

CUSTODIAN DEED

**TOLIMAN PTY LTD
ACN 604 612 786**

as Trustee of the

W&A HARRIS SUPER

(Current Trustee)

**TOLIMAN HOLDINGS NO1 PTY LTD
ACN 605 015 487**

(Initial Custodian)



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THIS DEED is made on 11 April 2015

PARTIES:

1. **TOLIMAN PTY LTD ACN 604 612 786** of 1 Meredith Street, HOMEBUSH NSW 2140 as trustee of the **W&A HARRIS SUPER (Current Trustee)**.
2. **TOLIMAN HOLDINGS NO1 PTY LTD ACN 605 015 487** of 1 Meredith Street, HOMEBUSH NSW 2140 (**Initial Custodian**).

RECITALS:

- A. The Current Trustee enters into this Deed only in its capacity as trustee of the Superannuation Fund.
- B. The Current Trustee wishes to borrow funds so as to acquire the Asset under a limited recourse borrowing arrangement pursuant to sections 67A and 67B of the SIS Act.
- C. As part of this limited recourse borrowing arrangement the Current Trustee has requested the Initial Custodian purchase the Asset on behalf of the Current Trustee in the name of the Initial Custodian and, amongst other things, upon the basis that the Current Trustee will provide or cause to be provided all of the amounts necessary to pay for the purchase of the Asset including incidental costs in relation to that purchase such as legal fees and stamp duty.
- D. The Current Trustee and the Initial Custodian have agreed to enter into this Deed so as to record the arrangements between the Trustee on the one hand and the Custodian on the other regarding the basis upon which the Initial Custodian will purchase the Asset on behalf of the Current Trustee.

WITNESSES:

1. Definitions and interpretation

1.1 Definitions

In this Deed, unless the context otherwise requires:

“**Asset**” means the asset set out in Item 1 of the Schedule;

“**Business Day**” means a day on which trading banks in Sydney, Australia are open for general banking business in Sydney, Australia, excluding a Saturday, a Sunday and a public holiday;

“**Custodian**” means the person for the time being who is the legal owner of the Specified Property (other than the Trustee) which person as at the date of the acquisition of the Asset is intended to be the Initial Custodian;

“**Deed**” means this document as amended from time to time;

“**Discretion**” means a right or power to act in accordance with one’s judgement;

“**Government Authority**” means any government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity;

“**GST**” means any goods and services, value added or similar tax, together with any related interest, penalties, fines or other charge;

“**Insolvency Event**” includes each of the following:

- (a) if any application is made for the winding up of the Custodian and the application is not dismissed or withdrawn within five (5) Business Days, or an order is made for the winding up of the Custodian;
- (b) if the Custodian passes a resolution for its winding up;
- (c) if a receiver, receiver and manager, provisional liquidator, trustee for creditors or in bankruptcy or analogous person is appointed to any property of the Custodian;
- (d) if the Custodian or any other person appoints an administrator to the Custodian or takes any step to do so;
- (e) if the Custodian being an individual, dies or is made or declared bankrupt, becomes incapable of managing his own affairs or is jailed;
- (f) if the Custodian:
 - (i) suspends payment of its debts;
 - (ii) ceases or threatens to cease to carry on all or a material part of its business or activities;
 - (iii) is or states that it is, unable to pay its debts; or
 - (iv) is taken to fail to comply with a statutory demand in accordance with section 459F of the Corporations Act;
- (g) if the Custodian takes any step for the purpose of entering into a compromise or arrangement with any of its members, or creditors, generally or any class of them; and
- (h) if the process of any court or authority is invoked against the Custodian or any of the Custodian’s property to enforce any judgment or order for the payment of money or the recovery of property and the Custodian is unable, within five Business Days, to satisfy the Trustee that there is no substantial basis for the judgment or order in respect of which the process was invoked;

“**Non-Superannuation Fund Property**” means real and/or personal property which is not, at the relevant time, an asset of the Superannuation Fund;

“**Notice**” includes a notice, consent, request, waiver, demand or other communication by a party to another party in connection with this Deed;

“**Parties to this Deed**” means the persons or entities who for the time being are to be considered to be parties to this Deed taking into account the provisions of clauses 1.2(i) and 1.7(a) of this Deed whether or not an accession deed or other documentation as referred to in clauses 1.7(b) and 1.7(c) has been entered into;

“**Previous Custodian**” means a person who has been the Custodian but has ceased to be a custodian as contemplated by clause 5.4;

