and the administrative concession does not apply (e.g. because the resolution was made later than two months after year end);

¹ <http://www.ato.gov.au/content/00318706.htm>

² FCT v Bamford & Ors [2010] HCA 10

³ Colonial First State Investments v Commissioner of Taxation [2011] FCA 16

- in a tax case before a court or tribunal; while the ATO's administrative practice binds the Commissioner, it does not bind a court, which will look to apply the law strictly;
- in a non-tax dispute, such as a family law or deceased estate matter, where the validity of a trustee's distribution of the trust's income (or capital) may be called into question if it is not consistent with the trust deed.

What does this mean for my practice and my clients?

From a practitioner's perspective, these changes mean you should be consulting with clients about how the income of the trust estate is going to be distributed, and this must happen early enough for resolutions to be made by the trustee on or before 30 June.

Practically, what does this involve?

Practically, this will require practitioners and/or their clients to:

- understand the terms of the trust deed (see Part 2);
- understand the requirements to make a valid resolution to distribute the income of the trust in accordance with the trust deed and to do so (see Part 3);
- draft comprehensive and effective trustee resolutions or minutes recording the resolution that has been made (see Part 4);
- communicate early about the income of the trust (known and unknown but anticipated) and the distribution strategy (including whether any income will be 'streamed') (see Part 5).

Part 2: Trust deeds and trust administration

Why is the trust deed important?

The trust deed is important because it establishes the trust and sets out:

- rules for the governance and operation of the trust; and
- the powers of the trustee.

Aren't all trust deeds pretty much standard?

No — a quick review of your clients' trust deeds will confirm this is the case — for these reasons:

- Although trustees are subject to some external regulation (for example, each state has a Trustees' Act), a trust deed is a private legal instrument and each trust deed is unique.
- Unlike companies, which are subject to the *Corporations Act 2001*, there are no 'replaceable rules' that apply to trusts generally.
- The drafting approach taken in trust deeds has changed over time: older trust deeds tend to use a lot of 'legalese' while modern trust deeds are drafted in a more 'plain English' style.

What should I be looking for in a trust deed?

The key clauses that you should locate and review in the trust deed are those dealing with:

- the **beneficiaries** of the trust: Most deeds provide for primary beneficiaries (named in the trust deed), general beneficiaries (defined in terms of a class or by their relationship to the primary beneficiaries) and default beneficiaries (who are entitled to the trust's income if the trustee does not make a valid distribution to the primary or general beneficiaries).
- the **income** of the trust: The trust deed may define the income of the trust as being equal to the trust's section 95 income (an 'income equalisation clause') or as being determined according to trust or general concepts. In some deeds, the income may not be defined, in which case it is determined according to trust or general concepts. Also, the trustee may have discretion to determine whether a receipt of the trust is income or capital of the trust.
- the requirements for the trustee to make a **distribution** of income: In particular, the trust deed will usually specify that the trustee must resolve or take action to distribute the trust's income by a particular point in time (e.g. 30 June).

- the ‘streaming’ of income: If the trustee wishes to stream income in accordance with the streaming rules, the trust deed must also contain provisions that allow a beneficiary to be made **specifically entitled** to an amount of trust income in its character as a capital gain or a franked distribution (see Part 5).
- the **vesting date** of the trust. This is the date that the trust comes to an end and the capital must be returned to the primary beneficiaries. It is important to make sure the vesting date has not passed.

What provisions in trust deeds commonly cause problems?

Trust deeds sometimes contain unusual clauses that can cause trouble for the trustee if it is not aware of them. For example, some trust deeds:

- require the trustee to resolve to distribute the trust income earlier than 30 June — for example, by the 26 June;
- do not contain a definition of income and require the trustee to make a determination about the income of the trust as a preliminary step to making a distribution;
- require the consent of the appointor or the guardian of the trust before trust distributions (particularly of capital) can be made. In some cases, the appointor or the guardian may be dead, so the consent cannot be obtained and the distribution cannot be made.

What if I don’t have the trust deed and the client can’t find it?

A missing trust deed can cause serious problems.

First, exhaust all avenues to find it. Check the offices of banks, accountants, lawyers and all other advisers who have received copies of the trust deed in the past.

A ‘deed of confirmation’ can be prepared where a copy has been found (for example, one that is unsigned and unstamped). This deed is intended to confirm that the copy of the deed attached represents the terms of the trust, confirming the copy as the original form of the trust deed. However, this may not satisfy the requirements of third parties who will transact with the trust or the ATO or state revenue authorities.

Alternatively, the trustee may make an application to the court for guidance under the provisions of the relevant state or territory Trustee Act, which allows a trustee to seek a declaration from the court varying the terms of the trust deed. This is the safest approach, but also the most complicated and expensive.

Part 3: Making a trustee’s resolution

What is a resolution and how is it different from a minute?

A ‘resolution’ is a decision of the trustee made in accordance with a power available to it under the trust deed. A minute or written trustee’s resolution creates a record of that resolution. Unless the trust deed provides otherwise, the minute or written resolution can be — and most often is — finalised some time after the resolution has been made (see Part 4).

When does the resolution need to be made?

The resolution must be made by the earlier of 30 June or the date set out in the trust deed (see also Part 5 of the ‘streaming’ rules for capital gains and franked dividends).

How do the trustees make a resolution?

The resolution must be made by following the process that is set out in the trust deed. While the process will vary depending on the particular terms of the deed, it will generally involve a consideration of the following matters (in sequence):

- **The trust deed:** The trustee should have the trust deed (and any deeds that have varied it over time) and refer to it when making a trustee’s resolution.
- **The beneficiaries:** The trustee should refer to the trust deed to see who it defines as beneficiaries of the trust and should determine the individuals or entities to which the trustee wants to make distributions of trust income are beneficiaries of the trust.
- **The income of the trust:** The trustee should consider how the trust deed defines income and should determine that what is sought to be distributed is ‘income of the trust’ as defined.

- **The distribution of income:** The trustee should consider and resolve to distribute the income of the trust (as determined) to the beneficiaries (as determined) in the manner and amounts/proportions desired.
- **The payment (or otherwise) of distributions:** The trustee should consider and resolve how the distributions of income will be paid, applied or set aside to or for the beneficiary.

What happens if the trustee is a company?

If the trustee is a company, there may be further requirements in the company's constitution about how directors' meetings are to be convened and held.

Problems can arise if you have not closely considered what the company's constitution says about directors' meetings. For example, if you find that one of the directors is overseas and the constitution does not permit meetings to be conducted other than in person, the company may be unable to form a quorum and the meeting cannot take place.

How can the trustees prove that they have made a resolution by 30 June if the minutes or written resolutions are not prepared at the same time?

You need evidence that objectively shows that a resolution was made in accordance with the terms of the deed (and, if you have a company trustee, at a properly convened meeting of the directors) on or before 30 June (or any earlier date the trust deed requires). This may include:

- notes or a diary entry recording the meeting and the matters discussed, prepared by the participants in the meeting or by an external observer (e.g. an accountant);
- an exchange of correspondence (letters, email etc.) recording or confirming the meeting and the matters discussed;
- a 'draft' minute that was circulated and discussed at the meeting and approved to be finalised (with or without further amendment).

While in theory it may be permissible under the terms of the trust deed to make a resolution orally or mentally, you will have greater difficulty proving that such a resolution has been made in the event of a dispute or if the ATO requires you to substantiate that the resolution was made before 30 June.

Part 4: Preparing a trustee's minute

What is a trustee's minute and how is different from a resolution?

As discussed above, the trustee's minute serves as a record of the resolution made by the trustee.

If the trustee is a company, the trustee's minute will be a record of the meeting of the directors of the company at which the resolution was made. In the case of a sole director company, the document produced to record the sole director's resolution can be called a 'Minute of Resolution' or simply a 'Trustee's Resolution'.

Similar principles apply where the trustee is one or more individuals.

If a document referred to as a 'Trustee's Resolution', rather than a 'minute', is not produced on or before 30 June, it should be made clear in the wording of the document that it is a record of a resolution made by the trustee at an earlier point in time. Otherwise, there may be some confusion about the date the resolution was made.

