



# **SPECIAL PURPOSE CONSTITUTION**

**ENCHANTING HORNBILL PTY LTD**

**ACN: 167 179 535**

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## **SMSF Strategies Special Purpose SMSF Corporate Trustee**

### **Part One**

#### **Purpose**

This Company is a special purpose dedicated self-managed superannuation fund ("SMSF") Trustee Company. Its sole purpose is to act as the Trustee of one or more SMSFs and is not appropriate for use as a Trustee of a family trust or any other Trust or for operations of a trading or investment company. As such it has limited rights to issue shares, cannot carry on a business, make investments or conduct itself in a manner detrimental to its sole purpose of acting as the Trustee of a SMSF or take actions that would see the SMSF or SMSFs for which it acts as Trustee rendered a non-SMSF or a non-complying SMSF.

#### **Rule 1 - Replaceable Rules do not apply**

- 1.** The "Replaceable Rules" referred to in Sections 135 and 141 of the *Corporations Act 2001* do not apply to the Company.

#### **Rule 2 - General Concepts**

- 2.1** Each "**SMSF Trustee Company Guide**" in the Explanatory Memorandum to the Rules of the Company is designed for information purposes only. It is not to be construed as forming part of the Rules of the Fund. If in any dispute, misunderstanding or action regarding the Rules of the SMSF Corporate Trustee of the Fund or the Fund itself any Court, the Regulator or any other person may have regard to the "**SMSF Trustee Company Guide**" or any part of the Explanatory Memorandum only to determine the ordinary meaning of the Rule.
- 2.2** A reference to any entity, body, Company or person also includes a reference to those persons or entities that have authority to act on behalf of the party including their successors, assigns, representatives, Responsible Officers and Legal Personal Representative.
- 2.3** Where a word is Capitalised it may be found in the "Definitions" Rule.
- 2.4** Where the term "SMSF" is used it means a "Self Managed Superannuation Fund" as defined in the *Superannuation Laws*.
- 2.5** Where there is conflict between the Constitution and the *Superannuation Laws*, the *Superannuation Laws* are paramount unless a breach of the *Superannuation Laws* does not result in a fine, penalty or non-compliance certificate or determination by the Regulator for the Trustee, the Funds that the Company acts as Trustee on behalf of or any Member of those Funds.
- 2.6** Where singular is used in the Rules it is to also mean plural and if a gender is used it is also to mean the opposite gender.
- 2.7** Except where the context requires words and phrases given a meaning by the *Corporations Act 2001* have the same meaning in this Constitution.

#### **Rule 3 - Special Purpose SMSF Trustee Company**

- 3.1** The primary purpose of the Company is to act as a Trustee for one or more SMSFs.
- 3.2** The Company is not to act as Trustee for any other Trust, carry on any business, make investments in its own capacity or do any other thing except in accordance with Rule 3.1 and pursuant to the Constitution of the Company.
- 3.3** The Company is a proprietary company limited by shares and must remain as such for the life of the Company unless otherwise authorised under the *Superannuation Laws* or by the Regulator for a Company acting as a Trustee of a SMSF.

**3.4** The Company must ensure at all times that the Fund remains continuously complying SMSFs.

#### **Rule 4 - Sole Shareholder Company**

**4.1** If there is only one Shareholder who is also a director of the Company this Constitution is to be read and interpreted as if any reference in this Constitution to more than one Shareholder and Director was a reference to that one Shareholder and Director.

### **Part Two – Directors, their Powers and Duties**

#### **Rule 5 - Appointment and Removal of Directors**

##### **General Appointment**

**5.1** Until otherwise determined by the Company in a General Meeting, the Company may have one Director or up to but no more than those number of Directors that ensures the Company validly acts as a Trustee for the Fund and that the Fund continues to remain a regulated complying SMSF. This includes ensuring that all Members of the Fund are Directors of the Company except where, for a complying SMSF, otherwise allowed under the Superannuation Laws.

**5.2** The Company may appoint a person as a Director by resolution passed in General Meeting provided that person is not a Disqualified Person and the appointment does not render the Fund a non-complying SMSF or a non-SMSF.

**5.3** The Directors of the Company may appoint a person as a Director provided that person is not a Disqualified Person and the appointment does not render the Fund a non-complying SMSF or a non-SMSF.

##### **Directors under a Legal Disability**

**5.4** A person may not act as a Director when they are under a legal disability and is to be removed or is to resign at the time of notification or awareness of any legal disability or within a reasonable period thereafter. Where the person is under a legal disability and is a Member of the Fund:

- a) if the Member has a Legal Personal Representative then the person's Legal Personal Representative may be appointed to act as a Director provided that the Legal Personal Representative is not a Disqualified Person, and is able to act as a Director, consents to act as a Director and is appointed as a Director of the Company. The Director may be appointed pursuant to Rule 5.2 or Rule 5.3;
- b) A Director, prior to resignation may appoint an Alternate Director where the Alternate Director is the Director's Legal Personal Representative provided the Alternate Director is not a Disqualified Person, the Legal Personal Representative consents and the appointment does not render the Fund a non-complying SMSF.

##### **Directors bound by Rules and Superannuation Laws**

**5.5** The Company and the Directors of the Company agree to be bound by the Constitution, Rules of the Fund, the *Superannuation Laws*, the Corporation Laws and any direction the Regulator may provide.

##### **Directors not to be Disqualified Persons**

**5.6** A person is removed as a Director where they become a Disqualified Person unless they are otherwise authorised to do so under the *Superannuation Laws* and the Rules of the Fund.

##### **Removal and Resignation of a Director**

**5.7** The Directors may at any time remove a Director or Alternate Director for any reason or where the continued appointment of the Director may result in the Fund becoming a non-complying SMSF. This includes where the Director is no longer a Member of the Fund unless otherwise

allowed under the Superannuation Laws.

- 5.8** A person may resign as a Director at any time provided it is in writing and forwarded to the registered office of the Company. An Alternate Director may be appointed by the Company in a General Meeting or by the Board only where the resigning Director remains a Member of the Fund.
- 5.9** The Company must give the Australian Securities and Investments Commission and the Regulator notice of the appointment, or termination of the appointment, or resignation of a Director or an Alternate Director, in accordance with the *Corporations Act 2001* and the *Superannuation Laws*.

### **Death of a Director Member**

- 5.10** Where the Company acts as Trustee of a Fund, when a Member dies:
- a) At the request of the deceased Member's Legal Personal Representative, and subject to their consent, the Directors may appoint the deceased Member's Legal Personal Representative as a Director provided that any appointment ensures that the Fund retains its complying SMSF status;
  - b) At the commencement of the payment of the deceased Member's Death Benefits to their Dependants or their Legal Estate the Legal Personal Representative Director appointed on behalf of the deceased Member must resign.

### **Rule 6 - Responsibilities of Directors**

- 6.1** The Directors are to hold all Assets of the Fund in the name of the Company unless the Superannuation Laws otherwise allow or the Trustee of the Fund has entered into a borrowing arrangement under the Superannuation Laws which require an Asset of the Fund to be held by a person as Custodian or Bare Trustee of the Fund. Where there is a change in name of the Company, the Directors as soon as possible must register all of the Fund's assets to reflect the change of the name of the Company.
- 6.2** Any contract, transaction or agreement of whatever nature undertaken by the Company on behalf of the Fund must be in the name of the Company unless the Superannuation Laws otherwise allow.
- 6.3** Unless the Corporations Act 2001 requires, the Directors are not to obtain an Australian Financial Services Licence.
- 6.4** It is the responsibility of the Directors of the Company in circumstances where the Company acts as Trustee of the Fund to:
- a) ensure that the Fund remains a Complying SMSF;
  - b) ensure that the Fund Trust Deed and Rules remain current;
  - c) act honestly in all matters concerning the Fund;
  - d) exercise, in all matters affecting the Fund and its Members, the same degree of care, skill and diligence as any normal prudent Trustee;
  - e) ensure that the Trustee's duties and powers are performed and exercised in the best interests of Members of the Fund;
  - f) not enter into any contract, transaction or agreement or do anything that would prevent or hinder the Trustee in suitably performing or exercising the Trustee's functions and powers;
  - g) disclose any conflict of interest in any dealing with or undertaking any transaction or investment on behalf of the Fund;

