

**Replacement self managed superannuation fund trust  
deed**

**BADG Superannuation Fund**



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# Replacement self managed superannuation fund trust deed

## Overview

- A On and from the date of signing the deed of variation this document is annexed to, the Trustee adopts the provisions of this document for BADG Superannuation Fund (**Fund**) to continue to:
- (i) provide superannuation benefits for the Members and their Dependants on the death of a Member; and
  - (ii) allow for any other purposes permitted by the Law.
- B The Trustee confirms it will continue to:
- (i) act as trustee of the Fund;
  - (ii) exercise its powers in accordance with this document; and
  - (iii) ensure the Fund enjoys any income tax concessions available to superannuation funds.

## Agreed terms

### 1 Fund

- 1.1 This document confirms:
- (a) how the Fund must operate;
  - (b) the responsibilities of the Trustee; and
  - (c) the rights and responsibilities of those associated with the Fund.

### 2 Key details

- 2.1 The key details of the Fund are as follows.

<b>Trustee</b>	Donato Carbone and Andrea Louise Carbone
<b>Name of Fund</b>	BADG Superannuation Fund

#### Review notes

- 1 BADG Superannuation Fund is a self managed superannuation fund (**SMSF**).
- 2 The rules for the SMSF are set out in this document, normally referred to as a 'trust deed'.
- 3 Once the deed is signed, there are a number of steps that the Trustee is obliged to take and specialist advisers should be able to guide you through the various government requirements – there is an explanation of the main obligations in the Product Disclosure Statement (**PDS**).
- 4 The PDS should be read in conjunction with the trust deed.
- 5 If this deed is being adopted as part of an update to an existing trust deed, most statutory requirements will have already been met.
- 6 Throughout the trust deed, there are 'review notes' (in the same format as this wording) designed to provide further insight to the legal provisions.
- 7 The review notes do not form part of the legal provisions of the trust deed or any of the other ancillary documents such as the PDS.
- 8 If there is any confusion or conflict between the review notes and the provisions of the trust deed and schedules, the trust deed and schedules apply.
- 9 Importantly, the trust deed and schedules are subject to any other provisions in the Law. If there is ever any doubt as to the appropriate approach to take, specialist advice should be obtained.
- 10 The PDS is a document that is designed to provide guidance in relation to all of the fundamental aspects of an SMSF.
- 11 It is also not legally binding as such (although it is compulsory to provide a PDS to each Member of an SMSF).
- 12 As the PDS is itself designed to be an information document, it does not have any review notes.

### 3 Definitions

#### 3.1 In this document:

<b>Term</b>	<b>Definition</b>
<b>Account</b>	Means any account established by the Trustee under this document, including the following:  (a) Accumulation Account; (b) Pension Account; (c) Income Account; (d) Floating Account; (e) Forfeiture Account; (f) Reserve Account; and (g) any other accounts required to be opened or maintained by the Trustee under the Law.
<b>Accumulation Account</b>	Means the account established by the Trustee.
<b>Allocated Pension</b>	Has the same meaning as in the SIS Regulations.
<b>Allot</b>	Has the same meaning as in the SIS Regulations.

<b>Annuity</b>	Has the same meaning as in the Law.
<b>Anti-detriment Payment</b>	Means a Superannuation Lump Sum arising from the death of the Member to compensate the Fund for the Tax payable on Contributions.
<b>Applicant</b>	Means a Member who makes a contributions splitting application.
<b>Approved Benefit Arrangement</b>	Means a fund or benefit arrangement other than the Fund (including another Complying Superannuation Fund, an Approved Deposit Fund or an Annuity arrangement) into which or from which assets can be transferred from or into without causing the Fund to be in breach of the Law, including an Eligible Rollover Fund.
<b>Approved Deposit Fund</b>	Means a fund which is complying approved deposit fund under the Tax Act.
<b>Auditor</b>	Means the auditor of the Fund.
<b>Beneficiary</b>	Means a person who is presently and absolutely entitled to receive a Benefit including a Member, a Dependant or a Pensioner.
<b>Benefit</b>	Means any amount which is payable out of the Fund to or in respect of a Member.
<b>Benefit Entitlement</b>	Means any amount held in the Fund which may become payable to a person but to which the person has not become absolutely and indefeasibly entitled.
<b>BDBN</b>	Means a nomination made by a Member for the payment or application of a death benefit that is binding on the Trustee under the Law.
<b>Business Day</b>	Means a day on which banks are open for general banking in the capital city of the State of the situs of the Fund.
<b>Child</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Closing Date</b>	Means the date the Fund is determined to be wound up, which must be on or before the date required by the Law.
<b>Compassionate Grounds</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Complying Superannuation Fund</b>	Means a fund which satisfies the definition of a complying superannuation fund under the Law.
<b>Constitutional Corporation</b>	Has the same meaning as in the Law.
<b>Contribution</b>	Means gross payments to the Fund in respect of Members, before the deduction of any Tax payable in respect of those payments and includes the transfer of an asset that is intended by the transferor to be a contribution.
<b>Corporations Act</b>	Means the <i>Corporations Act 2001</i> (Cth).
<b>Dependant</b>	Includes anyone who is a dependant as defined under the Law.
<b>Directors</b>	Means (where the Trustee is a Constitutional Corporation) the directors or board of management for the time being of the Trustee.

<b>Disclosure Document</b>	Means any document required to be given under the Law to a person applying to be a Member.
<b>Earnings</b>	Means all net income and net capital gains derived from the assets of the Fund, whether realised or unrealised, after deducting any capital losses, allowances for expenses and Tax as the Trustee determines.
<b>Eligible Rollover Fund</b>	Has the same meaning as in the Law.
<b>Employee</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Employer</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Financial Year</b>	Means a period of 12 months ending on 30 June or any other period of 12 months as the Trustee determines.
<b>Floating Account</b>	Means the account established by the Trustee.
<b>Forfeiture Account</b>	Means the account established by the Trustee.
<b>Fund</b>	Means BADG Superannuation Fund.
<b>Fund Earning Rate</b>	Means the earning rate for the Fund (which may for the purposes of this document be negative) calculated by the Trustee after taking into account any provisions or reserves for future contingencies as the Trustee determines.
<b>Gainful Employment</b>	Means engagement in any business, trade, profession, vocation, calling, occupation or employment for gain to the extent required by the Law.
<b>Guarantee Act</b>	Means the <i>Superannuation Guarantee Charge Act 1992</i> (Cth), the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth) and any regulations made to those Acts.
<b>Income Account</b>	Means the account established by the Trustee.
<b>Income Stream</b>	Means: <ul style="list-style-type: none"> <li>(a) a Pension;</li> <li>(b) an Annuity; or</li> <li>(c) a Benefit payable in a form other than as a Superannuation Lump Sum,</li> </ul> as allowed under the Law.
<b>Individual Trustee</b>	Means a natural person who is appointed to be a Trustee of the Fund.
<b>Insurer</b>	Means any insurer with whom the Trustee effects any Policy.
<b>Law</b>	Means any requirement under the following acts and regulations: <ul style="list-style-type: none"> <li>(a) SIS Act;</li> <li>(b) SIS Regulations;</li> <li>(c) <i>Family Law Act 1975</i> (Cth);</li> <li>(d) <i>Family Law (Superannuation) Regulations 2001</i> (Cth);</li> <li>(e) Corporations Act;</li> </ul>

	<p>(f) <i>Corporations Regulations 2001</i> (Cth);</p> <p>(g) Tax Act; and</p> <p>(h) any other legislation which the Trustee must comply with for the Fund to:</p> <p>(i) qualify for concessional Tax treatment as a Complying Superannuation Fund; or</p> <p>(ii) meet any other requirement of a Statutory Authority.</p>
<b>LPR</b>	Has the same meaning as in the SIS Act.
<b>Levy</b>	Includes a levy payable by the Fund in accordance with the <i>Superannuation Supervisory Levy Act 1991</i> (Cth), the <i>Superannuation (Fund Assistance Levy) Act 1993</i> (Cth) and any other legislation or regulations which impose levies on the Fund.
<b>Maximum Splittable Amount</b>	Has the same meaning as in the SIS Regulations.
<b>Member</b>	Means a person who has been admitted as a member of the Fund and has not ceased to be a member of the Fund.
<b>Member Account</b>	Means an Accumulation Account or Pension Account as the context requires.
<b>Nominated Beneficiary</b>	Means any Dependant or LPR of a Member, nominated by the Member.
<b>Non-BDBN</b>	Means a nomination made by a Member in relation to the payment or application of a death benefit that is not a BDBN.
<b>Non-Member Spouse</b>	Has the same meaning as in the SIS Act and SIS Regulations. A person ceases to be a Non-Member Spouse when:
	<p>(a) the entitlement of the Non-Member Spouse in respect of a Payment Split is paid out of the Fund; or</p> <p>(b) they become a Member.</p>
<b>Payment Flag</b>	Has the same meaning as in the Law.
<b>Payment Split</b>	Has the same meaning as in the Law.
<b>Pension</b>	Includes a Benefit paid in accordance with the meaning of 'pension' under the Law.
<b>Pension Account</b>	Means the account established by the Trustee.
<b>Pensioner</b>	Means a Member who is entitled to receive or has applied to receive Benefits payable to the Member as a Pension, including a Reversionary Beneficiary in receipt of a Pension.
<b>Permanent Incapacity</b>	Has the same meaning as in the Law.
<b>Permitted Entity</b>	Means any person or entity permitted under the Law to make a contribution in respect of a Member.