Who should draft the trustee's minute?

Usually, the trustee's minute or resolution is prepared by an accountant or lawyer acting for the trustee.

In larger companies, the minutes of directors' meetings may be prepared by the company secretary.

When does the trustee's minute need to be prepared?

The trustee's resolution or minute should be prepared within a reasonable period of time following the making of the resolution. If it is prepared shortly after the meeting it is more likely to be seen as a contemporary and reliable record of what happened at the meeting.

If the trustee is a company, the directors have an obligation under section 251A of the Corporations Act 2001 (Cth) to record the resolutions in a minute, and to place that minute in the company's minute book (a required record of the company), within 30 days of the resolution being passed. Not doing so is a strict liability offence under the Corporations Act.

When should the trustee's minute be signed and dated?

The minute itself should not be dated 30 June unless it was prepared and finalised at this time. It is perfectly acceptable to sign and date the minute after 30 June. What is important is that the minute notes that the meeting was held on or before 30 June.

The same applies for a trustee's resolution in the case of a sole director company trustee or a sole individual trustee. Similarly, though, it should be clear that the resolution was made on or before 30 June and that the document is simply recording this resolution.

What should be in the trustee's resolution or minute?

The trustee's resolution or minute should be a narrative of how the meeting was conducted (except for sole directors and trustees, where meetings are not required), documenting what matters were considered and what determinations and resolutions were made.

Adopting the process set out above (in Part 3), the trustee's resolution or minute should record the following information:

- that the general details of the meeting (if applicable) were provided, including the date and time it was held, the place it was held, who was present (and, in the case of a company, who was appointed chair of the meeting) and who attended as an observer;
- that the trust deed was tabled at the meeting and referred to by the trustee;
- that the provisions of the trust deed defining the beneficiaries of the trust were referred to (the particular clause could be noted in the minutes), and that the trustee determined that the individuals or entities to which the trustee wants to make distributions of trust income are beneficiaries of the trust;

- that the provision of the trust deed defining the income of the trust was referred to (the particular clause could be noted in the minutes), and that the trustee determined that what is sought to be distributed is 'income of the trust' as defined;
- that the provision of the trust deed setting out the process by which the trustee may distribute income was referred to (the particular clause could be noted in the minutes), and that the trustee resolved to distribute the income of the trust (as determined) to the beneficiaries (as determined) in the manner and amounts/proportions desired; and
- that the provision of the trust deed which states that the income of the trust can be paid, applied or set aside for a beneficiary was referred to (the particular clause could be noted in the minutes), and that the trustee has resolved how the distributions of income will be paid, applied or set aside to or for the beneficiary.

Please refer to the trust deed and sample distribution minutes **attached**.

Part 5: Dealing with trust income

What do I do if I don't know what the income of the trust is at 30 June?

In most cases, the trustee will not have complete information about the trust's income on or before 30 June, given that financial statements won't have been prepared and the trustee is waiting on information from third parties (for example, tax reports for managed investments are usually sent out in September/October). However, the fact that the trustee does not know precisely what the income of the trust will be does not necessarily mean that it cannot make an effective resolution to distribute the trust's income by 30 June.

Most trust deeds require the trustee to ‘determine’ the income of the trust and make provision for this income to be distributed to the trust’s beneficiaries. Unless the trust deed specifically requires otherwise, it should be possible for the income of a trust to be ‘determined’ even if the precise amounts are not yet known. For example, it may be sufficient for the trustee to determine that it has received interest from funds on deposit, dividends on shares and a capital gain on the sale of an asset, and that such amounts will constitute income of the trust.

Also, unless the trust deed specifies otherwise, it is generally acceptable to make distributions to beneficiaries in terms of a proportion of the trust income or by referring to a specific amount and then a balance (although this may not apply if you want to ‘stream’ — see below). The ATO confirms this in its recent factsheet titled *Trustee resolutions must be made no later than 30 June*.

Do you have to prepare the trust accounts by 30 June to make beneficiaries presently entitled to trust income?

No. Your resolution does not need to specify an actual dollar amount for the resolution to be effective in making a beneficiary presently entitled, unless the trust deed specifically requires it.

A resolution is effective if it prescribes a clear methodology for calculating the entitlement. For example, the entitlement can be expressed as a specified percentage of the income — whatever that turns out to be.

Alternatively, if you know that the income of the trust will be at least a certain amount, you may choose to make one or more beneficiaries presently entitled to the certain amount, and other beneficiaries entitled to the balance — whatever that turns out to be.

Also, when the accounts and income tax return have been finalised, the trustee can confirm the precise dollar amounts of the distribution in a further resolution, reflecting the earlier one in which the resolution was made.

What do I have to do in order to ‘stream’ franked dividends and capital gains to particular beneficiaries?

New rules introduced last year deal with ‘streaming’ capital gains and franked dividends to particular beneficiaries. If these amounts are effectively streamed under the rules, they are no longer taxed under Division 6 but instead under more specific provisions (in Subdivision 115-C for capital gains and in Subdivision 207-B for franked dividends and franking credits).

The key to effectively streaming a capital gain or franked dividend is to create a ‘specific entitlement’ in favour of the particular beneficiary. The requirements to create a specific entitlement are set out in the legislation. They include:

- The trust deed contains provisions enabling the trustee to make a beneficiary ‘specifically entitled’.
- The ‘specific entitlement’ must be created by the beneficiary being specifically allocated the amount of a capital gain **in its character** as a capital gain or a franked dividend.
- The ‘economic benefit’ representing the franked dividend or capital gain must pass, or be reasonably expected to pass, to the beneficiary being made specifically entitled to it.
- The ‘specific entitlement’ to the franked dividend or capital gain must be recorded as such in the accounts and other records of the trust, including a trustee’s resolution.

The recording requirement must be satisfied:

- by 30 June for franked dividends; and
- by 31 August for capital gains.

In relation to capital gains, it is important to remember that the requirement to record the ‘specific entitlement’ by 31 August does not override the requirements of the trust deed itself.

Also, the ATO's view is that if a trust that has an 'income equalisation clause' — that is, a clause that equates trust income with net taxable income (which will include any net capital gain) — and the beneficiaries are made 'presently entitled' to all of the income of the trust by 30 June to satisfy the requirements of the trust deed, then the trustee cannot make a different beneficiary 'specifically entitled' to a capital gain by 31 August. To avoid any unintended consequences under the streaming rules, it is prudent to make all resolutions and trust records making a beneficiary 'specifically entitled' to a capital gain by 30 June, rather than waiting until 31 August.

For detailed information about the streaming rules, please refer to CPA Australia's *Trust Streaming Manual*.

Can I fix a particular beneficiary's distribution from the trust at a particular amount to make sure they don't get a greater share of the trust's income if the trust gets an amended assessment?

The general view is that trust resolutions that try to 'cap' the amount of a beneficiary's distribution to a particular dollar amount, or set out how a post-assessment adjustment resulting in higher assessable income (and therefore trust income) will flow to the beneficiaries, will not be effective. This is because of the High Court's decision in *Bamford* that Division 6 worked on a 'proportionate' basis and not a quantum basis. Consequently, any distribution of income to a beneficiary — whether or not of a specific amount — simply sets the proportion of the trust's income that will be applied to tax that beneficiary on the trust's tax income. This law cannot be overridden by a determination or decision of the trustee.

Can the trustee make a distribution of income by which the amount of the distribution is dependent on an external variable — for example, the amount of the carried forward losses of another trust or a beneficiary's other income?

The general view is that distributions where the amount depends on external variables or factors will be void because they are too uncertain and do not represent a proper application of the trustee's power to distribute. If such distributions are sought, you should obtain specific expert legal advice.

If my trust deed has an 'income equalisation clause', does that mean that I can treat 'notional' tax amounts, such as franking credits, as trust income?

The ATO has release draft Taxation Ruling TR 2012/D1 in which the Commissioner sets out his views on the meaning of 'income of the trust estate' for the purposes of Division 6.

