



HERBERT
SMITH
FREEHILLS

Deed of Variation

Alastair Swayn Foundation



Deed of Variation

Date ►

19th October 2019

By

Trustee

Alastair Swayn Foundation Pty Ltd
ACN 612 319 963
(Trustee)

Recitals

- 1 By Deed of Settlement dated 16 May 2016 (the **Deed**, which term includes the Deed as amended from time to time) between Alisa Moss (as settlor) and the Trustee (as trustee), a settlement known as **Alastair Swayn Foundation** was established.
- 2 The Deed was amended by a Deed of Variation dated 15 May 2017 and a Deed of Variation dated 28 June 2017.
- 3 Clause 13 of the Deed provides as follows:
 - “(a) Pursuant to clause 11(c), the Trustee may at any time, by deed, revocable or irrevocable:
 - (i) revoke, add to or vary the trust or provision of this Deed or any previous revocation, addition or variation; or
 - (ii) declare any new or other trust or provision concerning the Trust Fund, for the benefit of the Beneficiary.
 - (b) The revocation, addition or variation of any trust or power under this provision shall not:
 - (i) cause the Trust to cease to be a trust for charitable purposes; or
 - (ii) prejudice any registration by Commissioner of the Australian Charities and Not-for-profits Commission of the Trust as a charity or the endorsement by the Commissioner of Taxation of the Trust as an income tax exempt charity.
 - (c) This Deed shall be capable of being revoked, added to or varied, only in compliance with this provision.
 - (d) The Trustee shall if required by law, notify the Commissioner of the Australian Charities and Not-



for-profits Commission and the Commissioner of Taxation of any change in this Deed promptly following the occurrence of that change.”

- 4 Pursuant to a unanimous decision of the directors of the Trustee pursuant to clause 11(c) of the Deed, the Trustee has determined to vary the deed in the manner outlined below.
- 5 The variations to the Deed made by this deed of variation are for the benefit of the Beneficiary, as defined in the Deed, and no variation contravenes the other requirements of clause 13 of the Deed.

This Deed of Variation provides that the trusts and provisions of the Deed are revoked, added to or varied so that they read and take effect as appears in the Annexure.

Annexure

The Deed of Settlement as amended

Date 16 May 2016

Parties

1. Alisa Moss of [REDACTED] (Settlor)
2. Alastair Swayn Foundation Pty Ltd ACN 612 319 963, of Level 1, 49 Jardine Street, Kingston, Australian Capital Territory (Trustee)

Background

- A. The Settlor wishes to establish a fund for certain Charitable Purposes.
- B. The Settlor proposes to create the Trust by payment of the Settled Sum to the Trustee to be held upon trust as specified in this deed.
- C. The Trustee has consented to act as the initial Trustee of the Trust upon and subject to the provisions of this Deed.

Operative Provisions

THIS DEED WITNESSES:

1. Definitions and interpretation

1.1 General Definitions

Meanings shall apply to words and expressions used in this Deed as specified in the dictionary provision, unless the context otherwise requires.

1.2 Special Definitions

Meanings shall apply to capitalised terms used in this Deed as specified in this provision, unless the context otherwise requires:

Accounting Period means:

- (a) the period commencing on the date of this Deed and ending on the following 30 June;



- (b) each complete subsequent period of 12 months commencing on 1 July in each year and ending on the following 30 June; and
- (c) the period commencing on 1 July immediately prior to, and ending on, the Vesting Date;

Advisory Committee means a committee established under clause 6;

Beneficiary means, so long as it is a charity, the Gallery, and a Substituted Beneficiary;

Board of Directors means the Trustee's board of Directors;

Charitable Purposes means the purposes set out in clause 2.4;

Commissioner means the Commissioner of Taxation, a Second Commissioner of Taxation or a Deputy Commissioner of Taxation for the purposes of the *Income Tax Assessment Act 1936* and the ITAA 97;

Director means a director of the Trustee;

Gallery means The Swayn Gallery of Australian Design Limited, (formerly named the Gallery of Australian Design Limited);

ITAA 97 means the *Income Tax Assessment Act 1997*;

Responsible Person means a person who not disqualified:

- (a) from managing a corporation within the meaning of the *Corporations Act 2001*; and
- (b) by the Commissioner of the Australian Charities and Not-for-profits Commission from being a responsible entity of a registered entity under the *Australian Charities and Not-for-profits Commission Act 2012*;

