

**SETTLOR**

**Jane Smith**

**TRUSTEE**

**John Johnson**

## **Company123 Family Trust**

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## Company123 Family Trust

THIS DEED OF TRUST is made on 25 September 2015.

B E T W E E N

The Party described in the Schedule to this Deed ("the Settlor") Jane Smith of the one part.

-and-

The Party described in the Schedule to this Deed ("the Trustee") John Johnson of the other part.

RECITALS :

A. The Settlor wishes to create a fund to be known as described in the Schedule to this Deed and make provision for certain Beneficiaries described in this Deed.

B. The Settlor wishes to appoint the Trustee as trustee of these presents and the Trustee has consented to become a trustee hereof upon the trusts and with and subject to the powers and

C. The Settlor has paid or will pay the sum of \$777.00 to the Trustee.

### OPERATIVE PARTS:

#### Definitions and Interpretation

##### 1.1 Definitions

In this Deed unless the context otherwise requires

(a) 'Act' means the Income Tax Assessment Act 1936 and/or the Income Tax Assessment Act 1997 or any reenactment or statutory modification of either Act and any regulation issued under those Acts.

(b) 'Appointor' means the person having the power under this deed to appoint or remove a trustee;

(c) 'beneficiary' means a person who may become entitled to income or capital;

(d) 'category' in relation to income or capital means that part or those parts of the income or capital which the trustee has separately identified, characterised, and recorded in the books of account of the Trust as provided in clause 6;

(e) 'capital' means that part of the trust fund as does not constitute income;

(f) 'child', 'children', 'grandchildren' includes a legally adopted child;

(g) 'default beneficiary' means a beneficiary referred to in clause 14.2(d);

(h) 'financial year' means a financial year for which income tax of a person other than a company, is levied under the Act;

(i) 'income' means the net income of the Trust as defined in s 95(1) of the Act, notwithstanding that all or part of that income may at trust law constitute capital; 'minor' means a person under the age of 18 years;

(j) 'person' includes a company, legal entity or body of persons;

(k) 'tax' means any tax or imposition payable to any government or government instrumentality and, without limiting that generality, includes income tax, capital gains tax, fringe benefits tax, consumption tax, value added tax, provisional tax, additional tax, penalty tax, stamp duty, a fine or interest for late payment, tax on deposit or withdrawal of funds from any account;

(l) 'termination date' means the date the Trust is wound up in accordance with this deed;

(m) 'the Trust' means the trust created by this deed;

(n) 'the Trustee' means the trustee or any subsequent trustee for the time being of the Trust;

(o) 'the trust fund' means the money paid by the Settlor to the Trustee to establish the Trust and all other money and property which becomes subject to the rights and obligations of this deed and includes a part of the trust fund; and

##### 1.2 Interpretation

In this deed, unless the contrary is expressly provided:

(a) the singular includes the plural and vice versa;

(b) a gender includes each other gender;

(c) headings are for convenience only and do not affect interpretation;

(d) reference to legislation or a provision of any legislation includes modifications or re-enactments of the legislation, or any legislative provision substituted for, and all legislation and statutory instruments and regulations issued under the legislation; and

(e) an expression not otherwise defined has the same meaning as in the *Interpretation of Legislation Act*.

### 1.3 Governing law

The Trust is to be governed by, and this deed is to be construed in accordance with, the laws of New South Wales.

## Establishment of Trust

### 2.1 Name of trust

The Trust is to be known as the Company123 Family Trust.

### 2.2 Settlement sum

The Trustee acknowledges having received \$777.00 from the Settlor and agrees to hold it on the trusts and subject to the terms of this deed.

### 2.3 Purpose of trust

The primary purposes of establishing the Trust are:

- (a) to directly or indirectly provide financial assistance to varying degrees for the maintenance, education and benefit in life any one or more of the beneficiaries;
- (b) to invest or utilise all or any part of the trust fund to achieve the purpose in para (a) without the necessity to have regard to generating income or accretion of capital;
- (c) to assist or benefit a beneficiary without regard to the taking of security or the possibility of incurring a loss of capital; and
- (d) to give to the Trustee the widest possible discretion in the exercise of its powers whether investment or otherwise.

## Beneficiaries

### 3.1 Beneficiaries

The beneficiaries of the Trust comprise:

#### *Persons*

- (a) John Johnson and Jane Johnson ("the specified beneficiaries");
- (b) the lineal descendants of the parents of the specified beneficiaries and spouses for the time being; widow or widower of such lineal descendants born before the termination date;
- (c) the spouse of any child or grandchild of either of the specified beneficiaries;
- (d) any parent, brother or sister, nephew or niece of either of the specified beneficiaries;

#### *Corporations*

- (e) a company which now or before the termination date is incorporated in Australia or under the laws of any other country of which a director, or natural person who beneficially owns a share carrying a right to vote at general meetings, is a beneficiary of this trust;

#### *Secondary trust*

- (f) a trustee of any other trust, whether now existing or created after the date of this deed ('secondary trust') where;
  - (i) a beneficiary or discretionary object of the secondary trust is a beneficiary of this Trust;
  - (ii) the provisions of the secondary trust require a vesting in interest of its trust property prior to the termination date of this Trust; and
  - (iii) the provisions of the secondary trust require the beneficiaries of that secondary trust to be such so as not to cause this deed to breach any applicable rule or law against perpetuities;

#### *Benevolent objects*

- (g) a trustee of any charitable trust; and
- (h) any association, society, authority, institution, church, religious order, corporation, person or entity which at the time a distribution of income or capital is to be made is exempt from income tax under the provisions of the Act or if at the relevant time a gift of money to such body is deductible against assessable income of the donor by virtue of the Act.

### 3.2 Additional beneficiaries

The Trustee may appoint a natural person who is not a beneficiary under clause 3.1 to be a beneficiary or a default beneficiary ('additional beneficiary') provided:

- (a) the Trustee obtains the prior written consent of the Appointor to the appointment of the additional beneficiary;

- (b) subject to clause 3.2(e), the appointment of the additional beneficiary is made by an instrument under hand of the Trustee;
- (c) the appointment of the additional beneficiary is not contrary to any express provision of this deed;
- (d) neither the Settlor, the Trustee for the time being nor any person whose appointment would result in infringement of any rule or law against perpetuities or vesting which may apply to the Trust may be appointed as an additional beneficiary; and
- (e) additional default beneficiaries are only appointed in accordance with the procedures for amending the terms of this deed as contained in clause 10.

### **3.3 Removal of beneficiaries**

- (a) A beneficiary, other than a default beneficiary, will cease to be a beneficiary.
  - (i) if by deed expressed to be irrevocable the beneficiary, not being a minor, unconditionally declares a determination to no longer be included as a beneficiary and serves a properly executed copy of such deed on the Trustee; or
  - (ii) where the Trustee with the consent of the Appointor by resolution or deed declares that a person or a class of persons is no longer to be included as a beneficiary and the deed or resolution is expressed to be irrevocable.
- (b) The provisions of clause 3.3(a)(ii) will be effective to exclude as a beneficiary a person under a legal disability, or more than one beneficiary, but will not be effective where the same would result in there being less than two natural persons as beneficiaries of the Trust.
- (c) A person who ceases to be a beneficiary will not thereby be excluded from subsequently being reappointed, or becoming a beneficiary.
- (d) Nothing in this sub-clause affects the rights of a person who has ceased to be a beneficiary to income or capital to which such person becomes entitled prior to such cessation.
- (e) A default beneficiary may only cease to be a beneficiary where a variation of this deed to such effect is made in accordance with clause 10 and where there will remain at least one default beneficiary.

### **3.4 No capital distribution to beneficiary who is sole director of the Trustee**

If the Trustee is a company having a sole director who is also one of the beneficiaries, no determination of the Trustee may be made distributing any capital to such beneficiary during the period the beneficiary is the sole director of the Trustee.

### **3.5 Exclusion of Foreign Beneficiaries**

Notwithstanding any other clause in this document, any person whose inclusion as a beneficiary of the Trust would result in the Trustee of the Trust being a foreign person or foreign purchaser under the legislation outlined in the following clause, is excluded as a beneficiary of the Trust.

This clause is irrevocable.

For clarity, the Trustee must not make a distribution or do any action which would cause the Trustee of the trust to be a:

- (a) Foreign person for the purposes of the following legislation:
  - (i) Duties Act 2001 (Qld);
  - (ii) Duties Act 1997 (NSW); or
  - (iii) Land Tax Act 1956 (NSW); or
- (b) Foreign purchaser for the purpose of the Duties Act 2000 (Vic); or  
The trustee of a foreign trust for the purposes of the Stamp Duties Act 1923 (SA).