- h) to provide new and prospective Members of the Fund with a Product Disclosure Statement if required by the *Corporations Act 2001*;
- i) provide to Members access to all and any information required to be given or viewed by Members under the *Superannuation Laws* but subject to the Privacy Act 1988;
- j) be aware of all and any changes to the *Superannuation Laws* to ensure that the Fund remains at all times a Complying SMSF;
- k) ensure the efficient administration of the Fund including, but not limited to, the appointment of an administrator and Auditor for the Fund, the payment of all taxes, excess contributions taxes and other imposts that must be paid by the Fund and the lodgement of all compulsory documentation to the Regulator in respect of the Fund and ensure that the Fund meets its Superannuation Law compliance responsibilities;
- l) keep accounts, all records, documents and minutes of valid Trustee meetings to enable the efficient administration and audit of the Fund by the Auditor and the Regulator so as to comply with all *Superannuation Laws* in respect of the keeping of accounts, records, documents and minutes for the Fund;
- m) notify the Regulator, in accordance with the provisions of the *Superannuation Laws*, of significant events and other events that occur in the Fund including any change in Trustee, Directorship, Membership of the Fund or where required. The Trustee is to notify the Regulator of these events within the time period required;
- n) not seek to delegate Trustee powers and responsibilities under the Rules of the Fund or the *Superannuation Laws* unless otherwise allowed under the Superannuation Laws.

## **Rule 7 - General Powers of Directors**

- 7.1** The affairs of the Company are to be managed by or under the direction of the Directors and is to be for the primary purpose of acting as SMSF Trustee of the Fund.
- 7.2** The Directors may exercise all the powers of the Company in this Constitution except any powers that the *Corporations Act 2001* or this Constitution require the Company to exercise in general meeting.
- 7.3** At all times the Directors must ensure that they have unlimited powers as to the administration and control of the Assets of the Fund. These include the right to sell, call in, convert into money, grant options or rights to purchase, mortgage, charge, sub-charge, or otherwise deal with or dispose of or transfer any item or Asset of the Fund.
- 7.4** Subject to the Rules of the Fund, the Directors in dealing with the Fund have all the powers that a Trustee has at law and all the powers specifically conferred on a SMSF Trustee including, but not limited to:
  - a) **engage SMSF Professionals and other advisers:** to employ or engage agents or professionals in the execution of transactions, undertakings, acquisitions, disposal, to transact any business or to do any act required to be done in connection with the administration of the Fund and to act upon the opinion or advice of any such person including a SMSF Auditor without being responsible for any loss or damage occasioned by acting in accordance therewith;
  - b) **enter into contracts and undertake transactions:** to enter into contracts, undertakings and other transactions for the benefit of the Fund and its Members whatsoever and wheresoever situate;
  - c) **open Bank and cash accounts:** to open in the name of the Fund, any cheque, savings, cash or other bank account with any bank, financial institution or managed fund wherever situated, as the Directors decides, with full power to operate or close any such account;
  - d) **acquire Corporate or Trust securities:** with respect to any company or trust in which the Fund holds shares, stocks, debentures, options, convertible notes or is otherwise interested or

concerned ("securities") to exercise all of the powers authorised under the constituent and any other relevant documents concerning the powers of equity, debt and other interest holders of the entity;

- e) **acquire Insurance Policies:** to effect or acquire policies of insurance from entities within or outside Australia of any kind on the life of any Fund Member or in respect of sickness, incapacity or accident to any Fund Member, to pay premiums, transfer, surrender, change the status of and deal with these policies in any manner whatsoever, whether or not these policies are individual policies on the life of one person or a group policy on the lives of two or more persons, to purchase or enter into insurance or investment bonds whether or not the bonds are linked to a policy over the life of any person;
- f) **deal with real property:** to acquire, dispose of, exchange, strata title, subdivide, mortgage, sub-mortgage, lease, sub-lease, grant, maintain, improve, re-lease or vary any right or easement or otherwise deal with any interest in real property;
- g) **enter into lease arrangements:** to rent premises from any person, acquire the interest of any lessee in any lease, purchase, hire, take on lease, grant leases, sub-leases, tenancies or rights of any nature to any interest in real estate, motor vehicles, computer hardware and software, fixtures and fittings, furniture, utensils, plant and equipment and other personal property of any description;
- h) **lease property owned by the Fund:** to lease and let property owned by the Fund upon terms and conditions as the Trustee may decide, to accept surrenders from, and to make arrangements with a lessee or tenant as the Directors may consider appropriate;
- i) **lend money:** subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status to lend and advance moneys;
- j) **borrow money or assets;** subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status, to borrow or raise any financial accommodation or Assets including under an instalment warrant or other borrowing arrangement authorised pursuant to section 67 of the *Superannuation Industry Supervision Act 1993* or the *Superannuation Laws*, and to assign, pledge, mortgage or charge any of the Fund as security for such financial accommodation;
- k) **enter into futures contracts and options:** both within and outside Australia to buy, sell, open, close-out or otherwise deal in futures contracts of all kinds, to enter into, vary, exercise, abandon or sell any put or call option or rights, or to place bids, make offers, hedge and effect orders including buying, selling, straddle, switch and stop-loss order, to tender and take delivery of commodities and currencies which are the subject of any futures contract or option, and otherwise to do and perform all things so as to operate on, utilise or deal with the facilities of any stock or futures exchange no matter where situate provided the Directors maintain a risk management strategy for the Fund if required under the *Superannuation Laws*;
- l) **deal with personal property:** to acquire, dispose of, exchange, hire, lease, maintain, improve, mortgage or otherwise deal with any interest in personal property;
- m) **deal with intellectual property:** to apply for, purchase or otherwise acquire and to sell patents, patent rights, copyrights, trademarks, designs, formulae, licences, concessions, know-how and the like, conferring any exclusive or non-exclusive or limited right to use of any other intellectual property rights and to use, exercise, develop or grant licences in respect of or otherwise turn to account the property rights or information so acquired;
- n) **obtain agencies and licences:** to apply for, purchase and hold any permit, agency or licence which may be desirable or required to enable or facilitate the carrying on of any business which the Fund is empowered to engage in and to surrender, relinquish, sell, vary or assign the same provide the said agency, licence or business does not breach the "Sole Purpose Test" or the *Superannuation Laws*;



- o) **pay management expenses:** to pay out of the Assets, Reserve Accounts or the Earnings of the Fund all costs, charges and expenses incidental to the management and operation of the Fund or to the exercise of any power, authority or discretion contained in the Rules or the Deed of the Fund;
- p) **pay General Expenses:** to pay insurance premiums, rates, taxes, rents, and outgoings in connection with any Assets of the Fund from the Assets, Reserve Accounts or the Earnings of the Fund and to manage such Assets and effect improvements and repairs as the Trustee may consider necessary or advisable;
- q) **set aside money in the Fund:** to set aside out of the Earnings of the Fund from time to time such money as may in the opinion of the Trustee be sufficient to meet any debt, tax or obligation due or accruing;
- r) **deal with itself:** notwithstanding any rule or law or equity to the contrary, to acquire as property of the Fund real or personal property the legal and beneficial interest in which is at the date of such acquisition the absolute property of the 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 which such acquisition the beneficial interest in and to the property shall be held by the Company as Trustee according to the Rules of the Fund;
- s) **deal with Choses-in-action:** to acquire choses-in-action including debts and obligations of all kinds for value or by way of gift or at a discount or at a premium and to assign, release, vary, relinquish or otherwise deal with the choses-in-action in any way whatsoever on such terms and conditions as the Directors see fit;
- t) **receive gifts or distributions:** to receive property by gift inter vivos or by distribution under a will or under the provisions of any other trust or otherwise from any person as an addition to the Fund, whether subject to liabilities or not and to hold these gifts according to the Rules of the Fund and to administer such additions under these provisions;
- u) **instigate legal proceedings:** to institute, join in and defend proceedings at law or by way of mediation or arbitration and to proceed to the final end and determination of, or to compromise the same and to compromise and settle any such dispute or proceedings for such consideration and upon the terms and conditions as the Directors may decide;
- v) **trade in foreign currency:** to undertake, contract, carry out or do anything including acquiring Assets in a foreign currency;
- w) **exercise all other powers:** to do all such other things as may be incidental to the exercise of the powers, rights, discretions and authorities hereby conferred on the Company acting as Trustee;
- x) **Power to appoint an Attorney:** the Trustee may in writing delegate the exercise of all or any of the powers or discretionary authorities hereby conferred on the trustee and execute any powers of attorney or other instruments necessary to effectuate such purpose;
- y) **Indemnities:** to give indemnities to or on behalf of any person the Trustee thinks fit;
- z) **Custodian:** to appoint any person as Custodian to hold legal title for any Asset acquired or to be acquired by the Trustee under such terms as the Trustee thinks fit.
- aa) **Bank Bills:** the Trustee may raise money in any lawful manner including by drawing, endorsing, accepting or otherwise dealing with any bill of exchange, promissory note or other negotiable instrument. The Trustee may secure the repayment of any moneys so raised with interest at such rate as the Trustee thinks fit and upon any terms and conditions in all respects as the Trustee thinks fit. Any money raised by the Trustee will form part of the Fund.

