

**HARLEM ENTERPRISES SUPERANNUATION FUND**

**2013 AMENDING DEED  
INCORPORATING CHANGE OF TRUSTEE**

**Harlem Enterprises Pty Ltd**  
ACN 064 730 187  
("Old Trustee")

**Hadden Enterprises Pty Ltd**  
ACN 142 647 863  
("New Trustee")

**Philip Francis Hadden**  
("Member")

**Chris Hogan & Co.**  
SUPERANNUATION LAWYERS

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**2013 AMENDING DEED  
INCORPORATING CHANGE OF TRUSTEE**

Made on 2013

Between: **Harlem Enterprises Pty Ltd** ACN 064 730 187  
("Old Trustee")

And: **Hadden Enterprises Pty Ltd** ACN 142 647 863  
("New Trustees")

And: **Philip Francis Hadden**  
("Member")

**Recital:**

- A. The parties wish to amend the trust deed and rules regulating the **Harlem Enterprises Superannuation Fund ("Fund")**.
- B. The New Trustee includes the member of the fund, who agrees to the amendments.
- C. The Old Trustee is the current trustee of the Fund and wishes to retire as trustee.
- D. The parties wish to appoint the New Trustees as the trustees of the Fund.
- E. The New Trustees have agreed to accept that appointment.

**Operative provisions:**

- 1. With effect from the date of this deed:
  - (a) the Old Trustee retires as Trustee of the Fund;
  - (b) the parties appoint the New Trustees to act as Trustee of the Fund in place of the Old Trustee;
  - (c) the New Trustees assume the role of Trustee of the Fund and are bound by the covenants on the part of the Trustee contained in the Trust Deed and must exercise all the powers and rights of the Trustee under the Trust Deed in accordance with the provisions of the Trust Deed;

- (d) the Old Trustee is released from all covenants on the part of the Trustee contained in the Trust Deed except for any breach of those covenants that arose under the Trust Deed before the date of this deed;
  - (e) the assets of the Fund that previously vested in the Old Trustee as Trustee vest in the New Trustees and all rights powers obligations and entitlements in relation to those assets attach to the New Trustees;
  - (f) the Old Trustee must do all things necessary to vest all Fund assets in the New Trustees; and
  - (g) the Old Trustee must indemnify the New Trustees against any claim, cost, loss, expenses, damage or other liability arising out of its acts or omissions (or both) in connection with the trusteeship of the Fund before the date of this deed and acknowledges sole responsibility for any breaches which may have occurred under the Trust Deed and for any breaches of any laws relevant to the conduct of superannuation funds before the date of this deed.
2. Nothing in the Trust Deed operates to confer any right of indemnity from the Old Trustee to the New Trustees.
3. With effect from the date of this deed, the current provisions of the trust deed and rules regulating the Fund are replaced with:
- "1. The Fund is to be known as **Harlem Enterprises Superannuation Fund**.
  - 2. This deed includes the rules attached to it ("**Rules**").
  - 3. The Trustee must hold the assets of the Fund on trust to apply them in the manner set out in the Rules.
  - 4. This deed may be amended in the manner set out in the Rules. The Rules may be amended or replaced by Trustee resolution."
4. The Rules regulating the Fund are those attached to this amending deed.
5. Despite anything in the Fund's governing rules, nothing in this deed amends any provision of those governing rules that provides for the payment of a defined benefit pension.
6. For clause 3 the terms "governing rules" and "defined benefit pension" have the same meaning as in the Superannuation Industry (Supervision) Regulations.
7. The parties acknowledge that although the Rules provide for different types of pensions, the payment of some types of pensions from the Fund may amount to a breach of the Superannuation Industry (Supervision) Act or Regulations. Accordingly, the Trustee undertakes to seek advice before paying any pension.

## 8. TRUSTEE DECLARATION

The Director of the New Trustee declares as follows:

I understand that as a Director of the Corporate Trustee of **Harlem Enterprises Superannuation Fund** I am responsible for ensuring that the fund complies with the *Superannuation Industry (Supervision) Act 1993* (SISA) and other relevant legislation. The Commissioner of Taxation ("**Commissioner**") has the authority and responsibility for administering the legislation and enforcing the fund's compliance with the law.

I must keep myself informed of changes to the legislation relevant to the operation of my fund and ensure the trust deed is kept up to date in accordance with the law and the needs of the members.

If I do not comply with the legislation, the Commissioner may take the following actions:

- impose administrative penalties on me;
- enter into agreements with me to rectify any contraventions of the legislation;
- disqualify me from being a Trustee or Director of a Corporate Trustee of any superannuation fund in the future;
- remove the fund's complying status, which may result in significant adverse tax consequences for the fund; and
- prosecute me under the law, which may result in fines or imprisonment.

### **Sole Purpose**

I understand it is my responsibility to ensure the Fund is only maintained for the purpose of providing benefits to the members upon their retirement (or attainment of a certain age) or their beneficiaries if a member dies. I understand that I should regularly evaluate whether the Fund continues to be the appropriate vehicle to meet this purpose.

### **Trustee Duties**

I understand that by law I must at all times:

- act honestly in all matters concerning the Fund;
- exercise skill, care and diligence in managing the Fund;
- act in the best interests of all the members of the Fund;
- ensure that members only access their super benefits if they have met a legitimate condition of release;
- refrain from entering into transactions that circumvent restrictions on the payment of benefits;
- ensure that my money and other assets are kept separate from the money and other assets of the Fund;
- take appropriate action to protect the Fund's assets (for example, have sufficient evidence of the ownership of Fund assets);
- refrain from entering into any contract, or do anything, that would prevent me from, or hinder me in, properly performing or exercising my functions or powers as a Trustee or Director of the Corporate Trustee of the Fund;

- allow all members of the Fund to have access to information and documents as required, including details about
  - the financial situation of the Fund;
  - the investments of the fund; and
  - the members' benefit entitlements.

I also understand that by law I must prepare, implement and regularly review an investment strategy having regard to all the circumstances of the Fund, which include, but are not limited to:

- the risks associated with the Fund's investments;
- the likely return from investments, taking into account the Fund's objectives and expected cash flow requirements;
- investment diversity and the Fund's exposure to risk due to inadequate diversification; and
- the liquidity of the Fund's investments having regard to the Fund's expected cash flow requirements in discharging its existing and prospective liabilities (including benefit payments); and
- whether the Trustees of the Fund should hold insurance cover for one or more members of the Fund.