“**Replacement Asset**” has the same meaning as outlined in section 67B of the SIS Act;

“**SIS Act**” means the *Superannuation Industry (Supervision) Act 1993* (Cth);

“**Specified Property**” means the Asset or another asset that:

- (a) is a Replacement Asset; and
- (b) is not an asset the Trustee is prohibited by the SIS Act or any other law from acquiring;

“**Superannuation Fund**” means the superannuation fund referred to in Item 2 of the Schedule;

“**Taxes**” includes any present or future tax, levy, impost, deduction, charge, rate, duty or withholding (together with any related interest, penalty, fine or expense in connection with any of them) which is assessed, levied, imposed or collected by a Government Authority;

“**Trust Deed**” means such documents (including but not limited to agreements, deeds and documents which set out rules in relation to the Superannuation Fund) as for the time being setting out the provisions and rules, if any, governing the Superannuation Fund;

“**Trustee**” means the trustee for the time being of the Superannuation Fund in its capacity as trustee of the Superannuation Fund and as at the date of this Deed means the Current Trustee in its capacity as trustee of the Superannuation Fund.

1.2 General

In this Deed, unless the context otherwise requires:

- (a) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation under, that legislation or legislative provision;
- (b) the singular includes the plural and vice versa;
- (c) a reference to an individual or person includes a corporation, firm, partnership, joint venture, association, authority, trust, state or government and vice versa;
- (d) a reference to any gender includes all genders;

- (e) a reference to a recital, clause, schedule or annexure is to a recital, clause, schedule or annexure of or to this Deed;
- (f) a reference to an Item is to an Item referred to in the schedule to this Deed;
- (g) a recital, schedule or annexure forms part of this Deed;
- (h) a reference to any document is to that document (and, where applicable, any of its provisions) as amended, novated, restated or replaced from time to time;
- (i) a reference to any party to this Deed or any other document includes that party's executors, administrators, substitutes, successors and permitted assigns;
- (j) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (k) a reference to a "related body corporate" of a body corporate is to a body corporate which is related to that body corporate within the meaning of section 50 of the Corporations Act; and
- (l) including and similar expressions must not be treated as words of limitation.

1.3 Headings

In this Deed, headings are for convenience of reference only and do not affect interpretation.

1.4 Business Day

If the day on which any act, matter or thing is to be done under or pursuant to this Deed is not a Business Day, that act, matter or thing:

- (a) if it involves a payment other than a payment which is due on demand, must be done on the preceding Business Day; and
- (b) in all other cases, must be done no later than the next Business Day.

1.5 Limitation of Custodian's Liability

- (a) Each liability incurred or action taken by the Custodian in relation to this Deed is incurred or taken by it solely in its capacity as the legal owner of the Specified Property.
- (b) Despite anything expressed or implied in this Deed or any other document but subject to paragraph (c) of this subclause, recourse may only be had to the Custodian to the extent of the interest of the Custodian in the Specified Property and not to any other extent and for the avoidance of doubt not to the Custodian personally or to any other asset of which the Custodian may have an interest.

- (c) Notwithstanding paragraph (b), the Custodian will be personally liable for any liability incurred to the extent that it is incurred as a result of the Custodian's:
 - (i) fraud, wilful misconduct or gross negligence; or
 - (ii) breach of trust, where it fails to show the degree of care and diligence required of it as a trustee having regard to its powers, authorities or discretions under this Deed.

1.6 Limitation of Trustee's Liability

- (a) Each liability incurred or action taken by the Trustee in relation to this Deed is incurred or taken by it solely in its capacity as trustee of the Superannuation Fund.
- (b) Despite anything expressed or implied in this Deed or any other document but subject to paragraph (c) of this subclause and clause 2 of this Deed, recourse may only be had to the Trustee to the extent to which the Trustee is actually able to obtain reimbursement from the assets of the Superannuation Fund and not to any other extent and for the avoidance of doubt not to the Trustee personally or to any Non-Superannuation Fund Property.
- (c) Notwithstanding paragraph (b), the Trustee will be personally liable for any liability incurred to the extent that it is incurred as a result of the Trustee's:
 - (i) fraud, wilful misconduct or gross negligence; or
 - (ii) breach of trust, where it fails to show the degree of care and diligence required of it as a trustee having regard to its powers, authorities or discretions under the Trust Deed.