<b>Policy</b>	Means any policy of assurance including a policy on the life of a Member or a non-Member for endowment, term, disablement, accident or sickness insurance.
<b>Preservation Age</b>	Has the same meaning as in the SIS Regulations.
<b>Preserved</b>	Means being subject to the prohibition against paying any amount from the Fund before a Member: (a) reaches Preservation Age; or (b) is otherwise entitled to be paid that amount under the Law.
<b>Reserve Account</b>	Means the account established by the Trustee.
<b>Retires from Employment</b>	Means enters into retirement as defined under the Law for the payment of Benefits.
<b>Retires from Gainful Employment</b>	Means enters actual retirement from Gainful Employment or Retires from Employment.
<b>Reversionary Beneficiary</b>	Means a Dependant nominated by a Pensioner (and in default of a nomination by the Pensioner, where appropriate, a Dependant nominated by the Trustee) who is eligible to receive a Benefit on the death of a Pensioner.
<b>Self managed superannuation fund</b>	Means a superannuation fund which satisfies the requirements of a self managed superannuation fund set out under the Law.
<b>Severe Financial Hardship</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Shortfall Component</b>	Has the same meaning as in the Guarantee Act.
<b>SIS Act</b>	Means the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth).
<b>SIS Regulations</b>	Means any regulations made under the SIS Act.
<b>Split</b>	Means to rollover or transfer out of the Fund or Allot for the benefit of the Applicant's Spouse an amount of the Applicant's Benefits equal to an amount of the Splittable Contributions made by, for, or on behalf of the Applicant.
<b>Splittable Contribution</b>	Has the same meaning as in the SIS Regulations.
<b>Spouse</b>	Has the same meaning as in the SIS Act, however: (a) where a person has more than one Spouse, the Trustee may determine: (i) who is a Spouse for the purposes of this document; and (ii) the proportions a Benefit is payable to each Spouse if there is no BDBN; (b) the Trustee, in determining whether a relationship is on a genuine domestic basis, may have regard to any matters, and attach weight to these matters, as it determines; (c) a person can be a Spouse of a Member even if that person or the Member is:

	(i) legally married to someone else; or (ii) the Spouse of another person.
<b>Statutory Authority</b>	Means a regulatory body or person having responsibility for the administration of superannuation.
<b>Superannuation Death Benefit</b>	Has the same meaning as in the Tax Act.
<b>Superannuation Lump Sum</b>	Has the same meaning as in the Tax Act.
<b>Superannuation Member Benefit</b>	Has the same meaning as in the Tax Act.
<b>Tax</b>	Includes any tax, surcharge, Levy, impost or duty payable by the Trustee.
<b>Tax Act</b>	Means the <i>Income Tax Assessment Act 1936</i> (Cth) and the <i>Income Tax Assessment Act 1997</i> (Cth) and any regulations or public rulings issued under those Acts.
<b>Temporary Incapacity</b>	Has the same meaning as in the SIS Act and SIS Regulations.
<b>Trustee</b>	Means: (a) as at the date of this document - Donato Carbone and Andrea Louise Carbone; and (b) in all cases - the trustee or trustees for the time being of the Fund.
<b>Unclaimed Benefits</b>	Means those Benefits described as unclaimed money under the SIS Act.
<b>Unrestricted Non-Preserved Amount</b>	Means an amount determined in accordance with the SIS Regulations.

#### Review notes

- 1 Throughout the trust deed and schedules, there are a number of terms that are used on multiple occasions.
- 2 All of these terms are summarised in the above table.
- 3 Some terms are defined with reference to the Law.
- 4 If you are interested, contact the adviser that assisted you in setting up this SMSF and we can provide through them a separate table which summarises the definitions (extracted from the relevant legislation) as at the date of this document.

## 4 Rules

- 4.1 The Fund is governed by this document and the Law.

## 5 Structure

- 5.1 The Fund is established by, and starts on the date of, this document.



- 5.2 The Fund is at all times vested in the Trustee and managed by the Trustee upon the terms and subject to the trusts, powers, authorities and discretions in this document.
- 5.3 The Fund consists of all assets held by (or on account of) the Trustee upon the trusts of this document.

## **6 Covenants**

- 6.1 The Trustee must act in accordance with this document and the Law.
- 6.2 If there is any inconsistency between this document and the Law, the provisions of the Law prevail.

## **7 Trustee**

### ***Purpose***

- 7.1 Subject to the Law:
- (a) the Trustee must at all times be a Constitutional Corporation; or
  - (b) if the Trustee is not a Constitutional Corporation, the sole or primary purpose of the Fund must be the provision of old-age pensions as that term is defined in the *Commonwealth of Australia Constitution Act*.

### ***Self managed superannuation funds***

- 7.2 A person can only be:
- (a) the Trustee; or
  - (b) a Director of the Trustee (if the Trustee is a Constitutional Corporation),
- in accordance with the provisions of this clause.
- 7.3 Subject to this document, where the Fund has a sole Member, the Trustee must either be:
- (a) a Constitutional Corporation where the Member is:
    - (i) the sole Director; or
    - (ii) one of only two Directors, and the Member and the other Director are related; or
    - (iii) one of only two Directors, and the Member is not employed by the other Director; or
  - (b) two Individual Trustees comprising the Member and another person who is either:
    - (i) related to the Member; or
    - (ii) not an Employer of the Member.
- 7.4 Subject to this document, where the Fund has more than one Member, the Trustee must satisfy one of the following, however no Member of the Fund may be employed by another Member of the Fund unless permitted by the Law:
- (a) a Constitutional Corporation where each Member is a Director and each Director is a Member; or

- (b) Individual Trustees where each Member is an Individual Trustee and each Individual Trustee is a Member of the Fund.
- 7.5 Regardless of any legislation regulating trusts in the jurisdiction of the situs of the Fund, and subject to this document:
- (a) a sole trustee may act; and
  - (b) a retiring trustee is fully discharged, even where only one trustee remains after the retirement.
- 7.6 The requirements in this clause are subject to any other rules in the Law.

***Appointment***

- 7.7 Subject to the Law, the Members with the majority of Benefits in the Fund may at their sole discretion in writing:
- (a) remove any Trustee of the Fund; or
  - (b) appoint a Trustee, with, or in replacement of, the existing Trustee.
- 7.8 The LPR of:
- (a) a deceased Member;
  - (b) a Member who has lost legal capacity; or
  - (c) a Member who has appointed the LPR as the Member's attorney,
- may exercise that Member's power to appoint a Trustee.
- 7.9 Where a Member is under the age of 18 years, a parent or guardian of the Member may exercise that Member's power to appoint a Trustee.
- 7.10 If the Fund has no remaining Members and no other person mentioned in this clause has the power to appoint a Trustee, then the LPR of the last remaining Member to have an LPR may appoint a Trustee.

***Ceasing to act***

- 7.11 Subject to the Law, a Trustee ceases to act if:
- (a) being an Individual, they die or otherwise lose legal capacity;
  - (b) being a Constitutional Corporation, it is placed into receivership or liquidation or an administrator is appointed;
  - (c) the Trustee is disqualified, removed or suspended from office under the Law;
  - (d) the Trustee resigns by notice to a majority of the Members; or
  - (e) the Trustee is removed from office by written notice given to the Trustee by Members with the majority of Benefits in the Fund.

***Powers personal***

- 7.12 Apart from the circumstances set out in this clause, the powers of the Trustee are personal to the persons nominated and cannot be exercised by any other person, entity or court.

### ***Transfer of assets***

- 7.13 On retirement or removal of a Trustee, the Trustee must:
- (a) hand over the books, accounts, documents and property of the Fund to the new trustee;
  - (b) do everything necessary to vest the assets of the Fund in the new trustee;
  - (c) do everything reasonably required by the new trustee to hand over to the new trustee possession and control of any assets registered with third parties;
  - (d) do all other things reasonably required by the new trustee to inform the new trustee of the arrangements of the Fund.