**7.5** The Trustee, subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status, may create another Fund with the same Rules, Members and the Company acting as Trustee including a Cloned Fund.

- 7.6** The Company is not authorised to carry out any transaction, undertaking, contract, business, investment or any other thing on behalf of the Fund that would breach the *Superannuation Laws* and result in the Fund becoming a non-Complying SMSF. Any such transaction, undertaking, contract, business, investment or thing is rendered null and void ab-initio.
- 7.7** Any two Directors of the Company may sign, draw, accept, endorse or otherwise execute a negotiable instrument for the Fund and the Company. If the Company has only one Director that Director may sign, draw, accept, endorse or otherwise execute a negotiable instrument for the Fund and the Company.

## **Rule 8 - Investment Powers of Directors**

- 8.1** The Directors must invest the Cash and Assets of the Fund in accordance with an Investment Strategy of the Fund. Any investment is to meet the *Superannuation Laws*, any relevant Trustee Law and ensure that the Fund retains its complying SMSF status.
- 8.2** The Directors may acquire and invest in any Asset or Cash on behalf of the Fund wherever situate in or outside Australia including, but not limited to the following:
- a) Stocks and shares of any entity (including a company), units in a unit trust both private and public including preference, convertible preference shares and any other type of equity or hybrid equity instrument in an entity;
  - b) Property either as passive investment or for development purposes, sale or rental income purposes directly, indirectly or by way of joint venture or partnership provided that the property is not encumbered and the Fund does not provide a guarantee in respect of any direct or indirect loan agreement incidental to the property unless the *Superannuation Laws* allow. Property investment includes the acquisition of property pursuant to a SMSF borrowing arrangement or property instalment warrant as allowed under the *Superannuation Laws* at the time of the investment. In instigating any property transaction, the Directors must ensure that the documentation relating to the transaction, including any indirect, joint venture or partnership interest satisfies the Fund's audit standards as well as the *Superannuation Laws*. These include, but are not limited to, an appropriate valuation;
  - c) Financial products including instalment warrants, options, futures, warrants, endowment warrants, unit trusts, property syndicates, joint ventures, hybrid trusts, pooled superannuation trusts and other instruments that provide the Fund with a reward on its investment;
  - d) Debt instruments including government and corporate bonds, mortgages, chattel leases, fixed term deposits, hybrid debt instruments and any other type of instrument where the investor receives an interest type of return;
  - e) Discount investments where the Members of the Fund may obtain a discount on services under an agreement with a third party provided that the return available on the investment is the same as that which would be obtained by an investor not able to participate in the discount and that the investment does not cause the Fund to breach the *Superannuation Laws*;
  - f) Art, sculpture, wine or any other collectible;
  - g) A business including share trading, property development or primary production provided the investment in the business does not breach the Sole Purpose Test, the Fund's Audit Standards or the *Superannuation Laws*;
  - h) Intellectual property including a trade mark, copyright, licence, patent. The holding of the intellectual property may be direct, indirect, as part of a joint venture or as an interest by way of a licence;
  - i) An income stream or annuity from a life insurance company, Superannuation Fund, financial institution, trust, body corporate or person;
  - j) A life insurance or friendly society bond or other investment including but not limited to an endowment, whole of life or other investment policy issued by any life insurance company;

- k) Any managed fund, managed investment scheme, collective investment vehicle, trust or unit trust product including a pooled superannuation trust provided the investment does not breach the *Superannuation Laws*;
- l) Entering into any joint venture, partnership, association or co-operative provided the Trustee assesses the risk of the venture and in particular the cash flow requirements and legal nature of the venture;
- m) Any other investment including a prudent investment under Trust Law;
- n) Assets of a Member of the Fund, Related Trust or a Related Party of a Member conditional upon the acquisition of the investment not breaching the *Superannuation Laws*;
- o) The investment in any financial or investment product that meets the conditions of the Sole Purpose Test and sections 66,67,84,85 and 109 of the Superannuation Industry Supervision Act 1993;

provided that the acquisition, investment and holding of the Asset is in accordance with the Fund's Investment Strategy and in addition the acquisition, investment and holding of the Asset does not breach the *Superannuation Laws* including the Sole Purpose Test.

**8.3** The Company, in carrying out investment business on behalf of the Fund, must comply with all of the provisions of Chapter 7 of the *Corporations Act 2001* and any other *Superannuation Laws*.

## **Rule 9 - Remuneration of Directors**

- 9.1** Where the Company acts as Trustee of a Fund, the Company nor any Director is to receive any payment or remuneration from the Fund unless the *Superannuation Laws* or the Regulator otherwise allows.
- 9.2** The Directors of the Company are to be paid the remuneration that the Company determines by resolution. Any such payment may not be as a direct or indirect result of the Company acting as a Trustee of the Fund unless the *Superannuation Laws* allow.
- 9.3** Subject to the *Superannuation Laws* and the Fund retaining its complying SMSF status the Company may seek to recoup all expenses properly incurred in carrying out its duties as Trustee from the Fund.
- 9.4** The Company may also pay the Directors' travelling and other expenses that they properly incur:
  - a) in attending Directors' Meetings or any Meetings of a committee of Directors; and
  - b) in attending any General Meetings of the Company; and
  - c) in connection with the Company's business.

## **Rule 10 - Directors' Meetings**

### **Calling of Directors' Meetings**

- 10.1** A Directors' Meeting may be called by a Director giving reasonable notice individually to every other Director unless the other Directors consent otherwise.
- 10.2** The Directors of the Company may hold a Directors Meeting at two (2) or more venues using technology that gives the Directors as a whole a reasonable opportunity to participate in the meeting and allows the parties present to hear and be heard by each other person present and adjourn and otherwise regulate the meeting as they determine.
- 10.3** Subject to the *Superannuation Laws* and the Directors' consent, at a Fund Meeting the Director with the most votes at the Meeting pursuant to Rule 10.6 is to chair any Meeting of the Directors.

- 10.4** Subject to Rule 10.3 the Directors may elect a Director to chair their Meetings. The Directors may determine the period for which the Director is to be the Chairman.
- 10.5** Unless the Directors determine otherwise, the quorum for a Directors' meeting is 2 Directors and the quorum must be present at all times during the meeting. In the event that the Company has only one Director and that Director records his decision or declaration to particular effect, the recording of the decision or declaration in writing shall be deemed to be a resolution passed at a meeting of the company's Directors.