1.7 Replacement of Trustee

- (a) The Trustee has entered into this Deed in its capacity as trustee of the Superannuation Fund and so as to bind all trustees for the time being of the Superannuation Fund. If the Trustee is replaced as trustee of the Superannuation Fund, then from the date of such replacement this Deed is to be construed and is to take effect as if the replacement trustee had executed this Deed on that date and any reference to the Trustee will be from that date a reference to the replacement trustee to the exclusion of the party which has been replaced.
- (b) If the Current Trustee is replaced as trustee under the Trust Deed, the Parties to this Deed must enter into an accession deed or other documentation with the replacing trustee, and take such other steps, as are necessary to give full effect to the replacement of the Current Trustee as a party to this Deed.

- (c) If a Trustee (not being the Current Trustee) is replaced as trustee under the Trust Deed, that trustee which is replaced together with the Parties to this Deed (other than the Current Trustee) must enter into an accession deed or other documentation with the replacing trustee, and take such other steps, as are necessary to give full effect to the replacement of the replaced trustee as a party to this Deed.

2. Recourse against the Trustee limited to rights relating to the Specified Property

Despite anything else contained or implied in this Deed, any other documents, any actual or implied right or otherwise, the liability, arising by reason of default by the Trustee in its capacity as trustee of the Superannuation Fund (and for the avoidance of doubt, the liability of the Superannuation Fund to the Custodian arising by reason of default by the Trustee in its capacity as trustee of the Superannuation Fund) is limited to rights relating to the Specified Property only.

3. Trustee's right to acquire legal ownership of the Specified Property

Despite anything else contained or implied in this Deed or any other documents, it is agreed by the Parties to this Deed that the Trustee in its capacity as trustee of the Superannuation Fund has the right to acquire legal ownership of the Specified Property by making one or more payments after acquiring the beneficial interest.

4. Powers and responsibilities of Custodian

4.1 Custodian's limitations on dealing with the Specified Property

Each of the Custodian and the Trustee agree and acknowledge one to the other that the Custodian must, subject to clause 5.2, receive and get in, hold and deal with the Specified Property in accordance with a written Notice from the Trustee.

4.2 Custodian's Undertakings

The Custodian undertakes to:

- (a) **(act honestly)** act honestly and in good faith in the performance of its obligations and the exercise of its powers and discretions under this Deed, and to show the degree of care and diligence required of a trustee having regard to the extent of its obligations, powers and discretions under this Deed;
- (b) **(act continuously)** act continuously as the legal owner of the Specified Property until it ceases to do so in accordance with clause 3 or clause 5.4; and
- (c) **(hold the Specified Property separately)** hold, and account for, the Specified Property separately from all other assets or property owned or administered by it.

4.3 Custodian's Powers

Subject to the other provisions of this Deed, the Custodian has, in relation to the Specified Property, the powers of a natural person and the powers and authorities conferred by law upon a trustee and any other powers which are incidental to those powers and authorities or necessary or desirable in connection with any of them.

5. Terms of appointment of Custodian

5.1 Authority and Extent of Responsibility

- (a) It is acknowledged by the Parties to this Deed that the Custodian holds the Specified Property on a resulting trust for the Trustee in the Trustee's capacity as trustee of the Superannuation Fund and that the Custodian does not have and will not have any beneficial interest in the Specified Property. Accordingly, the Custodian has no duties in its capacity as such trustee other than those expressly set out in this Deed and the Custodian will not incur any liability to the Trustee or any other person for the non-performance of any duty which might otherwise be implied or imposed upon a trustee except to the extent to which such non-performance concerns a duty of the Custodian expressly set out in this Deed.
- (b) Without limiting the generality of paragraph (a), the Custodian:
 - (i) **(applicable law)** has the powers and discretions, and is entitled to the indemnities and protections, conferred on trustees by applicable law except to the extent that this Deed expressly provides otherwise;
 - (ii) **(use agents)** may exercise its rights and perform its duties either personally or through agents selected by it with reasonable care, and is not liable for any default, wilful misconduct or negligence of any such agent;
 - (iii) **(rely on advisers)** may engage such legal, accounting and other advisers as it considers necessary or desirable and may rely in good faith on advice which it receives from them;
 - (iv) **(assume documents etc. genuine)** may assume without investigation that any document or information provided to it is genuine and accurate if it believes in good faith that this is the case;
 - (v) **(not personally liable)** is not responsible for any loss, liability, cost or expense which may be incurred as a result of the performance or non-performance by it of its obligations or the exercise or non-exercise by it of its powers or discretions under this Deed except to the extent contemplated by clause 1.5(c); and
 - (vi) **(other dealings)** may enter, despite its role as contemplated by this Deed (and its duties arising therefrom), into other transactions

with the Trustee or any other party or any related body corporate of any of them as if it had not undertaken that role and did not have those duties, and need not account to any person for any profits which it may derive from any such transactions.