### ***Remuneration***

- 7.14 If permitted by the Law, if any person acting as a Trustee is a trustee company, lawyer, financial adviser or accountant, that person (or any firm of which they are a member) may charge all usual and reasonable professional fees for professional work done in the administration of the Fund, regardless of whether the work performed is within the normal scope of the profession of which the Trustee is a member.

### ***Members***

- 7.15 No Individual Trustee, Director or officer of a Constitutional Corporation or Employee of an Employer is by virtue of their office or the powers delegated to them by the Trustee disqualified from being a Member of the Fund or from exercising rights or deriving any Benefits as a Member of the Fund.

## **8 Liability**

- 8.1 A Trustee is not liable:
- (a) for the consequences of any act, omission, error or forgetfulness whether of law or fact on the part of the Trustee or their legal or other advisers; or
  - (b) generally for any breach of duty or trust,
- unless it is proved to have been committed, given or omitted in bad faith, recklessly or grossly negligently by that Trustee.

### ***Indemnity***

- 8.2 The Trustee is indemnified out of the Fund against liabilities incurred by it:
- (a) in the execution, or attempted execution, of this document;
  - (b) because of the failure to exercise any of the trusts, authorities, powers or discretions of this document; or
  - (c) by virtue of being the Trustee,
- unless the loss or liability is proved to be caused by any act or omission or fraud or in bad faith, or the wilful misconduct, recklessness or gross negligence of the Trustee.

#### Review notes

- 1 The Law is prescriptive about how a superannuation fund satisfies the definition of being an SMSF.

- 2 The basic principle is that all Trustees (whether individuals or directors of a corporate Trustee) must be Members of the SMSF and vice versa.
- 3 There are exceptions to this rule. While there can be a mixture of individual and corporate Trustees, there must not be more than four Trustees in total.
- 4 Special rules also apply in relation to any Trustee who has lost capacity, is under the age of 18 or dies. Generally the LPR for the Member is permitted to act as Trustee on their behalf in these circumstances.
- 5 The Tax Office requires notification confirming the Trustee of an SMSF. The standard forms also require the Trustee to provide a number of declarations confirming its understanding of the Law.
- 6 In certain instances, particularly where an event of bankruptcy occurs, persons will be disqualified from acting as a Trustee of an SMSF, and again in this type of situation, specialist advice should be sought.

## 9 Members

- 9.1 The Trustee may, on the date and terms it determines, admit as a Member any person who applies, unless the admission would cause the Fund to breach the Law.
- 9.2 Each Member is deemed to have consented to be bound by this document.

## 10 Notification to Members

- 10.1 The Trustee must give all new Members a Disclosure Document containing the information as required by the Law.
- 10.2 The Trustee must annually give Members, former Members (or their LPR) and Beneficiaries any information required by the Law.
- 10.3 A copy of any documents required by the Law must be made available for inspection by any Member or Beneficiary on their request.
- 10.4 The Trustee must notify the Members of the manner, time and place in which meetings of the Members held under the Law and for the purposes of this document are to be held.

### Review notes

- 1 While (in order to qualify as an SMSF) each Individual Trustee must be a Member and vice versa, there are still a number of notifications that must be provided to Members when they join an SMSF.
- 2 There must also be regular Trustee meetings, in particular whenever significant decisions or events relating to the Fund need to be made.
- 3 Where the Trustee is a company, all the rules that apply under the *Corporations Act 2001* (Cth) in relation to conducting meetings and recording decisions must be followed.
- 4 There is no equivalent legislation for Individual Trustees, however a similar approach should still be adopted.
- 5 Generally each Trustee (or Director) will get one vote. In some situations, steps may be taken to change the voting ability of each Trustee to align with their respective Member balances of entitlements under the Fund, however specialist advice should be obtained before implementing this type of arrangement.

## 11 Ceasing to be a Member

- 11.1 A person ceases to be a Member on the first of the following to occur:

- (a) the Trustee determines that the Member has been paid all of their Benefit from the Fund;
- (b) where the Member dies, the Trustee determines that the deceased Member's Benefit has been paid in accordance with this document;
- (c) the Trustee determines that the Member's membership would cause the Fund to cease complying with the Law; or
- (d) the Trustee acting reasonably determines that the Member should cease to be a Member.

**Review notes**

- 1 There are a range of reasons that a Member may choose to leave a Fund, including:
  - a desire to become a member of another fund (including an industry fund);
  - due to the dissolution of a spousal relationship with another Member;
  - a decision to otherwise wind up the Fund;
  - the Member becomes a disqualified person.
- 2 Whenever a Member is seeking to withdraw their Benefits from the Fund, the Trustee is obliged to ensure that payments are done in a way that complies with the Law and that the transfer is completed in a timely manner.

## **12 Contributions**

### ***Eligibility***

- 12.1 The Trustee may accept Contributions from a Member, an Employer or any other Permitted Entity.

### ***Allocation***

- 12.2 Each Contribution must be allocated within 28 days after the end of the month in which it is received.

### ***Guarantee Act***

- 12.3 Where the Trustee accepts Contributions under the Guarantee Act, the Trustee must give all certificates, reports and other information required by the Guarantee Act.

## **13 General Contribution provisions**

### ***Form***

- 13.1 A Contribution may be made either:
- (a) in cash; or
  - (b) by transfer of an asset or assets, if permitted by the Law.

### ***Obligations***

- 13.2 Subject to the Law:
- (a) in the absence of any agreement to the contrary, no Member, Employer or Permitted Entity is obliged to make a Contribution in any Financial Year; and

- (b) a person may remain a Member despite no Contributions being made in respect of that Member for any Financial Year.

**Limits**

- 13.3 The Trustee must refuse to accept any Contribution or Shortfall Component if:
- (a) under the Law the Contribution is not authorised to be made;
  - (b) the Contribution is in excess of the amount of Contributions that can be made on the Member's behalf under the Law;
  - (c) acceptance of the Contribution or Shortfall Component would cause the Fund to no longer qualify as a Complying Superannuation Fund; or
  - (d) any Statutory Authority directs the Trustee not to accept a Contribution by an Employer or any Shortfall Component.

**Eligibility**

- 13.4 If any Contribution or Shortfall Component is accepted by the Fund in breach of the Law, the Trustee must refund the Contribution or Shortfall Component as required by the Law, less any:
- (a) Tax payable that the Member has authorised the Trustee to pay;
  - (b) charge which an Insurer may have made; and
  - (c) reasonable costs.

**Review notes**

- 1 Subject to the rules in relation to transactions with Members and other related parties, the Trustee may accept cash or assets given to the Fund by way of Contributions.
- 2 Contributions can also be made via a roll-over or transfer from another superannuation fund, as long as the strict requirements of the Law are complied with.
- 3 The PDS sets out in detail the basis on which Contributions can be made for a Member.
- 4 The law in this area has changed regularly since 2000 and specialist advice should be obtained if there are any doubts about whether a Contribution will fall within the rules.
- 5 This can be particularly important where a Contribution may potentially be in excess of what is otherwise permitted under the Law, otherwise penalty tax rates can often apply.

## **14 Contribution splitting**

**Application**

- 14.1 Subject to the Law, the Trustee may accept an application from an Applicant to Split the Applicant's Benefit (up to the Maximum Splittable Amount).

**Split**

- 14.2 If the Trustee accepts an application under this clause, the Trustee must effect the Split within 90 days after receiving the application, but cannot Allot any amount for the benefit of the Spouse unless they are a Member.

**Review notes**

- 1 Subject to the Law, the Trustee may permit Members to 'split' Contributions.

- 2 This means, for example, if one Member is receiving Contributions from, say, an employer, they can choose to have those Contributions directly allocated to, for example, their Spouse.
- 3 As with many other aspects of the Contribution rules, the exact requirements can be complex, and if there is any doubt about the ability to split the Contributions, specialist advice should be obtained.

## **15 Approved Benefit Arrangements**

### ***Asset transfers***

- 15.1 Following a request of a Member, or the LPR of a Member, the Trustee may determine to Allot, transfer or rollover all or part of any Member's Account to any other Member's Account or Approved Benefit Arrangement, in accordance with the Law.

### ***Effect***

- 15.2 Once an Allotment, transfer or rollover under this clause has been effected:
- (a) the receipt of the transferred or rolled over Benefit by the proper officer of the Approved Benefit Arrangement is a complete discharge to the Trustee and the Trustee has no responsibility to see to the application of it; and
  - (b) all the rights and interest of that Member under this document (and all the rights and interest of any person otherwise entitled to claim in respect of the Member or on the occurrence of any event or circumstances affecting the Member) in respect of the amount paid are entirely extinguished.