In this ruling, the ATO reconciles its view with the decisions in *Bamford*, *Colonial First State* and other cases. The ATO's view is that the 'income of the trust estate' is the 'distributable' income of the trust. This means 'notional amounts', such as franking credits, foreign tax credits and Division 7A deemed dividends, are not part of the 'income of the trust estate' because they cannot fund a distribution to a beneficiary. If these notional amounts are not included in the 'income of the trust', it may mean there is no trust income that can be distributed in order to flow franking credits to beneficiaries.

At the time of writing, this ruling has not been finalised.

Sample Trustee Resolution

Minutes of meeting of Directors Vito PTY LTD

ACN 222 333 444
(Company)
as trustee of the Corleone Family Trust (Trust)

Date	30 June 2012
Time	11:59pm
Place	1 Shady Lane, Melbourne, Victoria
Present	Vito Corleone, Michael Corleone, Santino Corleone and Alfredo Corleone
Chair	Vito Corleone was elected Chair of the meeting.
Quorum	The Chair informed the meeting that a quorum was present.
Trust Deed	The Chair noted that the Company acts as trustee of the Trust established by deed dated 1 January 2005 (Trust Deed).
Eligible beneficiaries under the Trust Deed:	The Chair noted that:
	1 Terms of Trust Deed
	1.1 The 'Primary Beneficiaries' of the Trust are relevantly defined in the Schedule to the Trust Deed and are as follows: <i>'Vito Corleone of 2 Coppola Drive, Melbourne 3000</i> <i>Michael Corleone of 4 Coppola Drive, Melbourne 3000</i> <i>Santino Corleone of 6 Coppola Drive, Melbourne 3000</i> <i>Alfredo Corleone of 8 Coppola Drive, Melbourne 3000'</i>
	1.2 The 'General Beneficiaries' of the Trust are relevantly defined in clause 1.1 of the Trust Deed as follows: 'General Beneficiaries and General Beneficiaries (as the case may be): General Beneficiary and General Beneficiaries (as the case may be) include: (a) the Primary Beneficiaries or Primary Beneficiaries (as the case may be); ... (c) any corporation, wherever incorporated or resident, of which any General Beneficiary is a member, whether or not that corporation is in existence at the Commencement Date; ...'

	<p>2 Beneficiaries</p> <p>Pursuant to the provisions of clause 1.1 of the Trust Deed:</p> <p>(a) Michael Corleone (Michael) is a General Beneficiary of the Trust;</p> <p>(b) Santino Corleone (Santino) is a General Beneficiary of the Trust;</p> <p>(c) Alfredo Corleone (Alfredo) is a General Beneficiary of the Trust; and</p> <p>(d) Genco Pty Limited (Genco) is a General Beneficiary of the Trust.</p>
Income of the Trust	The Chair noted that under clause 4.4 of the Trust Deed the Trustee must determine the income of the Trust Fund for each Accounting Period.
Determination of income under the Trust Deed	<p>The Chair proposed in accordance with clause 4.4 of the Trust Deed that the income for the Accounting Period be calculated in the same manner as net income is calculated under the <i>Income Tax Assessment Act 1936</i> (Cth) and the <i>Income Tax Assessment Act 1997</i> (Cth) (Tax Acts), provided that where, in calculating the net income under the Tax Acts, it is necessary to:</p> <p>(e) gross up any amount of income (for example, tax offsets such as foreign tax credits or franking credits);</p> <p>(f) include any amount of deemed assessable income; or</p> <p>(g) make any deemed deduction,</p> <p>then the grossing up or deemed assessable income (excluding net capital gains included in assessable income) or deemed deduction must not be included in calculating the net income of the Trust Fund for the Accounting Period.</p>
Distribution of income under the Trust Deed	The Chair noted and the meeting considered the Trust Deed insofar as it relates to the distribution of the 'income' of the Trust by the Company (as Trustee of the Trust) to the 'General Beneficiaries' of the Trust in an Accounting Period.
Proposed distribution of Trust income	<p>The Chair proposed that the Company (as trustee for the Trust) distribute the Trust's 'income' for the Accounting Period ending 30 June 2012 so as to:</p> <ul style="list-style-type: none"> • first, pay, apply or set aside an amount of \$10,000 of the Trust's income for the Accounting Period ending 30 June 2012 for the benefit of Michael; • second, pay, apply or set aside an amount of \$30,000 of the Trust's income for the Accounting Period ending 30 June 2012 for the benefit of Santino; • third, pay, apply or set aside an amount of 90% of the Trust's remaining income (after making the distributions in (a) and (b)) for the Accounting Period ending 30 June 2012 for the benefit of Alfredo; and • fourth, pay, apply or set aside the balance of the Trust's income for the Accounting Period ending 30 June 2012 for the benefit of Genco.
Resolved	The meeting considered the Chair's proposals and resolved in favour of them.
Secretary to do certain things	The Chair instructed the Secretary to do all things as were necessary to give effect to the resolutions passed at the meeting.
Closure	There being no further business the Chair declared the meeting closed.

Signed as a true and correct record.

Chair

Sample trust deed

The Corleone Family Trust

Prepared By:
Hagen Barristers & Solicitors
Mr Tom Hagen, Principal
Level 1, 13 Duvall Drive
Melbourne VIC 3000
3201775_1

Date	This deed is made the day stated in item 1
Parties	The person named and described in item 2 as settlor (Settlor) The person or persons named and described in item 3 as the trustee or trustees (Trustee)
Recitals	A The Settlor desires to provide for the Primary Beneficiaries and the General Beneficiaries. B For the purpose of giving effect to that desire, the Settlor has settled or is about to settle on the Trustee the sum set out in item 6 to establish the trust named in item 8 (Trust). C The Trustee has consented to become the trustee of the Trust in accordance with the powers and subject to the provisions of this deed.

The parties agree.

1 Definitions and interpretation

1.1 Definitions

In this deed:

Accounting Period means any one of the following:

- (a) the period commencing on the Commencement Date and ending on the following 30 June;
- (b) each subsequent 12-month period ending on 30 June;
- (c) the period commencing on 1 July prior to the Vesting Day and ending on the Vesting Day; or
- (d) any other period determined by the Trustee,

provided that no Accounting Period will commence prior to the Commencement Date and no Accounting Period will end after the Vesting Day.

Appointor means the person or persons named or described in item 7 or any other person or persons who are appointed to hold that position under this deed.

Child and **Children** (as the case may be) includes:

- (a) a natural child, an adopted child, an ex-nuptial child, a stepchild and a former stepchild;
- (b) a person who is or was at any time under the guardianship or foster care of a person; and

- (c) a person accepted as a member of the family by the Trustee in writing and approved by the Appointor (if any) in writing.

Commencement Date means the date of this deed.

General Beneficiary and **General Beneficiaries** (as the case may be) include:

- (a) the Primary Beneficiary or Primary Beneficiaries (as the case may be);
- (b) the parents, grandparents, brothers, sisters, Spouses, uncles, aunts and Children of the Primary Beneficiary or the Primary Beneficiaries, the Spouses, Children and grandchildren of those parents, grandparents, brothers and sisters, the Spouses, Children, grandchildren and great-grandchildren of the Children of the Primary Beneficiary or Primary Beneficiaries and the Children and grandchildren of the Spouses of the Primary Beneficiary or Primary Beneficiaries;
- (c) any corporation, wherever incorporated or resident, of which any General Beneficiary is a member, whether or not that corporation is in existence at the Commencement Date;
- (d) a trustee (in that trustee's capacity as that trustee) of any trust or settlement in which any General Beneficiary has an interest, whether absolute or contingent or by way of expectancy and whether liable to be defeated by the exercise of any power

of appointment or revocation or to be diminished by the increase of the numbers of members of the class to which that General Beneficiary belongs, whether or not that trust or settlement is in existence at the Commencement Date;

