

TRUST STREAMING MANUAL

USING THIS GUIDE

The purpose of this guide is to provide CPA Australia's members with practical direction on the Streaming Rules with a specific focus on the practical issues presented by the 'specific entitlement' requirements for trust deeds, distribution minutes and other trust records.

This is particularly important as it is an aspect of the rules that is causing significant confusion among the membership.

The guide is structured as follows:

- Summary of key update points
- Part A: Overview
- Part B: Flowchart – the Streaming Rules
- Part C: Specific Entitlement – trust deeds and recording
- Part D: Principles of trust administration for accountants
- Part E: Case study – sample trust deed and distribution minutes

Practitioners must appreciate that this guide is intended to be a reference and is not a substitute for legal advice, particularly on matters that will require an interpretation of the terms of a trust deed.

Sample trust related material is provided for illustrative purposes and should not be used as a 'template' as it may not be compatible with the trust deed or circumstances.

Also, the Streaming Rules are new and untested, so the way they are interpreted by the ATO and/or the courts over time may produce results that have not been anticipated at the time this guide was prepared.

About the author

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FURTHER READING

For further information, please refer to:

- *Taxation Laws Amendment (2011 Measures No 5) Act 2011* (Act No. 62 of 2011)
- *Taxation Laws Amendment (2011 Measures No 5) Act 2011* Explanatory Memorandum
- ATO Press Release: 'Overview of the Taxation of Trusts'
- ATO Technical Update: Trusts tax time toolkit
<http://www.ato.gov.au/General/Trusts/In-detail/Trust-tax-time-toolkit/Technical-update/>
- CPA Australia interview with ATO Senior Tax Counsel Fiona Dillon
<http://www.cpaustralia.com.au/professional-resources/taxation/trusts>
- *Commissioner of Taxation v Bamford* [2010] HCA 10 (30 March 2010) (**Bamford**)
- Decision Impact Statement – Bamford
- *Colonial First State Investments v Commissioner of Taxation* [2011] FCA 16 (**Colonial**)
- Decision Impact Statement – Colonial
- *Greenhatch v Commissioner of Taxation* [2011] AATA 479
- *Commissioner of Taxation v Clark* [2011] FCAFC 5 (**Clark**)
- 'Creation of a new trust – Statement of Principles', August 2001 (modified 21 April 2011).

SUMMARY OF KEY UPDATE POINTS

Practitioners have now had four years' experience dealing with the Streaming Rules¹. The purpose of this updated edition of CPA Australia's Trust Streaming Manual is to highlight some key developments in the Commissioner's interpretation of the Streaming Rules and their practical application.

First though, a brief history lesson. The Streaming Rules were introduced as 'interim' measures, for the dual purpose of addressing anomalous outcomes arising from the High Court's Bamford decision and to provide certainty for trustees in streaming capital gains and franked dividends. At the time, the Streaming Rules were introduced in anticipation of a broader review of the taxation of trusts and a 'rewrite' of Division 6 of the 1936 Act, which the then Government had underway.

Needless to say, there has been considerable change in the political landscape from 2012 to 2015, and the broader review of the taxation of trusts commenced by the former government did not reach a conclusion. At the time of writing, a review of the taxation of trusts remains part of the current government's broader tax reform agenda. However, there has been nothing certain proposed in terms of actual legislative change.

As such, we can surmise that the 'interim' streaming rules are, for the time being, permanent and will remain so until a review of the taxation of trusts results in actual legislative change. This is not something that anyone anticipates will happen with particular haste.

GENERAL DEVELOPMENTS IN TRUST TAXATION

In the four years since the introduction of the Streaming Rules, there have been developments in the ATO's administrative and interpretative approach to trusts more generally. These developments have significant implications for trust administration and practice. Some of the more noteworthy developments are:

The withdrawal of Tax Rulings IT 328 and IT 329

In Tax Rulings IT 328 and IT 329, the Commissioner offered an administrative concession by which trustee resolutions what were made within two months of 30 June, were generally acceptable for tax compliance purposes.

By withdrawing these rulings, the Commissioner was making it clear that for trustee resolutions distributing income, 30 June means 30 June².