### **How Directors Vote**

- 10.6** At a Directors' Fund Meeting a proportional voting rule is to apply whereby each Director or Alternate Director is to hold that number of votes equal to 1 vote for each \$1 of the aggregate Value of Member Superannuation Interests they or the Member they represent holds in the Fund. The Directors may at any Directors' Meeting, in accordance with the proportional voting rule, decide upon the appropriate voting arrangements to apply for that Meeting, any matter to be determined in the Meeting or in respect of any future Meetings or matters to be decided upon in those meetings.
- 10.7** A Director may appoint a person to act as that Director's Proxy at any Meeting of the Company or the Fund.
- 10.8** A resolution of the Directors must be passed by a majority of the votes cast by Directors entitled to vote on the resolution.

### **Dealing with Specific Fund Benefits**

- 10.9** Subject to the *Superannuation Laws* and despite Rule 10.6, at any Fund Meeting dealing with a deceased Member's Death Benefits or a Member's Incapacity Superannuation Benefits only the Director representing the deceased or incapacitated Member may vote on any resolution dealing with the deceased or incapacitated Member's Superannuation Interest or Superannuation Benefits.

### **Directors Meeting via Document**

- 10.10** The Directors of the Company may pass a resolution without a Directors' Meeting being held if all the Directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.
- 10.11** Separate copies of a document may be used for signing by the Directors of the Company, if the wording of the resolution and statement is identical in each copy.
- 10.12** The resolution is passed when the last Director signs.
- 10.13** Minutes of all meetings of Directors must be taken and recorded in accordance with the provisions of Section 251A of the *Corporations Act 2001*.

## **Part Three – Shares and Shareholders**

### **Rule 11 - Shares**

- 11.1** Except as required by the *Superannuation Laws*, the Company shall only issue fully paid ordinary shares. Shares must not and cannot be held jointly under any circumstances.
- 11.2** Only Members of a Fund, their Legal Personal Representative or any entity the Member controls may be Shareholders. Directors of the Company do not have to be Shareholders.
- 11.3** The Company is not bound by or compelled in any way to recognise (whether or not it has notice of the interest or rights concerned) any equitable, contingent, future or partial interest in any share or (except as otherwise provided by this Constitution or by law) any other right in respect

of a share except an absolute right of ownership in the registered holder.

**11.4** Every person whose name is entered as a Shareholder in the register of Shareholders shall be entitled without payment to receive a certificate ("Share Certificate"), in accordance with the provisions of Section 1087 of the *Corporations Act 2001*, specifying the shares held by that Shareholder. If a Share Certificate is defaced, lost or destroyed then that Share Certificate shall be replaced in accordance with the provisions of the *Corporations Act 2001*.

**11.5** While the Company acts in its capacity as Trustee of a SMSF no dividend is payable by the Company on any shares issued.

## **Rule 12 - Ordinary Transfer of Shares**

**12.1** Subject to the Rules of the Company and the Superannuation Laws any Shareholder may transfer all or any of his, her or its shares by instrument in writing ("instrument of transfer") in any usual or common form or in any other form that the Directors approve. The instrument of transfer shall be executed by or on behalf of both the transferor and the transferee.

**12.2** A transferor of shares remains the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of Members in respect of the shares.

**12.3** The instrument of transfer must be left for registration at the registered office of the Company together with such fee (if any) not exceeding \$1.00 as the Directors require, accompanied by the certificate of shares to which it relates and such other information as the Directors properly require to show the right of the transferor to make the transfer, and thereupon the Company shall, subject to the powers vested in the Directors by the Rules of the Company, register the transferee as a Shareholder.

**12.4** Subject to the Superannuation Laws and the Fund retaining its complying SMSF status the Directors may suspend registration of transfers of shares in the Company at the times and for the periods they determine. The periods of suspension must not exceed 30 days in any one calendar year.

**12.5** The Directors of the Company may refuse to register a transfer of shares in the Company for any reason.

**12.6** Before any Member or any person entitled to an interest in shares of the Company, such as a Trustee in bankruptcy or Legal Personal Representative, sells or transfers any shares in the Company, that Shareholder or Trustee or Legal Personal Representative must give notice in writing to the Directors that he, she or it desires to make such a sale or transfer. Such notice shall appoint the Directors of the Company as the agents of the Shareholder or Trustee or Legal Personal Representative for the purposes of the sale or transfer. The price at which the shares are to be sold or transferred shall be agreed upon by the Directors and the Shareholder or Trustee or Legal Personal Representative or where no agreement as to price can be reached, at a price determined by the Auditor of the Company or if there is no Auditor by an independent expert valuer whose appointment is mutually agreed upon by the Directors and the Shareholder or Trustee or Legal Personal Representative.

**12.7** The purchaser or transferee of the shares must be approved of by all the Directors. Where approval of the purchaser or transferee is not unanimous the Directors shall offer on behalf of the Shareholder or Trustee or Legal Personal Representative the shares for sale at the agreed or determined price, to the other Shareholders of the Company. In the event of all or any of the shares not being sold pursuant to this Rule the Shareholder or Trustee or Legal Personal Representative may sell or transfer those shares to any person as he, she or it sees fit provided such sale or transfer meets the conditions of the Constitution.

**12.8** Any shareholder, being a natural person, may transfer any share, which he or she holds, to his or her wife, husband, son or daughter both while alive and through a will. The provisions of Rules 12.6 and 12.7 do not apply to a transfer under this Rule.

## **Rule 13 - Transfer of Shares on Death, Incapacity and Bankruptcy**

### **Death of Shareholder**

- 13.1** If a Shareholder dies, the Company will recognise only the Legal Personal Representative of the deceased Shareholder as being entitled to the deceased shareholder's interest in the shares.
- 13.2** If the Legal Personal Representative gives the Directors the information they reasonably require to establish the Legal Personal Representative's entitlement to be registered as holder of the shares:
- a) the Legal Personal Representative may by giving a written and signed notice to the Company, elect to be registered as the holder of the shares; and
  - b) the Legal Personal Representative is entitled, whether or not registered as the holder of the shares, to the same rights as the deceased shareholder.
- 13.3** On receiving an election under Rule 13.2, the Company must register the Legal Personal Representative as the holder of the shares.
- 13.4** Where a Shareholder is declared bankrupt the shares in the Company the bankrupt Shareholder owns are to be forfeited to the Company for nil value.

### **Mental Incapacity of Shareholder**

- 13.5** If a Legal Personal Representative entitled to shares because of the mental incapacity of a Shareholder gives the Directors the information they reasonably require to establish the Legal Personal Representative's entitlement to be registered as the holder of the shares;
- a) the Legal Personal Representative may by giving a written and signed notice to the Company, elect to be registered as the holder of the shares; and
  - b) the person is entitled, whether or not registered as the holder of the shares, to the same rights as the Shareholder.

### **Member leaves the Fund**

- 13.6** Where the Shareholder is no longer a Member of the Fund, their shares are to be forfeited without compensation.

## **Rule 14 - Meeting of Shareholders**

### **Who can call a Meeting**

- 14.1** A Director may call a meeting of the company's Shareholders.
- 14.2** Meetings of the Company's Shareholders may also be called in accordance with the provisions of the *Corporations Act 2001*.
- 14.3** At least 21 days' notice must be given of a meeting of the Company's Shareholders and such notice must be given in accordance with the provisions of the *Corporations Act 2001*.
- 14.4** When a meeting of the Company's Shareholders is adjourned, new notice of the resumed meeting must be given if the meeting is adjourned for 1 month or more.

### **Quorum at a Meeting of Shareholders**

- 14.5** The quorum for a meeting of the Company's Shareholders where the Company has two or more Shareholders, is one Shareholder and the quorum must be present at all times during the meeting. Where the Company has one Shareholder, one Shareholder in person shall be quorum. For the purposes of this regulation "Shareholder" includes a person attending as a Proxy or

attorney or as representing a corporation which is a Shareholder or other duly authorised representative.

**14.6** In determining whether a quorum is present, individuals attending as proxies or body corporate representatives are to be counted. However, if a Shareholder has appointed more than one Proxy or representative, then only one of them is to be counted. If an individual is attending both as a Shareholder and as a Proxy or body corporate representative, that individual is only to be counted once.