### ***Eligible Rollover Funds***

- 15.3 The Trustee may if permitted by the Law, and must if required by the Law, transfer a Member's Benefit to an Eligible Rollover Fund and must give any information to the trustee of the Eligible Rollover Fund at the times and in the manner required by the Law.

### **Review notes**

- 1 As set out above, where a Member chooses (or is forced) to leave a Fund, the entitlements of the Member should be transferred to an 'Approved Benefit Arrangement'.
- 2 The rules set out under the Law confirm the requirements that a Trustee must satisfy when making any type of transfer for an exiting Member, and the Trustee must be satisfied that the Fund receiving the Member's Benefit does comply with all the aspects of the Law.
- 3 Best practice dictates that the Trustee should obtain a declaration from the trustee of the recipient fund that it does meet the relevant criteria.

## **16 Accumulation Account**

- 16.1 The Trustee may establish an Accumulation Account for each Member or Beneficiary.
- 16.2 The Trustee may credit to and debit the Accumulation Account for a Member or Beneficiary any amounts required by this document and the Law as it determines.

## **17 Pension Account**

- 17.1 The Trustee may establish a Pension Account in respect of a Pensioner.

- 17.2 The Trustee must transfer to the Pension Account for a Pensioner any assets of the Fund or amounts determined in accordance with this document which the Trustee determines necessary to cash the Member's Benefit as a Pension.
- 17.3 The Trustee may credit to the Pension Account for a Pensioner as it determines:
- (a) the portion of the Earnings (if positive); and
  - (b) any other amounts that the Trustee determines and which are permitted by the Law.
- 17.4 The Trustee may debit to the Pension Account for a Pensioner all Benefits paid to the Pensioner.

## **18 Income Account**

- 18.1 The Trustee must establish an Income Account for the Fund.
- 18.2 The Trustee must credit and debit the Income Account with all amounts required by this document and the Law.
- 18.3 At the end of each Financial Year or at any other time that the Trustee determines or the Law requires, the Trustee must determine:
- (a) the Earnings in respect of the period since the previous determination; and
  - (b) the Fund Earning Rate.
- 18.4 Subject to this document and the Law, the Trustee must use the Fund Earning Rate to determine the proportion of the Earnings to be credited or debited to other Accounts (including Member Accounts, Pension Accounts or Reserve Accounts) from the Income Account.
- 18.5 The Trustee must, when required by the Statutory Authority or the Law, notify the Members of the basis of the calculation of the Fund Earning Rate.

## **19 Floating Account**

### ***Establishment***

- 19.1 The Trustee may establish a Floating Account for the Fund.

### ***Transfers***

- 19.2 The Trustee must transfer to the credit of the Floating Account any amount remaining in the Income Account after distribution of Earnings.

### ***Separation***

- 19.3 Amounts credited to the Floating Account do not form part of any Member Account and any income earned by the Fund on the moneys held in the Floating Account must be credited to the Floating Account.

### ***Use***

- 19.4 The Floating Account may be used as the Trustee determines, including for the following purposes:
- (a) as part of a reserving strategy;
  - (b) to supplement the Fund Earning Rate; and



(c) to pay any Tax.

***Adjustment of Member Account***

19.5 The Trustee may adjust the credit of a Member Account to reflect the Fund Earning Rate applying at the date of payment.

## **20 Reserve Accounts**

***Establishment***

20.1 Subject to the Law, the Trustee may establish one or more Reserve Accounts for the Fund and determine what amounts are credited or debited to those Accounts.

***Investment strategy***

20.2 The Trustee must formulate and implement a separate investment Strategy for any Reserve Account.

***No entitlement***

20.3 No Member, nor any other person, has any entitlement to any amount held in a Reserve Account.

**Review notes**

- 1 In order to give effect to the Fund's investment strategy and in turn discharge the obligations imposed by the sole purpose test (as explained in the PDS), there must be flexibility to deal with all assets of the Fund.
- 2 The primary tools available to the Trustee to do this are the various types of Accounts that they choose to establish within the Fund.
- 3 During the lifecycle of a Fund, the Trustee will generally establish most, if not all, of the following Accounts:
  - Accumulation Account – this manages the ongoing Contributions and investments of Members up until they reach a condition of release. Generally, there will be a separate Accumulation Account for each Member;
  - Pension Account – once a Member starts receiving an Income Stream, the Pension Account will be used to manage the Pension payments;
  - Income Account – this Account manages the return on investments, prior to them being allocated to another Account;
  - Floating Account – this Account is designed to receive any excess Earnings that are not otherwise allocated to a Member's Accumulation Account;
  - Reserve Account – Reserve Accounts, within strict parameters set by the Tax Office and the Law, can be used to help manage fluctuations in returns across the lifecycle of the Fund. Reserve accounts can also be used to help manage the payment of income streams, lump sum payments on death and managing allocation of Contributions;
  - whenever using a Reserve Account, the Trustee should set out the parameters of the Account as part of the investment strategy for the Fund.

## **21 Valuation of Fund**

21.1 At the end of each Financial Year or at any other time the Trustee determines or the Law requires, the Trustee must:

- (a) make a valuation of all of the assets of the Fund;
- (b) transfer any surplus or deficiency in the valuation of assets, other than specific investments, to the Income Account; and
- (c) ensure that the records and accounts of the Fund reflect the valuation of each asset.

## **22 Records, reports and audit**

### ***Trustee obligations***

22.1 The Trustee must:

- (a) keep accounts of all dealings of the Fund;
- (b) safely retain all documents for any period required by the Law;
- (c) prepare and lodge all documents required by the Law;
- (d) ensure the Fund is audited at the end of each Financial Year and that the Auditor provides any certificates required by the Statutory Authority;
- (e) once each Financial Year, report on the affairs of the Fund to the Members in the form required by the Law;
- (f) record against a Member's Benefit or Benefit Entitlement, a Payment Flag that has been validly served on the Trustee under the Law until it is validly lifted;
- (g) comply with any direction or requirement of the Statutory Authority or a court in relation to the Fund.

#### **Review notes**

- 1 While the Trustee may delegate a number of its duties, it is still ultimately responsible for the way in which the Fund is managed.
- 2 One important aspect of this is that all assets, agreements and transactions on behalf of the Fund should be recorded in the name of the Trustee.
- 3 The Trustee must also keep proper accounts for the Fund and determine the value of the Fund at least once a year.
- 4 The accounts must in turn be audited each year.

## **23 Service providers**

23.1 The Trustee may determine to appoint any one or more persons, as:

- (a) investment manager;
- (b) actuary;
- (c) administration manager;
- (d) Auditor;
- (e) custodian; or
- (f) any other consultants the Trustee determines as appropriate for the Fund.

#### **Review notes**

- 1 Each Trustee is ultimately responsible for all aspects of the Fund.

- 2 The Trustee however is able to seek specialist advice, particularly in areas where they do not necessarily have skills or experience themselves.
- 3 Any delegation of various aspects of the Fund to one or more of the types of consultants or advisers outlined above is often appropriate.

## 24 Insurance

### *Member policies*

- 24.1 The Trustee may effect Policies with an Insurer and may secure the Benefit of a Member via any form of Policy.

### *Member requests*

- 24.2 Where a Member notifies the Trustee to effect a Policy of a specified type in respect of that Member, another Member or a non-Member, the Trustee must:
- (a) effect that Policy unless it would cause the Fund to cease being a Complying Superannuation Fund;
  - (b) record that the Policy has been effected for that Member for the purposes of determining allocations to the Member Account, unless the Trustee resolves and it is permissible under the Law, to allocate part or all of the Policy to a Reserve Account; and
  - (c) credit the Member Account or Reserve Account (if applicable) with any income and profit and debit it with any costs, charges or Tax relating to that Policy.

### Review Notes

- 1 The Trustee can arrange for insurance for the benefit of any Member.
- 2 Any insurance arrangements should align with the overall investment strategy of the Fund or an individual investment strategy for the benefit of a particular Member.
- 3 Specialist advice should be obtained given the relatively complex rules in relation to insurance held via superannuation as well as related Tax consequences.
- 4 While generally the rules in relation to life insurance are simple, particularly where cover for total and permanent disablement, trauma or salary continuance are desired, there are a number of restrictions that need to be considered.
- 5 Similarly, while an SMSF is permitted to self-insure against various risks, specialist advice should be obtained before doing so.

## 25 Tax

- 25.1 The Trustee may deduct Tax from any Benefit payable to a Beneficiary in relation to a Contribution or Shortfall Component before the Contribution or Shortfall Component is credited to the Accumulation Account of a Member.

### Review notes

- 1 There are a significant number of taxes that can apply to an SMSF, including:
  - income tax;
  - capital gains tax;
  - contributions tax;
  - various surcharges;
  - stamp duty; and
  - land tax.
- 2 Generally, Earnings that relate to a Pension Account will be tax free.