## **Income**

### **4.1 Discretionary distribution**

The Trustee holds the income of a financial year which is available for distribution upon trust to pay, apply or set aside the income, or any part of the income, to or for the benefit of the beneficiaries, other than a default beneficiary who is not otherwise a beneficiary, or any one or more of them exclusive of the other or others who are living or which are in existence at the time payment, application or setting aside of such income is made in such shares or proportions and from such category of income as the Trustee may in its discretion determine. The Trustee may so distribute only income from the after all taxation has been paid and may be made with franking credits attached.

### **4.2 Accumulation**

- (a) The Trustee may before the end of a financial year resolve to accumulate the whole or a part of the income of that financial year whereupon such accumulation will subject to clause 4.2(c), form part of capital.
- (b) A resolution to accumulate may be in respect of the whole or a part of one or more categories of income.
- (c) The Trustee may pay tax in respect of an accumulation out of the accumulation or out of capital.

### **4.3 Default**

If the Trustee fails to effectively pay, apply or set aside the whole of the income of a financial year as provided

in clause 4.1 or to effectively resolve to accumulate the income as provided in clause 4.2, the Trustee must hold the income which has not been so paid, applied, set aside or on trust absolutely:

- (a) for the default beneficiaries named or described in clause 14.2(d)(i); and
- (b) if there are no such persons, for the default beneficiaries described in clause 14.2(d)(ii), as if the last day of the financial year were the termination date. The provisions of clause 14.2(d) with respect to the manner of distribution apply to this sub-clause.

#### **4.4 Manner of distribution**

The payment, application or setting aside of income of a financial year may be effectively made as follows:

- (a) for a beneficiary who is not under a legal disability:
  - (i) by paying the income to the beneficiary or to such person on behalf of the beneficiary as the beneficiary may authorise or direct; or
  - (ii) by setting the income aside to a separate account in the books of the Trust in the name of the beneficiary whereupon such moneys will constitute a loan at call and will not bear interest unless the Trustee and the beneficiary otherwise agree;
- (b) for a beneficiary who is a minor or otherwise under a legal disability:
  - (i) by paying the income to an account with a bank or permanent building society in the name of the beneficiary or in the name of a person, who may be the Trustee, operating such account on behalf of or in trust for the beneficiary;
  - (ii) by paying the income as the Trustee may decide to a parent or guardian of the beneficiary to be applied for the benefit of the beneficiary;
  - (iii) by paying the income as the Trustee may decide to any person to be applied directly for or towards the benefit of the beneficiary;
  - (iv) by setting aside income to a separate account in the books of the Trust in the name of the beneficiary on which interest will accrue at such rate (if any) as the Trustee may decide; or
  - (v) by paying the income to any person who by law is entitled to receive moneys on behalf of or to administer the property of the beneficiary;
- (c) payment may be made to a beneficiary, not being a natural person, notwithstanding that such beneficiary may have a liquidator, provisional liquidator, receiver, receiver and manager or administrator appointed to it or in respect of its asset;
- (d) the trustee may, unless otherwise precluded by law, pay from an account referred to in clause 4.4(b)(iv), or an account in the name of the Trustee under clause 4.4(b)(i), moneys which are to be applied for the maintenance education or advancement of the beneficiary for whom the account is held; and
- (e) the Trustee may effect a distribution of income to a beneficiary by one, or partly by one and partly by any other, of the methods of allocation provided in clause 4.4(a) or (b).

#### **4.5 Payment to a beneficiary under a legal disability**

Where the Trustee pays, applies or sets aside income to or for a beneficiary under a legal disability in accordance with this clause, whether made with or without the obtaining of a receipt:

- (a) such payment, application or setting aside constitutes a full discharge to the Trustee in relation to such distribution of income;
- (b) the Trustee is not bound to see to the application of such distribution of income; and
- (c) where moneys are invested, such investment discharges the Trustee in relation to such investment from the trusts of this deed other than such as are stated to expressly apply to such investment.

#### **4.6 Manner of payment to a beneficiary**

- (a) The payment application or setting aside of income to or for the benefit of a beneficiary may be by a determination or resolution of the Trustee and upon such determination or resolution being made the beneficiary will have an immediate vested indefeasible interest in and to that part of the income so paid, applied or set aside for the financial year to which the determination or resolution relates.
- (b) Any such determination or resolution may specify a category and the amount of income from that category to which a beneficiary is entitled, and income by reference to a specific sum or a percentage of the income or any category of income of a financial year.
- (c) The Trustee's determinations or resolutions previously provided in this clause are irrevocable and the income must be dealt with as required by such determination or resolution.

#### **4.7 Trust of applied income not affected by amendment of deed**

A trust declared or effective in respect of income paid, applied or set aside for a beneficiary is not affected by the subsequent exercise of any power of revocation or amendment of this deed.

#### **4.8 Tax**

Where the Trustee is required by law to pay tax:

- (a) in respect of income of a financial year allocated or distributed to a beneficiary or to any entitlement or benefit of a beneficiary out of the trust fund or moneys held by the Trustee on trust for the beneficiary pursuant to a provision of this deed, the Trustee may pay the tax out of income or capital to which the beneficiary is presently entitled or may deduct the tax out of moneys which may then or thereafter come into the hands of the Trustee or over which the Trustee has control and to which the

- beneficiary is or becomes entitled; and
- (b) in respect of an accumulation of income, it may pay the tax out of such income or from capital as it may decide.

## **Capital**

### **5.1 Distribution of capital**

Until the Trust is wound up, the Trustee holds capital for the beneficiaries as follows:

- (a) on or prior to the termination date the whole or any part of the capital, or of any category of capital, is held for such one or more of the beneficiaries to the exclusion of the others as are then living or in existence and if more than one in such shares or proportions as the Trustee in its discretion may at any time or times determine in the manner provided in this clause; and
- (b) on termination of the Trust, the capital available for distribution which has not been the subject of an effective determination of the Trustee pursuant to clause 5.1(a) must be held for the default beneficiaries named and in the manner described in clause 14.2(d).

### **5.2 Effect of determination**

A determination of the Trustee pursuant to clause 5.1(a) must be either:

- (a) an irrevocable written declaration, instrument or resolution of the Trustee; or
- (b) a written declaration, instrument or resolution of the Trustee made prior to the termination date and expressed to be revocable during a period which expires prior to the termination date. Such determination will become effective upon the expiration of the relevant period and the Trustee failing to revoke the determination. The period expressed in such revocable determination may be expressed as a fixed period by reference to the occurrence of an event or by reference to the life of a person or the last survivor of the joint lives or two or more persons.

### **5.3 Manner of distribution**

Capital to be distributed by way of a determination, or to a default beneficiary pursuant to the provisions of this clause, may be effected:

- (a) in any manner in which income is able to be paid, applied or set aside in accordance with the provisions of this deed; or
- (b) by the transfer in specie of any asset comprised in the trust fund at a valuation determined by or acceptable to the Trustee.

### **5.4 Effect of determination**

When a determination of the Trustee in favour of a beneficiary becomes irrevocable, the beneficiary will have an immediate vested indefeasible interest in the capital the subject of such determination. If such distributed capital continues to be held by the Trustee, the Trustee must hold it on a separate trust for the beneficiary.

### **5.5 No resulting trust**

A determination of the Trustee pursuant to this clause is not effective to the extent to which the determination creates a resulting trust:

- (a) in favour of the Settlor;
- (b) in favour of the Trustee; or
- (c) where the resulting trust would result in a liability arising at any time under any applicable law on account of death or estate duties or an imposition or tax arising by reference to the death of a person.

### **5.6 Tax**

Where the Trustee becomes liable to pay tax in respect of or arising out of a distribution of capital, it may deduct and pay the tax out of such distribution, and to the extent to which the distribution may be insufficient to fully discharge such liability, the Trustee may pay the tax from other moneys or property which may be in its possession or control as it may decide.

## **Categories of Income and Capital**

### **6.1 Categories of income and capital**

The Trustee may separately record the following categories of income or capital in the accounts of the Trust which under the Act:

- (a) are dividends:
  - (i) which are fully franked;
  - (ii) which are unfranked;
  - (iii) to which a foreign tax credit attaches; or
  - (iv) to which another separately identifiable taxation consequence or benefit may attach; and
- (b) is income or capital:
  - (i) which has an Australian source;
  - (ii) which has an ex-Australian source;
  - (iii) to which a foreign tax or other credit attaches;
  - (iv) which is exempt from tax or subject to differing rates of tax or tax treatment; or
  - (v) which has or gives rise to any other separately identifiable taxation consequence or benefit.