At the time, this change in the ATO's stance was the cause of some concern among tax professionals. However, in an overall sense, the change is a positive one. This is because it has brought about an alignment between tax and trust deed compliance. The major problem with the Commissioner's administrative concession was that it created a false sense of security among many practitioners and trustees that the terms of the trust deed could be ignored and this would have no adverse consequences. Unfortunately, many practitioners and trustees learned the hard way that not complying with the terms of the trust deed could give rise to very serious problems, mostly unrelated to tax.

The release of Draft Tax Ruling TR 2012/D1

In TR 2012/D1, the Commissioner sets out his views on the meaning of the term 'income' for the purposes of section 97 of the 1936 Act.

Importantly, the Commissioner makes his view clear that 'income' to which a beneficiary can be 'presently entitled' to means income which is capable of distribution ('distributable income').

¹ Introduced by the *Tax Laws Amendment (2011 Measures No 5) Act 2011* on 29 May 2011.

² In all cases, however, check the trust deed. It is not uncommon for trust deeds to specify a date earlier than 30 June as the date by which the trustee needs to finalise its determination about the distribution of income.

This means that ‘notional amounts’, which are treated as assessable for tax purposes but not supported by any underlying cash flow, cannot form part of the ‘income’ of the trust for the purposes of section 97. This is the case even if the trustee has an ‘income equalisation clause’ i.e. a clause in the trust deed which equates the ‘income’ of the trust with the net income determined for the purposes of section 95 of the 1936 Act (which applies a tax basis of recognition of income and expenses). Examples of ‘notional amounts’ include imputation credits, ‘market value substitution rule’ capital gains and Division 7A deemed dividends.

The key practical implication of this is that a trustee may be in a position where the trust has positive net income when ‘notional’ amounts are taken into account but negative net income when those amounts are excluded. A common case where this arises is where a trust with tax deductible interest expenses, say a margin loan over shares. If imputation credits are included in the trust’s net income (because of an income equalisation clause or a trustee’s determination), the trust has positive net income overall. However, if imputation credits are excluded from the trust’s net income because they are ‘notional’ amounts, then the trust’s income may be negative overall. In the latter case, as there is no ‘distributable’ net income, a distribution cannot be made to any of the beneficiaries. Consequently, the imputation credits cannot flow through to the beneficiaries and so are ‘wasted’.

Moreover, in keeping with the ATO’s views in TR 2012/D1, under the Streaming Rules a ‘specific entitlement’ cannot be created in favour of a ‘notional’ amount, such as a taxable capital gain that arises in a trust because of the ‘market value substitution rule’. Similarly, a ‘specific entitlement’ cannot be created to imputation credits, so it is not possible to separately stream imputation credits to the distribution they are attached to.

The release of Tax Determination TD 2012/22

In TD 2012/22, the Commissioner outlines, with useful examples, the way that the ‘proportionate approach’ would operate to attribute to a trust’s beneficiaries a change in the trust’s ‘net income’ after the trustee has determined the distributions of a trust’s income for an income year (a ‘post-determination change’). A post-determination change in a trust’s net income may arise where, because of an ATO audit adjustment, a deduction the trustee has claimed is disallowed or a further amount of income is included as assessable (assuming also the trust adopts its taxable income as the trust income).

TD 2012/22 looks at how a post-determination change in the trust’s ‘net income’ will be treated in different scenarios, based on the approach taken to making the distributions to begin with e.g. distributions to the trust’s beneficiaries based on specific dollar amounts, defined percentages of fractions and by providing for a ‘balance’ beneficiary. The Tax Determination also considers the effect that the definition of income in the trust deed (i.e. by reference to ordinary trust principles or by using an ‘income equalisation clause’) will have on the way that the trust resolution will work.

TD 2012/22 is very practical and the examples are useful, so is recommended reading for all practitioners.

Section 100A guidance – Reimbursement arrangement

More recently, the ATO has released guidance materials on its views about the operation of section 100A in an audit or review context.

Very broadly, section 100A is a specific anti-avoidance measure, which enables the Commissioner to assess a trustee on a trust’s net income if the Commissioner forms a view that the way income has been distributed, and the arrangements in place between the trustee and the beneficiaries to whom distributions have been made, represents a ‘reimbursement arrangement’.