**14.7** A meeting of the Company's Shareholders, that does not have a quorum present within 30 minutes after the time for the meeting set out in the notice of meeting, is adjourned to the date, time and place the Directors specify. If the Directors do not specify one or more of those things, the meeting is adjourned to:

- a) if the date is not specified-the same day in the next week; and
- b) if the time is not specified-the same time; and
- c) if the place is not specified-the same place.

**14.8** If no quorum is present at the resumed meeting of the Company's Shareholders within 30 minutes after the time for the meeting, the meeting is dissolved.

### **Chairing a Meeting of Shareholders**

**14.9** The Directors at a meeting of the Company's Shareholders must elect an individual present to chair the meeting (or part of it) if an individual has not already been elected by the Directors to chair it or, having been elected, is not available to chair it, or declines to act, for the meeting (or part of the meeting).

**14.10** The Shareholders at a meeting of the Company's Shareholders must elect a Shareholder present to chair the meeting (or part of it) if:

- a) a Chairman has not previously been elected by the Directors to chair the meeting; or
- b) a previously elected Chairman is not available, or declines to act, for the meeting (or part of the meeting).

**14.11** The Chairman must adjourn a meeting of the Company's Shareholders if the Shareholders present with a majority of votes at the meeting agree or direct that the Chairman must do so.

### **Proxies**

**14.12** A Shareholder of the Company who is entitled to attend and cast a vote at a meeting of the Company's Shareholders may appoint a person as the Shareholder's Proxy to attend and vote for the Shareholder at the meeting.

**14.13** A Proxy appointed to attend and vote for a Shareholder has the same rights as that Shareholder, except where those rights are qualified by the appointment.

### **Notice of a Meeting of Shareholders**

**14.14** The Company must, when a meeting of the Shareholders is called, send to each Shareholder, along with the notice of the meeting, a Proxy appointment form and a notice as to the appointment of Proxies which:

- a) advises that for the appointment of a Proxy to be effective the Proxy appointment form and if the appointment is signed by the appointer's attorney - the authority under which the appointment was signed or a certified copy of the authority, must be received at least 48 hours before the meeting; and

- b) refers to the relevant Sections of the *Corporations Act 2001* that deal with the appointment of proxies, the rights of proxies, Proxy documents and the validity of Proxy votes, namely Sections 249X to 250C of the *Corporations Act 2001*.

**14.15** Unless the Company has received written notice of the matter before the start or resumption of the meeting at which a Proxy votes, a vote cast by the Proxy will be valid even if, before the Proxy votes:

- a) the appointing Shareholder dies; or
- b) the Shareholder is mentally incapacitated; or
- c) the Shareholder revokes the Proxy's appointment; or
- d) the Shareholder revokes the authority under which the Proxy was appointed by a third party; or
- e) the Shareholder transfers the share in respect of which the Proxy was given.

#### **Voting at a Meeting of Shareholders.**

**14.16** At a meeting of the Shareholders of the Company the proportional voting rule is to apply whereby a Shareholder receives that number of votes equal to 1 vote for each \$1 held in the aggregate Value of Member Superannuation Interests they or the Member they represent holds in the Fund.

**14.17** The Chairman of a Meeting of the Company's Shareholders has, subject to any conflict of interest, a casting vote, and also, if the Chairman is a Shareholder, any vote the Chairman has in his or her capacity as a Shareholder.

**14.18** A resolution of the Shareholders must be passed by a majority of the votes cast by Shareholders entitled to vote on the resolution unless the *Corporations Act 2001* requires that the matter be decided by a Special Resolution.

#### **Minutes of Meeting of Shareholders**

**14.19** Minutes of all Meetings of the Company must be taken and recorded in accordance with the provisions of the *Corporations Act 2001*.

### **Part Four – Miscellaneous**

#### **Rule 15 - Company Secretary**

**15.1** The Directors of the Company may or may not in accordance with the provisions of the *Corporations Act 2001*, appoint a secretary and may appoint one or more assistant or deputy secretaries.

**15.2** A secretary or an assistant or deputy secretary holds office on the terms and conditions (including as to remuneration) that the Directors determine.

#### **Rule 16 - Company Seal**

**16.1** The Company may, in accordance with the provisions of Section 123 of the *Corporations Act 2001*, have a common seal and a duplicate seal.

**16.2** If the Company has a common seal it may use the common seal to execute documents in accordance with the provisions of Section 127 of the *Corporations Act 2001*.



## **Rule 17 - Accounts and Books**

- 17.1** The Company, at the discretion of the Board must keep such accounting records as correctly record and explain the transactions of the Company.
- 17.2** Such accounting records are to be kept in such form and supported by such documentation as to enable those accounting records to be properly audited.
- 17.3** The Company, at the discretion of the Board may, as soon as practical after the end of each Financial Year:
- a) prepare a balance sheet recording the assets and liabilities of the Company as at the end of that preceding Financial Year;
  - b) prepare a profit and loss account recording the profit derived or loss incurred by the Company for that preceding Financial Year (or part year if the Company was not in existence for a full year);
  - c) arrange for the Company's balance sheet, profit and loss account and accounting records to be properly be accounted for;
  - d) arrange for all tax returns and other statements required to be lodged by the Company to be lodged as and when required.
- 17.4** The Company must retain any accounts and statements for a period of 10 years after the end of the Financial Year to which they relate.
- 17.5** The Directors of the Company, or the Company by a resolution passed at a general meeting, may authorise a Shareholder to inspect books of the Company.

## **Rule 18 – Indemnity**

- 18.1** Every officer, auditor or agent of the Company shall be indemnified out of the property of the Company against any liability incurred by him or her in his or her capacity as officer, auditor or agent in defending any proceedings, whether civil or criminal, in which judgement is given in his or her favour or in which he or she is acquitted or in connection with any application in relation to any such proceedings in which relief is, under the *Corporations Act 2001*, granted to him or her by a Court.

## **Rule 19 - Variation of the Rules of the Company**

- 19.1** The Shareholders at a Meeting or the Directors of the Company may vary in whole or part any of the Rules of the Company or the name of the Company in accordance with the *Corporations Act 2001*.
- 19.2** Any variation is to be passed by Special Resolution only.

## **Part Five – Definitions**

### **Rule 20 - Definitions**

**Account** means those accounts, including Company accounts established by the Directors for the Company.

**Alternate Director** is a person who has been appointed as Director of the Company on behalf of a Member or deceased Member according to the Rules of the Company or pursuant to the *Superannuation Laws* including the Legal Personal Representative of a deceased Member of the Fund, the Legal Personal Representative of a Member where the Member is under a legal disability because of age, mental incapacity or for some other reason, the Legal Personal Representative of a Member who holds the Member's Enduring Power of Attorney or any other person who may act as an Alternate Director under the *Superannuation Laws*.

**Assets** include, but are not limited to real, personal or intellectual property, shares, futures, collectibles and any other asset that a Fund may lawfully hold on behalf of a Member, Superannuation Interests, Insurances held by the Company of the Fund as Trustee for current and future Members of the Company or their Dependants and the Legal Estate of a deceased Member and includes any Assets or property transferred or contributed to the Fund plus income, earnings and profits arising from those Assets or property interests but excludes cash.

**Associate** has the meaning given by the *Superannuation Laws* including sections 10 to 17 of the Corporations Act 2001.

**Auditor** is an auditor authorised under the *Superannuation Laws* to be an auditor of a Company acting as Trustee of a SMSF.

**Australian Financial Services Licence** has the same meaning as it has in Chapter 7 of the Corporations Act 2001.

**Board** means the Directors acting in a Meeting of the Directors of the Company.

**Books** includes:

- a) a register; and
- b) any other record of information; and
- c) financial reports or financial records, however compiled, recorded or stored; and
- d) a document;

**Chairman** is the Director who acts as Chairman at any Meeting of Directors or Shareholders.

**Child** in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person.

**Cloned Fund** includes, subject to the *Superannuation Laws* and the Fund retaining its complying SMSF status, a complying SMSF that bears an identical set of Rules, Members and Trustee as the Fund.