Settled Money means the amount of \$100.00;

Specified Income means income of the Trust other than donations, gifts, government grants, and other voluntary transfers of property to the Trust;

Statutory Officer in relation to a company means a director, company secretary and any other officer of that company;

Substituted Beneficiary means any charitable entity for any object or purpose similar to the objects or purposes of the Gallery, as decided by the Trustee, being an entity endorsed by the Commissioner of Taxation as an income tax exempt charity under Subdivision 50-B of the ITAA 97;



Termination Date means the date determined by the Trustee following a unanimous decision of the Directors to wind up the Trust;

Trust means the charitable trust created under this Deed;

Trust Fund means:

- (a) the Settled Money;
- (c) any money or property given, bequeathed or transferred to the Trustee as an addition or accretion to money or property held by the Trustee upon and subject to the Trust;
- (d) any income derived from property held by the Trustee upon and subject to the Trust at any time, whether in relation to the then current, or any previous year or Accounting Period;
- (e) any accumulation of income made or effected under any power of the Trustee under this Deed, whether during the then current, or any previous year or Accounting Period;
- (f) any addition of any nature or description to any property, whether capital or income, held by the Trustee upon and subject to the Trust derived or received from any source at any time; and
- (g) any investment and/or other property of any nature or description into which property held by the Trustee upon or subject to the Trust is at any time converted or reconverted; and

Trustee means Alastair Swayn Foundation Pty Ltd ACN 612 319 963 and any other company appointed or acting in the capacity of a trustee under this Deed or any law.

1.2 Interpretational rules

In this Deed, unless the context requires otherwise:

- (a) the singular (including defined terms) includes the plural and vice versa;
- (b) a gender includes the other genders;
- (c) the headings are used for convenience only and do not affect the interpretation of this Deed;
- (d) other grammatical forms of defined words or expressions have corresponding meanings;



- (e) a reference to a document includes the document as modified from time to time and any document replacing it;
- (f) the word "person" includes a natural person and any body or entity whether incorporated or not;
- (g) the word "month" means calendar month;
- (h) the words "in writing" include any communication sent by letter, facsimile transmission or email or any other form of communication capable of being read by the recipient;
- (i) a reference to a thing includes a part of that thing;
- (j) a reference to all or any part of a statute, rule, regulation or ordinance (**statute**) includes that statute as amended, consolidated, re-enacted or replaced from time to time;
- (k) wherever "include" or any form of that word is used, it must be construed as if it were followed by "(without being limited to)";
- (l) money amounts are stated in Australian currency unless otherwise specified;
- (m) a reference to any agency or body, if that agency or body ceases to exist or is reconstituted, renamed or replaced or has its powers or functions removed (**defunct body**), means the agency or body that performs most closely the functions of the defunct body;
- (n) to the extent that any provision of this Deed would prevent the Trust from benefiting under the will of the Alastair Hall Swayn, that provision is to be construed and given effect to as if the words that would result in that outcome were omitted, whether the provision is in severable terms or not, but so that the construction does not cause the Trust to cease to be a trust for charitable purposes; and
- (o) if any provision of this Deed is ambiguous, it must be construed broadly so as to widen and not restrict the power, authority and exercise of discretion by the Trustee.



2. Trust creation

2.1 Settlor transfer

The Settlor shall upon or prior to execution of this Deed pay to the Trustee the Settled Money for the purpose of creating, and to be held by the Trustee upon, the trusts and the exclusively Charitable Purposes specified in this Deed.

2.2 Trustee declaration

The Trustee declares that the Trustee has received and shall hold the Settled Money and all other present and future assets comprising the Trust Fund at any time transferred to or otherwise received by the Trustee upon and subject to the trusts, duties and provisions, together with the powers, specified in this Deed.

2.3 Trust name

The name or title of the trust shall be the **Alastair Swayn Foundation**.

2.4 Charitable purposes

The Trustee declares that the Trust has been created exclusively for the charitable purposes of advancing architectural culture and education by, to the extent they are charitable and for the public benefit, including providing money property or benefits to:

- (a) support the Gallery to collect, conserve and display designs and records including drawings, models, photographs digital records and other items of Australian architecture and design including private and public housing and work place design;
- (b) support the Gallery to undertake research into influences on Australian architecture and design;
- (c) support the Gallery to undertake research into future trends in Australian architecture and design including private and public housing and work place design;
- (d) provide grants for research into Australian architecture and design including housing;
- (e) promote and support education in architecture, design and technology; and
- (f) fund visits by overseas scholars to further advance and promote architecture, design and technology; and



- (g) all things incidental or conducive to carrying out the above charitable purposes.