- (c) Despite any other provision to the contrary set out in this Deed, the exercise of any Discretion by the Custodian as conferred under this Deed requires the consent of the Trustee in all instances.

5.2 Limitation on Custodian's Obligation to Act

The Custodian is not obliged to take any step contemplated by this Deed:

- (a) if prevented from doing so by applicable law;
- (b) if it considers that to do so would constitute a breach of trust; or
- (c) unless it has first been indemnified to its satisfaction.

5.3 Remuneration

The Custodian is entitled to such remuneration as it agrees in writing with the Trustee.

5.4 Cessation as custodian

- (a) The Custodian may cease to be the registered owner of the Specified Property by giving not less than 30 days' prior written Notice to the Trustee. Despite such written Notice, such cessation takes effect on the later to occur of:
 - (i) the cessation date specified in the written Notice; and
 - (ii) the execution by the Custodian and the replacement custodian of the document(s) of transfer of (or other document(s) necessary to effect the transfer of) the Specified Property from the Custodian to the replacement custodian, though where such document(s) is capable of registration then it must be in registrable form.
- (b) The Custodian must cease to be the legal owner of the Specified Property if:
 - (i) an Insolvency Event occurs in respect of the Custodian; or
 - (ii) it receives a written Notice to that effect from the Trustee which Notice specifies the name of the replacement custodian (which replacement custodian is not the Trustee) and the Trustee has paid to the Custodian the amount payable by reason of clause 5.3 of this Deed.
- (c) The cessation of the Custodian as the registered owner of the Specified Property by reason of paragraph (b) takes effect on the earliest to occur of:

- (i) if the ownership of the Specified Property is registered on a public register – on the date of registration of the document(s) referred to in clause 5.4(a)(ii);
- (ii) if the ownership of the Specified Property is registered on a private register - on the date of registration of the document(s) referred to in clause 5.4(a)(ii);
- (iii) in any case other than as referred to in sub-paragraph (i) and sub-paragraph (ii) – on the date on which the last person required to execute the document(s) referred to in clause 5.4(a)(ii) executes that document(s).

5.5 Transfer of Specified Property and Records to New Custodian

A person or entity, upon ceasing to be the registered owner of the Specified Property as contemplated by clause 5.4, must:

- (a) do, sign, execute and deliver all deeds, documents, instruments and acts necessary to transfer the legal title in the Specified Property to the new custodian; and
- (b) deliver to the new custodian all books, records, documents, certificates of title and other matters in its possession relating to the Specified Property.

The Trustee must pay any reasonable costs, charges and expenses incurred by a retiring Custodian or new Custodian under this clause.

6. Costs and GST

6.1 Costs

The Trustee indemnifies the Custodian and each Previous Custodian against, and must pay the Custodian and each Previous Custodian on demand the amount of, all losses, liabilities, costs and expenses (including, without limitation, legal expenses on a full indemnity basis) and Taxes in connection with:

- (a) the negotiation, preparation, execution, stamping and registration of this Deed;
- (b) the administration, enforcement or attempted enforcement or preservation or attempted preservation of any rights, or the performance or attempted performance of any obligations, under or in relation to this Deed;
- (c) any amendment to, or any consent, approval, waiver, release or discharge of or under, this Deed; and
- (d) the document(s) of transfer of the Specified Property from the Custodian to a new custodian as referred to in clause 5.4(a).

6.2 GST

All payments, if any, to be made to the Custodian under or in connection with this Deed have been calculated without regard to GST.

If all or part of any such payment is the consideration for a taxable supply for GST purposes then, when the payment is made:

- (a) an additional amount must be paid to the Custodian equal to that payment (or part) multiplied by the appropriate rate of GST (currently 10%); and
- (b) the Custodian must promptly provide to the person who was liable in respect of the payment a tax invoice complying with the relevant GST legislation.

Where under this Deed a Party to this Deed is required to reimburse or indemnify for an amount (in this clause 6.2 called the "Amount"), that Party to this Deed will pay the relevant amount (including any sum in respect of GST) less any GST input tax credit the recipient of the Amount determines that it is entitled to claim in respect of that amount.