- (e) any relative by blood or marriage of the Appointor;
- (f) any corporation, a share in which is beneficially owned or held by the trustee or trustees for the time being of any trust or settlement under which any General Beneficiary has an interest, whether absolute or contingent, and whether liable to be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the number of members in the class to which that General Beneficiary belongs, whether or not that trust or settlement is in existence at the Commencement Date;
- (g) the persons, corporations, entities and trusts (if any) that are named, described or defined in item 5 as additions to the class of General Beneficiaries;
- (h) any institution, body or organisation from time to time having objects that are charitable at law;
- (i) the trustee of any superannuation fund in or under which a General Beneficiary is a member or is entitled to benefit, whether vested or contingent;
- (j) any executor or trustee of a will of a General Beneficiary in their capacity as executor or trustee of the will;
- (k) any employee or former employee of the Trustee or any General Beneficiary;
- (l) any godchild of a General Beneficiary who is nominated as a General Beneficiary by the Trustee in writing and approved by the Appointor (if any) in writing; and
- (m) any other person, corporation, trust or entity from time to time nominated in writing by the Trustee with the consent of the Appointor (if any),

provided, however, that the following persons are excluded from being or becoming General Beneficiaries unless specifically named or defined in item 4 and item 5 respectively:

- (n) the Settlor;
- (o) any Child of the Settlor; and
- (p) any person claiming through the Settlor;
- (q) (the persons within categories (n), (o) and (p) being called **Excluded Persons**); and
- (r) any corporation and the trustee of any settlement or trust (in its capacity as trustee of that settlement or trust and in its own right) in or under which any Excluded Person has an actual or contingent beneficial interest so long as that interest continues.

Primary Beneficiary and Primary Beneficiaries

mean the person or persons named, described or defined in item 4.

Set Aside, in relation to a General Beneficiary, includes placing sums to the credit of that General Beneficiary in the books of the Trust Fund.

Spouse of a particular person includes their:

- (a) legally married spouse;
- (b) widow or widower;
- (c) former spouse; and
- (d) de facto partner or same-sex partner who is living or has lived with the person, although not legally married to that person, on a bona fide domestic basis as though legally married to that person.

Primary Beneficiaries and General Beneficiaries

include persons who from time to time until the Vesting Day come within:

- (a) the category described in item 4 and item 5; and
- (b) the foregoing definitions,

despite the fact that those persons may not be in existence or have not come into the defined category at the Commencement Date.

Tax Acts means the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

Trust Fund means the settled sum stated in item 6 and paid or to be paid by the Settlor to the Trustee, together with all money, investments and property paid or transferred to and accepted by the Trustee as additions to the Trust Fund, the accumulations of income empowered to be made under this deed, all accretions to the Trust Fund, and the investments and property from time to time representing the money, investments, property, accumulations and accretions or any part or parts of them respectively.

Trustee includes any additional or successor trustee or trustees of the Trust appointed under this deed.

Vesting Day means the first date to occur of the following dates:

- (a) 80 years less one day from the Commencement Date;
- (b) where the rule of law commonly known as the rule against perpetuities would render void any of the dispositions of trusts of this deed relating to any property comprising part or the whole of the Trust Fund, the date of expiration of that perpetuity period; or
- (c) the date the Trustee appoints in writing.

1936 Act means the *Income Tax Assessment Act 1936* (Cth).

1.2 Name of Trust

The trust created by this deed will be known by the name stated in item 8.

1.3 Interpretation

In this deed, headings are inserted for convenience only and do not affect the interpretation of this deed, and unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes the other gender;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;

- (d) the meaning of general words is not limited by specific examples introduced by 'includes', 'including', 'for example', 'such as' or similar expressions;
- (e) a reference to a document, including this deed, is to the document or instrument as amended, varied, novated, supplemented or replaced from time to time;
- (f) a party includes the party's successors and permitted transferees and assigns and, if the party is an individual, includes executors and personal legal representatives;
- (g) a reference to a person includes an individual, a partnership, a corporation or other corporate body, a joint venture, a firm, a trust, an association (whether incorporated or not), a government and a government authority or agency;
- (h) a reference to a statute, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (i) all monetary amounts are in Australian dollars unless otherwise stated, and a reference to payment means payment in Australia dollars;
- (j) a reference to a part, clause or party is a reference to a part or clause of, or a party to, this deed;
- (k) a reference to this deed includes the recitals and any schedules, annexures, exhibits or attachments to this deed; and
- (l) item numbers refer to those items in the schedule.

2 Declaration of trust

The Settlor and the Trustee declare that the Trustee will, from the Commencement Date, stand possessed of the Trust Fund and of the income of the Trust Fund on the trusts and with the powers and subject to the provisions of this deed.

3 Trust accounts

3.1 Establishment of separate accounts — income and expenses

The Trustee may establish in the accounting records of the Trust separate accounts and ledgers for each separate category or class of income showing the nature, source and accounting for the income and the expenses relating to that income made in the Accounting Period.

3.2 Establishment of separate accounts — deductions, credits and rebates

If the Trustee establishes in the accounting records of the Trust separate accounts and ledgers for separate categories or classes of income and expenses, the Trustee may in the accounting records of the Trust also establish separate accounts and ledgers to determine and allocate any deductions, credits or rebates that are allowable or available in accordance with relevant taxation legislation at the time of any determination or allocation including credits and rebates in respect of franked dividends, the flow-on franking amount, payments that have been subject to PAYG withholding, PAYG credits, and income derived when there are foreign beneficiaries and foreign income.

3.3 Capital receipts

Notwithstanding clauses 3.1 and 3.2, the Trustee may establish, in the accounting records of the Trust, separate accounts and ledgers for capital receipts showing the nature, source and accounting for the capital and the attributable expenses relating to that capital, and the Trustee may also establish any further accounts that it considers appropriate or necessary to discharge its obligations under this deed or under any legislation that may require the Trustee to maintain that account.

3.4 Deposit into separate funds

On receipt of income or capital into the Trust Fund, the Trustee may deposit each separate category or class of income or capital into the separate fund that is established in accordance with clauses 3.1 to 3.3.

3.5 Accounting records

Without limiting the powers of the Trustee, the Trustee may, in the accounting records of the Trust for any Accounting Period, establish any separate accounts and ledgers that are required to determine and allocate the whole or a part of the income or any capital gain of the Trust Fund allocated to each class or category of income or capital to one or more beneficiaries or for the purposes of the accumulation of that income under clause 5.5.

3.6 Allocation to beneficiaries

Notwithstanding anything to the contrary contained in this deed or otherwise provided in this clause, the Trustee may from time to time apply the sums to the credit of any account for any income or capital category or class to the credit of any other one or more accounts of any income or capital categories or classes and to allocate the whole or a part of that net combined income or net capital gain attributable to those accounts for separate categories or classes of income or capital to one or more General Beneficiaries or for the purposes of accumulation without having regard to the different categories or classes of income or capital.

4 Income

4.1 Collection

The Trustee will receive and collect all dividends, interest and rents and all other income of the Trust Fund.

4.2 Payment of expenses

The Trustee must pay out of the gross income of the Trust Fund all costs and disbursements, commissions, fees, tax (including any goods and services tax, land tax or income tax), management charges and other proper outgoings in respect of the investments and administration of the Trust Fund.

4.3 Nature of receipts

The Trustee may determine whether any receipt, profit, gain (whether realised or unrealised) payment, loss, outgoing, provision or reserve, or any sum of money or investment, in an Accounting Period is or is not to be treated as being on income or capital account and whether, and the extent to which, any provisions or reserves need to be made for the Accounting Period.

4.4 Trustee must determine the income of Trust Fund

The Trustee must determine the income of the Trust Fund for each Accounting Period.

4.5 No determination

If no determination is made or to the extent to which no determination is made under clause 4.4 prior to the end of an Accounting Period, then the income for that Accounting Period is calculated in the same manner as net income is calculated under the Tax Acts for that Accounting Period, provided that where, in calculating the net income under the Tax Acts, it is necessary to:

- (a) gross up any amount of income (for example, tax offsets such as foreign tax credits or franking credits);
- (b) include any amount of deemed assessable income; or
- (c) make any deemed deduction,

the grossing up or deemed assessable income (excluding net capital gains included in assessable income) or deemed deduction isn't included in calculating the net income of the Trust Fund for the Accounting Period unless the Trustee determines otherwise before the end of the Accounting Period.