2.5 Non-profit purpose

The assets and income of the Trust shall be applied solely in furtherance of the Charitable Purposes specified in this provision, and no portion shall be distributed directly or indirectly to the Trustee, its directors, or its members, in their capacity as such, except as bona fide compensation for services rendered or expenses incurred on its behalf.

2.6 Trust termination

The Trust created by, and the provisions of, this Deed shall terminate on the Termination Date.

2.7 Tax endorsement compliance

The Trustee shall at any time procure that the Trust:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its Charitable Purposes principally in Australia; and
- (b) applies its income and assets solely for the purposes in this Deed.

3. Trust income and capital

3.1 Application of income and capital

The Trustee must hold the Trust Fund and the income of the Trust Fund derived in each Accounting Period on trust to pay or apply the income and, if and so far as it thinks fit, all or any part of the capital of the Trust Fund, solely for the purposes in clause 2.4.

3.2 Factors Trustee may consider

In exercising its discretions under clause 3.1, the Trustee may have regard to:

- (a) any recommendations of an Advisory Committee with authority to make the recommendations; and
- (b) the provisions and objects, so far as they are consistent with the Charitable Purposes of the Trust, of any other trust (including a trust established by a testamentary instrument) where:



- (i) the capital of that other trust has been transferred to or otherwise vested in the Trustee to hold on the trusts of this deed; and
- (ii) the trustee of the other trust has requested the Trustee to recognise the provisions or objects of the other trust in exercising the Trustee's discretion and powers under this deed.

3.3 Polices and rules

For the purpose of paying or applying the income or capital of the Trust Fund, the Trustee may:

- (a) formulate policies;
- (b) make rules in connection with a policy; and
- (c) revoke or amend a policy or rule and formulate others.

3.4 Trustee may accumulate

Despite clause 3.1, the Trustee may, in any Accounting Period accumulate and retain as part of the Trust Fund so much of the income and capital of the Trust Fund as it thinks fit, so long as the average proportion of the Specified Income accumulated in any three consecutive Accounting Periods commencing on or after 1 July 2019 does not exceed 20% of the Specified Income derived by the Trustee during each of those three consecutive Accounting Periods, or any other percentage or amount that is from time to time approved by the Commissioner.

3.5 Registration and endorsement

It is intended that the Trust shall qualify as, and apply for and retain:

- (a) registration as a charity by the Commissioner of the Australian Charities and Not-for-profits Commission; and
- (b) endorsement by the Commissioner as a charity which is exempt from income tax under Subdivision 50-B of the ITAA 97.

4. Asset distribution

4.1 Distribution methods

Distributions of any income or capital of the Trust Fund to which the Beneficiary is entitled as a result of any decision of the Trustee under any provision of this Deed may be effected by the Trustee in its decision by:



- (a) payment of the distribution amount to or for the benefit of the Beneficiary; or
- (b) transfer in specie of any capital asset of the Trust Fund to or for the benefit of the Beneficiary at a value decided by the Trustee.

4.2 Tax provisioning

- (a) The Trustee may make provision from any net income or assets of the Trust Fund for any Accounting Period for any liability of the Trustee for any tax payable in relation to any income or capital of the Trust Fund held by the Trustee or paid to the Beneficiary during that Accounting Period or in connection with any business activity of the Trust.
- (b) The Trustee may resort to the income or assets of the Trust Fund for any subsequent Accounting Period or any money held by the Trustee on behalf of the Beneficiary to pay any liability of the Trustee for any tax assessed or payable on income or capital of the Trust Fund paid to the Beneficiary, or in connection with any business activity of the Trust, to the extent that any previous provision is inadequate.
- (c) This provision shall not limit or prejudice any legal or other right of the Trustee in the event of any tax assessment being issued to the Trustee in relation to the Trust Fund or to any payment of any income or capital of the Trust Fund to the Beneficiary or in connection with any business activity of the Trust.