#### **Investment Restrictions**

I understand that, as a Director of the Corporate Trustee of the Fund, subject to certain limited exceptions specified in the law, I am prohibited from:

- lending money of the Fund to, or providing financial assistance to, a Member of the Fund or a Member's relative (financial assistance means any assistance that improves the financial position of a person directly or indirectly including the provision of credit);
- acquiring assets (other than business real property, listed securities, certain in-house assets and acquisitions made under mergers allowed by special determinations or acquisitions as a result of a breakdown of a relationship) for the Fund from Members or other related parties of the Fund;
- borrowing money (or maintaining an existing borrowing) on behalf of the Fund except in certain limited circumstances (while limited recourse borrowing arrangements are permitted, they can be complex and particular conditions must be met to ensure that legal requirements are not breached);
- having more than 5% of the market value of the Fund's total assets at the end of the income year as in-house assets (these are loans to, or investments in, related parties of the fund - including trusts - or assets subject to a lease or lease arrangement between the Trustee and a Member, relative or other related party); and
- entering into investments on behalf of the Fund that are not made or maintained on an arm's length (commercial) basis (this ensures the purchase or sale price of the Fund's assets and any earnings from those assets reflect their market value).

#### **Accepting Contributions and Paying a Benefit**

I understand that I can only accept contributions and pay benefits (income streams or lump sums) to Members or their beneficiaries when the conditions specified in the law and the Fund trust deed have been met.

#### **Administration**

I understand that the Trustees of the fund must:

- keep and retain for at least 10 years

- minutes of all Trustee meetings at which matters affecting the Fund were considered (this includes investment decisions and decisions to appoint members and trustees);
- records of all changes of Trustees, including Directors of the Corporate Trustee;
- each Trustee's consent to be appointed as a Trustee of the Fund or a Director of the Corporate Trustee;
- all trustee declarations; and
- copies of all reports given to members
- ensure that the following are prepared and retained for at least 5 years
  - an annual statement of the financial position of the Fund;
  - an annual operating statement;
  - copies of all annual returns lodged; and
  - accounts and statements that accurately record and explain the transactions and financial position of the fund
- ensure that an approved auditor is appointed within the prescribed period (currently this is no later than 31 days before the due date for lodgement of the Fund's annual return but this may change to 45 days) to audit the Fund for each income year, and provide that auditor with documents as requested
- lodge the Fund's annual return, completed in its entirety, by the due date
- notify the ATO within 28 days of any changes in
  - membership of the Fund, or Trustees or Directors of the Corporate Trustee
  - name of the Fund
  - contact person and their contact details
  - postal address, registered address or address for service of notices for the Fund
- notify the ATO in writing within 28 days of the Fund being wound up or after becoming aware that the Fund has ceased to be a self managed superannuation fund

#### **Declaration**

By signing this declaration I acknowledge that I understand my duties and responsibilities as a Director of the Corporate Trustee of **Harlem Enterprises Superannuation Fund**.

I understand:

- I must ensure this document is retained for at least 10 years or while I remain a Director of the Corporate Trustee (whichever is longer) and if I fail to do this, penalties may apply;
- I may have to make this document available for inspection by a member of staff of the ATO and if I fail to do this, penalties may apply;
- I do not have access to the government's financial assistance program that is available to trustees of Australian Prudential Regulation Authority (APRA) regulated funds in the case of financial loss due to fraudulent conduct or theft.

#### **Eligibility to Act**

The Trustee (and the Director of the Corporate Trustee) are not now, and have never been, disqualified persons as described in Section 120 of the Superannuation Industry (Supervision) Act 1993.

#### **Individuals**

*An individual is a disqualified person if:*

- 1.1 at any time the individual has been convicted of an offence against or arising out of a law of the Commonwealth or a State or Territory of Australia or a foreign country, being an offence in respect of dishonest conduct; or
- 1.2 a civil penalty order was made in relation to the person; or
- 1.3 the person is an insolvent person under administration; or
- 1.4 the Regulator under the legislation has disqualified the individual.

**Bodies Corporate**

A body corporate is a disqualified person if:

- 2.1 the body corporate knows or has reasonable grounds to suspect that a person acting as a responsible officer of the body corporate is a disqualified person;
- 2.2 a Receiver or Receiver and Manager has been appointed in respect of property beneficially owned by the body corporate;
- 2.3 an Official Manager, Deputy Official Manager or Administrator has been appointed in respect of the body corporate;
- 2.4 a provisional liquidator has been appointed in respect of the body corporate; or
- 2.5 the body corporate has begun to be wound up.

Executed as a deed

Executed by the **Old Trustee**  
**Harlem Enterprises Pty Ltd**  
ACN 064 730 187

In accordance with Section 127(1) of the  
Corporations Act 2001



.....  
Signature of Sole Director

**PHILIP FRANCIS HADDEN**

◀ SIGN

Executed by the **New Trustee**  
**Hadden Enterprises Pty Ltd**  
ACN 142 647 863

In accordance with Section 127(1) of the  
Corporations Act 2001



.....  
Signature of Sole Director

**PHILIP FRANCIS HADDEN**

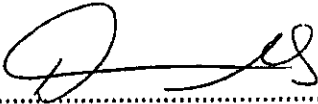
◀ SIGN

Signed by the Member in the presence of:



Philip Francis Hadden

◀ SIGN



Signature of witness

DE 11 STENT ST, BEECHBORO WA

Address of witness

DEBBIE RICHARDSON

Name of witness (BLOCK LETTERS)

(Witness must be 18 years old or over)

◀ SIGN



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## 1 INTERPRETATION

Unless the contrary intention appears:

- A reference to the Deed or the Rules or any other document includes any variation or replacement.
- A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- The singular includes the plural and vice versa.
- A power to appoint includes a power to vary or cancel the appointment.
- When the word **including** introduces a list of items, it does not exclude a reference to other items of the same class.
- A reference to a person includes a firm, a body corporate, an unincorporated association or any authority.