7. Notices

7.1 Delivery

A Notice must be in writing and delivered on a Business Day, sent by prepaid mail (airmail if overseas), by fax to the address or fax number of the recipient party set out in clause 7.3 or by electronic communication to the information system of the recipient party set out in clause 7.3, or to such other address, fax number or information system as that party may from time to time notify the other parties for the purposes of this clause 7.

7.2 Receipt

A written Notice given in accordance with clause 7.1 will be treated as having been received:

- (a) if it is delivered before 5pm on a Business Day, at the time of delivery otherwise at 9am on the next following Business Day;
- (b) in the case of posting, upon receipt;
- (c) if sent by fax, upon production of a complete transmission report by the machine from which the fax was sent which indicates that the fax was sent in its entirety to the fax number of the recipient notified for the purposes of this clause 7 (but if the communication is not completed by 5pm on a Business Day, at 9am on the next following Business Day); and
- (d) if sent by electronic communication, upon production of a complete confirmation of delivery report by the information system from which the electronic communication was sent which indicates that the electronic communication has entered the information system of the recipient

notified for the purposes of this clause 7 (but if the electronic communication has not entered the information system by 5pm on a Business Day, at 9am on the next following Business Day).

7.3 Addresses for Notices

For the purposes of this clause 7, the address, fax and information system details of each party are as set out in respect of the relevant party in the schedule to this Deed.

8. Third Parties

Except in the case of fraud, no person dealing with or contracting with the Custodian will be required to enquire or ascertain the terms of this Deed or whether any contract or dealing with the Custodian is proper or has been authorised or to see to the application of any money paid to the Custodian.

9. Law and jurisdiction

9.1 Governing Law

This Deed is governed by the law in force in the state of New South Wales.

9.2 Submission to Jurisdiction

The Parties to this Deed submit to the non-exclusive jurisdiction of the courts exercising jurisdiction in the state of New South Wales and any courts that may hear appeals from those courts in respect of any proceedings in connection with this Deed.

10. General

10.1 Waiver

The non-exercise of or delay in exercising any power or right of a Party to this Deed does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the Party to this Deed to be bound by the waiver.

10.2 Rights Cumulative

Subject to the provisions of this Deed, the rights and remedies provided in this Deed are cumulative and not exclusive of any rights or remedies provided by law.

10.3 Amendment

This Deed may only be amended or supplemented in writing signed by the Parties to this Deed.

10.4 Assignment

No Party to this Deed may assign or transfer all or any part of its rights or obligations under this Deed:

- (a) except in accordance with clause 1.7; or
- (b) unless it obtains the prior consent of each other Party to this Deed.

10.5 Severability

Any provision in this Deed which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable, and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of this Deed or affecting the validity or enforceability of that provision in any other jurisdiction.

10.6 Further Assurance

Each party must do, sign, execute and deliver and must procure that each of its employees and agents does, signs, executes and delivers, all deeds, documents, instruments and acts reasonably required of it or them by notice from another party to carry out and give full effect to this Deed and the rights and obligations of the parties under it.

10.7 Counterparts

This Deed may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

10.8 Attorneys

Each attorney who executes this Deed on behalf of a party declares that the attorney has no notice of any revocation, suspension or variation of the power of attorney under the authority of which the attorney executes this Deed.

10.9 No merger

The provisions of this Deed do not merge with any action performed or document executed by any Party to this Deed for the purposes of performance of this Deed.

SCHEDULE

- Item 1
(Asset – clause 1.1):
The property described as 20 Whitlock Drive, ROTHWELL QLD 4022
- Item 2
(Superannuation Fund – clause 1.1):
W&A HARRIS SUPER
- Item 3
(Addresses for Notices – Current Trustee – clause 7.3):
1 Meredith Street, HOMEBUSH NSW 2140
Fax No:
Email:
- Item 4
(Addresses for Notices – Initial Custodian – clause 7.3):
1 Meredith Street, HOMEBUSH NSW 2140
Fax No:
Email:

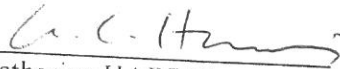
EXECUTED as a Deed.

Dated: 11-4-15

Signed by TOLIMAN PTY LTD
in accordance with its Constitution
in the presence of:



William James HARRIS
Secretary

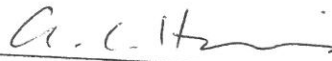


Anne Catherine HARRIS
Director

Signed by TOLIMAN
HOLDINGS NO1 PTY LTD in
accordance with its Constitution in
the presence of:



William James HARRIS
Secretary



Anne Catherine HARRIS
Director