5. Trustee powers

5.1 General powers

- (a) The Trustee shall at any time have all the general powers in relation to the Trust Fund that a natural person has as a sole, absolute and beneficial owner in relation to property of any nature or description, despite the fact that the Trust Fund is trust property and that the Trust is a charitable trust.
- (b) Any provision in this Deed that the Trustee shall be entitled to exercise any power for any purpose shall mean that that power may be exercised by the Trustee:
 - at any time in the absolute and uncontrolled decision of the Trustee, without necessity for the consent of any person and without the Trustee being under any liability, or being legally required or compelled by any person, to exercise that power;



- without the Trustee being legally required or compelled to provide or communicate any reason to any person for the exercise of that power;
- in relation to the whole or any part or parts of the Trust Fund at any time;
- whether conditionally or unconditionally and/or upon and subject to any provisions as the Trustee thinks fit; and
- do all other things incidental to the exercise of the Trustee's powers under this deed.

except where there is an express provision in this Deed to contrary effect.

5.2 Trustee decisions

Any decision made by the Trustee under any provision of this Deed in relation to any fact or question concerning, affecting or connected with the Trust or the Trust Fund or the powers or actions of the Trustee, whether actual, potential, express or implied, shall be conclusive and binding upon any person interested in the Trust Fund and shall not be disputed by any person for any reason of any nature or description, despite the fact that that person may at the time of the decision be subject to any legal disability or not be alive or in existence.

5.3 Legal compliance

The Trustee shall not exercise any power under this Deed in default under any law or in any manner resulting in the invalidation of any provision of this Deed.

5.4 Accounting practices

For the purposes of this Deed, unless otherwise specified:

- (a) any decision as to financial matters and any financial accounts or statements made or prepared under this Deed shall comply with general accounting standards, except for any disclosed departure; and
- (b) any accounting term used in this Deed shall be interpreted in compliance with general accounting standards.

5.5 Specific powers

- (a) The Trustee shall at any time have the express powers in relation to the Trust Fund conferred by any provision of this Deed in addition to:



- (i) the general absolute powers conferred under this provision; and
 - (ii) any express and implied powers conferred upon a Trustee by any law.
- (b) An express power conferred upon the Trustee under any provision of this Deed shall not limit:
- (i) the general absolute powers conferred by this provision; or
 - (ii) any other express or implied power conferred by any provision of this Deed or by law.

5.6 Decision powers

Express powers of decision conferred by this Deed on the Trustee in relation to the Trust Fund shall comprise:

- (a) any decision of any dispute arising under or in relation to the performance of the trusts and powers in this Deed; and
- (b) any decision that any part of the Trust Fund in its actual condition or state of investment shall be applied in or towards the payment of the interest of, or any payment to or for the separate benefit of, the Beneficiary and for that purpose:
 - (i) to estimate the value of component parts of the Trust Fund; and
 - (ii) to engage any agent to make that valuation.

5.7 Investment powers

Express powers of investment, payment or application conferred by this Deed on the Trustee in relation to the Trust Fund shall comprise:

- (a) investment of any asset of the Trust Fund in any form of investment, including any investment authorised by any law in any State or Territory of Australia for the investment of trust money;
- (b) transfer or variation of any investment comprised in the Trust Fund;
- (c) purchase or sale of any property, despite the fact that that property does not produce income or is of a wasting, hazardous or speculative nature;
- (d) possession, purchase, transfer, lease, charter, creation or acceptance of options or rights in, creation of any security interest over or release of any property;



- (e) performance of any maintenance activity or construction activity in relation to any property;
- (f) purchase, subscription for or acceptance of allotment of any marketable securities issued by any company with consequential powers, including:
 - (i) exercise of any right and performance of any liability relating or incidental to the marketable securities;
 - (ii) creation of any agreement modifying any right or liability;
 - (iii) creation of any agreement relating to any debt arrangement, or increase or reduction of the capital, of any company;
 - (iv) creation of any agreement relating to, or in the course of, the liquidation of any company;
 - (v) deposit, transfer or release of the marketable securities, or the legal interest in the marketable securities, for any purpose; and
 - (vi) payment of any call, contribution or other cost in relation to the marketable securities, or legal interest in the marketable securities;
- (g) deposit or credit with any bank or other financial institution, whether at call or for a fixed term and whether deriving interest or otherwise;
- (h) advancing credit to any person for any purpose, whether at call or for a fixed term and whether or not deriving interest or secured by any security interest or guarantee;
- (i) purchase or sale of any assets or share or interest in any business or company;
- (j) performance or termination of any business activity of any nature or description in any business capacity;
- (k) purchase of any reversionary or deferred property or right of any nature or description;
- (l) procurement or termination of any insurance of any nature or description and at or subject to any premiums, whether single or payable periodically, and with or subject to any rights or provisions of any nature or description, or exercise of any right relating to any insurance; and
- (m) purchase of any investment:



- (i) whether or not incurring any personal liability in their capacity as Trustee; and
- (ii) despite the fact that the investment is not authorised under any law for the investment of trust assets; and/or
- (iii) despite the fact that the investment e may not produce income or is subject to any liability or prejudicial effect or is without security.