**Company** means this Company duly incorporated under the *Corporations Act 2001* and that acts as a SMSF Trustee.

**Complying SMSF** is a SMSF that is determined by the Regulator to be a complying superannuation fund under the *Superannuation Laws*.

**Constitution** means the Rules of the Company.

**Court** includes any properly constituted Court situate in Australia whether at a Federal or State level including both criminal and civil Courts.

**Dependant** includes, subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status, a Spouse of or a Child of a Member of the Fund, or a person in an Inter-Dependent Relationship with a Member of the Fund or any financial dependant of a Member of the Fund irrespective of age and any other person the Company acting as Trustee of the Fund is of the opinion is a Dependant of the Member of the Fund at the relevant time.

**Director** is a person duly and properly appointed as a Director of the Company and whose appointment does not result in the Fund being a non-complying SMSF or the Fund not being a SMSF.

**Directors' Meeting** includes a Fund Meeting.

**Disqualified Person** includes a person as defined in the *Superannuation Laws* and:

1. where the person is a Director, a person where at any time (including prior to the establishment of the fund):
  - a) the individual was convicted of an offence of dishonest conduct against or arising out of a law of the Commonwealth, a State, a Territory or a foreign country;
  - b) a civil penalty order has been made in relation to the Trustee as a consequence of a breach of the Superannuation Laws;
  - c) the person is an undischarged bankrupt under the Bankruptcy Act 1966 or the law of any other country or external Territory; or
  - d) who the Regulator has disqualified from being a Trustee under the Superannuation Laws.
2. where it is a Company:
  - a) a receiver, or receiver and manager has been appointed in respect of property beneficially owned by the company; or
  - b) an official manager or administrator has been appointed in respect of the company; or
  - c) a provisional liquidator has been appointed in respect of the body; or
  - d) the company has begun to be wound up;
  - e) the body Corporate knows, or has reasonable grounds to suspect, that a person who is, or is acting as, a responsible officer of the company is a Disqualified Person and that they are not eligible to apply to APRA under Part 15 of the Superannuation Laws to claim a Disqualified Person waiver or that they do not wish to apply for such a waiver,

unless the Regulator decides otherwise

**Financial Year** is any year commencing 1 July and ending 30 June.

**Fund** is the SMSF that the Company acts as Trustee for.

**Fund Meeting** is a Meeting of the Directors where one or more matters relating to the business of the Fund is considered.

**General Meeting** is a Meeting of the Shareholders where one or more matters relating to the Fund or Company is considered.

**Incapacity Superannuation Benefits** include those Superannuation Benefits authorised under the Superannuation Laws or the Regulator to be paid by the Company acting as Trustee of the Fund to a Member, their Dependants, Legal Estate or other person in the event of a Member's Temporary Incapacity, Permanent Incapacity or for some other reason.

**Legal Estate** includes, subject to the *Superannuation Laws* and the Fund retaining its complying SMSF status, a trust established or created under a trust deed, will, bare trust, Enduring Power of Attorney, by way of Court order or in any other way for the purpose of holding a Member's Assets in the event that a Member lacks legal capacity or in respect of a deceased Member's Assets in the event of their death for distribution to Dependants, the Legal Estate or any other beneficiary.

**Legal Personal Representative** means the executor of a will or administrator of the estate of a deceased person, the Trustee of the estate of a person under a legal incapacity or a person who holds an Enduring Power of Attorney granted by a Member of the Fund and includes any other person the *Superannuation Laws* allow as a Member's Legal Personal Representative.

**Meeting** is a duly convened meeting of Directors and Shareholders under the Constitution of the Company.

**Member** is a person who is a Member of the Fund for which the Company acts as Trustee for.

**Member Death Benefit** is a Superannuation Benefit paid by the Fund to a deceased Member's Legal Personal Representative or Dependant as allowed under the *Superannuation Laws*.

**Non-complying SMSF** is a SMSF that is held, or may be held by the Regulator due to a breach of the *Superannuation Laws* by the Trustee, to be a non-complying SMSF in any income year.

**Non-SMSF** is a Superannuation Fund that is not a SMSF.

**Pay** includes credit, distribute, set-off or where a person receives a benefit in kind.

**Permanent Incapacity** is, subject to the *Superannuation Laws* and the Fund retaining its complying SMSF status, any condition that the Company acting as Trustee of the Fund determines amounts to permanent incapacity including in relation to a Member, means ill-health (whether physical or mental), where the Trustee is reasonably satisfied that the Member is unlikely, because of the ill-health, to engage in gainful employment for which the Member is reasonably qualified by education, training or experience.

**Product Disclosure Statement** includes, subject to the *Superannuation Laws*, any statement by the Trustee or provided by another person for the benefit of the Trustee, that provides Members, prospective Members or any other person material to enable them to understand the operations of the Fund, the Superannuation Interests available to Members, what Superannuation Benefits are payable by the Trustee and any other information required under the *Superannuation Laws*.

**Proxy** is a person who, under this Constitution holds a Shareholder or Director's right to attend a Meeting of the Company or the Fund and attends and votes in their place.

**Related Party** means a person defined as a related party under the *Superannuation Laws*.

**Related Trust** means a trust defined as a related trust under the *Superannuation Laws*.

**Relative** includes, in relation to an individual, the following:

- a) a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of that individual or of his or her spouse;
- b) the spouse of that individual or of any other individual specified in paragraph (a).

**Regulator** is the Commissioner of Taxation, the Australian Prudential Regulation Authority or the Australian Securities Investment Commission whichever has jurisdiction for regulating the Company and the *Superannuation Laws* as it applies to circumstances of the Fund and Company

**Responsible Officer**, in relation to a body Corporate means:

- a) a Director of the company;
- b) a Secretary of the company; or
- c) an Executive Officer of the company.

**Rules of the Company** include the Rules herein and include any addition, variation, change or amendment provided it meets the relevant Rule requirements.

**Self Managed Superannuation Fund and SMSF** is a superannuation fund that meets all of the terms and conditions of a Self Managed Superannuation Fund as that term is defined under the *Superannuation Laws*.

**Shareholder** is the person or entity who owns shares in the Company.

**SMSF** shall mean and include the same definition as Self Managed Superannuation Fund.

**SMSF Professional** includes a person authorised and if required licensed under the *Superannuation Laws* to provide advice, audit services, administration services or any other services to the Trustee of a SMSF including a lawyer, accountant, financial planner, a fully qualified Member of the *Self Managed Super Fund Professionals Association of Australia* or a SMSF Professional listed as such on [www.smsfstrategies.com](http://www.smsfstrategies.com).

**SMSF Trustee Company** is a company, person or entity that acts as Trustee of a SMSF and includes the Company.

**Sole Purpose Test** means the test laid down from time to time in the *Superannuation Laws* regarding the provision of Superannuation Benefits to Members and others from the Fund.

**Special Resolution** means a resolution of which a special resolution notice as required under the Corporations Act 2001 has been given and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution.

**Spouse** in relation to a person includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as a couple and also includes, where the *Superannuation Laws* allow, Members of the same sex or any other relationship between two persons.

**Superannuation Fund** is a trust or other entity that is held to be a superannuation fund under the *Superannuation Laws*.

**Superannuation Benefit** includes a payment, the transfer of an Asset or a payment in kind, whether by way of a Superannuation Lump Sum or a Superannuation Income Stream from the Fund to a Member or other person on behalf of a Member or deceased Member provided the *Superannuation Laws* allow.

**Superannuation Interest** is any interest in a Superannuation Fund created under the *Superannuation Laws* and the Rules of the Fund.