- 3 Similarly, the payment of a death benefit to people who satisfy the definition of a 'tax dependant' will also be tax free.
- 4 The rules about taxation and SMSFs are relatively complex and change regularly, so specialist advice should be obtained.

## 26 Types of Benefits

### *Entitlement*

- 26.1 Where a Member becomes entitled to a Benefit under this document and the Law, and there are no cashing restrictions that apply to the Benefit under the Law, the Member may elect by notice to the Trustee to be paid the Benefit in one or more of the forms permitted by the Law, including:
- (a) one or more Superannuation Lump Sums; or
  - (b) one or more Income Streams.

### *Pre 1 July 2007 entitlements*

- 26.2 Where a Member was already receiving one or more Income Streams before 1 July 2007, that Member may continue to receive them, as permitted by the Law.

### *Election*

- 26.3 Unless the Trustee otherwise determines, an election given by a Member under this document:
- (a) is not binding on the Trustee;
  - (b) is to be provided before the Benefit starts to be paid; and
  - (c) must confirm the amount to be paid and the extent to which the amount is to be paid as any one or more types of Benefit.

### *Restrictions*

- 26.4 The Trustee may only pay a Benefit in accordance with any cashing restrictions imposed by the Law.

### *Transfers*

- 26.5 Where a Member or a Beneficiary is entitled to be paid a Benefit, the Trustee may transfer any:
- (a) interest in a Policy to the Member or Beneficiary;
  - (b) assets of the Fund of an equivalent value to that Member or Beneficiary.

### Review notes

- 1 There are two ways that a Member can access their entitlements in an SMSF, namely:
  - a lump sum; and
  - b Income Stream.
- 2 The Trustee determines how Benefits are paid, and can combine one or more lump sums with one or more Income Streams.
- 3 Importantly, the entitlement to Benefits is subject to the various expenses of the Fund, which must be deducted before Benefits are paid.

## **27 Preservation**

27.1 The Trustee must Preserve the amounts of Contributions as required by the Law.

## **28 Payment of Unrestricted Non-Preserved Amount**

28.1 Subject to the Law:

- (a) a Member may elect at any time to withdraw all or any part of their Unrestricted Non-Preserved Amount by giving notice to the Trustee; and
- (b) the minimum Unrestricted Non-Preserved Amount which may be withdrawn by a Member must be determined by the Trustee and notified to the relevant Members.

## **29 Additional benefits**

29.1 The Trustee may determine to pay to a Member's Accumulation Account:

- (a) an Anti-detriment Payment;
- (b) any portion of the Floating Account; and
- (c) any other amounts allowed under the Law.

## **30 Retention**

30.1 Where a Member or Beneficiary does not require Benefits to be paid, the Trustee may retain all or any part of any Benefit in the Fund until the earlier of:

- (a) the date the Member or Beneficiary entitled to the Benefit notifies the Trustee that it requires the Benefit; or
- (b) the date the Benefit is required to be paid under the Law or this document.

## **31 Compulsory payment**

### ***Payment***

31.1 The Trustee must cash a Member's Benefit as soon as practicable after the first of the following:

- (a) the death of a Member; or
- (b) as required under this document; or
- (c) as required under the Law.

### ***Cashing***

31.2 The Trustee may cash a Member's Benefit in any one or more of the following ways:

- (a) a single lump sum;
- (b) an interim lump sum and a final lump sum;
- (c) one or more Pensions; and
- (d) one or more Annuities.

## **32 Voluntary payment**

- 32.1 Subject to the Law, any Member may elect to receive a Benefit on or after the occurrence to them of any of the following events:
- (a) Retires from Gainful Employment;
  - (b) suffers Permanent Incapacity;
  - (c) suffers Temporary Incapacity;
  - (d) if a temporary resident, departs Australia permanently in circumstances described in the Law, and requests the Trustee for the release of their Benefits;
  - (e) ends Gainful Employment with an Employer who had (at any time) made Contributions to the Fund;
  - (f) suffers Severe Financial Hardship;
  - (g) attains age 65;
  - (h) suffers events that lend to release on Compassionate Grounds as determined by the Trustee;
  - (i) attains Preservation Age; or
  - (j) satisfies any other condition of release permitted by the Law.

### **Review notes**

- 1 As outlined above, there are various triggers for the voluntary payment of a Benefit as well as the mandatory or compulsory triggers, such as death.
- 2 There are a number of rules in relation to the steps the Trustee must follow when paying Benefits following death.
- 3 In relation to the voluntary triggers, the Trustee, working with the Member, has more discretion as to whether any Benefits will be released, and if so, the basis on which to do so.

## **33 Pension Benefits**

- 33.1 Subject to the Law and this document, the following provisions apply to the payment of a Pension by the Trustee:
- (a) any Pension must be cashed in accordance with any Trustee resolutions or pension agreement;
  - (b) if the amount standing to the credit of the relevant Pension Account is less than the instalment to be cashed, the lesser amount must be paid and the Trustee's liability in respect of the cashing of the Pension is discharged;
  - (c) an amount representing the capital value of a Benefit may be applied to the purchase of an Annuity in the Trustee's name and payments under that Annuity to be made directly to the Member; and
  - (d) if a Pensioner:
    - (i) commits an act of bankruptcy; or

- (ii) becomes or is insolvent or enters into any deed of assignment or deed of arrangement,

then the Pension immediately ceases and the Pension Account becomes an Accumulation Account, provided the cessation of the Pension is not prohibited under the Law.

## **34 Unclaimed Benefits**

34.1 As required by the Law, the Trustee must:

- (a) give to the Statutory Authority a statement of Unclaimed Benefits; and
- (b) pay any Unclaimed Benefits to the Statutory Authority.

## **35 Forfeited Benefits**

### ***Forfeiture***

35.1 Subject to the Law, Benefits retained by or payable out of the Fund must be forfeited and applied as the Trustee determines if:

- (a) without the prior approval of the Trustee, the Member or Beneficiary purports to assign, alienate or charge any Benefits;
- (b) the Member's interest in any Benefit becomes payable to or vested in any other person, company, government or other public authority;
- (c) the Member is unable personally to receive or enjoy the whole or any portion of a Benefit;
- (d) the Trustee determines the Member is incapable of managing their affairs; or
- (e) the Trustee determines the Member has committed a fraud or is guilty of dishonesty or embezzlement.

### ***Establishment***

35.2 The Trustee may establish a Forfeiture Account and may transfer to it any amounts forfeited under this document.

### ***Treatment***

35.3 Moneys held in the Forfeiture Account do not form part of any other Account and any income derived by the Fund in respect of moneys held in the Forfeiture Account must be credited to the Forfeiture Account.

### ***Unclaimed Benefits***

35.4 Subject to the Law, the Trustee may determine to treat as unclaimed, forfeit and transfer to an account for Unclaimed Benefits, any moneys in the Fund standing to the credit of any Member whose whereabouts are unknown.

#### **Review notes**

- 1 The circumstances where a Member's interest in an SMSF may be forfeited are relatively narrow.

- 2 Due to the seriousness of the consequences of forfeiting a Member's Benefit, the Trustee should obtain specialist advice before doing so.
- 3 Practically, the issue of forfeiture comes up most regularly in the context of a Member committing an act of bankruptcy.
- 4 This said, due to changes to the bankruptcy rules in the mid 2000s, a Member's entitlement in the Fund, while they remain in accumulation mode, will generally be protected on bankruptcy, with no dollar limit to this level of protection.

## **36 Death benefits**

### ***Payment if BDBN***

- 36.1 If a Member has made a BDBN that at the date of their death is valid, any Benefit payable on or following the death of the Member must be paid by the Trustee as set out in the BDBN.

### ***Payment if no BDBN***

- 36.2 If a Member has not made a valid BDBN at the date of their death, the Trustee may determine how to pay the Member's Benefit.

### ***Commutation***

- 36.3 Subject to the Law, the Trustee may, and must where required by the Law:
- (a) discharge its liability to a Member or Beneficiary in respect of a Pension by paying to the Member or Beneficiary a Superannuation Lump Sum equal to the balance of the relevant Pension in the Pension Account; or
  - (b) determine that the commutation of a Pension Benefit following the death of a Pensioner is treated as a Superannuation Member Benefit or a Superannuation Death Benefit.

### **Review notes**

- 1 The death of a Member triggers a compulsory cashing obligation.
- 2 This means the Trustee must either pay a lump sum or Income Stream in accordance with the Law.
- 3 The payment must be to a 'dependant', which broadly includes only immediate family members or the LPR of the Member (so it can then be distributed in accordance with the Member's will).
- 4 Where the Benefit is paid to a non-tax dependant (tax dependants are essentially only a spouse or a child under the age of 18), additional tax may be payable.
- 5 There is the ability for the Trustee to make a payment in excess of the Member's balance using the 'anti detriment' provisions under the Tax Act. Specialist advice should be obtained before the Trustee makes any form of death benefit payment, particularly if the anti-detriment provisions may be applicable.
- 6 The Trustee must also take into account the impact of any nominations (these are explained in more detail below).