5.8 Contractual powers

Express powers of creation, execution or performance of any agreement conferred by this Deed on the Trustee in relation to the Trust Fund shall comprise:

- (a) acquisition, transfer, purchase, sale, lease or licence;
- (b) borrowing from, and securing by any security interest the payment of money to, any person, whether alone or jointly and/or severally with any other person;
- (c) creation of any guarantee for or relating to the payment of money or performance of any agreement by any person and securing that liability by way of guarantee by any security interest over or affecting any asset comprised in the Trust Fund;
- (d) purchase, drawing, making, acceptance, endorsement, discount, execution, issue, transfer or conversion of any negotiable instrument;
- (e) creation of any option over or relating to any asset comprised in the Trust Fund to any person; and
- (f) creation of any agreement of any nature or description in connection with the performance of any business activity.

5.9 Administrative powers

Express powers of administration conferred by this Deed on the Trustee in relation to the Trust Fund shall comprise:

- (a) attracting and encouraging donations, gifts, endowments, trust distributions and other forms of financial assistance to or for the benefit of the Trust;
- (b) sponsoring, organising and undertaking fund raising activities and arranging for the issue of appeals for donations;
- (c) the acceptance and receipt of property by testamentary disposition, gift inter vivos or under the provisions of any other trust or otherwise from any other



person as an addition to the Trust Fund and holding and administering that additional property for the purposes of the Trust;

- (d) manage any real property with all the powers of an absolute owner including, but not limited to, power to allow the Beneficiary to occupy or use property on the terms and conditions the Trustee thinks fit; and
- (e) the non-acceptance or otherwise refusal to accept as part of the Trust Fund any gift, donation, settlement or other disposition in money, moneys worth or property;
- (f) transfer and application of the proceeds of any investment comprised in the Trust Fund into or for any other investment or property of any nature or description;
- (g) exercise of any right and performance of any liability attaching to, arising out of or relating to any asset comprised in the Trust Fund;
- (h) creation of any agreement or performance of any action relating to the partition, subdivision or conversion to strata or any other title of any property at any time comprised in the Trust Fund and payment of any money by way of equality of partition, subdivision or conversion;
- (i) incorporation, registration, establishment, promotion or purchase of any company or participation with any other person for that purpose;
- (j) acceptance of engagement as, or engagement of any person to act as, a director or other officer of any company where marketable securities of that company are comprised in the Trust Fund and receipt of the remuneration derived from that office, with accountability to the Trust for the remuneration;
- (k) consent to the legal interest in any asset comprised in the Trust Fund to be held or registered in the name of any nominee of the Trustee;
- (l) creation and operation in any usual manner of any account with any bank or other financial institution;
- (m) creation of effectual receipts and releases for any money received by or on behalf of the Trustee or otherwise relating to any action relating to this Deed;
- (n) engagement of any employee or agent including any Director, in connection with any business activity performed by the Trustee, or any action necessary or desirable by the Trustee, under this Deed, including the receipt and payment of money, with consequential power of creation of any agreement relating to the remuneration and costs payable to, or any



scheme or superannuation retirement benefit or pension for the benefit of the employee or agent;

- (o) payment out of the Trust Fund of any cost which the Trustee may at any time incur relating to:
 - (i) management of the Trust Fund;
 - (ii) exercise of any power conferred by this Deed;
 - (iii) performance of any provision of this Deed;
 - (iv) any tax payable in relation to this Deed, the Trust Fund, the Trustee or any payment to the Beneficiary following any decision by the Trustee; and
 - (v) cost in any way connected with the preparation, registration, execution or stamping of this Deed or the acquisition or disposal of assets of the Trust Fund;
- (p) performance of any action necessary or desirable for the maintenance or protection of the Trust Fund;
- (q) taking and acting upon the written decision of a lawyer practising in any country or jurisdiction where the Trust Fund is invested at any time in relation to:
 - (i) the interpretation or effect of this Deed; or
 - (ii) any other document or legislation or as to the administration of the Trust, and
 - (iii) without liability to any person beneficially interested in relation to any action performed by the Trustee in compliance with that decision, except that nothing in this provision shall prohibit or impede the Trustee from engagement in any legal action.
- (r) performance of any other action incidental or ancillary to the exercise of any power conferred on the Trustee under this Deed or by law.