A ‘reimbursement arrangement’ is one where, despite the distribution being made to a particular beneficiary, another party (including the trustee itself) will actually enjoy the benefit of the distribution. This may arise where, for example, a distribution remains unpaid and the funds representing the distribution are paid or loaned to another party. Other cases where a ‘reimbursement arrangement’ has the potential to arise include:

- ‘circular’ distributions that arise because a trustee distributes trust income to corporate beneficiary in which the trustee also owns shares
- distributions that are made to beneficiaries who then gift the entitlement to others of back to the trustee at a later date

- long-standing unpaid present entitlements that are not being paid down.

The key exception to section 100A applying is in relation to an arrangement that can be characterised as an ‘ordinary family or commercial arrangement’. This is, by its nature, an ambiguous concept. The purpose of the ATO’s section 100A guidance material is to offer the Commissioner’s view on what may be regarded as an ‘ordinary family and commercial arrangement’ and what will not.

Having said that, in a case where capital gains or franked dividends are streamed under the Streaming Rules, because of the requirement that the beneficiary ‘receive, or be reasonably expected to receive’ the ‘financial benefit’ referable to the capital gain or franked dividend, the likelihood of section 100A applying will be low in most cases.

THE STREAMING RULES

Streaming discounted capital gains

The ATO’s view on the approach to streaming discounted capital gains is set out in its ‘Technical Update’ on the taxation of trusts³. Here, the ATO states that the total ‘financial benefits’ that are referable to a capital gain will generally equal the capital gain as calculated for trust purposes, less any losses the trustee has applied against the gain (but only to the extent that those corresponding capital losses were applied against the capital gain for tax purposes). Put another way, it is the ‘gross’ undiscounted capital gain.

The Streaming Rules require that a beneficiary to whom a capital gain is streamed receive, or be entitled to receive, the ‘financial benefit’ referable to the capital gain. A beneficiary may receive, or be entitled to receive, the financial benefit referable to a capital gain by being ‘presently entitled’ to it.

In the case where the CGT discount applies to a capital gain made by the trustee, if the terms of the trust deed provide that trust’s income is its ‘net income’ for tax purposes (because an income equalisation clause applies or a determination as such by the trustee), the trustee can only make a beneficiary ‘presently entitled’ to the taxable part of the capital gain, and the financial benefit that relates to that part, under a usual income distribution power.

In this case, to create an entitlement to the part of the capital gain that is sheltered by the CGT discount and so is not included in the trust’s income, it will be necessary for the trustee to create a separate entitlement to that amount by using a capital distribution power (given that the discount sheltered component will represent an accretion to the trust’s capital). As such, in the relevant trustee resolution, it may be necessary to make both a distribution of income and a distribution of capital. An example of this is set out in the sample distribution minutes in this manual.

A practical issue to be aware of is that when making a distribution of capital, some trust deeds require additional conditions to be met; a common example, especially in older trust deeds, is that the consent of a ‘guardian’ be obtained prior to a distribution of capital being made. As such, in all cases, the terms of the trust deed should be carefully reviewed. Also, it will be essential to confirm that the beneficiary is able to benefit from the capital of the trust as a ‘capital beneficiary’.

If under the terms of a particular trust deed, the income of the trust is its accounting income (because the trust deed does not contain an income equalisation clause, or if under a power in the deed the trustee determines this to be the case), then a capital distribution may not be required to ensure that a beneficiary can be made ‘specifically entitled’ to the ‘financial benefit’ referable to the gross capital gain. This is because a beneficiary to whom a capital gain will be ‘streamed’ can be made ‘presently entitled’ to the financial benefit attributable to the gross capital gain, by the application of the usual income distribution clause. An important exception to this is where the amount determined by the trustee to be the trust income does not equate to the ‘financial benefit’ which is preferable to the capital gain because of accounting adjustments, and the differential has for accounting purposes been carried to the trust’s capital profits reserve: in such a case, it may be necessary to rely on a capital distribution power to ensure that the full amount of the ‘financial benefit’ that is related to the capital gain finds its way to the beneficiary to whom the capital gain has been streamed.

³ ATO Technical Update: Trusts tax time toolkit - <http://www.ato.gov.au/General/Trusts/In-detail/Trust-tax-time-toolkit/Technical-update/>

Recording a beneficiary's 'specific entitlement'

Under the Streaming Rules, the trustee has two months from year end (that is, to 31 August) to record that a beneficiary has been made 'specifically entitled' to trust's capital gain.