### **6.2 Other categories**

The Trustee may identify and separately record and maintain in the books of accounts of the Trust, income or

capital having, or in respect of which there is attached, individual or unique characteristics other than as referred to in the preceding sub-clause.

**6.3 Allocation of income or capital of a category**

A resolution or determination of the Trustee by which income of a financial year or capital is distributed or accumulated may at the direction of the Trustee separately deal with all or part of the income or capital of a category, so that all or part of that income or capital may be specifically or separately allocated and identified in a distribution to a beneficiary or in any accumulation.

**6.4 Allocation of expenses**

Expenses and outgoings of the Trust may at the discretion of the Trustee be allocated against and deducted from income or capital of any one or more categories.

**6.5 Effect of allocation on categories of income**

If the Trustee does not exercise its discretion as provided in the preceding sub-clause, outgoings and expenses of the trust fund for a financial year must be allocated firstly against and deducted from income which is not income of a category. To the extent to which that income is insufficient to absorb all expenses and outgoings, then the part which is not so absorbed must be allocated against any income of a category to which a tax credit, rebate or exemption does not attach and thereafter against the remaining income.

**6.6 Distributed income retains categorisation**

Income or capital to which a beneficiary becomes entitled and which can be identified as being of a category, retains its separate identity on passing to or being received by the beneficiary or when the beneficiary otherwise becomes entitled to it.

**Appointment and Removal of Trustee**

**7.1 Power of appointment**

The power to appoint a new trustee in place of the Trustee or in addition to and jointly with the Trustee and the power to remove the Trustee is subject to the following provisions of this clause vested in:

- (a) The person described in the Schedule to this Deed ("the Appointor") during his lifetime and
- (b) on and from the death of the Appointor in the person described in the Schedule to this Deed ('the default Appointor'); and
- (c) on and from the death of the survivor of the appointor and the default Appointor in such person as such survivor may by deed or will nominate; or
- (d) on and from the death of such survivor with no such nomination having been made or such nominee having died or ceased to be in existence or unwilling to act as Appointor, in the Trustee for the time being.

**7.2 Relinquishment of powers of appointment**

The power and authority vested in the Appointor by this clause may at any time be relinquished by notice in writing given to the Trustee in which event the Appointor, upon giving such notice, will cease to act as such and the following provisions will apply:

- (a) subject to clause 7.2(b), where there are joint Appointors, the survivor or survivors as the case may be will so act; or
- (b) the Appointor or the default Appointor who holds office as Appointor and wishes to relinquish such power may by written instrument on or prior to such relinquishment appoint another in his or her place and such appointee will be the Appointor or a joint Appointor during the lifetime of the Appointor giving notice or until the appointee relinquishes such power of appointment, and an appointee upon being so appointed may exercise the power given to his or her appointor under this deed.

**7.3 Residual power of appointment**

If at any time no person has the power to appoint a new trustee or an additional trustee, the power is vested in the Trustee for the time being of the Trust.

**7.4 Trust fund vests in new trustee**

Where a trustee or an additional trustee is appointed pursuant to the power of appointment contained in this clause, the trust fund at that time vests in the person, or jointly in the persons, who thereupon becomes the trustee without the necessity for any vesting, declaration, transfer, conveyance or other assurance.

**7.5 Restrictions of power of appointment**

The power to appoint a new trustee contained in this clause must not be exercised in favour of:

- (a) the Settlor;
- (b) a person who is solely entitled to exercise the power of appointment for the time being; or
- (c) a person who settles property or moneys on the Trust by gifting moneys or property to the Trustee to be held as an accretion to the trust fund.

Where the new trustee is a corporation having a sole director, sole shareholder or both who is a person described in clause 7.5(a), (b) or (c), this clause 7.5 does not operate to restrict the appointment of such company as the new trustee but clause 3.4 may apply.

**7.6 Manner of exercise of power of appointment**

- (a) The power to appoint or remove a trustee may be exercised by memorandum under hand or by deed, and where the Trustee is a corporation must be approved by resolution of its directors.
- (b) Nothing in this deed is to be taken as limiting the right to appoint a corporation or a resident of a place outside Victoria or Australia as trustee.

**7.7 Appointor under a legal disability**

If the Appointor becomes subject to a legal disability, including being declared bankrupt or an order being made for the sequestration of the estate of the Appointor, then from the time of such disability and during the continuance of such disability, the power of appointment and removal vested in the Appointor will vest in the default Appointor. If the default Appointor is not then living, such power will vest in the Trustee. Upon the Appointor ceasing to be subject to a disability including a sequestration order ceasing to have effect, then such power of appointment and removal will then cease and revert in the Appointor.

**7.8 Default Appointor under a legal disability**

If the default Appointor becomes entitled to exercise such power of appointment and removal and during such time becomes subject to a legal disability, including being declared bankrupt or an order being made for the sequestration of the estate of the default Appointor, then from such time the power of appointment and removal vested in the default Appointor will vest in the Trustee. Upon the default Appointor ceasing to be subject to the legal disability including the sequestration order ceasing to have effect, the power of appointment and removal will then cease and revert in the default Appointor.

**7.9 Appointment of one or more trustees**

The place of the Trustee who retires, resigns or is removed may be filled by a sole appointment or the appointment of more than one new trustees.

**7.10 Transfer of records and property**

Upon the resignation, retirement or removal of the Trustee, the Trustee (if a company by its responsible officer) must promptly, at the expense of the Trust (where such expense is necessary and properly incurred):

- (a) hand to the new trustee all books, records, documents and other property of or pertaining to the Trust;
- (b) do all things necessary to transfer the legal title in the assets of the trust fund to the new trustee;
- (c) sign such authorities and give such direction as the new trustee sees necessary or desirable to give possession or control of such trust property as may be in the hands of third parties; and
- (d) give such assistance as the new trustee may reasonably require to put the new trustee into full knowledge of the affairs of the Trust.

**Provisions Relating to Trustee**

**8.1 No distribution to the Settlor or the Trustee**

- (a) Income or capital, other than remuneration permitted under clause 8.2, may not be paid or transferred beneficially to or applied for the benefit of:
  - (i) the Settlor; or
  - (ii) the Trustee;
- (b) No discretion or power conferred by this deed may be exercised and no provision of this deed operates so as to confer any direct or indirect benefit in the trust fund to the Settlor or to a trustee.
- (c) Where the Trustee is a company having a sole shareholder who is a beneficiary, the Trustee is not taken to be in breach of clause 8.1(a) by paying or transferring income or capital to, or by applying income or capital for the benefit of, such sole shareholder. If the sole shareholder is also the sole director of the Trustee, clause 3.4 will apply.

**8.2 Remuneration**

- (a) The Trustee may be paid out of the income or capital remuneration for the Trustee's services by way of periodical fee, commission or otherwise as does not exceed fees charged by the Public Trustee of Victoria (or any person succeeding to or substantially taking over the functions of the same) in acting as trustee of an inter vivos trust if it were to carry out or perform duties similar to those performed by the Trustee.
- (b) The Trustee may pay all costs, charges and expenses of administering the trust fund out of the trust fund whether from the capital or income as the Trustee may determine. If the trustee is an accountant, solicitor or other person engaged in a profession, shall in addition to any entitlement under clause 8.2(a) the Trustee may charge and be paid all usual professional charges for business transacted, or time expended or actions of the Trustee or any employee or partner of the Trustee in connection with the trusts of this deed including any action which the Trustee not being in a profession could have done personally.

### **8.3 Limitation of liability**

The Trustee is not liable or answerable or accountable under this deed or in respect of the Trust for any loss other than a loss attributable to:

- (a) dishonesty of the Trustee; or
- (b) the wilful commission of an act known by the Trustee to be a breach of trust.

### **8.4 Indemnity**

The Trustee shall be entitled to be indemnified out of the assets for the time being comprising the Trust Fund or any Allocated Fund against liabilities incurred by the Trustee in the execution or attempted execution or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of which the Trustee hereof may incur liabilities but shall have no recourse against any of the beneficiaries to meet such indemnity and shall have no right whatsoever to be indemnified by any beneficiary against any liability whatsoever (notwithstanding that the beneficiary may have requested the Trustee to incur the same or may have consented to the Trustee incurring the same) unless the beneficiary agrees in writing to give such indemnity.

### **8.5 Exercise of Powers and discretions**

In the exercise of its powers and discretions, no Trustee shall be responsible for -

- (a) any loss or damage occasioned by the exercise of any discretion or power hereby or by law conferred on the Trustee or by failure to exercise such discretion or power; or
- (b) any breach of duty or trust whatsoever unless it shall be proved to have been committed made or omitted in personal conscious fraudulent bad faith by the Trustee charged to be so liable.