## **37 BDBNs**

### ***Non-BDBN***

- 37.1 A Member may at any time make a Non-BDBN designating one or more Nominated Beneficiaries of any Benefit payable by the Trustee on or following the death of the Member, however the notice:



- (a) must be provided to the Trustee; and
- (b) is not binding on the Trustee.

**BDBN**

- 37.2 A Member may at any time provide notice to the Trustee that they have made a BDBN if the BDBN:
- (a) is in writing;
  - (b) is signed and dated by the Member in the presence of two witnesses, who:
    - (i) have both turned 18 years; and
    - (ii) are not a Nominated Beneficiary; and
  - (c) contains a declaration signed and dated by the witnesses, stating that the notice was signed by them both and the Member while all together.
- 37.3 A Member may in a BDBN nominate:
- (a) the proportions in which the Benefit is to be paid to each Nominated Beneficiary; and
  - (b) the manner or form (whether by way of Pension, Superannuation Lump Sum or otherwise) in which those Benefits must be paid.
- 37.4 A BDBN may be confirmed, amended or revoked at any time by the Member however will be otherwise effective until revoked.
- 37.5 A BDBN may only be revoked by:
- (a) making a later valid BDBN; or
  - (b) written notice to the Trustee.
- 37.6 Where:
- (a) a Member makes a BDBN that is otherwise valid; and
  - (b) the BDBN contains a nomination in favour of a person who is deceased at the date a payment is to be made,
- the BDBN will be invalid in relation to of the nomination in favour of that deceased person and the Trustee must:
- (c) pay the Member's Benefit in accordance with the remaining terms of the BDBN; or
  - (d) if no other person is validly nominated, pay the Member's Benefit as if the BDBN was invalid at the date of the Member's death.
- 37.7 A BDBN made, confirmed, amended or revoked by a Member's attorney is binding on the Trustee as though the action was done personally by the Member.

**38 Payment if no BDBN**

- 38.1 Subject to this document and the Law, any Benefit payable on the death of a Member may be paid or applied however the Trustee determines, in the proportions the Trustee decides to any one or more of a Member's:

- (a) Nominated Beneficiaries (if any) designated in a Non-BDBN;
- (b) Dependants; or
- (c) LPR.

### **39 Payment if BDBN is invalid or ineffective**

39.1 Subject to the Law, if a Member makes a BDBN that at the date of death is invalid or ineffective, the BDBN is treated as a Non-BDBN, deemed to be dated the day of the purported BDBN.

### **40 Payment where conflicting instructions**

40.1 If a Member has:

- (a) validly made a BDBN or a Non-BDBN or both; and
- (b) validly nominated a Reversionary Beneficiary in respect of their Benefit,

then the nomination of the Reversionary Beneficiary must be followed by the Trustee, regardless of any BDBN or Non-BDBN.

#### **Review notes**

- 1 There are essentially six possible scenarios in relation to any death benefit payment and these are summarised below.
  - a No nomination - the Member may have made no direction or nomination to the Trustee. In this situation, the Trustee has complete discretion as to how to distribute the death benefit payment.
  - b Non-BDBN - if the Member has made a nomination which does not satisfy the requirements of a BDBN, the Trustee retains complete discretion as to how to distribute the death benefit, although it should still take into account what is set out in the Non-BDBN.
  - c Lapsing BDBN - where there is a valid BDBN, the Trustee must pay the death benefit in accordance with it. The only situation where the Trustee need not follow the lapsing BDBN is where, even though it is otherwise validly prepared, it is stated to be enforceable for a defined period (often three years). If the Member dies outside the relevant period, then the Trustee is not bound to follow the BDBN.
  - d Non lapsing BDBN - it is possible for Members to create BDBNs that are non-lapsing. If they are validly prepared, they are binding on the Trustee.
  - e Hardwired BDBN - BDBNs can be embedded (or hardwired) into the trust deed. Specialist advice should be obtained in relation to this approach, which is generally adopted where there are concerns that a nomination, even if otherwise a valid BDBN, may not be followed.
  - f Reversionary Beneficiary - where a Member has been receiving an Income Stream, it is possible to establish that Income Stream in a way that it automatically reverts or passes to another person, regardless of any nomination that may have been made.
- 2 The interplay between death benefit payments and a Member's estate plan can be complex and best practice dictates that Members should implement a comprehensive estate plan and complementary strategy in relation to their superannuation entitlements (sometimes referred to as an 'SMSF will').

3 Furthermore, the impact of incapacity should also be considered. For example, if a lapsing BDBN is to be implemented, thought should be given to allowing the LPR of a Member who is incapacitated to have the power to sign an updated BDBN on their behalf.

## **41 Information to be provided**

41.1 If a Member's Benefit or Benefit Entitlement becomes subject to a Payment Split, the Trustee must give the Member and the Non-Member Spouse all material required by the Law.

## **42 Trustee may create new interest**

42.1 Subject to the Law, the Trustee may admit a Non-Member Spouse in respect of a Payment Split as a Member if the Non-Member Spouse requests the Trustee to do so.

42.2 If the Trustee admits a Non-Member Spouse as a Member, the Trustee must reduce the Member's Benefit Entitlement in respect of the Payment Split by the amount required by the Law.

## **43 Interest of Non-Member Spouse**

43.1 If a Non-Member Spouse in respect of a Payment Split is not a Member, the Trustee must:

- (a) either:
  - (i) transfer the entitlement of the Non-Member Spouse to an Approved Benefit Arrangement; or
  - (ii) pay the entitlement of the Non-Member Spouse to the Non-Member Spouse; and
- (b) reduce the Member's Benefit Entitlement in respect of the Payment Split by the amount required by Law.

43.2 Any payment, transfer or rollover of the entitlement of a Non-Member Spouse in accordance with a Payment Split is a complete discharge to the Trustee.

43.3 The Trustee may deduct from the amount to be paid in respect of a Payment Split any Tax that is calculated by the Trustee to be payable.

## **44 Family Law fees**

44.1 The Trustee may:

- (a) charge reasonable fees in respect of any action taken by the Trustee under the *Family Law Act 1975* (Cth); and
- (b) determine to recoup any such fees from:
  - (i) a Member's Benefit Entitlement; or
  - (ii) the entitlements of the Non-Member Spouse.

### **Review notes**

1 Where a Member of the Fund has a relationship breakdown with a Spouse, there are provisions under government legislation that can require a Member's interest in the Fund to be 'split' with their former Spouse.

- |   |  |
|---|--|
| 2 | Where these rules apply, the Trustee can be required to reallocate entitlements within the Fund and often will be required to then transfer the entitlement to another fund.   |
| 3 | As with a number of other aspects of SMSFs, where a Payment Split is to take place, specialist advice should normally be obtained, primarily because of the number of different laws that can apply (for example, tax, superannuation, family law and stamp duty). |

## 45 Amendment

- 45.1 Subject to this document and the Law, the Trustee may amend, alter, vary or absolutely revoke or resettle all or any of the provisions set out in this document, including any schedules, with immediate, prospective or retrospective effect.

### *Limitation*

- 45.2 No amendment may be made that would:
- (a) cause the trusts to fail by reason of the rule against perpetuities, unless otherwise permitted by law;
  - (b) allow a person other than a Constitutional Corporation to be a Trustee, unless the governing rules at all times provide that the sole or primary purpose of the Fund is the provision of old-age pensions;
  - (c) cause a BDBN made by a Member to become invalid or ineffective without the written consent of that Member or their LPR; or
  - (d) cause a BDBN made by a Member to become invalid or ineffective after the date of that Member's death.

## 46 Termination

### *Events*

- 46.1 The trusts terminate and the Fund is wound up if any of the following events happen:
- (a) all Members agree to terminate the Fund;
  - (b) the Trustee determines to terminate the Fund; or
  - (c) the Fund is required by Law to be terminated.

### *Notice*

- 46.2 Upon the trusts terminating, the Trustee must give notice to the Members of the Closing Date.
- 46.3 From the Closing Date no further Contribution may be made by any Employer or any Member, other than arrears of Contributions due on or before the Closing Date.

### *Surplus*

- 46.4 If a surplus remains after paying all Benefits for Members and Beneficiaries, that surplus must, subject to the requirements of the Law and this document, be paid by the Trustee as it determines.