The ATO has noted⁴ that, notwithstanding the extended timing rule that applies for the purposes of the Streaming Rules, if a 'present entitlement' has already been created to the amount of the capital gain in favour of a beneficiary at year end, it cannot after year end be 'streamed' to a different beneficiary. A 'present entitlement' to a capital gain may be created at year end because the amount of the capital gain is included in the trust income (e.g. because of the operation of an income equalisation clause), and the trustee applied its income distribution power under the trust deed to distribute it, or a present entitlement arises in favour of a 'default beneficiary' of a trust to the trust income to which no beneficiary is otherwise presently entitled.

As such, in practical terms, the safest thing to do is to prepare any resolution by which a 'specific entitlement' to a capital gain is sought to be created at year end, at the same time as 'ordinary' resolutions dealing with the trust's income are prepared.

Note also that the extended time to meet the 'recording' requirement of the Streaming Rules does not apply to franked dividends.

RESETTLEMENT RISK WHEN VARYING TRUST DEEDS

Following the introduction of the Streaming Rules, many trustees reviewed their trust deed to ensure that adequate provisions were made to enable 'streaming' to apply. In many cases, trust deeds required variation to insert adequate and appropriate provisions. This may remain the case still for many trust deeds.

Since the last edition of this Streaming Manual, the Commissioner has withdrawn his *Statement of Principles* regarding the resettlement of trusts. In turn, there was judicial consideration of the question of resettlement of trusts, at the Full Federal Court level, as a result of Clark's case.

Taxation Determination TD 2012/21 was issued on 24 October 2012 in response to the Full Federal Court's decision in Clark's case. The key message for practitioners after Clark and the Commissioner's view in the TD are:

- in most cases, provided a trustee validly exercises an existing power of amendment under the trust deed, or the trust deed is amended with the approval of the Court, CGT events E1 or E2 will not occur
- the exception is where the variation terminates an existing trust, or causes trust assets to be held on a separate charter of rights and obligations (such as trust assets of a discretionary trust subsequently becoming held on trust for a specific beneficiary)
- reading and following the terms of the trust deed is critical to ensure the amendment power is properly exercised.

⁴ See the transcript of CPA Australia's Interview with ATO Senior Tax Counsel, Fiona Dillon, at: <http://www.cpaaustralia.com.au/professional-resources/taxation/trusts>

PART A: OVERVIEW

A BRIEF OVERVIEW OF THE NEW RULES

The Streaming Rules⁵ came into effect on 29 June 2011 and set out a number of what were then new requirements to be satisfied for capital gains and franked dividends to be 'streamed' by the trustee of a trust to specific beneficiaries ("the Streaming Rules").

Application and scope of the Streaming Rules

The Streaming Rules apply for the 2011 income year onwards.

By deliberate policy choice, the Streaming Rules apply only to capital gains and franked dividends.

Because the existing Australian Taxation Office (ATO) rulings dealing with streaming⁶ were withdrawn in response to the High Court's decision in the *Bamford Case*⁷, there is now considerable uncertainty about whether other income, such as unfranked dividends, interest and foreign income can be streamed for tax purposes. This uncertainty persists as at the date of this updated Streaming Manual.

This uncertainty will continue unless and until there is legislative intervention.

How the Streaming Rules work

The Streaming Rules set out a number of new legislative concepts to determine how and when capital gains and franked dividends can be effectively 'streamed' and new legislative machinery for bringing these amounts to tax. The Streaming Rules do this by:

- making 'streaming' a statutory concept, requiring the trustee to make a beneficiary '**specifically entitled**' to a capital gain or franked dividend derived by the trust
- removing capital gains and dividends from the operation of Division 6 of the *Income Tax Assessment Act 1936* (ITAA 1936) where the requirements to create a 'specific entitlement' in the capital gain or the franked dividend to the beneficiary are met
- assessing effectively streamed capital gains and franked dividends under two existing subdivisions that have been amended: Subdivision 115-C of the *Income Tax Assessment Act 1997* (ITAA 1997) for capital gains and Subdivision 207-B of ITAA 1997 for franked dividends. This assessment is on a quantum basis: that is, the beneficiary is assessed on the amount streamed, net of 'directly relevant expenses'
- leaving any capital gains and franked dividends not effectively streamed, together with all other income, to be assessed under Division 6 of the ITAA 1936 and assessed to the beneficiaries on a proportionate basis in the usual way.