**Superannuation Laws** means the *Superannuation Industry (Supervision) Act 1993*, the *Superannuation Industry (Supervision) Regulations (1994)*, the *Income Tax Assessment Act 1997*, the *Income Tax Regulations*, the *Corporations Act 2001*, the *Corporations Regulations*, the *Social Security Act 1991 (C'th)*, the *Social Security Regulations*, the *Veterans Entitlement Act 1986 (C'th)*, the *Veterans Entitlement Regulations*, the *Family Law Act 1975*, the *Family Law Regulations*, the *Bankruptcy Act 1966*, *Superannuation (Departing Australia Superannuation Payments Tax) Act 2006*, *Superannuation (Excess Concessional Contributions Tax) Act 2006*, *Superannuation (Excess Non-concessional Contributions Tax) Act 2006*, *Superannuation (Self-Managed Superannuation Funds) Supervisory Levy Amendment Act 2006* and any other law dealing with an Australian Superannuation Fund.

**Taxes** include any impost assessed by a Government to the Trustee of the Fund.

**Trustee** is the Trustee of a SMSF and the Company acting as Trustee of a SMSF including the Fund.

**Trust** does not include a superannuation fund or SMSF.

**Trustee Law** means whichever of the *Trustee Act (NSW) 1925*, the *Trustee Act (Vic) 1958*, the *Trustee Act (SA) 1936*, the *Trustees Act (WA) 1962*, the *Trusts Act (Qld) 1973*, the *Trustee Act (Tas) 1898*, the *Trustee Act (ACT) 1957* and the *Trustee Act (NT) 1907* apply and any other Commonwealth, State or

Territory legislation that relates to the duties, role and investment powers of a Company acting as a Trustee of a SMSF or Superannuation Fund.

**Value of a Member's Superannuation Interest** is the value the Company acting as Trustee of the Fund determines in respect of a Member Superannuation Lump Sum Superannuation Interest or Member Superannuation Income Stream Superannuation Interest as those terms are defined under the Rules of the Fund and if there is no such determination by the Trustee it is the value of the Member's particular Superannuation Interest at the time of the last audit of the Company plus any additions made to the Superannuation Interest less any deductions to the Superannuation Interest up to the time of the value of the Member's Superannuation Interest.

## **Explanatory Memorandum**

### **The SMSF Trustee Company Guide – Rule 1**

The *Corporations Act 2001* provides that, unless the Constitution of the Company otherwise provides, replaceable rules as provided for in the *Corporations Act 2001* are to apply. Many of these Rules relate to ordinary companies carrying on a business. As the Company is a special purpose Trustee Company for SMSFs, the replaceable rules are not to apply to the SMSF Trustee Company.

### **SMSF Trustee Company Guide – Rule 2**

The “SMSF Trustee Company Guides” in the Explanatory Memorandum are designed to assist Directors, Shareholders, superannuation professionals, lawyers and the Courts to interpret the Rules of the Company’s Constitution. The SMSF Trustee Company Guides do not form part of the Rules. They are ancillary to the Rules. They are designed to provide clarity of application of the Rules in all situations and transactions relating to the Company.

When applying the Rules, singular means plural, gender is applicable to its opposite and when referring to a Company, trust or other entity it includes all those persons responsible for the entity’s actions. The Rules of the SMSF Corporate Trustee are for a Company acting as a Trustee of a “Self Managed Superannuation Fund”. That term has been abbreviated to “SMSF” for the purposes of these Rules.

If there is conflict between the Rules of the Company and the *Superannuation Laws*, the Superannuation Laws are to prevail unless the breach of the *Superannuation Laws* does not result in a fine, penalty or non-compliance notice for the Fund, Company or Member. However these Rules contain several provisions not provided for within the *Superannuation Laws*. If this be the case the Rules are to be read and applied exclusively.

### **SMSF Trustee Company Guide – Rule 3**

The Company is designed primarily to act as the Trustee of a SMSF. It is a proprietary company limited by shares and is not to become otherwise, act in any alternative capacity or operate a business.

### **SMSF Trustee Company Guide– Rule 5**

**Role of Company:** The Rules of the Company are designed specifically to act as the Trustee for a Complying SMSF.

**Disqualified Persons:** The Company and the Directors of the Company must not be a Disqualified Person. There are serious penalties of up to two years’ imprisonment for Directors knowingly acting as Directors of a Trustee Company where they are Disqualified Persons under the Superannuation Laws. A Director is a Disqualified Person if they are bankrupt or have been charged with an offence of dishonest conduct. A Disqualified Person may apply to the Regulator for an exemption under the Trustee rules.

**SMSF Trustee Conditions:** Under the *Superannuation Laws* all Members must be a Trustee or Director of a SMSF Corporate Trustee of the Fund in which they are a Member. However the Superannuation Laws provide that the Trustee Company of a SMSF is allowed to appoint a non-Member as a Director on the Board in circumstances where:

1. There is only one Member of the Fund, another person in addition to the Member Director provided that the other Director is not an employee of the Member, unless the person is a Relative of the Member at the time of employment.
2. If a Member has died, the Legal Personal Representative of the Member is authorised to become a Director of the SMSF Trustee Company subject to the Company Constitution, for the period beginning on the day the Member died until the day a Death Benefit becomes payable from the Fund.
3. If a Member of the Fund is under a legal disability, the Legal Personal Representative of the Member may take the Member’s place as an Alternate Director of the Company. If the Member is

a child under the age of 18, the parent or guardian of the Member may be a Director of the Trustee Company on behalf of the child where there is no Legal Personal Representative.

4. If the Legal Personal Representative of the Member has an Enduring Power of Attorney in force in respect of that Member, except where the Member is a Disqualified Person they may become an Alternate Director of the Trustee Company. This includes where a non-resident of Australia is a Member of the Fund.

A Director of a Trustee Company must resign or be removed as Director if they become a Disqualified Person or relinquish Membership of the Fund. Subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status where a Member becomes legally incompetent an Alternate Director may be appointed.

When a Member dies their Legal Personal Representative replaces the deceased Member as a Director of the Trustee Company and also Member of the Fund. They will have exclusive Director's voting rights as to the payment of the deceased Member's Death Benefits. Immediately the deceased Member's Death Benefits commence to be payable they must resign as Director instantly.

As a Company acting as Trustee, the Company is required to notify ASIC and the ATO of any changes in Directorship, Company name change and other such things within a period of 21 days from the change. The ATO may also require a Director of a Trustee Company to make a declaration to the Commissioner regarding their knowledge of the *Superannuation Laws*, their agreement to keep up to date with the *Superannuation Laws* and maintaining a current set of Rules of the Fund. The Director is required to complete any such declaration.

### **SMSF Trustee Company Guide – Rule 6**

The Company and its Directors are acting as the Trustee of a SMSF. It is their duty and responsibility to act as a Trustee on behalf of the Members of the Fund who are beneficiaries of the SMSF. It is also the Trustee Company's duty to ensure that the Fund remains at all times both a SMSF and a Complying SMSF.

For the Trustee Company to discharge its duties the Directors should appoint SMSF Professionals; maintain current knowledge of Trustee requirements in the *Superannuation Laws* and have detailed knowledge of the Rules of the Fund. Additionally, the Trustee Company must ensure that the Fund's compliance requirements and responsibilities are met in accordance with both the *Superannuation Laws* and the Regulator.

The Trustee Company is required to notify the Regulator of any significant events including, but not limited to, where there is a change in Membership of the Fund, a change to the Directors, a change to the name of the Company and a change of the registered office of the Company. It is compulsory to notify the Regulator of these events within 21 days of the changes.

### **SMSF Trustee Company Guide – Rule 7**

For the Fund to be and remain as a Complying SMSF whilst simultaneously maximising the returns on the Assets of the Fund for the benefit of Members, the Directors must have broad powers. These powers including, but not limited to, dealing both domestically and internationally with Assets, entering into various contracts and undertakings, dealing with various persons directly, investing widely and otherwise acting in the Fund's best interests. Any such power exercised is subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status.

The Directors are not authorised to conduct any transaction, investment, business or action that would make the Fund a non-Complying SMSF. If the Directors conduct any transaction, investment, business or action that makes the Fund a non-Complying SMSF, then the offending transaction, contract or action is void.

Any director of the Trustee Company is to be indemnified in any action taken against the Trustee where they were acting in their role as Trustee of the Fund provided the *Superannuation Laws* allow and the Fund retains its Complying SMSF status.