### ***Payment to other persons***

- 46.5 If any payment of Benefits under this clause is required by the Law to be deferred until the occurrence of a specified event, then the Member is not entitled to receive that Benefit and the Trustee may determine to:
- (a) transfer the Benefit to another Complying Superannuation Fund;
  - (b) purchase an Annuity or Pension with the Benefits commencing no earlier than the specified event; or
  - (c) transfer the Benefits to an Approved Deposit Fund.

#### **Review notes**

- 1 The requirements under the Law in relation to the winding up of the Fund are detailed and must be followed by the Trustee precisely.
- 2 For most SMSFs, the winding up event will be triggered by the death of the last remaining Member.
- 3 In this scenario, it will generally be the LPR of that Member who has the responsibility for winding up the Fund.
- 4 Often that Member will not have had any particular involvement with the Fund historically, and indeed, may have no prior experience in relation to SMSFs.
- 5 Seeking appropriate specialist advice is often critical in the context of the winding up of an SMSF.

## **47 Powers**

- 47.1 In addition to all powers at law, the Trustee has the powers listed at Schedule 1.

## **48 Governing jurisdiction**

- 48.1 This document is governed by and is to be construed in accordance with the laws of Queensland.
- 48.2 The situs of the Fund is deemed to be Queensland. However the Trustee may at any time determine by resolution that this settlement takes effect and that the administration of the Trust Fund is to be in accordance with the laws of the state, territory or country in which the Trustee is domiciled, resident or has a place of business.

## **49 Interpretation**

- 49.1 In this document:
- (a) singular words include the plural, and vice versa;
  - (b) each word suggesting a gender includes all other genders, including neutral gender;
  - (c) a reference to a person includes natural persons, firms, companies and any form of a corporation, trustee, trust, partnership, associations, unincorporated body, government and local authority or agency, or any other entity whether or not it comprises a separate legal entity;
  - (d) a reference to a clause, schedule or annexure are references to this document and references to this document include every clause, the matters set out in the Overview and any schedules or annexures;

- (e) if any person signs this document on behalf of a party pursuant to a power of attorney, they confirm that there is nothing that impacts on their authority to do so;
- (f) a reference to a document or agreement (including a reference to this document) means that entire document or agreement (including all schedules or annexures) as amended, supplemented, novated, varied or replaced;
- (g) a reference to a person includes that person's estate successors, legal personal representatives, executors, administrators, permitted substitutes and permitted assigns;
- (h) where any word or phrase is defined in this document, its other grammatical forms have a corresponding meaning;
- (i) a reference to this document includes the agreement recorded by this document;
- (j) headings and any table of contents are not to be taken into account in the construction of this document;
- (k) a reference to legislation or to a modified, rewritten, consolidated provision or section of legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- (l) the applicable time zone for any action required under this document is the one applying in the situs of the person responsible for performing the action;
- (m) a reference to writing includes printing, typing, copying, facsimile, and any other method of representing words, symbols, figures or drawings in a visible and tangible manner or electronically;
- (n) if any part of this document is illegal or unenforceable it can be severed, with the remaining clauses (or parts of the clause) remaining in force;
- (o) if any part of this document is illegal or unenforceable in any jurisdiction, it can be severed in the relevant jurisdiction, with the remaining clauses (or parts of the clause) remaining in force;
- (p) unless this document provides for a notice or communication to be given orally, any notice or other communication must be in writing and signed by the person giving the notice and be addressed to the address of the person to whom it is to be given;
- (q) a reference to 'month' means a calendar month;
- (r) if any provision of this document is ambiguous, it is to be interpreted broadly to widen and not restrict the provisions;
- (s) where an expression is defined anywhere in this document, it has the same meaning throughout; and
- (t) a reference to 'dollars' or '\$' is to an amount in Australian currency.

**Notices**

49.2 A notice or other communication is deemed to be received:

- (a) in the case of a posted letter, on the second Business Day after posting;

- (b) in the case of delivery by generally recognised overnight courier, on the next Business Day after dispatch with that courier;
- (c) in the case of personal delivery, on the date of delivery;
- (d) in the case of facsimile transmission, at the time recorded on the transmission report from the machine from which the facsimile was sent; and
- (e) in the case of transmission by email, on the day of transmission if there is confirmation that the transmission was completed before 5.00pm on a Business Day, and alternatively, on the next Business Day. Email service is effective only if there is confirmation that it was sent in full and without error and the message is not rejected or undeliverable as evidenced by a message to that effect received by the sender.

***Counterparts***

- 49.3 This document may be signed in any number of counterparts and all counterparts together make one document.

## Schedule 1 - Powers of Trustee

### *Investment strategy*

- A The Trustee must formulate and give effect to one or more investment strategies having regard to the Fund's circumstances and the Law.

### *Specific investments*

- B The Trustee may determine to make separate investments in respect of certain Members or Beneficiaries (or certain classes of Members or Beneficiaries) of the Fund or in respect of different classes of investment for certain Members or Beneficiaries and if it does must:

- (1) record who the investments are made for, for the purposes of determining allocations to the Member Account;
- (2) credit the Member Account with any income and profit and debit it with any costs, charges or Tax in the proportions determined applicable.

### *General powers*

- C The Trustee may determine to:

- (1) pay Benefits out of the Fund to a Member or a Dependant;
- (2) decide who are Dependants for the purposes of this document;
- (3) in case of the mental or physical ill health or incapacity of any person entitled to Benefits, pay or apply those Benefits or any part as the Trustee determines to or for the benefit of any person without being responsible for seeing to their application;
- (4) undertake any step to commit the Trustee to conduct the Fund at all times as a Complying Superannuation Fund;
- (5) seek modifications of or exemptions from the application of the Law to the Fund; and
- (6) accept Contributions and any Shortfall Component from any person authorised to make Contributions or pay the Shortfall Component.

### *Other powers*

- D The Trustee may:

#### *Generally deal with Fund*

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

#### *Discretion*

- (2) allow all or any part of the Fund to be invested as authorised by this document;



- (3) invest or reinvest in any form of investment:
  - (a) authorised by law or not;
  - (b) with or without disclosing the Fund; and
  - (c) whether alone, jointly or in partnership with others including with the Trustee acting in any capacity;
- (4) postpone the sale, calling in, realisation or conversion for any period, even if the asset is wasting, speculative or reversionary in nature;
- (5) vary or transpose investments;

***Forms of investment***

- (6) invest in any manner the Trustee determines, for example:
  - (a) Property;
  - (b) syndicates of any kind;
  - (c) crowd sourced funding;
  - (d) bank accounts and investments;
  - (e) debentures and unsecured notes;
  - (f) insurance bonds;
  - (g) shares, units and convertible notes;
  - (h) franchises;
  - (i) government securities; or
  - (j) common fund investments;

***Power to lend***

- (7) lend moneys forming part of the Fund, or give credit to any person or company (including any company any Beneficiary may own shares in or is a director of) on such terms as the Trustee may decide:
  - (a) at call or for a period of time;
  - (b) at a rate of interest or at no interest; and
  - (c) with the taking of security in any form or without security;

***Power to borrow and to provide security***

- (8) 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 for purposes as the Trustee may decide;
- (9) secure the repayment of any moneys or other indebtedness by mortgage, charge or other security or encumbrance over the whole or part of the Fund as the Trustee may decide;

***Property***

- (10) hold, use or buy;
- (11) construct, demolish, maintain, repair, renovate, reconstruct, erect, develop or improve;
- (12) sell, transfer or convey (including by auction, contract, tender or option);
- (13) manage, hire, surrender, let, licence or lease on any terms all or any part of the Property (including, for example, for a period of more than 21 years);
- (14) receive livestock on agistment;
- (15) buy stock, plant, equipment and fittings;
- (16) make allowances to and arrangements with tenants, including where a tenant is a Beneficiary;
- (17) take on lease or exchange;
- (18) take or grant options or rights in, including easements or any other right;
- (19) exchange for other Property, either with or without consideration;
- (20) alienate, mortgage, charge or pledge;
- (21) allow any Beneficiary to occupy, utilise or have custody on whatever terms the Trustee determines, including free of any charge or only requiring reimbursement of expenses;
- (22) reconvey, release or discharge, or otherwise deal with any Property;
- (23) apply for, buy or otherwise acquire any patents, patent rights, copyrights, designs, trademarks, formulas, licences, concessions and anything else conferring exclusive, non-exclusive or limited rights to use any secret or other information about any invention:
  - (a) may be capable of being used for any of the purposes of the Fund; or
  - (b) the acquisition of which may benefit the Fund;
- (24) use, exercise, develop or grant licences in respect of or otherwise turn to account any property rights or information acquired;
- (25) co-own with any other person, to any degree and on any terms,  
any Property;

***Commercial bills***

- (26) 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;