All persons claiming any beneficial interest in or over the property subject to this Deed shall be deemed to take with notice of and subject to the protection hereby conferred on the Trustee.

### **8.6 Professional Advice**

Any Trustee may obtain and consider the advice of someone who is experienced and knowledgeable in any discipline, where appropriate but is not bound to do so.

### **8.7 Manager**

The Trustee shall not be bound in any case to act itself but shall be at full liberty to engage or employ any contractors managers solicitors accountants clerks workers servants or agents to do any act or to transact any business of whatever nature required to be done in the premises including the receipt and payment of money notwithstanding that the Trustee could have done such act or transacted such business and to remunerate such persons for their services.

### **8.8 Vacation of office**

Any Trustee (not being the only Trustee) may resign his, her or its office by notice in writing given to the other Trustees and such resignation shall take effect upon such notice being given.

## **Custodian Trustee**

### **9.1 Nominee**

The Trustee may nominate any person or persons to act on his/her/its/their behalf and to hold documents or to carry out specific tasks on behalf of the Trustee.

### **9.2 Deposit of documents of title**

The Trustee may deposit the documents of title to property or securities for the time being subject to the Trust with a solicitor, accountant, bank, trust company, investment or stock broker or like institution in any part of the world in which any of the trust fund is invested or situated, and the Trustee shall not be liable or responsible for any loss not caused by its own fault which may in any manner occur in relation to or by reason of such loss.

## **Variation of Trust**

### **10.1 Variation of trust deed**

Subject to the provisions of clause 10.2, at any time prior to the termination date the Trustee may with the written consent of the Appointor (if any) by deed alter, vary or revoke any trust or provision of this deed other than this clause, clause 7 and clause 8.1.

### **10.2 Restriction on variation**

An alteration, variation or revocation pursuant to clause 10.1 must not:

- (a) divert or modify a vested interest of a beneficiary in income or capital or the investments representing the same or income derived from any such investment to which such beneficiary has become absolutely entitled pursuant to this deed; or
- (b) infringe any applicable law or rule against perpetuities or relating to remoteness of vesting or the period during which income may be accumulated or otherwise extend the termination date or result in any provision of the Trust becoming void.

## **Accounts**

### **11.1 Preparation of financial accounts**

In each financial year the Trustee must cause financial statements, including a profit and loss account and balance sheet as at the end of each financial year, to be prepared by a qualified chartered or public accountant authorised to practise in the place where the financial affairs of the Trust are in the main conducted, certified by such accountant to be a true and proper statement of the affairs of the trust fund setting out all: (a) income;

- (b) capital;
- (c) costs and disbursements and other outgoings paid or payable out of the trust fund and chargeable against income;
- (d) capital expenditure and liabilities chargeable to capital;
- (e) investments and money comprised in the trust fund;

- (f) amounts distributed by the Trustee to each beneficiary; find
- (g) to the extent to which the Trustee may require, the separate recording of any category of income or capital.

#### **11.2 Financial records**

The Trustee must:

- (a) establish and maintain proper accounts in book or computer form which must accurately record all receipts and outgoings in relation to the trust fund; and
- (b) separately record income and capital of different categories as are provided by this deed as the Trustee may decide.

#### **11.3 Provision of financial statements**

The Trustee must at the request of the Appointor supply to the Appointor:

- (a) a copy, or in the case of computer recording a hard copy, of such financial statements certified as provided in clause 11(1); and
- (b) such information and explanations as the Appointor may require.

#### **11.4 Trustee may audit accounts**

The Appointor may by notice in writing to the Trustee given at any time, require the financial statements of the Trust to be audited by an auditor nominated by the Trustee and approved by the Appointor. The costs of such auditor are to be paid out of the trust fund. If the Trustee fails to nominate an auditor within 14 days of the giving of a notice, or fails within 28 days of the giving of such notice to nominate an auditor who is approved by the Appointor, the Appointor may at any time thereafter appoint an auditor who will continue to hold such office until removed by the Trustee with the Appointor's consent.

### **Investment of Trust Fund**

#### **12.1 Power to invest and vary investments**

The Trustee may invest the trust fund in any form of investment and vary an investment at any time.

#### **12.2 Diminishing the duty of care**

If the Trustee is not a public company or a subsidiary of a public company, there is no obligation on the Trustee in exercising a power of investment to exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

#### **12.3 Review of investment performance**

The Trustee may, but is not required to, review at any time or at fixed intervals the performance (individually or as a whole) of the Trust investments.

#### **12.4 Broadening of investment power**

The Trustee may exercise the power to invest the trust fund or vary an investment without the need to comply with any rule and principle of law or equity including:

- (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries;
- (b) a duty to invest the trust fund in investments which are not speculative, hazardous or involving waste; and
- (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries. For the purposes of this and the next sub-clause, the expressions 'vary an investment' and 'varying an investment' includes realising an investment or a change to a term or condition of an investment.

#### **12.5 Investment advice**

In exercising the power of investment, the Trustee may, but is not required to, having regard to the size and nature of the Trust, do either or both of the following:

- (a) obtain and consider independent and impartial advice for the investment of the trust fund, varying an investment or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and
- (b) pay out of the trust fund the reasonable costs of obtaining the advice.

### **Powers**

#### **13.1 General powers**

In the administration of the Trust and in the exercise of the powers, authorities and discretions conferred by this deed or by law, the Trustee has the following powers which are in addition to the powers, authorities and discretions vested in it by any other provision of this deed or by law and which do not limit the powers, authorities and discretions otherwise vested in the Trustee by this deed or by law:

- (a) *Generally deal with trust fund:* to sell, call in, convert into money, grant options or rights to purchase, mortgage, charge, sub-charge, or otherwise deal with, dispose of or transfer any item or asset comprising the whole or part of the trust fund or otherwise held by the Trustee under the terms of the Trust for such consideration and on such terms as in its discretion it may think fit as if it were the absolute and beneficial owner of the trust fund;

- (b) *Real property*: to acquire, dispose of, exchange, mortgage, sub-mortgage, lease, sub-lease, let, grant, release or vary any right or easement or otherwise deal with real property or any estate or interest in real property;
- (c) *Personal property*: to acquire, dispose of, exchange, hire, lease, let, mortgage or otherwise deal with personal property of any kind;
- (d) *Lease*: to rent premises from any person, acquire the interest of any lessee in any lease, purchase, hire, take on lease, grant leases, sub-leases, tenancies or rights of any nature in and to any realty or estate or interest in land or in and to motor vehicles, computer hardware and software, fixtures and fittings, furniture, utensils, plant and equipment and personalty of any other description;
- (e) *To let*: to lease and let property forming part of the trust fund for such period, at a rental and to persons and upon such terms as the Trustee may decide and to accept surrenders from, make allowances to and arrangements with, a tenant with or without consideration as the Trustee may think fit;
- (f) *Employment*: to engage or employ persons, including, a person having an interest in or who is the holder of an office in the Trustee, or obtain such other assistance as the trustee may deem requisite, to provide staff, amenities and to vary and terminate any contract of employment;
- (g) *Engage experts*: to employ or engage agents or professionals in the execution of these trusts and powers and instead of acting personally from time to time, to employ or engage and pay out of the trust fund such managers, agents, advisers, solicitors, barristers, auditors, accountants, brokers, surveyors, valuers or other persons to transact any business or to do any act required to be done in connection with the administration of the trusts and to act upon the opinion or advice of any such person without being responsible for loss or damage occasioned in so acting;
- (h) *Power to lend*: to lend moneys forming part of the trust fund, or give credit to any person or company on such terms as the Trustee may decide, in particular without limiting the generality of the foregoing, to a beneficiary, or person having an interest in or the holder of an office in the Trustee and any such lending or giving of credit may be made at call or for a period of time and may be made at a rate of interest or at no interest, and may involve taking of security in any form or without security;
- (i) *Power to borrow*: to raise or borrow moneys either alone or jointly with another or others, from any person including a firm or company, either bearing or free of interest and on terms and conditions and for purposes as the Trustee may decide, and to secure the repayment of any moneys or other indebtedness by mortgage, charge or other security or encumbrance over the whole or part of the trust fund as the Trustee may decide or to have the repayment secured over property of a third party which may include property of the Trustee or a beneficiary, whether such third party collateral security is given alone or jointly with property of the trust fund and no lender is required to inquire as to whether the necessity for any such borrowing has arisen or as to the purpose for which it is required, or as to the application of moneys borrowed;
- (j) *Commercial bills*: to draw, endorse, accept, guarantee or be a party in any way to a commercial bill or other bill of exchange, promissory note, letter of credit, hypothecation or other facility involving the raising, borrowing or lending of moneys by or to the Trustee;
- (k) *Credit*: to enter into alone or with others any agreement or arrangement for obtaining credit upon such terms as the Trustee may see fit including but not limited to obtaining, upon deferred terms as to payment, goods, trading stock or other property or services of any nature;
- (l) *Attorney*: to appointment any person as the representative or attorney of the Trustee for the purpose of executing any document which the Trustee is permitted or authorised to execute by this deed or by law and to revoke any such appointment;
- (m) *Service entity*: to act as a service entity in providing office supplies and services, including professional or other employees, office furniture and equipment of all types, stationery, telephone and electricity services, management, administration and consultancy services and anything incidental to them;
- (n) *Bank accounts*: to open in the name of the Trustee or in the name of a person or corporation as nominee of the Trustee or in the joint names of the Trustee and another, any cheque, savings deposit or other account with any bank or financial institution wherever situated with full power to operate on any such account including, without limitation, power to sign, draw and endorse cheques and other negotiable or transferable instruments on the account and to close the account;
- (o) *Management expenses*: to pay out of income or capital all costs, charges and expenses incidental to the management of the trust fund or to the exercise of any permitted power, authority or discretion or in carrying out or performing the trusts of this deed;
- (p) *Pay general expenses*: to pay insurance premiums, rates, taxes, rents and outgoings in connection with real or personal property of the trust fund and to manage such property and effect repairs as the Trustee may consider necessary or advisable and where the Trustee is unable to charge such expenditure against income it is at liberty to resort to capital;
- (q) *Corporate securities*: with respect to any company in which the Trustee holds shares, debentures, options, convertible notes or other security ('securities') to exercise the following powers in addition to powers conferred by law:
  - (i) to pay calls on securities or permit securities to be forfeited and sold;
  - (ii) to purchase securities and take up securities of a new issue;