**Account Balance** means the aggregate balance of all Member Accounts of a Member other than the Non-Vested Member Account, plus any proportion of that account that the Trustee determines (or if the individual Trustees or the corporate Trustee's directors do not agree on a proportion, the whole of that account).

**Binding Death Benefit Nomination** means a written notice that:

- directs the Trustee to pay the whole or part of a benefit payable on the Member's death to one or more Dependants or the legal personal representative in specific proportions; and
- may include instructions as to the manner of payment (eg lump sum or pension) and particular assets to be transferred by way of payment.

**Child** in relation to a person includes:

- (a) an adopted child, a stepchild or an ex-nuptial child of the person; and
- (b) a child of the person's Spouse; and

- (c) a child of the person within the meaning of the Family Law Act 1975.

**Co-contribution Act** means the Superannuation (Government Co-contribution for Low Income Earners) Act.

**Constitutional Corporation** has the same meaning as in Government Requirements.

**Deed** means the deed establishing the Fund.

**Dependant of a Member** means:

- (a) a Spouse;
- (b) a Child;
- (c) any other person the Trustee believes is, or was at the date of death, dependent on the Member or otherwise meets the definition of dependant under Government Requirements.

**First Home Saver's Account** has the same meaning as in the First Home Saver's Account Act.

**Fund** means the superannuation fund constituted by the Deed and the Rules.

**Government Requirements** means any requirements under laws relating to superannuation funds:

- (a) imposed on the Trustee; or
- (b) that the Fund must satisfy to qualify for the most favourable taxation treatment available to superannuation funds.

**Member** means anyone whom the Trustee has admitted to membership.

**Member Account** means an account kept for a Member under rule 8.7.

**Non-Member Spouse** has the same meaning as in Government Requirements.

**Non-Vested Member Account** means a Member Account kept to record amounts mentioned in rule 8.7(a) and (b) that are not the Member's "minimum benefits" as defined in Government Requirements.

**Permanent Incapacity** means ill-health (whether physical or mental), where the Trustee is reasonably satisfied (and two legally qualified medical practitioners have certified) that the Member is unlikely, because of the ill-health, ever again to engage in gainful employment for which the Member is reasonably qualified by education, training or experience.

**Rules** means these rules.

**Shortfall Component** has the same meaning as in the Superannuation Guarantee (Administration) Act.

**SIS Regulation** means Superannuation Industry (Supervision) Regulation.

**Spouse** in relation to a person includes:

- (a) a man or woman with whom the person is in a registered relationship as defined in the Acts Interpretation Act 1901; and
- (b) another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

**Tax** includes any duty or government impost.

**Temporary Incapacity** means ill-health (whether physical or mental) that caused the Member to cease to be gainfully employed but does not constitute Permanent Incapacity.

**Terminal Medical Condition** means:

- (a) two registered medical practitioners have certified, jointly or separately, that the Member suffers from an illness, or has incurred an injury, that is likely to result in the Member's death within 12 months after the date of the certification;
- (b) at least one of the practitioners is a specialist practising in an area related to the illness or injury; and
- (c) for each of the certificates, the certification period has not ended.

**Trustee** means the Trustee for the time being under rule 7.

## 2 MEMBERSHIP

### Admission

- 2.1 Anyone may apply to the Trustee for admission as a Member or for the admission of a person for whom the applicant intends to contribute.
- 2.2 The Trustee may reject an application.
- 2.3 Before admitting a person as a Member the Trustee must ensure that the Trustee structure of the Fund meets Government Requirements and may require the person:
  - (a) to be examined by a registered medical practitioner approved by the Trustee; or
  - (b) to give the Trustee any document or information it considers relevant to the administration of the Fund; or
  - (c) to enter into a written agreement with the Trustee, imposing special conditions in respect of the applicant's membership; or
  - (d) any combination of (a), (b) and (c).
- 2.4 If the Trustee admits a person as a Member, membership commences only when the Trustee has approved the application and either:
  - (a) the person has become a Trustee or (if the Trustee is a Constitutional Corporation) a director of the Trustee; or
  - (b) the Trustee has satisfied itself that when the membership commences, the Fund will meet the definition of self managed superannuation fund in Government Requirements.

### Terms

- 2.5 Each Member is bound by the Deed and Rules.
- 2.6 The Trustee is the Member's attorney to do anything the Trustee considers appropriate to administer the Fund.

**Non-Member Spouse**

- 2.7 Subject to rule 2.4 the Trustee may admit a Non-Member Spouse as a Member if:
- (a) Government Requirements require the Trustee to create an interest in the Fund for the Non-Member Spouse; or
  - (b) Government Requirements permit the Trustee to do so and the Trustee elects to do so.

- 2.8 The Trustee must do so in a manner that is consistent with Government Requirements.

**Membership ends**

- 2.9 A Member's membership of the Fund ends when the Member is no longer entitled to benefits from the Fund and either:
- (a) the Member has resigned as a Trustee or a director of the Trustee; or
  - (b) the Trustee has satisfied itself that when the membership ends, the Fund will meet the definition of self managed superannuation fund in Government Requirements.

**3 TRANSFERS****Transfer in**

- 3.1 The Trustee may:
- (a) accept a transfer of assets to the Fund in respect of a Member; and
  - (b) provide benefits in respect of the Member
- on terms that the Trustee agrees with the Member and in a manner that complies with Government Requirements.

**Transfer out**

- 3.2 The Trustee may transfer assets out of the Fund in respect of a Member (with or without the Member's consent) up to the Member's Account Balance. However, the transfer must comply with Government Requirements.
- 3.3 The Trustee is not responsible for the manner in which the transferee deals with the amount transferred.

- 3.4 If the Member's total Account Balance is transferred, the Member is no longer entitled to benefits from the Fund.

**4 CONTRIBUTIONS****Members**

- 4.1 A Member may make contributions if the Trustee agrees.

**SGC shortfalls, Co-contributions and FHSA payments**

- 4.2 The Trustee may accept a Shortfall Component or a payment under the Co-contribution Act (including a low income superannuation contribution) or from a First Home Saver's Account transferred to the Fund for a Member and must treat it as a contribution for the Member.