5.10 Investment assessment

- (a) The Trustee in the exercise of any investment power may, without liability, have regard to any matter, to the extent applicable to the facts of the Trust, comprising:



- (i) the purposes of the Trust and the needs and circumstances of the Beneficiary;
 - (ii) the desirability of diversifying investments of the Trust Fund;
 - (iii) the nature of, and the risk associated with, existing assets comprising the Trust Fund;
 - (iv) the need to maintain the real value of the capital or income of the Trust;
 - (v) the risk of capital or income loss or depreciation;
 - (vi) the potential for capital appreciation;
 - (vii) the likely income return and the timing of income return;
 - (viii) the length of the term of the proposed investment;
 - (ix) the probable duration of the Trust;
 - (x) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
 - (xi) the aggregate value of the Trust Fund;
 - (xii) the effect of the proposed investment in relation to the tax liability of the Trust or the Beneficiary;
 - (xiii) the likelihood of inflation affecting the value of the proposed investment or other trust property of the Trust;
 - (xiv) the costs, including commission, fees, charges and duties payable, of making the proposed investment; and
 - (xv) the results of any review of existing investments comprised in the Trust Fund, whether individually or as a whole and whether on an annual or other basis.
- (b) The Trustee may, having regard to the size and nature of the Trust:
- (i) obtain and consider independent and impartial advice reasonably required for the investment of the Trust Fund or the management of the investment from a person whom the Trustee reasonably believes to be competent to give the advice; and/or



- (ii) pay out of the Trust Fund any reasonable cost of obtaining the advice.

5.11 Personal interest of the Trustee

The Trustee and any director or other officer of the Trustee may exercise or concur in exercising all powers and discretions in pursuit of the Charitable Purposes for the benefit of the Beneficiary given by this deed or by law even though the Trustee or that person:

- (a) has or may have a direct or personal interest or a conflict of fiduciary duty in the method or result of exercising the power or discretion; or
- (b) may benefit either directly or indirectly from the exercise of any power or discretion,

and even though the Trustee is a sole Trustee.

6. Advisory committees

- (a) The Trustee may establish Advisory Committees and appoint and remove, or make provisions for the appointment and removal of, members of Advisory Committees.
- (b) Each Advisory Committee may consist of a single individual or the number of individuals that the Trustee decides.
- (c) The functions of each Advisory Committee will be decided by the Trustee and, subject to the Trustee's decision, will be to advise the Trustee on how payments or applications or income and capital should be made under clause 3.1.
- (d) The Trustee may specify:
 - (i) the manner in which proceedings of each Advisory Committee are to be conducted;
 - (ii) the manners which the Advisory Committee must have regard to in carrying out its functions; and
 - (iii) any other matters concerning the Advisory Committee or its functions that the Trustee decides.



7. Trustee accounting

7.1 Trust assets

- (a) The Trustee shall keep the Trust Fund entirely separate and distinct from any other trust fund.
- (b) The Trustee shall not mix or blend the Trust Fund with any other trust fund created under any other trust, whether created by the Settlor or any other person, so as to cause the trust funds to become one trust fund.

7.2 Trust accounting records

- (a) The Trustee shall keep complete and accurate accounting records of all receipts and outgoings on account of, and assets comprising, the Trust Fund.
- (b) The Trustee shall separately record income and capital of different categories as decided by the Trustee under the asset treatment provision.

7.3 Trust financial accounts

The Trustee shall cause to have prepared financial statements, including a profit and loss account and balance sheet as at the end of each Accounting Period, in compliance with general accounting standards specifying, if applicable, in relation to the Trust Fund:

- (a) income and capital;
- (b) costs, outgoings, losses, liabilities or provisions paid or payable out of the Trust Fund and chargeable against income;
- (c) capital expenditure and liabilities chargeable to capital;
- (d) investments and money comprised in the Trust Fund;
- (e) amounts distributed by the Trustee to the Beneficiary;
- (f) the separate recording of any category of income or capital under the asset treatment provision, to the extent decided by the Trustee; and
- (g) allocation of losses and outgoings among all or any of the categories of loss or outgoing or allowable deduction of the Trust Fund under the asset treatment provision, to the extent decided by the Trustee.