- (iii) to attend meetings personally or by proxy, attorney or representative and vote at the discretion of the Trustee;
- (iv) to sell securities at a price and upon terms as the trustee may decide;
- (v) to assent to or join in any arrangement relating to the sale, transfer or exchange of any securities or modifying any rights, privileges or interests in relation to securities, to agree to any scheme or arrangement for the increase or reduction of the value or amounts of any securities or of the capital of any company in which any securities form part of or the trust fund or by which any securities are substituted or given in exchange, either wholly or partly for other securities, whether in the same company or not, and for any such purpose to deposit, surrender or exchange any scrip or documents of title relating to the securities and to pay out of capital or income any contribution or incur any expense in connection with such scheme or arrangement and generally to manage and deal with any securities as if the Trustee owned them beneficially; and
- (vi) to agree in respect of a winding up with the liquidator of the company or any member or creditor of the company, or in a voluntary administration, as the Trustee thinks fit;
- (r) *Unit trust interests:* to acquire units or sub-units of any fixed or flexible unit trust either by way of application, purchase or by way of settlement by the Trustee in the establishment of such unit trust and to exercise all rights including voting rights and perform all obligations as a holder of any units in such trust and to accept all distributions by the trustee of such unit trust as income or capital and as unit holder the Trustee may in its absolute discretion consent to a breach of trust by the trustee of the unit trust or give its consent to, or waive its rights with respect to, any action taken or to be taken by the trustee of the unit trust and the Trustee may so act even if the Trustee's actions may not be in the interests of the Trust or the unit trust;
- (s) *Franchises:* to acquire by means of purchase or otherwise and to sell, dispose, relinquish or otherwise deal in franchises, franchises, agreements, licences or things of like nature relating to subject matters of all kinds;
- (t) *Subdivision of property:* to partition or subdivide property of any kind which, or any interest in which, may for the time being be subject to these trusts and to pay moneys by way of equality or partition;
- (u) *Development of property:* to enter into any agreement with any person with respect to the development and turning to account of any real or personal property or any interest in property and any other right, privilege or interest for the time being subject to these trusts or with respect to the construction of any buildings, laying out or preparing land for building purposes or in developing or turning to account real or personal property or any rights, privileges or interests;
- (v) *Promotion of companies:* to establish, promote or acquire any company or join in the promotion or establishment of any company and to do anything which a person, not being a trustee, is authorised or empowered to do under any law relating to or governing any such company;
- (w) *Maintain property:* to maintain and preserve in good and substantial order and condition real or personal property of the trust fund or otherwise held by the Trustee under the terms of this deed and to pay or defray those costs;
- (x) *Guarantees and indemnities:* power, whether with or without security and whether alone or jointly or severally or both jointly and severally with any other person, to guarantee, indemnify, secure by way of mortgage, charge or otherwise over the whole or part of the trust fund or undertake in any way the payment or repayment of money or debts (including any interest whether existing or to accrue) previously or then lent or to be advanced or any existing or future duties, undertakings, liabilities or obligations incurred or which may at any future time be incurred by any person whether a beneficiary or not and to guarantee, indemnify or secure, with or without security, the due performance of any contract, agreement, covenant or obligation of any person whether a beneficiary or not;
- (y) *Power to set aside:* to set aside out of income or capital from time to time such money as may in the opinion of the Trustee be sufficient to meet any debt or obligation due or accruing;
- (z) *Superannuation and bonuses:* to pay bonuses, gratuities or retirement benefits or to establish and support or aid in the establishment and support of schemes providing superannuation, death and retirement benefits or any one or more of such benefits in respect of employees of ex-employees of the Trustee including in the case of a corporate trustee directors or other holders of any office of the Trustee and the dependants of any of such persons and for the benefit of employees, ex-employees and their dependants of any company or person associated with the Trustee;
- (aa) *Futures contracts and options:* to engage brokers and commission agents and vary and determine the terms of any such engagement and either directly or through any broker or agent in any market in any part of the world to buy, sell, open, close-out or otherwise deal in futures contracts of all kinds and to enter into, vary, exercise, abandon or sell any put or call option or rights, or to place bids, make offers, hedge and effect orders including buying, selling, straddle, switch and stop-loss orders to tender and take delivery of commodities and currencies which are the subject of any futures contract or option and otherwise to do and perform all things so as to operate, utilise or deal with the facilities of any stock or futures exchange;
- (bb) *To mix funds:* to mix the trust fund including its income and any other moneys held from time to time by the Trustee pursuant to these trusts with other moneys held by the Trustee pursuant to any provision of this deed or under any other trust and;