5 Distributions prior to vesting

5.1 Distribution of income

The Trustee may, in each Accounting Period, pay, apply or Set Aside the whole or any part that the Trustee deems fit of the income of the Trust Fund of that Accounting Period for any charitable purposes and/or for the benefit of all or any one or more exclusive of the other or others of the General Beneficiaries living from time to time in any proportions and in any manner that the Trustee deems fit without being bound to assign or disclose any reason.

5.2 Distribution from categories

In exercising the discretion in clause 5.1, the Trustee may pay, apply or Set Aside income from any category or categories or source or sources that the Trustee deems fit.

5.3 Default distributions

Immediately prior to the end of each Accounting Period, the Trustee will be deemed to hold as much of the income of the Trust Fund for each Accounting Period as has not been the subject of an effective determination in relation to that Accounting Period in trust successively for the same persons and in the same proportions as the Trustee would hold of the Trust Fund under clause 6 as if the last day of that Accounting Period were the Vesting Day.

5.4 Separate trust fund

Amounts Set Aside for any General Beneficiary under clauses 5.1 and 5.3 will not form part of the Trust Fund as defined in clause 1.1, but will be held by the Trustee as a separate trust fund on trust for that General Beneficiary absolutely but on the same terms as this deed, with power to the Trustee pending payment to that General Beneficiary to invest, apply or deal with that fund or any resulting income or any part in the manner provided for in clause 9(d).

5.5 Accumulation

Despite the provisions of clauses 5.1 to 5.4, the Trustee may, at any time or times prior to the Vesting Day, so long as permitted by law, accumulate the whole or any part of the income of the Trust Fund, and add that income to the capital of the Trust Fund but so that the Trustee may at any time or times prior to the Vesting Day resort to those accumulations and pay or apply the whole or any part or parts for any charitable purposes and/or for the benefit of any one or more exclusive of the other or others of the General Beneficiaries living from time to time in any proportions and in any manner that the Trustee deems fit and without being bound to assign any reason.

5.6 Powers in relation to capital

The Trustee will have the powers in relation to capital of the Trust Fund conferred on the Trustee by this deed.

6 Distributions on vesting

On the Vesting Day, the Trustee will stand possessed of the Trust Fund on trust for any charitable purposes and/or for any of the General Beneficiaries for any interests and in any proportions, and for one to the exclusion of the other or others, that the Trustee may appoint and in default of and subject to any appointment:

- (a) on trust for any of the Primary Beneficiaries who are living on the Vesting Day and, if more than one, as tenants in common in equal shares absolutely, provided that if any Primary Beneficiary dies prior to the Vesting Day leaving a Child or Children living at the Vesting Day, the Child or Children will stand in the place of the deceased Primary Beneficiary and take, if more than one, as tenants in common in equal shares the share that the deceased Primary Beneficiary would have taken had he or she survived to the Vesting Day; or
- (b) if any part or parts of the Trust Fund are not effectively or validly disposed of by the trusts declared by this deed or by any deed in force varying, altering or adding to those trusts,

the Trustee will stand possessed of that part or those parts of the Trust Fund on trust for any charitable purposes that the Trustee may determine, any resulting trust to the Settlor being negated.

7 Benefits

Any benefits conferred on any General Beneficiary will be in addition to and not in substitution for any provision that may be made by the Settlor for the General Beneficiary, whether by settlement or will or otherwise.

8 Trustee considerations

8.1 No obligation to review investment performance

Despite anything to the contrary contained in this deed or otherwise provided, the Trustee will, for the purposes of section 6(3) of the *Trustee Act 1958* (Vic), be under no obligation at any time to review the performance of investments of the Trust Fund.

8.2 No obligation in relation to section 8 of the *Trustee Act 1958* (Vic)

Except to the extent required by law, the Trustee will not be obliged to have regard to any matter considered in section 8 of the *Trustee Act 1958* (Vic) or to give reason for any decision made in respect of the Trustee's exercise of its power of investment under this deed.

9 Trustee's specific powers

The Trustee will, despite anything to the contrary contained in this deed or otherwise provided, have the power:

- (a) at any time and from time to time before the Vesting Day, out of the income or the capital of the Trust Fund, but not out of any money referred to in clause 9(d), to raise any sum or sums and pay the same to any one or more of the General Beneficiaries for their own use and benefit in addition to any income or capital or share of income or capital to which they may

from time to time be entitled, or to apply that sum or those sums to or for the benefit of the General Beneficiary or General Beneficiaries in any manner that the Trustee deems fit;

- (b) at any time and from time to time before the Vesting Day, to lend any sum or sums out of the Trust Fund and any money held in trust under this deed to any one or more of the General Beneficiaries, either with or without security, on any terms and conditions as to repayment and with or without interest that the Trustee deems fit;
- (c) at any time and from time to time, to pay or apply the whole or any part of the capital or the whole or any part of any income, or accrued or accumulated income, to which any infant beneficiary is either absolutely or contingently entitled in any manner that the Trustee deems fit for the benefit of that infant and, without limiting the generality, in particular for the maintenance, education or advancement of that infant, and in the exercise of that power the Trustee may pay the same to a parent or guardian of that infant without being bound to see to the application by that parent or guardian;
- (d) while any General Beneficiary is under any legal disability, on behalf of that General Beneficiary, to invest any income that the Trustee may decide to Set Aside for or pay to that General Beneficiary under clause 9(a) and the resulting income from that investment in any of the investments authorised by this deed, including any of the investments authorised by clause 10, while the Trustee may at any time and from time to time resort to any part of the income and pay, apply or deal with the same or any part in any manner that the Trustee deems fit for the benefit of that General Beneficiary under and in the terms of the power in clause 9(c);
- (e) at any time and from time to time, to raise any sum or sums out of the income or capital of the Trust Fund and pay the same or transfer any portion of the Trust Fund in its existing

form of investment to or for the advancement or benefit of any General Beneficiary, if he or she is of full age, or to a parent or guardian of any infant General Beneficiary (whether absolutely or by way of resettlement on any trusts that the Trustee deems fit), freed and discharged from the trusts of this deed, and the receipt of the General Beneficiary of any money or property so paid or transferred will constitute a full and final discharge to the Trustee in relation to the trusts of this deed;

- (f) to allow any General Beneficiary to occupy, have custody of or use and grant to any General Beneficiaries the right to occupy and use any immovable property or chattels for the time being forming part of the Trust Fund, on any terms or conditions as to inventories, repair, replacement, insurance, outgoings or otherwise that the Trustee deems fit and so that the Trustee will not be liable for any loss or damage that may occur to any property so forming part of the Trust Fund during, or by reason of, any occupation, custody or use except insofar as that loss or damage is occasioned by the conscious and willful default or neglect of the Trustee;
- (g) in any condition or circumstance that the Trustee deems expedient, to appoint, either in respect of the whole of the Trust Fund or any part of the Trust Fund, a new trustee in any country of the world, including Australia, and to transfer, assign and set over the investments for the time being representing the Trust Fund or any part of the Trust Fund to that new trustee on the same or similar trusts and subject to the same or similar terms and conditions as those declared in this deed and either subject to the control of the Trustee or to the exclusion of that control;
- (h) to invest the Trust Fund or any part of it in investments that are speculative in nature;
- (i) to discriminate and act partially between General Beneficiaries and different classes of General Beneficiaries without an obligation to assign or disclose any reason;

- (j) to determine:
 - (i) whether any property or any increase or decrease in the number or value of any property or holdings of property, or any receipts or payments from, for or in connection with any property, will be treated as capital or income; and
 - (ii) generally all matters about which any doubt, difficulty or question may arise under or in relation to the execution of the trusts and powers of this deed,

provided that every determination of the Trustee in relation to any of the matters referred to in this clause, whether made on a question formally or actually raised or implied in any of the acts or proceedings of the Trustee in relation to the Trust Fund, will bind all parties interested in that determination and will not be objected to or questioned on any ground;

- (k) to do all acts and things permitted under the *Trustee Act 1958 (Vic)* and general law; and
- (l) to do all acts and things that a natural person can do by law as if the Trustee were the absolute beneficial owner of the assets of the Trust Fund.