**Employers and others**

- 4.3 The Trustee may:
- (a) accept contributions for a Member from any other person;
  - (b) at its discretion, refuse to accept all or part of a contribution.
- 4.4 The Trustee must not accept a contribution contrary to Government Requirements. However, if it does and if Government Requirements permit, the Trustee:
- (a) must repay the contribution to the contributor; but
  - (b) may first make deductions for any liabilities or expenses incurred (and provisions for liabilities and expenses) in relation to the contribution.

**Splitting of contributions**

- 4.5 A Member may apply to the Trustee to transfer to the Account of the Member's Spouse some or all of the Member's Account Balance representing contributions made by, for, or on behalf of the Member. The application may include a request to transfer the relevant amount out of the Fund in respect of the Member's Spouse.

- 4.6 If the Trustee agrees to make the transfer, it must do so within 90 days after receiving the request, but only if the application complies with Government Requirements.

#### Form of contributions

- 4.7 A contribution may be made in cash, by the transfer to the Trustee or its custodian of a beneficial interest in property, by increasing the value of the Fund or by reducing the liabilities of the Fund.

#### Limit on contributions

- 4.8 If any part of a purported contribution in respect of a Member would be either an "excess concessional contribution" or an "excess non-concessional contribution" under the Income Tax Assessment Act, then:

- (a) the Trustee must not accept that part; and
- (b) that part is not included in the Fund's assets regardless of whether or not it has been mingled with those assets.

#### Refund of excess contributions

- 4.9 If the Trustee receives a release authority issued under Government Requirements in respect of excess contributions tax, the Trustee must pay to the Member in accordance with Government Requirements the least of:

- (a) the amount stated in the authority;
- (b) the amount the Member requests; and
- (c) the Member's Account Balance.

## 5 BENEFITS - ENTITLEMENT

Rule 5 sets out the circumstances in which a benefit becomes payable from the Fund. Rule 6 deals with when and how the benefit is actually paid.

#### Request - age 65

- 5.1 If a Member (who has not otherwise become entitled to a benefit under the Rules) requests a benefit at or after age 65, the Member becomes entitled to a benefit equal to the Member's Account Balance.

#### Death benefits

- 5.2 If a Member dies the Trustee must pay a benefit equal to the Member's Account Balance.

- 5.3 If, in relation to any part of the benefit:
- the Trustee accepted a Binding Death Benefit Nomination;
  - it has not been revoked; and
  - it can be followed under Government Requirements
- then the Trustee must follow the Binding Death Benefit Nomination in relation to that part of the benefit.

- 5.4 If in relation to any part of the benefit:
- the Trustee does not hold a current Binding Death Benefit Nomination; or
  - the relevant nomination cannot be followed for any reason
- the Trustee must pay that part of the benefit to any or all of the Member's Dependants and legal personal representative in the proportions that the Trustee decides.

- 5.5 If rule 5.4 applies and there is no Dependant or legal personal representative then, if Government Requirements permit, the Trustee may pay that part of the benefit to any other people in proportions the Trustee decides.

- 5.6 Any benefit nomination not expressed to be binding on the Trustee is given for information only and does not affect the Trustee's discretion in distributing the benefit.

- 5.7 Subject to the instructions in a Binding Death Benefit Nomination as to the manner of payment, the Trustee may pay any part of the benefit as a lump sum or as a pension or in any other form as it considers appropriate including the settlement of a trust for the benefit of any Dependant.

- 5.8 No pension is payable to a person under rule 5 until the person is a Member. However, the Trustee (and not the payee) may determine which provisions of rule 6 apply.

### Terminal Medical Condition

- 5.9 If a Member requests a benefit while a Terminal Medical Condition exists in relation to the Member, then the Member becomes entitled to a benefit equal to the Member's Account Balance.

### Retirement or leaving employment

- 5.10 If a Member (who has not otherwise become entitled to a benefit under the Rules):
- (a) leaves any business, trade, profession, vocation, calling, occupation or employment because of Permanent or Temporary Incapacity; or
  - (b) retires or retired (before or after joining the Fund) from any business, trade, profession, vocation, calling, occupation or employment; or
  - (c) ceases any employment (at any time and for any reason except death) and the employer has contributed to the Fund for the Member; or
  - (d) having reached age 60, ceases any arrangement under which the Member was employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment; or
  - (e) leaves Australia in circumstances where Government Requirements permit the Trustee to pay a benefit
- the Member becomes entitled to a benefit equal to the Member's Account Balance.

### Request – Transition to retirement pensions, rollovers, Spouse benefits, temporary residents etc

- 5.11 If a Member requests payment of a benefit, the Trustee must pay the benefit to the extent that the payment complies with Government Requirements.

### Financial incapacity

- 5.12 If the Trustee believes a person entitled to a benefit cannot manage the person's financial affairs, the Trustee may pay the

benefit to another person to be used for the first person's advantage.

- 5.13 The Trustee is not responsible for the application of the benefit by the payee. However, the payment must comply with Government Requirements.

### Hardship and compassionate grounds

- 5.14 The Trustee may at any time pay to a Member a benefit up to the Member's Account Balance if the payment complies with Government Requirements in relation to financial hardship or compassionate grounds.

### Unclaimed money and lost members

- 5.15 The Trustee must pay a benefit to the Commissioner of Taxation in respect of a Member as and when required under the Superannuation (Unclaimed Money and Lost Members) Act.

### Excessive benefits

- 5.16 If the Trustee believes that:
- (a) a Member's benefit will be excessive for the purposes of the Income Tax Assessment Act; or
  - (b) payment of a benefit will result in the Trustee or an employer contravening a law relating to corporations
- the Trustee may, if Government Requirements permit:
- (i) reduce the contributions payable for the Member; or
  - (ii) reduce the benefit to the extent necessary to avoid (a) or (b) and transfer the amount of the reduction to the Fund's reserves; or
  - (iii) apply a combination of (i) and (ii) as it considers appropriate.

- 5.17 However, the Trustee need not investigate whether (a) or (b) applies to a benefit.

### No assignments

- 5.18 The Trustee must not recognise any assignment or charge of a benefit (or any other interest in the Fund) that is contrary to Government Requirements.