- (i) to invest the moneys so mixed in any investment, property, interest, arrangement or business or in any other mode or manner in which the Trustee may by law or by this deed be empowered to invest the trust fund;
  - (ii) to exercise all powers, authorities and discretions with respect to the mixed fund which the Trustee is by this deed or by law authorised to exercise with respect to the trust fund; and
  - (iii) to make such arrangements with respect to the moneys and their investment with any other person as the Trustee would be authorised or empowered by law or by this deed to make or enter into;
- (cc) *Trustee's power to deal with itself:* notwithstanding any rule of law to the contrary, to acquire as property of the trust fund real or personal property the beneficial interest in which is at the date of such acquisition the absolute property of the Trustee provided that any property so acquired is acquired for a consideration being not greater than the current market value of the property and upon such acquisition the beneficial interest in and to the property will be held by the Trustee upon the trusts contained in this deed;
- (dd) *Policies:* to effect or acquire policies of life assurance of any kind on the life of any person or in respect of sickness, disability or accident to any person and to pay premiums, transfer, surrender, change the situs of and deal with such policies in any manner, whether or not such policies are individual policies on the life of one person or a group policy on the lives of two or more persons, and to purchase or enter into insurance or investment bonds whether or not the bonds are linked to a policy over the life of any person;
- (ee) *Determination between capital and income:* to determine whether real or personal property, or any increase or decrease in value of any property, or any receipts or payments from, for or in connection with real or personal property, is to be treated as and credited or debited to capital or to income of the trust fund and generally to determine all matters as to which any doubt may arise in relation to the execution of the Trust and powers of the Trust and every determination of the Trustee in relation to any of these matters whether upon a question formally or actually raised or implied in any of the acts or proceedings of the Trustee in relation to the trust fund, binds all interested parties and may not be objected to on any ground;
- (ff) *Partnerships and joint ventures:* to enter into partnership or joint venture with any person on such terms as the Trustee thinks fit and to vary the terms of or terminate and be a party to the partition of assets of any such partnership or joint venture;
- (gg) *To permit beneficiary to use trust property:* to permit a beneficiary to reside in any house, flat, strata title lot or other residential unit or to use any personal property which, or the proceeds of sale of which, may for the time being be subject to the Trust with or without consideration and generally upon such terms as the Trustee in its discretion thinks fit;
- (hh) *Agency and licence:* to apply for, purchase or hold any permit, agency or licence which may be desirable or required to enable or facilitate the carrying on of any business or venture which the Trustee is empowered to engage in and to surrender, relinquish, sell, vary or assign the same;
- (ii) *Choses-in-action:* to acquire choses-in-action, including debts and obligations of all kinds, for value or by way of gift or at a discount or at a premium and to assign, release, vary, relinquish or otherwise deal with such choses-in-action in any way on such terms and conditions as the Trustee may see fit;
- (jj) *Advertise:* to adopt such means of making known and advertising any business which the Trustee is empowered to carry on or in pursuing any power as may seem expedient or desirable;
- (kk) *Make gifts and donations:* to make gifts or donations out of the trust fund for any charitable, scientific or educational purpose;
- (ll) *Receive gifts:* to receive property by gift inter vivos or by will or under the provisions of any other trust or otherwise from any person as an addition to the trust fund and whether subject to liabilities or not and to hold the same upon these trusts and to administer such additions as part of the trust fund;
- (mm) *Legal proceedings:* to institute, join in and defend proceedings at law or by way of mediation or arbitration and to proceed to the final end and determination and to compromise and settle any such dispute or proceedings for such consideration and upon such terms and conditions as the Trustee may decide;
- (nn) *Intellectual property rights:* to apply for, purchase or otherwise acquire and to sell patents, patent rights, copyrights, trade marks, designs, formulas, licences, concessions, know-how and the like conferring any exclusive or non-exclusive or limited right to use or any other intellectual property rights and to use, exercise, develop or grant licences in respect of or otherwise turn to account property rights or information so acquired;
- (oo) *Power to appropriate trust fund in specie:* to appropriate in specie any portion of the trust fund, or any investment to or towards the share or entitlement of a beneficiary and to charge any such share or entitlement with such sum of money by way of equality as the Trustee may think fit and for these purposes the Trustee may fix the value of any real or personal property forming part of the trust fund and every such appropriation, charge and valuation is binding on all persons who may at any time be entitled to any interest in the trust fund;

- (pp) *Release of powers:* by irrevocable deed to renounce and release any power conferred on the Trustee under the Trust in respect of the whole or part of the trust fund or the income and upon such renunciation and release coming into effect, such power is to be taken to be at an end and no longer exercisable by the Trustee to the extent of such renunciation and release;
- (qq) *Incidental powers:* to do all other things as may be incidental to the exercise of the powers, rights, discretions and authorities conferred on the Trustee by this deed; and
- (rr) *Carry on business:* from time to time to carry on alone or jointly with another or others any business or an interest in any business and use the trust fund in carrying on such business as the Trustee may decide with power to charge against or pay or retain out of the trust fund all debts, costs, expenses and other outgoings incurred in carrying on such business or for the purpose of carrying it on or for the purpose of establishing a proposed business and without limitation the Trustee has the following powers:
- (i) to investigate and determine the feasibility or desirability of establishing or carrying on or acquiring any business or an interest in any business which the Trustee proposes or considers establishing or carrying on or acquiring and the Trustee is entitled to incur expenses in or in connection with any investigation and determination and to pay or recoup such expenses out of income or capital whether or not pursuant to that investigation and determination the Trustee proceeds to establish or carry on that business;
  - (ii) to establish any business;
  - (iii) to acquire the whole or part of the goodwill of an existing business;
  - (iv) to acquire the assets, or an interest in the assets, of or used in any business;
  - (v) to undertake to meet liabilities or contingent liabilities incurred or to be incurred by any person in or about the establishment or carrying on or acquisition of the whole or part of an existing business the goodwill and assets of which or any of which are proposed to be acquired by the Trustee and to give indemnities for or enter into guarantees of such liabilities and contingent liabilities or any of them;
  - (vi) to acquire, or join in acquiring, chattels and stock in trade for use in, or in connection with, any business carried on or proposed to be carried on by the Trustee or in which the Trustee may acquire an interest;
  - (vii) to make payments or incur expenses or liabilities (including donations) which the Trustee considers to be for the benefit of any business carried on by or proposed to be carried on by the Trustee or in which the Trustee may have an interest or which the Trustee considers will promote or facilitate such business notwithstanding that the Trustee may be under no legal or enforceable obligation to make such payments or incur such expenses or liabilities and notwithstanding that such payments or the incurring of such expenses or liabilities do not produce any direct benefit to the trust fund;
  - (viii) to sell the good will of any business;
  - (ix) to enter into any covenant or agreement in restraint of trade;
  - (x) to enter into contracts for importing or exporting goods and to enter into contracts for the shipping or other transportation of goods; and
  - (xi) to carry on any business in the same manner and with the same powers and rights as the Trustee would have in relation to the business as if it were carrying it on in its own right and not as trustee and in carrying on such business:
    - (A) the Trustee may transfer title to any property which it holds as trustee, with or without consideration, notwithstanding any limitation on such power which might otherwise by operation of law or under any other provision of this deed prevent such title being effectually or validly transferred by reason of it being a trustee or the transferee having notice that it is a trustee;
    - (B) any person dealing with the Trustee may contract with and make payments to the Trustee without being required to inquire as to whether the Trustee has power to deal with them under this deed or whether the trustee is properly exercising any power it may have in so dealing and such person is not obliged to inquire as to the proper application by the Trustee of any payment so made or is accountable for the non-application of such money notwithstanding that such person was on notice that the Trustee was carrying on such business as a trustee;
    - (C) the title of any person to whom property is transferred by the Trustee, whether with or without consideration, is not affected by any notice that the Trustee held title to such property as a trustee and the receipt of the Trustee is an absolute discharge for any payment made to the Trustee.

### 13.2 Power to act as a director

The Trustee, being a natural person, may become a director of any company in which any moneys forming part of the trust fund are from time to time invested and may receive the remuneration attached to such office without being liable to account.

### **13.3 Power to act notwithstanding personal interest**

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

## **Winding up of Trust**

### **14.1 Termination date**

The Trust must wind up and terminate on the first to occur of:

- (a) the date which the Trustee with the written consent of the Appointor determines; or
- (b) on the date described in the Schedule to this Deed

### **14.2 Procedure on termination**

Subject to any provision of this deed which limits or restricts distributions of capital, the Trustee must at the termination date:

- (a) pay out or otherwise discharge and satisfy all debts and liabilities in relation to the Trust;
- (b) distribute or otherwise deal with the income in any manner expressly provided by this deed and any income not so dealt with will form part of capital;
- (c) distribute or otherwise deal with capital in any manner expressly provided in clause 5; and
- (d) hold the remainder of the trust fund on trust for the following default beneficiaries:
  - (i) such of the persons described in the Schedule to this Deed as are living on the termination date and if more than one in equal shares as tenants in common and if a default beneficiary dies before the termination date leaving issue living on that date:
    - (A) such issue will take equally among themselves the share to which their parent would otherwise have been entitled had that parent been living on the termination date; and
    - (B) such issue are not to be taken to be, or be capable of becoming, a default beneficiary until the death of the parent of that person and unless at the time such issue is a beneficiary by reason of clause 13.1; and
  - (ii) if the whole or any part of the trust fund fails to so vest in any one or more of such default beneficiaries set out in clause 14.2(d)(i), for such of the bodies described in the Schedule to this Deed ("the charitable objects") as are in existence on the termination date and if more than one in equal shares. The receipt of the treasurer, secretary or other officer of the administrative body of such charitable object is a sufficient discharge to the Trustee.

### **14.3 Distribution in specie**

On the winding up of the Trust, the Trustee may distribute property comprised in the trust fund in specie in satisfaction of a part of the trust fund to which a beneficiary is entitled.

- 14.4. On the winding up of the Trust, the Trustee must cause to be prepared financial statements as at the termination date which must comply with the provisions of clause 11 and if at that time there is an Appointor, it must make available to the Appointor a signed and certified copy of the financial statements in printed form which must include particulars of all distributions of capital. If there is no Appointor, the Trustee must supply a copy of all such statements and particulars to each beneficiary entitled to receipt of income or capital on the winding up.