10 Trustee's general powers

The Trustee will, in addition to the powers and privileges otherwise conferred on the Trustee by law, have the following powers:

- (a) to apply and invest all money at any time forming part of the Trust Fund in any investments, whether or not involving liabilities and with or without security and on any terms and conditions that the Trustee deems fit and to the intent that the Trustee will have the same power in all respects as if the Trustee were the absolute owner beneficially entitled, including the subscription for, the taking up on allotment and the purchase of any shares, stocks, bonds, mortgages, debentures, obligations or securities of any government authority or corporation incorporated in any

part of the world and in the units or sub-units of any fixed or flexible trust that is established or managed by any company and the taking of and the purchase of the whole or any part or share or interest (including a minority part or share or interest) in any business or partnership and the goodwill and assets of that business or partnership and the purchase of any real or personal property, wheresoever situated, and to exercise all rights and privileges and perform all duties and obligations appertaining or incidental to those rights and privileges, and the Trustee may make or purchase any of those investments for cash or in consideration of an annuity or otherwise and on any terms and conditions that the Trustee deems fit, and the Trustee may make or purchase that investment for a sum greater than the amount of the Trust Fund for the time being, and the Trustee may agree to pay for that investment wholly or in part from any future money that may come into the Trustee's hands, including dividends, profits, interest or other income paid or payable in respect of that investment;

- (b) to advance and lend money to and to borrow and raise money from and to secure by mortgage or otherwise the payment of money to any persons, firms, corporations, governmental or municipal bodies on any terms, with or without security or interest, that the Trustee deems fit, including the power to join with any other company or person in executing any mortgage or other document for the purpose of securing the payment of money to the Trustee jointly with any other person or company or for the purpose of securing the payment of money to any other person or company and, without in any way limiting the generality of the foregoing, to invest the whole or any part of the Trust Fund in mixed contributory mortgages secured over real estate through the agency or in the name of the nominee or nominees acting in that capacity for the contributors to that mortgage;

- (c) to give any guarantee or indemnity or both for payment of money or the performance of any contract, obligation or undertaking by any person, firm, corporation, association or trust on any terms, with or without security, that the Trustee deems fit and to secure that guarantee by mortgaging or charging (by fixed or floating charge or otherwise) any undertaking of the Trustee or all or any part of the Trust Fund, including any property that may subsequently be acquired by the Trustee, so that it will form part of the Trust Fund and the rights of the mortgagee or chargee will take priority in all respects over the rights of the beneficiaries and all other persons;
- (d) to vary or transpose any investments into or for any other or others of any nature and to vary the terms of or property comprised in any security;
- (e) to construct or demolish buildings and to hold, use, purchase, maintain, repair, renovate, reconstruct, develop, redevelop, improve, sell, transfer, convey, surrender, let, lease, exchange, take and grant options or rights, alienate, mortgage, charge, pledge, reconvey, release, discharge or otherwise deal with any real or personal property;
- (f) to purchase, sell, transfer, surrender, exchange, charge, take and grant options or rights in any stocks, shares, debentures, units or securities of any kind with or without deferred, restricted, qualified or special rights attaching;
- (g) to purchase or acquire or to sell or transfer to any person any reversionary or deferred property or rights of any description or any interest in any property for the life of any person or any life or life endowment or sinking fund or term or other policy or policies of insurance of any nature and at or subject to any premium or premiums, whether single or payable periodically and with or subject to any option, rights, benefits, conditions or provisions, and the Trustee will have power to pay out of the income or capital of the Trust Fund, as the Trustee deems fit, all sums payable from time to time for premiums or otherwise for the effecting or maintenance of any policy or policies of insurance (whether owned by the Trustee or otherwise) or for the exercise or enjoyment of any option, right or benefit under that policy or those policies, and any surrender of any of those policies will for all the purposes of this deed be deemed to be a sale;
- (h) to pay out of the Trust Fund, or the income, all costs, charges and expenses incidental to the management of the Trust Fund or to the exercise of any power, authority or discretion contained in this deed or in carrying out or performing the trusts that the Trustee may at any time incur, including all income tax or other taxes payable in respect of the Trust Fund, costs in any way connected with the preparation and execution of this deed and all money that the Trustee may be required to pay as probate, estate, gift, stamp or revenue duties including stamp, gift or settlement duties payable in respect of the Trust Fund;
- (i) where the Trustee determines to invest any part of the Trust Fund in the subscription for or the taking up on allotment or the purchase of any shares, stock or debentures in any corporation, to exercise the following powers in addition to the powers authorised by law:
 - (i) to pay calls on any shares or to permit those shares to be forfeited and sold;
 - (ii) to purchase any further shares, stock or debentures and to take up any shares, stock or debentures of a new issue of any corporation;
 - (iii) to lend money to any corporation, whether secured by debentures or in any other way or not secured, at any rate of interest and on any terms that the Trustee deems fit;
 - (iv) to hold any shares, stock or debentures acquired by the Trustee under the powers conferred by statute or otherwise by law or by this clause for as long as the Trustee deems fit;

- (v) to sell any shares, stock or debentures held by the Trustee at any price that the Trustee deems fit (whether or not that price is less than the sum that appears from the accounts of the corporation to be the value of those shares, stock or debentures) and on any terms, with or without security, that the Trustee deems fit;
- (vi) to assent to or join in any arrangement relating to the sale or transfer or exchange of any of those shares, stock, debentures or interests or modifying any rights or privileges or interests in relation to them, and to agree to any scheme or arrangement for the increase in or reduction of the value or amounts of any shares or stock or of the capital of any corporation and for any of those purposes to deposit, surrender or exchange any scrip or document of title relating to them and to pay out of the capital of the Trust Fund or the income any contribution or incur any necessary expense in connection with that scheme or arrangement, and generally to manage and deal with those shares, stock or investments as if the Trustee owned them beneficially; and
- (vii) to enter into any agreement in respect of the winding up of any corporation in which the Trustee holds shares or is otherwise concerned or interested, and to agree with the liquidator or with any member or members of that corporation or any other person on any matters that the Trustee deems fit, for the division or partition in kind or specie of the assets or property of any nature of the corporation, and to accept any of those assets and property in payment or satisfaction of any interest of the Trustee in the corporation with power to pay any money by way of division or partition;
- (j) to carry on anywhere in Australia or elsewhere, and either alone or in partnership, any business or businesses including any business or businesses of manufacturers, wholesale and retail buyers, sellers, merchants, importers, exporters, dealers, brokers and agents in any kind of commodities, merchandise, choses in action and articles of commerce and of farmers, graziers and agriculturalists and any other form of business that the Trustee deems fit;
- (k) to agree to the partition, subdivision or exchange of any land or other property that forms part of the Trust Fund, and to pay any money by way of equality of partition, division or exchange;
- (l) to establish, promote or acquire any corporation or join in the promotion, establishment or acquisition of any corporation;
- (m) to appropriate, without obtaining any of the consents required by statute or otherwise by law, any part or parts of the Trust Fund, either in the actual condition or state of investment or by setting apart or crediting in the books or accounts of the Trust any sum or sums in or towards the satisfaction of any share or shares, whether vested or contingent, to which any person is or may be entitled in the Trust Fund, and for that purpose to make or cause to be made a valuation or valuations of the Trust Fund or any part or parts of the Trust Fund or of any interest in the Trust Fund that the Trustee may deem necessary either by the Trustee or by any person or persons, whether duly qualified or not, that the Trustee may appoint in any manner and at any respective times that the Trustee considers just and proper, and every valuation and every appropriation made by the Trustee will bind all persons interested, whether in the share to which the appropriation is made or in any other shares or otherwise interested in the Trust Fund, despite the fact that those persons may not exist or may be an infant or

subject to any other legal disability at the time of that appropriation, or that the Trustee or any person who is a director or shareholder of the Trustee making the appropriation is or may be beneficially interested, either directly or indirectly, in the property appropriated or may benefit, either directly or indirectly, as a result of the exercise by the Trustee of the power of appropriation referred to in this clause;