### Interest on benefits

- 5.19 The Trustee may credit or debit interest to a benefit paid after the date it becomes payable.

### Deductions for Tax

- 5.20 The Trustee must comply with Government Requirements regarding deductions of Tax from benefits and other payments from the Fund.

### Trustee's discharge

- 5.21 The Trustee's only obligation in respect of a benefit is to pay it in good faith to or on behalf of a person the Trustee believes is entitled to the benefit. Otherwise, the Trustee is completely discharged by that payment.

### Forfeited benefits

- 5.22 A Member forfeits the part of a benefit not attributable to Member contributions if:
- (a) the Member purports to assign, alienate or charge; or
  - (b) any other event occurs that results in another person becoming entitled to all or part of the benefit. However, this rule has no effect to the extent that it is inconsistent with Government Requirements or the Bankruptcy Act.

- 5.23 The Trustee must, if Government Requirements permit, apply a forfeited benefit for the Member and the Member's Dependants in proportions that the Trustee decides.

### Splitting of benefits

- 5.24 The Trustee must reduce a Member's Account Balance or the amount of any pension payment to the Member if:
- (a) Government Requirements relating to Non-Member Spouses require the Trustee to do so; or
  - (b) those Government Requirements permit the Trustee to do so and the Trustee elects to do so.

- 5.25 If the Trustee makes a reduction under rule 5.24, the Trustee must apply the amount of the reduction (in the manner required or permitted by, and adjusted as required by, Government Requirements) for the benefit of the relevant Non-Member Spouse.

- 5.26 To the extent that Government Requirements allow the Trustee any discretion in any of the matters mentioned in rule 5.24 or 5.25, the Trustee may exercise that discretion as it sees fit without regard to the interests of the Non-Member Spouse.

- 5.27 The Trustee may charge fees in respect of those matters to the extent permitted under Government Requirements.

## 6 BENEFITS - PAYMENT

Rule 5 sets out the circumstances in which a benefit becomes payable from the Fund. Rule 6 deals with when and how the benefit is actually paid. A pension is not payable to anyone (including a reversionary beneficiary) until the person is a Member. The deed or resolution implementing this version of the Rules has preserved the application of previous versions insofar as they deal with the payment of pensions that commenced before this version.

- 6.1 If the Trustee is not a Constitutional Corporation, then the Fund's primary purpose is to provide old-age pensions and the Trustee must pay benefits due to a Member as pensions except to the extent that the Member requests otherwise.

### Account based pensions

- 6.2 The Trustee must pay all or part of a benefit as an account based pension if the Member requests.
- 6.3 The Trustee must pay the pension from a Member Account of the Member on terms that the Trustee and Member agree as to the level and frequency of payment. However, the level of the pension must be within the minimum and maximum levels (if any) prescribed by Government Requirements for such a pension and the

- Trustee must pay the pension at least annually.
- 6.4 Unless Government Requirements permit:
- (a) the pension entitlement must not be transferred or used as security for a borrowing; and
  - (b) after the pension commences the capital supporting it must not be added to by way of contribution or a rollover to the Fund.
- 6.5 The Member may elect to commute all or part of the pension by notifying the Trustee in writing.
- 6.6 The Trustee must comply with the Member's election if it approves the election and the election complies with Government Requirements (including Government Requirements in relation to the minimum level of pension for the financial year when the commutation takes place).
- 6.7 If the Member dies while entitled to the pension, the Trustee may either pay a benefit under rules 5.2 to 5.8 or continue the pension under rule 6.19.
- 6.8 The pension commences when the Trustee and Member agree (but no later than required by Government Requirements) and ends when the balance of the relevant Member Account is nil.
- 6.9 If the pension reverts or is commuted, the reversionary component or commuted amount must not be greater than the benefit that was payable before the reversion or commutation or the amount permitted under Government Requirements.
- 6.10 The pension must not be used as security for a borrowing or transferred except to a reversionary beneficiary on the death of the Member or of another reversionary beneficiary.
- 6.11 The Trustee must continue to keep the relevant Member Account and must debit pension payments and commutations to the Member Account.

### Market linked pensions

- 6.12 The Trustee must pay all or part of a benefit as a market linked pension if the Member requests and the pension is purchased with a rollover superannuation benefit from the commutation of:
- (a) an annuity provided under a contract that meets SIS Regulation 1.05(2), (9) or (10); or
  - (b) a pension provided under rules that meet SIS Regulation 1.06(2), (7) or (8); or
  - (c) a pension provided under terms and conditions that meet Retirement Savings Accounts Regulation 1.07(3A).
- 6.13 On receipt of the request, the Trustee must pay from a Member Account of the Member a pension for the term set out in SIS Regulation 1.06(8).
- 6.14 The level of the pension and any commutations must be determined in the manner prescribed by Government Requirements for a market linked pension and the Trustee must pay the pension at least annually.
- 6.15 The pension has no residual capital value.
- 6.16 The pension must not be used as security for a borrowing or transferred except to a reversionary beneficiary on the death of the Member or of another reversionary beneficiary.
- 6.17 The Trustee must continue to keep the relevant Member Account and must debit pension payments and commutations to that Member Account.

### Transition to retirement pensions

- 6.18 If the Trustee and Member agree that:
- (a) an account based pension is also a "non-commutable allocated pension" or a "transition to retirement income stream"; or
  - (b) a market linked pension is also a "non commutable pension"
- then the Trustee must not pay any part of the benefit unless the Trustee is satisfied that the payment is consistent with



Government Requirements in relation to such a pension.

#### Reversionary pensions

- 6.19 Unless inconsistent with Government Requirements or the terms of the relevant pension, a Member who requests a pension may nominate one or more of the Member's Dependants as reversionary beneficiaries (either successive or concurrent) in relation to the pension. If reversionary beneficiaries are nominated as concurrent, the request must nominate the respective portions of the pension that revert to them. If no reversionary beneficiary is nominated then on the Member's death, the Trustee may nevertheless continue paying the relevant pension to any or all of the Member's Dependants and legal personal representative in proportions the Trustee decides (unless inconsistent with Government Requirements or rule 5.3).

#### Lump sum

- 6.20 If a person entitled to a benefit requests, the Trustee may pay the benefit as a lump sum.