## **Resettlement**

### **15.1 Resettlement**

- (a) Subject to clause 15.2, the Trustee may with the written consent of the Appointor (if any) pay, or transfer with or without consideration, the whole or part of the trust fund to a trustee ('the new trustee') for the time being of another trust ('the new trust') constituted under the laws of any state or territory of Australia, or any country, other than Australia, and whether or not such new trust is in existence at the date of this deed, provided that:
  - (i) any one or more of the beneficiaries of the Trust has an interest in the capital or income of the new trust or a right as a discretionary object similar to any right which a beneficiary may have under this Trust; and
  - (ii) no income or capital, other than remuneration permitted under clause 8.1, is paid, transferred beneficially to, or applied for the benefit of, the Settlor or the Trustee.
- (b) Upon such payment or transfer to the new trust, the moneys or property so paid or transferred will be held by the new trustee freed and discharged from the trusts of this deed and on the terms of such new trust as an addition to the property comprised in the new trust whether or not the new trustee or any one of them is resident outside the jurisdiction of the courts of Victoria or Australia and whether

or not the proper law of such new trust is the law of any other State or Territory or country and without the Trustee being bound to see to the application of such moneys.

- (c) Any such resettlement will bind all persons who are bound under this deed. Where the Trustee is also the new Trustee it may at any time declare that it holds the trust fund or a part of the trust fund as trustee of the new trust whereupon the trust fund or such part of the trust fund is to be taken to have been paid or transferred to it as new trustee and held on the terms of the new trust and will take effect accordingly.

**15.2 Restriction on resettlement**

No resettlement pursuant to clause 15.1 may:

- (a) divert or modify a vested interest of a beneficiary in income or capital or the investments representing the same or income derived from any such investment to which such beneficiary has become absolutely entitled pursuant to this deed; or
- (b) infringe any applicable law or rule against perpetuities or relating to remoteness of vesting or the period during which income may be accumulated or otherwise extend the termination date or result in any provision of the Trust becoming void.

## Schedule

<b>Date of this deed</b>	25 September 2015
<b>The name of the trust</b>	Company123 Family Trust
<b>The settlor</b>	Jane Smith
<b>The address of the settlor</b>	1 Flinder Street, Melbourne, VIC, 3000
<b>The names and addresses of the trustees</b>	John Johnson, 2B Mercer Rd, Armadale, 3143
<b>The named beneficiaries</b>	John Johnson, 2B Mercer Rd, Armadale, 3143 Jane Johnson, 2B Mercer Rd, Armadale, 3143
<b>The appointors</b>	
<b>The law of the jurisdiction that governs this deed</b>	New South Wales
<b>The settled sum</b>	\$777.00
<b>Termination Date:</b>	The 80th anniversary of the day before the date of this Trust

## Execution

Executed as a deed.

Dated: \_\_\_\_\_

Signed, sealed and delivered  
by:

Signature: \_\_\_\_\_  
John Johnson, trustee of the trust created by  
this deed

Witness signature: \_\_\_\_\_

Witness name: \_\_\_\_\_

Signature: \_\_\_\_\_  
Jane Smith  
Settlor of the trust created by this deed

Witness signature: \_\_\_\_\_

Witness name: \_\_\_\_\_

## PRUDENT PERSON PROVISIONS

Trustee Act 1958  
Act No. 6401/1958

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5. A trustee may, unless expressly prohibited by the instrument creating the trust-
- (a) invest trust funds in any form of investment; and
  - (b) at any time, vary an investment.
6. **Duties of trustee in respect of power of investment**
- (1) Subject to the instrument creating the trust, a trustee must, in exercising a power of investment-
    - (a) if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
    - (b) if the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.
  - (2) A trustee must exercise a power of investment in accordance with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of any consent or approval with respect to trust investments.
  - (3) Subject to the instrument creating the trust, a trustee must, at least once in each year, review the performance (individually and as a whole) of trust investments.
7. **Law and equity preserved**
- (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment continue to apply except to the extent that they are inconsistent with this or any other Act or the instrument creating the trust.
  - (2) Without limiting the generality of sub-section (1), a duty imposed by any rules and principles of law or equity includes-
    - (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
    - (b) a duty to invest trust funds in investments that are not speculative;
    - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries;
    - (d) a duty to take advice.
  - (3) Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.
  - (4) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice are payable out of trust funds.
8. **Matters to which trustee must have regard in exercising power of investment**
- (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to-
    - (a) the purposes of the trust and the needs and circumstances of the beneficiaries; and
    - (b) the desirability of diversifying trust investments; and
    - (c) the nature of and risk associated with existing trust investments and other trust property; and
    - (d) the need to maintain the real value of the capital or income of the trust; and
    - (e) the risk of capital or income loss or depreciation; and
    - (f) the potential for capital appreciation; and
    - (g) the likely income return and the timing of income return; and
    - (h) the length of the term of the proposed investment; and
    - (i) the probable duration of the trust; and
    - (j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; and
    - (k) the aggregate value of the trust estate; and (1) the effect of the proposed investment in relation to the tax liability of the trust; and
    - (m) the likelihood of inflation affecting the value of the proposed investment or other trust property; and
    - (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and
    - (o) the results of a review of existing trust investments.
  - (2) A trustee may-
    - (a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and
    - (b) pay out of trust funds the reasonable costs of obtaining the advice.

These explanatory notes are intended to provide those who are to administer or be a beneficiary of a discretionary trust established by a deed with a guide to its probable operation. (A discretionary trust is often also referred to as a "family" trust, even though the trust does not fall within the definition of "family trust" in taxation legislation.)

They illustrate of how a typical discretionary trust might operate. These notes should not be read as a statement of the requirements of trust law or income tax law or a summary of the terms of a particular trust (which vary from deed to deed); nor should the notes be used as a substitute for professional advice.

## **Administration of Trust**

### **Role of Settlor**

1. Only role is to pay the settled sum to the trustee to establish the trust.
2. Can never be a beneficiary - must not be the "prime mover" behind the establishment of the trust.

### **Trust Fund**

1. The sources of the assets of the un-allocated discretionary trust fund include:
2. the settled sum; debts incurred by the trustee in the administration of the trust.
3. Income or capital that in the past has been allocated to beneficiaries is held on separate trusts, ie in allocated funds (often confused with loan accounts).
4. Particular care should be taken:
  - a. to preserve the settled sum (particularly where the trust incurs losses); and
  - b. in the investment of allocated funds.
5. Transfers of assets to and from the trust are disposals and acquisitions for capital gains purposes (even if the legal owner does not change).
6. Transfers of dutiable assets to the trust are subject to stamp duty (even if the legal owner does not change) and some transfers from the trust to beneficiaries are also caught.
- 7.

### **Role of Trustee - General Administration of the Trust Fund**

1. Holds the un-allocated assets of the trust (the "trust fund") for the class of beneficiaries (subject to any units or fixed entitlements a beneficiary might hold).
2. Manages any money loaned to the trust in accordance with the terms of those loans.
3. Manages the trust fund and is liable to pay unpaid trust debts; but can claim an indemnity from the trust fund (but not from beneficiaries).
4. Has a wide discretion as to the investment of the trust fund.
5. Obtains a "T" tax file number.
6. Opens and conducts all bank accounts and makes all investments in own (rather than the trust's) name, but may choose to indicate trustee capacity on titles.
7. Maintains an asset register for capital gains purposes.
8. General day to day responsibilities and decision making.

### **Role of Trustee - Allocation of Net Income and Capital**

1. Records the different categories of trust income (eg franked dividends and capital gains) and capital payments received.
2. Separately identifies sufficient net income or capital to satisfy the entitlements of any trust beneficiaries that hold units or other fixed entitlements to the net income or capital of the (otherwise discretionary) trust.
3. May advance an allocation of net income or capital to a beneficiary prior to the end of a financial year.
4. (By the end of each financial year) selects which of the beneficiaries from the defined class have been, or are to be allocated, the net income of the trust available for discretionary allocation.
5. Allocations are only valid for tax purposes if the trustee irrevocably intends that sooner or later the allocation will be paid to, or spent on, the beneficiary.
6. Prepares annual minute of resolution to evidence allocations to selected beneficiaries.
7. Prepares annual accounting statements.
8. Prepares and lodges a "T" income tax return with the Australian Taxation Office.
9. Records the allocation of net income (and any capital) and the categories applicable to each beneficiary.
10. May accumulate (taxed at the highest marginal income tax rate) any part of the net income as an addition to the capital of the trust.