- (n) to sell the whole or any part or parts of the investments or property for the time being comprised in the Trust Fund at any time or times and on any terms and conditions that the Trustee deems proper, including the power to sell life or reversionary interests in those investments or that property;
- (o) for any purpose of or incidental to the administration of the trusts or provisions of this deed or the exercise of any power or authority vested in the Trustee:
 - (i) to raise and borrow money by sale, mortgage, charge, pledge, exchange or deposit of any property comprised in the Trust Fund for any amounts and on any terms and conditions that the Trustee deems fit, without liability for any loss or injury arising from the exercise of that discretion; and
 - (ii) to grant securities over the Trust Fund of all types and forms, including for the purpose of raising money or to secure the money advanced or to be advanced to any other person, firm, corporation, association or trust;
- (p) to invest all or any money capable of being invested in accordance with this deed in any of the modes of investment for the time being and from time to time permitted by law of the Commonwealth of Australia or any of the states for the investment of trust money;
- (q) to invest all or any money capable of being invested in accordance with this deed on deposit in any trading bank or savings bank or other financial institution in Australia;
- (r) to open any account or accounts with any bank or banks and to operate by and in all usual ways any account or accounts;
- (s) to exercise any power capable of being conferred on a trustee or trustees by any valid trust instrument and, without derogating from the generality of the foregoing, to dispense, insofar as it is lawful so to do, with the necessity of obtaining any order of the courts of the place of administration of the trusts created by this deed for the purpose of effecting or validating any transaction;
- (t) to remunerate any General Beneficiary who is at any time employed by the Trustee to the same extent and in the same manner as if that General Beneficiary were not a General Beneficiary under this deed and all bona fide payments made by the Trustee to that General Beneficiary, in the form of remuneration for services rendered or to be rendered or on account of expenses in connection with that employment, will not be or be deemed to be payment to the General Beneficiary of or on account of his or her share in the Trust Fund or in the income;
- (u) if any probate, succession, estate or other duties, fees or taxes become payable in any part of the world in respect of the Trust Fund or any part of the Trust Fund on the death of the Settlor or on the death of any General Beneficiary or any other person, to pay all or any part of those duties, fees and taxes out of the Trust Fund, despite the fact that those duties, fees or taxes, or some part of them, are not or may not be recoverable by the revenue authorities from the Trustee or from the Trust Fund by legal process in the place where the same became payable;
- (v) to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading and other negotiable or transferable instruments, to transact any business or enter into any facilities or other arrangements concerning any promissory notes, bills of exchange, bills of lading or other

- negotiable or transferable instruments and, for the purpose of carrying out any of these powers, to execute any documents or perform any acts incidental to the exercise of those powers;
- (w) to grant options in respect of any assets held subject to the trusts under this deed to any person, firm or country;
 - (x) to deal or trade in derivatives, manage or hedge financial risks and deal or trade in future contracts and options;
 - (y) to enter into any option agreement relating to any lending or financing facility, agreement or transaction;
 - (z) to identify and separately record income and capital of different categories and from different sources;
 - (aa) to grant to any legal person, whether natural or otherwise, a power of attorney for the purposes of exercising any of the powers of the Trustee;
 - (bb) to take and act on the opinion or advice given by lawyers, accountants or any other persons in relation to the interpretation or the effect of this deed or any other document or any statute or as to the administration of the Trusts or the powers of the Trustee, without being liable to anyone in respect of any act done by the Trustee in accordance with that opinion or advice;
 - (cc) to make an election that the Trust is a family trust under schedule 2F, section 272-80 of the 1936 Act;
 - (dd) to make an election that the Trust is an interposed entity under schedule 2F, section 272-85 of the 1936 Act;
 - (ee) to make an election and application to the Federal Commissioner of Taxation that the Trust is a member of any GST group under Subdivision 48-A of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and corresponding regulations;

- (ff) to delegate the exercise of all or any of the powers or discretionary authorities conferred on the Trustee by this deed and to execute any powers of attorney or other instruments necessary to effectuate that purpose; and
- (gg) to vest the Trust by so appointing in writing.

11 Trustee as a director

11.1 Appointment

The Trustee may become a director of, or appoint any person to act as a director on the Trustee's behalf of, any corporation in which any money forming part of the Trust Fund is from time to time invested and may receive the remuneration attached to that office, or permit the Trustee's representative to receive that remuneration, without being liable to account.

11.2 Holding of shares

Any representative of the Trustee may become qualified to act as a director in accordance with clause 11.1, if the constitution (if any) and any replaceable rules so allow, by holding in his or her name shares held by the Trustee, provided that the representative executes a declaration of trust in favour of the Trustee generally accompanied by the certificates of those shares and accounts to the Trustee for all dividends and bonuses paid.

12 Trustee's personal interest

The Trustee may exercise, or concur in the exercising of, all powers and discretions under this deed or by law, despite the fact that the Trustee or any person being a director or shareholder of the Trustee has or may have a direct or personal interest in the mode or result of exercising that power or discretion or may benefit either directly or indirectly as a result of the exercise of that power or discretion and despite the fact that the Trustee for the time being is the sole Trustee.

13 Trustee's manner of acting

13.1 Acting personally

The Trustee will not be bound to act personally.

13.2 Employment of others

The Trustee will be at full liberty to act as manager or to employ any manager, solicitor, accountant, clerks, contractors, workmen, employees, servants or any agents to transact all or any business of any nature required, including the receipt and payment of money, and the Trustee must determine the remuneration, charges and expenses to be allowed and paid.

14 Liability of Trustee

The Trustee will not be personally liable for the consequence of any error or omission, whether of law or of fact, on the part of the Trustee or the Trustee's legal or other advisers, or generally for any breach of duty or trust, unless it is proved to have been committed, made or omitted in fraudulent bad faith by the Trustee and all persons claiming any beneficial interest in, over or to the Trust Fund will be deemed to have notice of the provisions of this clause.

15 Blending of money

The Trustee will have power:

- (a) to blend, for the purposes of investment, any money that the Trustee holds on separate trusts (whether that money is subject to any other settlements or declarations of trust); and
- (b) to join with any other person or persons in making common investments.

16 Trustee's exercise of discretion

16.1 Absolute and uncontrolled discretion

Subject always to any express provision to the contrary contained in this deed, every discretion vested in the Trustee will be absolute and uncontrolled and every power vested in the Trustee will be exercisable at the Trustee's absolute and

uncontrolled discretion, and the Trustee will have the like discretion in deciding whether or not to exercise any power.

16.2 No responsibility for loss

The Trustee will not be responsible for any loss or damage suffered by the exercise of any discretion or power conferred on the Trustee or by the failure to exercise any discretion or power.

17 Expenses

Any Trustee for the time being who is a solicitor or accountant or any firm of which the Trustee may be a member will be entitled to make all usual and proper charges for both professional and other services in the administration of the Trust to the same extent that the Trustee would have been entitled to make if the Trustee were not a trustee under this deed.

18 Variation of deed

The Trustee for the time being may at any time and from time to time by deed, with the written consent of the Appointor (if any), revoke, add to or vary all or any of the provisions of this deed, including this clause, and any variation, alteration or addition made to this deed from time to time, and may by the same or any other deed or deeds declare any new or other trusts or powers concerning the Trust Fund or any part or parts but so that the rule against perpetuities is not infringed as a result and so that the variation, alteration or provision will not affect the beneficial entitlement to any amount Set Aside for any General Beneficiary prior to the date of the variation, alteration or addition.