#### Rollover or annuity

- 6.21 A person entitled to a benefit may direct the Trustee to:
- pay all or part of the benefit to another fund; or
  - apply all or part of the benefit to purchase an annuity in the name of the person or; if the person is a Member, in the name of the Member or one or more of the Member's Dependants.

- 6.22 The Trustee must comply with the direction if the payment complies with Government Requirements.

#### Compulsory rollover

- 6.23 The Trustee may, if Government Requirements permit, pay all or part of a benefit to another fund without the consent of the person entitled to the benefit.

#### Benefits in specie

- 6.24 If a person entitled to a benefit requests, the Trustee may pay all or part of the benefit by transferring assets to the person or the person's nominee. The transfer must comply with Government Requirements.

#### Deferral, preservation and flagging

- 6.25 If a person entitled to a benefit requests, the Trustee may defer payment of all or part of the benefit. The deferral must comply with Government Requirements. If the Trustee believes that the payment of any part of a Member's benefit will contravene the Family Law Act, the Trustee must not pay that part.
- 6.26 If Government Requirements require part of a benefit to be preserved, the Trustee must:
- keep that part in the Fund until Government Requirements permit it to be paid; or
  - with the Member's written consent (if required by Government Requirements) pay that part to another fund that the Trustee believes will comply with Government Requirements regarding preservation of benefits.

- 6.27 If part of a benefit is kept in the Fund and the Member dies before it is paid, the Trustee must pay it under rules 5.2 to 5.8.

#### Unclaimed benefits

- 6.28 The Trustee must comply with Government Requirements as to unclaimed benefits and the transfer of benefits to other funds.

#### Types of benefit

- 6.29 If a Member requests, the Trustee may pay a benefit as one or more pensions or lump sums under rule 6. However, the manner of payment must be consistent with Government Requirements and the Trustee must establish one or more separate Member Accounts as the source

of each type of benefit in respect of the Member.

a Member if it purports to have been given by or on behalf of the Member.

## 7 TRUSTEE

### Nature and number

- 7.1 The Trustee must be either a sole Constitutional Corporation or (if Government Requirements permit) one or more individuals.

### Delegation

- 7.10 The Trustee may delegate any of its powers, duties and discretions to anyone if the delegation complies with Government Requirements.

### Retirement and removal

- 7.2 A Trustee may retire if the Trustee gives prior written notice to the Members (or their legal personal representatives).

### Administrators and investment managers

- 7.11 In particular, the Trustee may appoint anyone to administer the Fund or to manage the Fund's investments or to perform both functions. However, the appointment must be written and must comply with Government Requirements.

- 7.3 A Trustee must retire when the Members or Government Requirements so require.

- 7.4 The Members may remove a Trustee from office by written notice.

### Discretions

- 7.12 The Trustee is completely unrestricted in the exercise of its powers and discretions.

- 7.5 An outgoing Trustee must vest all the Fund's property in the continuing or new Trustee or its custodian.

- 7.13 The Trustee and any of its directors, employees, delegates or agents may be involved in the exercise of the Trustee's powers and discretions even if they have a conflict of interest or duty.

### Appointment

- 7.6 The Members (or their legal personal representatives) may make a written appointment of an additional or replacement Trustee. The appointment may be prospective or retrospective but must comply with Government Requirements.

### Remuneration

- 7.14 The Members may agree a rate of remuneration that the Trustee or its directors may receive from the Fund if that would be consistent with Government Requirements.

### Vacancy

- 7.7 The Trustee must ensure that any vacancy in the individual Trustees or on the corporate Trustee's board of directors is filled as and when required by Government Requirements.

### Liability

- 7.15 The Trustee's liability is limited to its own dishonest acts or omissions and its own intentional or reckless failures to exercise the degree of care and diligence that it is required to exercise.

### Powers

- 7.8 The Trustee may do anything it considers appropriate to administer the Fund and to comply with Government Requirements. However, the Trustee must administer the Fund in a manner consistent with Government Requirements.

### Indemnity

- 7.9 In dealing with Members, the Trustee may treat any communication as given by

- 7.16 The Trustee, former Trustees, and any of their directors or employees are indemnified in respect of any Tax, loss or expenditure that they incur in relation to the Fund or the administration of the Trustee or a former Trustee unless it results from the person's dishonesty or intentional or reckless failure to exercise

the degree of care and diligence which the person was required to exercise.

7.17 Rule 7.16 does not apply to the extent that its application is inconsistent with Government Requirements.

7.18 A Member must indemnify the Trustee for any loss or liability incurred because (or partly because) the Trustee relies on information which the Member gives to the Trustee.

## 8 ADMINISTRATION

### Information to Trustee

8.1 Every Member and any other person who claims a benefit must give the Trustee any information or documents it reasonably requires to administer the Fund.

8.2 The Trustee may require a Member to be examined by a registered medical practitioner approved by the Trustee.

8.3 The Trustee must treat any information it acquires in relation to Members and their Dependants as confidential and may use that information only in the administration of the Fund.

### Information to Members and others

8.4 The Trustee must give information and documents to others as and when required by Government Requirements. For this purpose, the Trustee may determine that a particular group of Members comprise a sub-plan.

### Notices

8.5 Any written communication by or on behalf of the Trustee relating to the Fund is taken to be given to a person if it is:

- (a) handed to the person; or
- (b) delivered to the person's address last known to the Trustee; or
- (c) posted by ordinary post from within Australia to the person's address last known to the Trustee.

In the case of posting, the communication is taken to have been received on the second business day after the day it is posted.

## Records

8.6 The Trustee must keep records for the Fund as and when required by Government Requirements.

## Member Accounts

8.7 The Trustee must keep one or more Member Accounts for each Member to record:

- (a) contributions and other amounts received for the Member (including, subject to rules 8.18 and 8.22, proceeds of insurance policies);
- (b) earnings or losses in respect of those amounts and amounts paid in respect of the Member;
- (c) a fair proportion of the Fund's Tax and expenses (including insurance premiums) and provisions for Tax and expenses; and
- (d) any allocation from a reserve that the Trustee determines.