7.4 Accountancy agency

- (a) The Trustee shall comply with its liability to prepare financial accounts under this provision by engagement of any accountant duly qualified to practise in the place where the business activity of the Trust is principally performed.
- (b) The Trustee shall procure the accountant to certify that the financial accounts are a proper and accurate statement of the assets, liabilities and business activities of the Trust Fund to and as at the date to which the financial accounts are prepared.

7.5 Accounts audit

The Trustee shall procure that the financial accounts of the Trust are audited within 5 months following the end of each Accounting Period by an accountant, who is independent from any accountant engaged in preparation of the financial accounts and qualified to act as a company auditor under the *Corporations Act 2001*.

8. Trustee protection

8.1 Liability exclusion

The Trustee including any Statutory Officer shall not be liable for:

- (a) any loss to the Trust Fund or to any person as a result of the exercise of, or failure to exercise, any power conferred on the Trustee by this Deed or by law; or
- (b) any default under any liability or trust of any nature or description,

except in the case of:

- (c) the dishonesty of the Trustee or Statutory Officer;
- (d) gross negligence or recklessness of the Trustee or Statutory Officer; or
- (e) a deliberate act or omission known by the Trustee or Statutory Officer to be a breach of trust.

8.2 Notice protection

Any person claiming any interest in the Trust Fund shall be taken to have actual notice of, and be subject to the protection conferred on the Trustee by, this provision and any indemnity in favour of the Trustee conferred by this Deed.



8.3 Trustee employee or agents

- (a) The Trustee shall not be liable in any case to act personally.
- (b) The Trustee may decide to engage any employee or agent to perform any action or business activity of any nature or description required to be performed in relation to the Trust, including the receipt and payment of money.
- (c) The Trustee may decide the remuneration and costs payable to any employee or agent so engaged.

8.4 Trustee disclosure

The Trustee shall not be liable to disclose to any person:

- (a) any document disclosing any deliberations of the Trustee, the manner of exercise of or any reason for the exercise or non-exercise of any power or any material upon which that reason might have been based; or
- (b) any other document relating to the exercise or proposed exercise of any power conferred on the Trustee,

without prejudice to any other legal right of the Trustee to refuse disclosure of any document.

9. Trustee indemnity

- (a) The Trustee shall be entitled to be indemnified out of the assets at any time comprising the Trust Fund against any liability incurred by the Trustee in good faith as a consequence of any actual or attempted execution or exercise, or failure to execute or exercise, any trust or power in relation to the Trust or of being the Trustee of the Trust.
- (b) The Trustee shall not be entitled to be indemnified by the Beneficiary in relation to any liability or other matter referred to in this provision.

10. The Trustee

10.1 Corporate Trustee

The Trustee shall be a company at all times.



10.2 Number and qualifications of Directors

If the Board of Directors of the Trustee does not at any time comprise of at least 5 Responsible Persons including at least 3 people with architectural or design qualifications or experience, the Trustee must not exercise any discretion or power until the requirement is met, except:

- (a) for the purpose of appointing a new Trustee and resigning as Trustee;
- (b) to protect the Trust Fund; or
- (c) in the case of urgency.

10.3 Trustee shareholders

If at any time all Directors are not shareholders of the Trustee and all shareholders of the Trustee are not Directors, the Trustee must not exercise any discretion or power until the requirement is met, except:

- (a) for the purpose of appointing a new Trustee and resigning as Trustee;
- (b) to protect the Trust Fund; or
- (c) in the case of urgency.

10.4 Resignation of Trustee

The Trustee may resign or retire as trustee of the Trust only if at the time of resignation or retirement another Trustee is appointed pursuant to clause 10.7.

10.5 Automatic removal of Trustee

The Trustee is automatically removed as trustee of the Trust if the Trustee:

- (a) resigns or retires in accordance with clause 10.4;
- (b) is not permitted by law to act as a trustee;
- (c) ceases to be a Trustee by operation of law; or
- (d) enters into liquidation, whether compulsory or voluntary (not being a voluntary liquidation for the purposes of amalgamation or reconstruction), or has an administrator, receiver or official manager or receiver and manager appointed.