***Open bank accounts***

- (27) open any account with any bank or other financial institution for any of the purposes and deposit money in, withdraw money from and operate the account;
- (28) authorise other persons to operate an account or sign any of the instruments set out above;

**Attorney**

- (29) appoint 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 document or by law and to revoke any appointment;

**Record and value assets**

- (30) record as an asset in the books of the Fund any identifiable Property, interest, right or benefit relating to the Fund, regardless of whether it would be recognised as an asset at law or under any relevant accounting standards.
- (31) allocate a value to any identifiable Property, interest, right or benefit recorded as an asset in the books of the Fund;

**Delegate**

- (32) authorise any person to act as its agent, attorney or delegate to hold any investment being part of the Fund as custodian and to perform any act or exercise any discretion within the Trustee's power including the power to appoint in turn its own agent, attorney or delegate. The appointment may be in respect of more than one delegate or severally and may include provisions to protect those dealing with the agent, attorney or delegate;

**Guarantees and indemnities**

- (33) guarantee, indemnify, secure by way of mortgage, charge or otherwise over the whole or part of the 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, either with or without security and either alone, jointly, severally or jointly and severally;

**Agree and settle accounts**

- (34) agree and settle accounts with all persons (including the Trustee) liable to account with the Trustee about the Fund;
- (35) sign effectual receipts, releases and discharges;

**Insurance**

- (36) buy or acquire (with or without any options, rights, benefits, conditions or provisions):
- (a) any reversionary, deferred proprietary or other rights; or
  - (b) any life, life endowment, sinking fund, term or other policy of insurance or assurance of any nature;
- (37) pay any amount payable, for premiums or otherwise:
- (a) to effect or maintain any policy of insurance or assurance (whether or not owned by the Trustee); or
  - (b) for the exercise or enjoyment of any option, right or benefit under any policy,

and the surrender of any policy for all purposes may be deemed by the Trustee to be a sale of the policy;

- (38) if it is necessary to make any claim under a policy, do all things and sign all documents for the perfection or enforcement of any rights arising from or in connection with any policy;

***Lease or hire***

- (39) take on lease, hire purchase, or in exchange, and enter into leasing agreements and hire purchase agreements in relation to, using money of the Fund or any Property as it determines;
- (40) sign a surrender of lease of any Property with or without consideration;

***Share acquisition***

- (41) enter into any contract, agreement or arrangement for the subscription, allotment, issue, purchase or acquisition of shares or other securities of any company or trust registered anywhere in the world;
- (42) agree to or concur in any amendment or variation to the constitution or any scheme of arrangement of any company or trust;

***Conflicts of interest***

- (43) exercise or concur in exercising all powers and discretions given under this document or by law notwithstanding that:
  - (a) 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 the power or discretion or may benefit either directly or indirectly as a result of the exercise of the power or discretion; and
  - (b) the Trustee for the time being is the sole trustee;

***Decide action***

- (44) decide or refer to an appropriate court, tribunal, arbitrator or mediator any action, proceeding, dispute, claim or demand;
- (45) settle all claims or accounts relating to the Fund;
- (46) sign releases and do all things determined as appropriate;

***Carry on business***

- (47) carry on any business, either alone or in partnership, with the same powers as if the business belonged to the Trustee absolutely;
- (48) enter into, vary or terminate any partnership or profit sharing or other similar arrangement with any Trustee in their own capacity or any other capacity, and with or without any other person;
- (49) operate any bank account opened by or on behalf of any business in which the Trustee is concerned or interested;

***Establish and support a related entity***

- (50) establish and support out of the Fund any company, association, institution or other fund (including a superannuation fund) designed in any way to benefit:
- (a) any Beneficiary; or
  - (b) the employees or ex-employees of any company, partnership, association or syndicate in which the Fund may have invested;
- (51) grant pensions and allowances;

***Power to appropriate Fund in specie***

- (52) appropriate in specie any portion of the Fund, or any investment to or towards the share or entitlement of a Beneficiary and to charge the share or entitlement with a 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 Property forming part of the Fund and the appropriation, charge and valuation will be binding on all persons who may at any time be entitled to any interest in the Fund;

***Pay expenses***

- (53) pay out of the Fund all costs, charges and expenses incidental to the:
- (a) management of the Fund;
  - (b) exercise of any power, authority or discretion; or
  - (c) carrying out or performing the role of Trustee of the Fund,
- which the Trustee incurs in any part of the world, including without limitation all:
- (d) taxes in respect of the Fund;
  - (e) liabilities incurred in carrying on any business or owning any Property;
  - (f) costs in any way connected with the Fund; and
  - (g) amounts by way of penalty, settlement, probate, estate gift, stamp or revenue duty;

***Employ***

- (54) employ any person (including any Beneficiary or the Trustee) in connection with any activities of the Trustee or in connection with anything required to be done under this document;
- (55) determine the remuneration to be allowed and paid in respect of any employee;
- (56) create or arrange any scheme of superannuation or similar arrangements for the benefit of any employee;
- (57) act personally and charge and be paid from the Fund a reasonable remuneration;
- (58) instead of acting personally, employ at the expense of the Fund any agents, managers, advisers and accountants (including any Beneficiary);

***Trustee's power to deal with itself***

- (59) notwithstanding any rule of law to the contrary, to acquire for the Fund any Property the beneficial interest in which is at the date of acquisition the absolute property of the Trustee in its own right or as trustee of another fund provided that any Property so acquired is acquired for a consideration being not greater than the current market value of the Property and upon acquisition the beneficial interest in the Property will be held by the Trustee upon the trusts contained in this document;

***Protection***

- (60) take any action for the adequate protection of the Fund;
- (61) take and act upon the opinion of any lawyer practising in any jurisdiction where the Fund or any part of it is invested:
- (a) about the status or the administration of the Fund; and
  - (b) without being liable to any person for any act done by the Trustee consistent with that opinion (although nothing in this clause prevents the Trustee or any Beneficiary from applying to any court);
- (62) do all other things incidental to the exercise of the powers and authorities conferred on the Trustee;

***Elections***

- (63) access any concessions, exemptions, roll-overs or other relief that may be available in relation to any duty, costs or tax payable in respect of the Fund, including by making any elections or choices available under the Tax Act. For clarity, this includes making (without limitation) any elections or choices involving family trust elections, interposed entity elections and capital gains tax roll-over choices or elections;

***Release of powers***

- (64) by revocable or irrevocable deed renounce and release any power conferred on the Trustee under the Fund in respect of the whole or part of the Fund or the income and upon the renunciation and release coming into effect, the power is to be taken to be at an end and no longer exercisable by the Trustee to the extent of the renunciation and release;

***Merger***

- (65) concur in the merger or takeover of any company or trust in which shares or other securities forming part of the Fund are held;
- (66) to exercise any rights attaching to shares or units in any company or trust held by the Trustee;
- (67) otherwise consent to or take part in any corporate action;

***Nominee***

- (68) allow any asset of the Fund to be held or registered in the name of any nominee or agent;
- (69) deposit securities over or titles in the Property of the Fund with any bank or other lender or guarantor;

### **Directorships**

- (70) become a director of any company in which any moneys forming part of the Fund are from time to time invested and receive the remuneration attached to the office without being liable to account.

#### Review notes

- 1 As can be seen, the Trustee has extremely wide powers and discretions to invest the assets of the Fund as deemed fit.
- 2 There are however a number of limitations, and the key ones are set out below.
- 3 The Trustee must always act in what would be objectively considered prudent in the context of each situation.
- 4 An important benchmark as to whether the Trustee has acted prudently will be whether a decision was appropriate in the context of the Fund's investment strategy.
- 5 There is an obligation on the Trustee to have a formal written investment strategy that is current at all times.
- 6 The Trustee must also ensure it complies with the 'sole purpose test'. This test requires that all arrangements of the Fund are focused on providing retirement benefits for the Members.
- 7 In this regard, there are restrictions on the ability of an SMSF to borrow money (there are a few exceptions to this limitation, particularly in relation to limited recourse loan arrangements).
- 8 Further, SMSFs should ensure that all transactions are conducted on an arm's length basis.
- 9 There are also prohibitions in relation to 'in-house' assets. An in-house asset is an investment in or a loan to a related party.
- 10 The Trustee must ensure that at all times the market value of any in-house asset is less than 5% of the total market value of all assets of the Fund.
- 11 Finally, there is a prohibition on an SMSF acquiring assets from a Member or a related party of a Member unless the relevant asset is:
  - a listed shares;
  - b business real property (as defined by the Law);
  - c a widely held unit trust; or
  - d a unit trust, which although not widely held, has no debt.
- 12 Separately, a Trustee will be indemnified in relation to any action against it, so long as they were appropriately acting in their role as Trustee.