## Asset portfolios

8.8 The Trustee may maintain separate asset portfolios to keep particular assets of the Fund.

8.9 To establish an asset portfolio, the Trustee must name it and specify the assets to be kept in it.

8.10 A Member may:

- (a) elect the asset portfolios to which (and the proportions in which) the Trustee allocates Member Account balances and future contributions for the Member; and
- (b) elect to switch asset portfolios, or proportions, or both.

8.11 The Trustee must comply with the Member's election if:

- (a) the Trustee approves the election; and
- (b) the allocation or switch complies with Government Requirements.

### Fund expenses

- 8.12 The Trustee must pay from the Fund all Tax and expenses relating to the Fund unless another person pays them. If another person pays Fund Tax or expenses the Trustee must, if the person requires, reimburse the person from the Fund unless Government Requirements do not permit reimbursement.

### Investment return

- 8.13 After each 30 June, the Trustee must determine the return since the last 30 June on the investments for each asset portfolio (or if there are none, for the Fund) and must ensure that the return is credited or debited from time to time to Member Accounts and reserves in a way that is fair and reasonable as between:
- (a) all Members; and
  - (b) the various kinds of benefits of each Member.
- 8.14 Whenever it considers appropriate, the Trustee may determine the investment return to be applied to a Member's Member Accounts, as at the date when a benefit or transfer becomes payable from them, for the period since the Fund's establishment or since the last 30 June (if later).
- 8.15 The Trustee may apply investment return to Member Accounts on the basis of daily, monthly or average balances or on any other basis the Trustee determines to be fair and reasonable.
- 8.16 When determining investment return the Trustee must take into account:
- (a) the realised and unrealised earnings or losses of asset portfolios (or if there are none, the Fund), including realised and unrealised capital gains or losses;
  - (b) expenses and Tax not debited to Member Accounts;
  - (c) the level of the Fund's reserve accounts; and
  - (d) the appropriateness of averaging earnings, losses and expenses over several years.

- 8.17 The Trustee must not distribute investment return in a way that takes any of the Fund's reserve accounts into debit.

### Reserves

- 8.18 The Trustee may set up one or more reserve accounts to record:
- (a) earnings or losses of the Fund not recorded in Member Accounts;
  - (b) contributions not yet allocated to Member Accounts;
  - (c) amounts no longer required to pay benefits for Members; and
  - (d) any insurance proceeds that the Trustee decides not to credit to a Member Account.
- 8.19 The Trustee may use amounts held in the Fund's reserve accounts for any purposes including:
- (a) averaging earnings, losses and expenses over several years;
  - (b) replacing contributions otherwise payable to the Fund; and
  - (c) providing additional benefits.
- However, the Trustee may apply those amounts only as and when the Members approve and Government Requirements permit.

### Audit

- 8.20 The Trustee must appoint an auditor (who meets Government Requirements) to audit the Fund's accounts and records and to give the Trustee a written report each year when Government Requirements so require.

### Inquiries and complaints

- 8.21 If Government Requirements so require, the Trustee must take reasonable steps to ensure that arrangements are in force under which:
- (a) any person entitled to a benefit from the Fund may inquire into, or complain about, the operation or management of the Fund in relation to that person; and
  - (b) the inquiry or complaint will be considered and properly dealt with within 90 days after it is made.

**Insurance proceeds**

- 8.22 Despite rule 8.7 the Trustee may credit proceeds of insurance policies to the Fund's reserves.

**9 INVESTMENT, VALUATION & BORROWING****Powers**

- 9.1 The Trustee may invest the Fund assets in any manner, as if it were investing its own property. For this purpose "invest" includes holding property for capital gain, income or both.

**Strategy**

- 9.2 The Trustee must formulate, review regularly and give effect to an investment strategy that has regard to the whole of the circumstances of the Fund including, but not limited to:
- (a) the risk involved in making, holding and realising, and the likely return from, the Fund's investments, having regard to its objectives and its expected cash flow requirements;
  - (b) the composition of the Fund's investments as a whole including the extent to which the investments are diverse or involve the Fund in being exposed to risks from inadequate diversification;
  - (c) the liquidity of the Fund's investments, having regard to its expected cash flow requirements;
  - (d) the ability of the Fund to discharge its existing and prospective liabilities;
  - (e) whether the Trustee should hold a contract of insurance that provides insurance cover for one or more Members; and
  - (f) the prudential management of the Fund's reserves (if any) consistent with the Fund's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due.

**Assets to be kept separate**

- 9.3 The Trustee must keep the Fund's money and other assets separate from any money and assets that:
- (a) are held by the trustee personally; or
  - (b) belong to a standard employer sponsor of the Fund or to a standard employer sponsor's associate.

**Valuation**

- 9.4 When preparing the annual accounts and statements required by Government Requirements the Trustee must ensure that each Fund asset is valued at the amount that a willing buyer could reasonably be expected to pay to a willing seller on the assumption that:
- (a) the buyer and the seller dealt with each other at arm's length;
  - (b) the sale occurred after proper marketing of the asset; and
  - (c) the buyer and the seller acted knowledgeably and prudentially in relation to the sale.

**Limited recourse borrowing**

- 9.5 The Trustee may borrow to acquire or replace assets. In carrying out the borrowing and the acquisition the Trustee must comply with Government Requirements and has the following powers:
- (a) To borrow money from any person for the purpose of:
    - acquiring a single asset;
    - repairing or maintaining an asset being acquired with borrowed money; or
    - refinancing such a borrowing upon terms that the Trustee deems fit.
  - (b) To give or to authorise the giving of any indemnity for or on behalf of any person or any security by mortgage or charge (whether fixed or floating) over the asset.
  - (c) To open any account with any financial institution, to operate the account and to draw, make, accept, endorse, discount, issue or otherwise deal with any