The Directors may create, at any time, subject to the *Superannuation Laws* and the Fund retaining its Complying SMSF status a Cloned SMSF that has the same Rules, Members and Trustee Company as the Fund.

### **SMSF Trustee Company Guide – Rule 8**

The Directors must invest the Assets of the Fund for the benefit of Members of the Fund according to the Sole Purpose Test.

Although the Directors have wide discretion in making any investment of the Fund, including investments both domestically and internationally, the Directors must first have regard to the Fund's Investment Strategy and the *Superannuation Laws*. The investment may also include a borrowing if allowed under the *Superannuation Laws*.

The *Superannuation Laws* prevent the Directors acting as a Trustee of a Fund from acquiring an Asset from a Fund Member, Related Trust or a Related Party of a Member or an Employer Sponsor. There are some exceptions to the Member acquisition laws including, amongst others:

- the acquisition of Business Real Property;
- the acquisition of listed shares, securities and widely-held managed funds;
- the acquisition of certain in-house assets provided the investment does not take the Fund's level of in-house assets to beyond the 5% in-house assets threshold;
- the acquisition of units in a unit trust and shares in a company where the underlying entity meets certain criteria in the *Superannuation Laws* under SIS Regulation 13.22C which requires no borrowings, no investments in other entities and no lending of assets to related parties;
- the investment meets the criteria for a geared investment under section 67 of the *Superannuation Industry Supervision Act 1993*.

The *Superannuation Laws* also limit the amount that a Trustee of a Fund can invest in loans, investments and leases with Members, Employer Sponsors, Related Trusts and Related Parties. The current limit is 5% of the market value of the Assets of the Fund.

In addition under the *Superannuation Laws* all dealings by the Director with a Member, Employer Sponsor, Related Party or Related Trust must be at arm's length.

### **SMSF Trustee Company Guide – Rule 9**

The Fund is a Complying SMSF and is therefore prevented by the provisions of the *Superannuation Laws* to pay or remunerate the Company in any manner whatsoever for undertaking the role of Trustee of the Fund. However, in the event that the Directors provide professional services as part of their day-to-day business activities and the Fund engages the Director to provide similar professional services to the Fund, the Director may charge a fee commensurate with ordinary professional practice for the work performed.

### **SMSF Trustee Company Guide – Rule 10**

The Directors are required to hold a Trustee Company Meeting in order to make decisions about significant events of the Fund. Significant events are those events that impact upon the status of the Fund and its Members.

The *Superannuation Laws* provide that matters determined at every valid Trustee Company meeting must be recorded in the Directors' minutes. These minutes and all records of the Fund must be held for a period of no less than 10 years.

At a Directors' Fund Meeting, each Director is given one vote per dollar balance of the Value of the Superannuation Interests of the voting Members that the Director represents. However, the Directors

may determine at a valid Fund Meeting an alternative voting method of the Directors for the purpose of that specific Directors' Meeting, a matter to be decided at that Meeting or for future Meetings.

Any decision is to be passed at a Directors' Meeting by a simple majority of votes. It must be evidenced by dated minutes and signed by the Chairperson of the specific meeting. All written records are to be kept by the Company for ten years.

Where the Directors of the Trustee Company are making any determination in respect of any Death Benefit payments, Incapacity Superannuation Benefits or other resolution with respect to a deceased or incapacitated Member's Superannuation Interests, the standard majority voting rule is not to apply at a Director's Meeting.

In this event only the deceased or disabled Member's Legal Personal Representative who is a Director is able to vote on matters dealing with the deceased or disabled Member's Superannuation Interests or Superannuation Benefits. In this respect however the deceased or disabled Member's Legal Personal Representative must be a Director and is to be so appointed by current Directors. These provisos secure and protect the interests and wishes of the deceased or incapacitated Member.

### **SMSF Trustee Company Guide – Rule 11**

Although the Trustee Company is acting primarily as the Trustee of a SMSF, it is still a Company. Only fully paid ordinary shares can be issued by the Directors of the Company and there can be no joint ownership. All Shareholders must have some connection with the Fund – either directly or indirectly. Directors are not required to be Shareholders of the Company.

### **SMSF Trustee Company Guide – Rule 12 and 13**

The Directors are the key figures in the affairs of the Company however Shareholders play an important role. Ultimately Shareholders have control of the Company and where it acts as Trustee of a SMSF, may influence the affairs and investments of the Fund. As such great care needs to be had as to who is to hold the shares and more importantly what is to happen to them in the event of Death, Incapacity and Bankruptcy.

It is important that any Shareholder has a link to the Fund whether as Director or Member of the Fund. It is unlikely that a Shareholder while Member of the Fund will transfer their shares. However where a Member leaves the Fund, say on divorce their share is forfeited.

### **SMSF Trustee Company Guide – Rule 14**

In certain circumstances the Shareholders of the Company will hold Shareholder's Meetings. This includes where the Directors are seeking to vary any of the Rules of the Company pursuant to Rule 19. It is the Directors' responsibility to ensure that Shareholders are properly notified of any Meeting and that Proxy forms are included as part of that notification.

At any Shareholder Meeting, a Shareholder may ask a Proxy to stand in their place, attend the Meeting and vote in a specific way.

At a Shareholder Meeting one of the Shareholders must act as Chairman who in any vote will hold a casting vote. All voting is based on the underlying Superannuation Interest Entitlements of the Shareholder or the Fund Member that the Shareholder represents. Minutes of any Shareholder Meeting must be kept by the Company for ten years.

### **SMSF Trustee Company Guide – Rule 17**

It is a requirement of the *Superannuation Laws* that the Trustee Company is required to keep accurate accounts for the Company on an Income Year basis and for a period of at least ten years. These include, but are not limited to the Company's set of accounts, tax returns and any other Accounts that the Directors may create.

### **SMSF Trustee Company Guide – Rule 18**

Any Director of the Trustee Company is to be indemnified in any action taken against the Director where they were acting in their role as Trustee of the Fund provided the *Superannuation Laws* allow and the Fund retains its Complying SMSF status.

### **SMSF Trustee Company Guide – Rule 19**

The Directors of the Company as well as the Shareholders may vary or change the Rules of the Company in accordance with requirements in the *Corporations Act 2001*.

### **SMSF Trustee Company Guide – Rule 20**

Throughout the Company's Constitution there are key phrases and terms that have been Capitalised for effect. These phrases and terms are important to the functioning of the Trustee Company and are held in Rule 20 – Definitions.

# SHAREHOLDER DECLARATION

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We, Eng Koh and Chuo Lau of 43 Cathies Lane, Wantirna, VIC 3152, as Shareholders of Enchanting Hornbill Pty Ltd , hereby agree to the Rules of this Constitution as set out above consistent with the Corporations Act 2001.

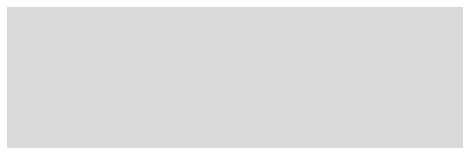
**DATE:**

**EXECUTED BY**

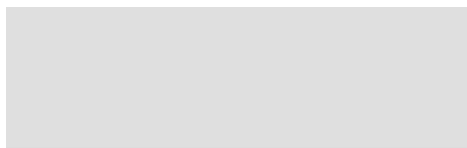
## **The Shareholders**

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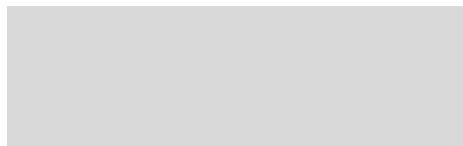
Eng Koh and Chuo Lau of 43 Cathies Lane, Wantirna, VIC 3152:



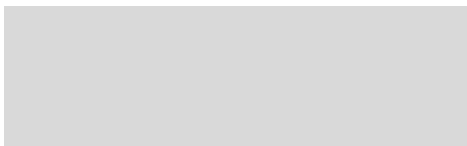
**Eng Koh**  
Shareholder



**Chuo Lau**  
Shareholder



Name of Witness



Witness Signature