19 General Beneficiary ceasing to be General Beneficiary

19.1 Request to be excluded

The Trustee may at any time, at the request or with the consent in writing of any General Beneficiary who has legal capacity, declare in writing that the General Beneficiary will, from that point onwards, not be a General Beneficiary for the purpose of the trusts constituted by this deed.

19.2 Effect of declaration to exclude

On a declaration under clause 19.1 being made, this deed will be read and the trusts constituted by this deed given effect, as if that person were not named or described in the definition of General Beneficiaries, provided, however, that the declaration does not affect any beneficial entitlement of that person to any amount Set Aside for or paid to him or her or it prior to the date of that declaration.

20 Change of Trustee

20.1 Power to remove and appoint

The Appointor, or any other person or persons who have been appointed to act as Appointor, will be entitled by instrument in writing at any time and from time to time:

- (a) to remove any Trustee;
- (b) to appoint any additional Trustee or Trustees; and
- (c) to appoint a new Trustee or Trustees in the place of any Trustee removed under this clause or who resigns the trusteeship or ceases to be Trustee by operation of law,

provided that, if there is no person holding the office of appointor or if the Appointor for the time being is under any legal disability, the statutory and other rights of removing and appointing a trustee will, to the exclusion of any other person or persons, be exercised by the person or persons granted power to do so by the *Trustee Act 1958* (Vic).

20.2 Retirement of Trustee

Any Trustee and any person who may by succession become a Trustee may retire by written notice to the continuing Trustee and the Appointor (if any), at which time the person giving the notice will immediately cease to be a Trustee, or to be a person who may by succession become a Trustee (as the case may be), provided that if at any time there is no Appointor entitled to exercise the powers set forth in clause 20.1, a sole surviving Trustee must not retire except on appointing a new Trustee in the Trustee's place.

20.3 Vacation of office of Trustee

The office of Trustee will be immediately vacated if that Trustee:

- (a) being an individual, dies or is found to be of unsound mind; or
- (b) being a company, enters into liquidation, whether compulsory or voluntary (not being merely a voluntary liquidation for the purposes of amalgamation or reconstruction),

and if that Trustee is the sole surviving Trustee, the new Trustee must be appointed by the Appointor or, failing that appointment, must be appointed in accordance with statutory provisions for appointing a trustee.

20.4 No obligation for multiple trustees

There will be no obligation for the Trust to have more than one Trustee.

20.5 Notices of changes to Trustee

A copy of all notices of changes in the trusteeship must be kept with this deed or included in a deed or deeds varying this deed and every notice will be sufficient evidence to any person having dealings with the Trustee as to the facts to which it relates.

20.6 Reliance on notices

Any person dealing with the Trustee may rely on a copy of this deed and of the notices kept with this deed, or of a deed or deeds varying this deed certified by the Trustee, to the same extent as he or she might rely on the original.

20.7 Acceptance of accounts and property

Any person becoming a Trustee may accept the accounts and the property delivered to the Trustee by the continuing Trustee or predecessors in office without being bound to enquire further as to the assets of the Trust Fund, and any person ceasing to be a Trustee may be given a full and complete discharge by the Appointor.

20.8 Decisions of Appointor

If the office of Appointor is held by more than one person, every decision or exercise of a power capable of being made by the Appointor will be valid only if made unanimously by all persons then holding the office of Appointor.

21 Appointment of successor Appointors

21.1 Nomination of successor Appointor

Any Appointor, including a successor Appointor may, by deed in writing:

- (a) from time to time, with the unanimous consent of all other persons acting as Appointor (if any), revocably or irrevocably, nominate any person or persons to be the successor or successors to the position of Appointor on, in the case of an individual, their death or resignation, and in the case of a corporation, the corporation resigning or entering into liquidation, whether compulsorily or voluntarily (not being merely a voluntary liquidation for the purposes of amalgamation or reconstruction); and
- (b) resign from the position of Appointor.

21.2 Revocation

A revocable appointment of a successor made under clause 21.1(a) may be revoked by the Appointor who made the nomination by deed in writing.

21.3 Further nominations after revocation

An Appointor revoking, under clause 21.2, a nomination made under clause 21.1 will not prevent the Appointor from making a further nomination or nominations under clause 21.1(a).

21.4 Copies of nominations and resignations

A copy of all nominations and resignations made under clause 21.1 and revocations made under clause 21.2 must be provided to the Trustee

and kept with this deed, and every nomination, resignation or revocation will be sufficient evidence to any person having dealings with the Appointor and the Trustee as to the facts to which it relates.

22 Accretions to fund

The Trustee will have the power, at any time prior to the Vesting Day, to accept any further or additional property that any person may in any way donate to or vest or cause to be vested in the Trustee to be held on the trusts set forth in this deed and, on that acceptance, all of that property will become part of the Trust Fund and be held by the Trustee accordingly.

23 Exercise in writing

Any determination by the Trustee in exercise of any power, discretion or authority conferred on the Trustee by this deed may, but need not, be made in writing.

24 Trustee disagreements

If the office of Trustee is held by more than one person or corporation, any disagreement between them as to any matter affecting the Trust Fund or as to the exercise, omission or abstention from exercising any of the Trustee's powers and discretions must be referred to a vote of all of those persons or corporations (either at a meeting of them or by post) and, if there is a 75% majority for or against a particular proposal, effect must be given to the wishes of that majority as if it were a unanimous decision by all of those persons or corporations.

25 Trustee contracts and right of indemnity

25.1 No rights against beneficiaries

The Trustee has no power or authority to enter into any contract that will bind or affect a General Beneficiary personally or to call on any General Beneficiary for any payment.

25.2 Trustee indemnity

The Trustee will be entitled to an indemnity out of the Trust Fund against any and all liabilities that the Trustee may incur or to which the Trustee may be subject.

25.3 Enforcement of contracts

Any contract made by the Trustee will be enforceable only against the Trust Fund, and all persons or corporations extending credit to, contracting with or having any claims against the Trustee in respect of the Trust Fund must look only to the Trust Fund for the payment of that contract or claim or for the payment of any debt, damage, judgement or decree or of any money that may otherwise become due or payable from the Trustee so that, in that event, neither the Trustee nor any General Beneficiary will be personally liable for that debt, damage, judgement or decree.

26 Trustee commission

Any Trustee may, from time to time, charge and retain out of the capital profits, accretions to capital and the income of the Trust Fund any commission that is agreed between the Trustee and the Appointor (if any) or otherwise as determined solely by the Trustee.

27 Governing law and jurisdiction

27.1 Governing law

This deed is governed by the laws in force in Victoria.

27.2 Jurisdiction

The parties submit to the non-exclusive jurisdiction of the courts of Victoria and the Federal Court of Australia and any courts that may hear appeals from those courts about any proceedings in connection with this deed.

EXECUTED as a deed.

Schedule

1 Date of making this deed

The 1st day of January 2005

2 Settlor

Salvatore Tessio of 1 Brando Crescent, Melbourne, Victoria 3555

3 Trustee

Vito Pty Limited ACN 222 333 444 of 2 Coppola Drive, Melbourne 3000

4 Primary Beneficiaries

Vito Corleone of 2 Coppola Drive, Melbourne 3000

Michael Corleone of 4 Coppola Drive, Melbourne 3000

Santino Corleone of 6 Coppola Drive, Melbourne 3000

Alfredo Corleone of 8 Coppola Drive, Melbourne 3000

5 Additional members of the class of General Beneficiaries

Nil

6 Settled sum

\$10

7 Appointor(s)

Vito Corleone of 2 Coppola Drive, Melbourne 3000

8 Name of Trust

The Corleone Family Trust

Signing page

SIGNED, SEALED AND DELIVERED by **SALVATORE TESSIO** in the presence of:

Signature of witness

Signature of **SALVATORE TESSIO**

Name of witness *(please print)*

THE COMMON SEAL of **VITO PTY LTD ACN 222 333 444**
was affixed in accordance with the Corporations Act 2001 in the presence of:

Signature of director

Signature of director / company secretary

Name of director *(please print)*

Name of director / company secretary *(please print)*