### **Role of Trustee - Administering Allocated Net Income and Capital**

1. Maintains separate accounts ("allocated funds") within the trust records for each beneficiary to whom allocations have been made and distinguishes the allocations from the trust fund and any loans made by the beneficiary.
2. Administers allocations in accordance with prudential standards, eg prudent investment rule, until allocations are:
3. applied for the benefit of the selected beneficiaries (eg by making payments to cover a beneficiary's expenses):
  - a. paid to the selected beneficiaries;
  - b. claimed by creditors of a beneficiary;
  - c. dealt with by of family court orders involving a beneficiary; or
  - d. claimed by the executor or administrator of an estate of a deceased beneficiary.

### **Trustee powers requiring written consent of Appointor**

1. Any variation of the terms of the deed.
2. The exercise of certain discretions, eg capital allocations.
3. The winding up or ending of the trust.
4. "Second generation" appointors may each have power of veto over net income distributions as well (see below).

### **Role of Appointor**

1. Unless bankrupt or lacking sufficient intellectual capacity, has the power to remove and appoint a new or additional trustee.
2. Gives consent or otherwise to certain major decisions made by the trustee.
3. Has indirect, but often effective, control of the trust.
4. (Depending on the terms of the deed) can pass on that control to others, eg by an amendment to the deed or (sometimes) via the Appointor's Will.
5. Care needs to be given to the terms of appointment of second generation appointors, eg when children are to replace parents as appointors; possible solutions include the insertion of deadlock or veto provisions in the deed.

### **Beneficiaries**

1. A class of potential beneficiaries, starting with the primary beneficiaries, is defined by the deed; special meanings are given to "child" and "spouse".
2. Actual beneficiaries are usually selected by trustee from the defined class and the trustee's selection may change from year to year.
3. Net income is usually automatically accumulated in the trust fund if the trustee fails to select beneficiaries before the end of a particular financial year.
4. Beneficiaries, eg children working in a family business, may acquire or be issued with units with a fixed entitlement to net income or capital.
5. The trustee has the discretion to loan trust fund money to a Beneficiary.
6. A beneficiary may be allowed free use the property of the trust.
7. Beneficiaries usually do not have any right to demand to receive any un-allocated net income or capital of the trust, other than:
  - a. net income or capital to which they are entitled, eg as unit-holders, or;
  - b. the balances of their allocated funds.
8. A beneficiary may elect to convert allocations to loans (the terms of such loans are usually much less onerous on the trustee in terms of duty of care).

### **Eligibility for Means Tested Pensions**

1. Trust assets that are a beneficiary's assets for pension purposes include loans and allocated funds.
2. Un-allocated trust assets do not form part of a beneficiary's assets for pension purposes (unless gifted to the trust by the beneficiary within the preceding 5 years).
3. Net income allocated to a beneficiary does count as income for pension purposes, even if not yet paid to, or spent on, the beneficiary.

### **Wills of Primary Beneficiaries**

1. Unless there are little or no net assets in the trust, eg because of loan balances, the trust will be a "non-estate" asset for estate planning purposes.

2. The primary beneficiaries will only be able to deal with the trust assets in their Wills if the trust deed so permits.
3. Dealing with the shares in a trustee company may be a waste of time if the replacement appointor proceeds to remove the company (it is often far more important to include an adjustment clause in a Will (see below).
4. The trust, being discretionary, needs special provisions in the deed or Will included if more than one person is to control the trust after the primary beneficiaries die.
5. Whenever it is likely that children or other relatives will have unequal outstanding balances in their allocated funds, it is important that steps be taken to either:
  - a. clear each of the allocated fund balances by:
    - i. paying expenses on behalf of the beneficiary;
    - ii. reimbursing the primary beneficiaries for expenses incurred on behalf of the beneficiaries - note that once a beneficiary is an adult, the beneficiary must consent to any reimbursements of expenses incurred during the beneficiary's childhood;
    - iii. making payments to the beneficiaries; or
    - iv. the beneficiaries volunteering to give the balances back to the trust or to the primary beneficiaries.
  - b. adjust for those unequal balances in the Wills of the primary beneficiaries.

#### **Residual Beneficiaries**

1. Usually the children of the primary beneficiaries.

2. Usually hold no power to demand capital or un-allocated net income so long as any of the primary beneficiaries are still alive.
3. The deed may provide that if the trust continues to exist after all primary beneficiaries have died, each residual beneficiary:
  - a. must unanimously consent to the distribution of net income (otherwise default distributions apply).
  - b. may veto the significant decisions of the trustee; and
  - c. can demand a share of the capital and cease to be a beneficiary.

## **Taxation of Net Income**

### **Trustee's Resolution**

1. An annual resolution is prepared by the trustee by the end of each financial year to deal with all of the net income of the trust for the year.
2. The resolution should also deal with all franking and other tax credits received and should cover "non-accounting" net income such as taxable capital gains.
3. The resolution should identify to which beneficiaries the net income is to be allocated and, if there are different types of trust income, should usually stream the different types of net income to the respective beneficiaries (see below).
4. Any net income that is to be accumulated should be included in the resolution.
5. A resolution should cover the possibility of additional net income of which the trustee may not as yet be aware or able to calculate and can make reference to percentages and balances of net income, as well as to amounts.

### **Income Tax Returns and Payment of Tax**

1. The trustee must lodge a "T" income tax return for the trust.
2. The trustee only pays tax on that part of the net income that:
  - a. no beneficiary is entitled to receive;
  - b. is accumulated as an addition to trust capital; or
  - c. is allocated to a beneficiary who is:
    - i. a non-resident; or
    - ii. under a legal disability (eg a beneficiary who is under 18 years or is a bankrupt, insane or intellectually disabled) and the beneficiary's income exceeds the minimum tax threshold.
3. Beneficiaries must include in their own tax returns the net income allocated to them by the trustee, together with any tax credits.
4. A separate "I" tax return should not be necessary if a beneficiary does not receive any other income or allocations of trust net income.
5. Each beneficiary is taxed on net income allocated, unless the beneficiary is:
  - a. exempt from income tax;
  - b. the trustee of another trust (taxed as above); or
  - c. a partnership (the tax liability is on the partners).
6. Subject to certain exceptions (eg disabled beneficiaries, certain "double" orphans), beneficiaries under 18 will be taxed at much higher rates than adult beneficiaries.
7. Losses can only be carried forward or "soaked up" if certain tests are satisfied. The trustee may need to make a "family trust election" - after taking appropriate advice - within the meaning of the *Income Tax Assessment Act 1936* in order to utilise losses.

### **Streaming Different Categories of Net Income**

1. A beneficiary may not have to pay tax on net income allocated if the beneficiary:
  - a. has an un-recouped capital loss and is streamed only taxable capital gains;
  - b. has a taxable income from all sources less than the income tax threshold;
  - c. has tax rebates, credits or un-recouped income losses that are available to offset any income tax liability; or
  - d. is exempt from income tax, eg a Church or a charity.
2. Such a beneficiary should, where possible, be allocated categories of income on which tax has not already been paid.
3. So that tax credits (such as franking credits on dividends and foreign tax credits) are not wasted, net income with tax credits should only be allocated, where possible, to beneficiaries who can use the credits.

4. Other beneficiaries may qualify for lower tax on certain types of net income, eg a non-resident receiving interest, royalties or unfranked dividends.

### **Amending and Ending the Trust**

#### **Amendments to the Trust Deed**

1. If the trustee and Appointor agree, most of the deed's clauses can be amended.
2. If the definition of the class of potential beneficiaries of the trust is amended, it may mean that the existing trust has been "resettled" into a "new" trust and:
  - a. a fresh amount of stamp duty will be payable on the amended deed and possibly on the consequent "transfers" of dutiable trust assets; and
  - b. there may well also be an acquisition and even a disposal for capital gains purposes.
3. Amendments to change the trustee or Appointor or to deal with the future control of the trust, if carefully drafted, should not "resettle" the trust.
4. As discretionary trust assets (other than allocated funds) do not form part of the personal estate of any of the trust beneficiaries, amendments to the deed are commonly needed to ensure that the "estate" planning wishes of the primary or other beneficiaries are carried out.

#### **Ending the Trust**

1. The trust may only exist until the "vesting date", ie a date nominated in the deed and in the vicinity of 80 years from the date the trust began.
2. The trustee may (with the Appointor's consent) resolve to end (or "vest") the trust at any time before that date.
3. Subject to any restrictions in the deed, the trustee can select which of the beneficiaries are to be allocated the trust assets.
4. Allocations of capital on a winding up of the trust may be exempt from stamp duty, but will be treated as a disposal for capital gains purposes.
5. Where possible, resolutions to allocate all or some of the trust capital at a future date should be provisional so as to:
  - a. allow the trustee to change that decision prior to the death of the primary beneficiaries; and
  - b. avoid creating an immediate disposal for capital gains purposes.