10.6 Expenses of change of Trustee

The costs, charges and expenses of and in connection with the resignation, removal and replacement of any Trustee under this Deed may be borne by the Trust Fund or income of the Trust Fund, as the Trustee determines.

10.7 Appointment of new Trustee

- (a) Not later than 1 month of a Trustee being removed under clause 10.5 a new Trustee must be appointed by the former Trustee.
- (b) Where a Trustee is removed under clause 10.5(d), a new Trustee may be appointed by the person, company or authority in whom control over the affairs of the former Trustee is vested or, in the case of the liquidation of the former Trustee, by the liquidator.

10.8 The successor Trustee

- (a) The Trustee for the time being will have all the powers, authorities and duties conferred upon and undertaken by the Trustee under this Deed and by the applicable law or any rule of court and any and all attorneys, agents, custodians or depositaries of the property comprising the Trust Fund or the income of the Trust Fund will be authorised to accept instructions from the Trustee for the time being as to its disposition.
- (b) Any attorney, agent, custodian or depositary of the property comprising the Trust Fund or the income of the Trust Fund appointed by any previous Trustee will become the same for the Trustee for the time being without the necessity for the execution or filing of any paper or the doing of any further act.

11. Exercising and recording the Trustee's determinations

- (a) Whenever the Trustee is empowered or required to fix any date, to nominate any person, to make any determination or declaration, to exercise any discretion, or to make any direction under this Deed then unless otherwise specified in this Deed, the Trustee may do so by deed, memorandum in writing or by oral declaration.
- (b) Subject to clause 11(a), the Trustee may:
 - (i) exercise or concur in exercising any discretion or power conferred by this Deed on the Trustee by a resolution of the Board of Directors; or



- (ii) delegate the right and power to exercise or concur in exercising any such discretion or power to one or more Directors appointed in writing from time to time by the Board of Directors for that purpose,

and any exercise of such discretion or power by the Board of Directors or any one or more of the directors must be recorded in the minutes and signed by the chair of the meeting at which the determination was noted or made.

- (c) A unanimous decision of the Board of Directors of the Trustee is required for a resolution to:
 - (i) amend this Deed for the purposes of clause 13; and
 - (ii) select any Substituted Beneficiary.

12. Third party protection

Any person dealing with the Trustee may rely upon a copy of this Deed and any attached notice, certified by the Trustee or solicitor for the Trustee, to the same extent as the original.

13. Trust amendment

- (a) Pursuant to clause 11(c) the Trustee may at any time, by deed, revocable or irrevocable:
 - (i) revoke, add to or vary the trust or provision of this Deed or any previous revocation, addition or variation; or
 - (ii) declare any new or other trust or provision concerning the Trust Fund,

for the benefit of the Beneficiary.

- (b) The revocation, addition or variation of any trust or power under this provision shall not:
 - (i) cause the Trust to cease to be a trust for charitable purposes; or
 - (ii) prejudice any registration by the Commissioner of the Australian Charities and Not-for-profits Commission of the Trust as a charity or the endorsement by the Commissioner of Taxation of the Trust as an income tax exempt charity.



- (c) This Deed shall be capable of being revoked, added to or varied, only in compliance with this provision.
- (d) The Trustee shall if required by law, notify the Commissioner of the Australian Charities and Not-for-profits Commission and the Commissioner of any change in this Deed promptly following the occurrence of that change.

14. Liability exclusion

Any person who is the Beneficiary or Settlor shall not at any time be personally liable to indemnify the Trustee, or any creditor of the Trustee, in any manner, whether upon demand or otherwise, in connection with any liability resulting directly or indirectly from the performance of any action by the Trustee in the capacity of a trustee of the Trust, despite any other provision of this Deed or implied or deemed to be included in the Deed.

15. Winding up

If, on the winding up of the Trust, any property remains after the satisfaction of all its debts and liabilities, the Trustee must give and transfer the property to the Beneficiary or if the Beneficiary is not then in existence, for one or more charitable funds, authorities or institutions with similar purposes to the Gallery.

16. Governing law and jurisdiction

- (a) This Deed, and the validity and performance of the trust created under this Deed, shall be governed by and construed in accordance with the laws applicable in the Australian Capital Territory as the proper law of the Trust.
- (b) The parties to this Deed irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and any court which may hear appeals from those courts.

END OF ANNEXURE



Executed as a deed

Trustee

Signed sealed and delivered by
Alastair Swayn Foundation Pty Ltd
by