- promissory note, bill of exchange, bill of lading, cheque or other negotiable or transferable instrument.
- (d) To delegate (in writing) the exercise of all or any of the powers or discretionary authorities conferred on the Trustee and execute any powers of attorney or other instruments necessary for that purpose.
- (e) To purchase, take on lease or licence, develop, construct, hold, improve, sell, transfer, convey, surrender, lease, licence or otherwise deal with any real property and, without limiting the generality of this clause, to develop any commercial or retail premises and hold or sell, transfer, convey, surrender, lease or licence such premises.
- (f) Generally to exercise or concur in exercising all the powers and discretions contained in the Deed or Rules or otherwise by law conferred even if any Trustee or director or shareholder of a Trustee has or may have a direct or personal 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 even if the Trustee for the time being is the sole Trustee.
- Collectables and personal use assets**
- 9.6 The Trustee must comply with Government Requirements in relation to collectables and personal use assets, and in particular their acquisition, use, storage, disposal, insurance and valuation.
- Custodian**
- 9.7 The Trustee may appoint a person to perform custodial functions in relation to any of the Fund's assets on terms the Trustee considers appropriate, if the appointment complies with Government Requirements.
- Restrictions**
- 9.8 The Trustee must comply with Government Requirements when investing the Fund's assets and disposing of assets.
- 9.9 The Trustee must comply with Government Requirements in relation to:
- (a) making loans; and
  - (b) borrowing.
- 9.10 The Trustee may charge the Fund's assets only if Government Requirements permit.
- 10 DEATH OR INCAPACITY – CONTROL & ESTATE PLANNING**
- Death - successor Trustees**
- 10.1 The Members may by deed appoint a person under rule 7.6 to become a Trustee upon the death of a Trustee named in the appointment. The appointment must be consistent with Government Requirements.
- Death - legal personal representative**
- 10.2 Where there is no corporate Trustee and a Member dies, the Member's legal personal representative may become a Trustee in place of the Member by making a written declaration to that effect and giving it to the other Trustees (if any).
- Incapacity - legal personal representative etc**
- 10.3 Where there is no corporate Trustee and a Member is incapable of acting as a Trustee, any one of the following people may become a Trustee in place of the Member by making a written declaration to that effect and giving it to the other Trustees (if any):
- the Member's legal personal representative;
  - where the Member is under a legal disability, the trustee of the Member's estate;
  - the holder of an enduring power of attorney granted by the Member; or
  - an administrator appointed by a State or Territory tribunal to manage the Member's estate.

10.4 Despite anything else in the Deed or Rules, a person who becomes a Trustee under rule 10.1, 10.2 or 10.3 may not be removed from office unless remaining in office would breach Government Requirements.

10.5 Subject to rules 5.3 and 10.13 to 10.16 (but despite anything else in the Deed or Rules), the Trustee must comply with any direction of a person mentioned in rule 10.1, 10.2 or 10.3 in matters pertaining to payment of the relevant Member's benefits or investment of Fund assets held to provide those benefits.

#### **Fund Guardian**

10.6 The Members may appoint one or more Guardians of the Fund. The appointment of a Guardian terminates only if the Members revoke it or if the Guardian dies, resigns or becomes incapable of managing financial affairs. A Guardian may appoint a successor Guardian to take office in any of those events.

10.7 An appointment of a Guardian must be in writing.

10.8 If there is a Guardian then despite anything else in the Deed or Rules:

- (a) in acting as trustee of the Fund, the Trustee must comply with any direction of the Guardian (or of all Guardians if there are more than one);
- (b) rules 7.3, 7.4, 7.6 and 12.2 have no effect; and
- (c) the Guardian (or all Guardians if there are more than one) may replace the Trustee if the replacement Trustee meets Government Requirements; and
- (d) the Members may not dismiss the Trustee or the replacement trustee.

#### **Binding Death Benefit Nominations**

10.9 A Member may give the Trustee a Binding Death Benefit Nomination.

10.10 A Binding Death Benefit Nomination is valid only if the Trustee accepts it in writing.

10.11 The Trustee may refuse to accept any Binding Death Benefit Nomination without giving any reason.

10.12 When the Trustee accepts a Binding Death Benefit Nomination, any previous Binding Death Benefit Nomination from the Member is taken to have been revoked.

#### **Vesting directions – bare trust**

10.13 A Member entitled to a benefit may give the Trustee a written direction to hold the Member's interest in the Fund upon trust for the Member absolutely.

10.14 The direction revokes any Binding Death Benefit Nomination in respect of the Member and may be expressed to be operative upon service of the notice or upon the Member's death.

10.15 Immediately the direction becomes operative:

- (a) the Member (or the Member's legal personal representative) is absolutely entitled to a proportionate interest in each asset of any asset portfolio to which the Member's Member Accounts are allocated and each asset of the Fund not allocated to an asset portfolio; and
- (b) the Trustee holds that interest on bare trust for the Member (or the Member's legal personal representative).

10.16 The proportionate interest is the share that the Member's Account Balance represents in relation to the net assets of the Fund.

## **11 AMENDMENT**

### **Power**

11.1 The Trustee may by deed or written resolution amend, delete or replace the Deed or Rules including rule 11. An amendment may be retrospective.

### **Restrictions**

11.2 An amendment may not alter a beneficiary's right or claim to an accrued benefit adversely to the beneficiary or

reduce the amount of that benefit unless Government Requirements permit.

(c) increasing those benefits with the consent of the Members.

11.3 An amendment may not permit an individual to be appointed Trustee unless Government Requirements permit.

12.6 The Trustee must comply with rules 5.2 to 5.8 and 6 regarding benefits payable for Members on winding up.

#### Notice

11.4 If Government Requirements so require, the Trustee must notify Members of an amendment. However, the amendment is effective even if the Trustee fails to notify Members.

## 12 WINDING UP

12.1 The Trustee may wind up the Fund.

12.2 The Trustee must wind up the Fund if the Members direct it to do so.

#### Notice

12.3 If the Fund is to be wound up, the Trustee must as soon as practicable notify each Member in writing. However, if the Trustee fails to notify any Member, the winding up is still effective.

12.4 As from the date of the Trustee's notice to Members, the Trustee must take reasonable steps to recover contributions then due, but must stop accepting other contributions.

#### Winding up procedure

12.5 The Trustee must determine investment return for each asset portfolio (or if there are none, for the Fund) to be applied to Member Accounts as at the date of the notice to Members. The Trustee must then apply the Fund assets towards:

- (a) satisfying actual and contingent liabilities (except benefits); then
- (b) providing pro rata for each Member in respect of the benefits then payable for the Member or, if a benefit is not then payable, a benefit equal to the Member's Account Balance; then