Creating a 'specific entitlement' to franked dividends or capital gains

The concept of a 'specific entitlement' is the central element in the Streaming Rules. Unless the requirements to create a 'specific entitlement' are met, the trust's capital gains or franked dividends must be assessed to the trust's beneficiaries proportionately under Division 6 of the ITAA 1936. This can cause unfavourable tax outcomes, as the key benefit of 'streaming' is to allow capital gains and franked dividends to be assessed to the beneficiary as that specific type of income based on their individual tax profile and attributes (e.g. in the case of capital gains, to an individual able to access the 50% CGT discount).

⁵ The amendments were introduced in *Tax Laws Amendment (2011 Measures No 5) Act 2011*.

⁶ Taxation Ruling 92/13, withdrawn on 22 June 2011.

⁷ *Commissioner of Taxation v Phillip Bamford & Ors [2010] HCA 10* – also, see the Australian Taxation Office's response to the decision on its Decision Impact Statement.

A ‘specific entitlement’⁸ to a capital gain or a franked dividend for a beneficiary will be created under the Streaming Rules where, in accordance with the terms of the trust deed:

- a beneficiary has ‘received, or can be reasonably expected to receive’, the amount of a ‘financial benefit’ (a financial benefit is defined in the legislation and will usually mean the cash or cash equivalent representing the capital gain or franked dividend)
- the ‘financial benefit’ is ‘referable’ to an amount of a capital gain or franked dividend derived by the trust
- the trustee records the ‘financial benefit’, in ‘its character as being referable’ to the capital gain or franked dividend in the ‘accounts or records’ of the trust within two months of year end in the case of capital gains or on or before year end in the case of franked dividends – subject to an administrative concession for the 2011 income year allowing the recording to be made by the end of August 2011⁹.

The amount of the financial benefit that a beneficiary has received or is entitled to receive in accordance with these requirements (called the beneficiaries ‘share of the net financial benefit’) is divided by the total financial benefits received by the trustee for the capital gain or franked dividend to calculate the amount that the beneficiary is ‘specifically entitled’ to. These concepts are explained further at Part C of this manual.

What the Streaming Rules mean for trust deeds and distribution minutes

The Streaming Rules and, in particular, the requirements around the creation of a ‘specific entitlement’, will have important legal and practical implications for the terms of trust deeds and the presentation of trust distribution minutes.

It is important for trustees and the practitioners advising them to understand that the Streaming Rules do not extend or re-write the terms of the trust deed to enable ‘streaming’ to take place. Rather, the Streaming Rules specify that for the trustee to create a ‘specific entitlement’, it must be enabled or permitted to satisfy the relevant legislative requirements under the terms of the relevant trust. To this end, it is critical that the trust deed enables the trustee to, at the very least:

- classify and account for the trust’s income separately according to its source (in particular, capital gains and franked dividends)
- allocate capital losses against capital gains and ‘relevant expenses’ against franked dividends in a corresponding way
- distribute amounts of capital gains and/or franked dividends to beneficiaries once they have been classified and accounted for in their character as capital gains and/or franked dividends. Alternatively, to advance or distribute trust capital (in some deeds called ‘corpus’)
- “pay, apply or set aside” an amount in favour of a beneficiary.

As the deed plays such an important part in the application of the Streaming Rules, many trustees are turning to practitioners seeking amendments to insert the necessary powers into the trust deed. This must be done in a careful and considered way, as there may be a risk of ‘resettlement’ of the trust if amendments are made which, among other things, change key terms of the trust or the beneficiaries entitlements. A resettlement creates a new trust and ends the existing trust so it can trigger both income tax and stamp duty liabilities, as it is for legal purposes a ‘disposal’ of the assets by the trustee. Resettlement issues are discussed further in Part D of this guide.

The Streaming Rules also place an obligation on the trustee to ‘record’ the ‘specific entitlement’ in the ‘accounts or records’ of the trust within the prescribed time. Practically, this now means that the trustee’s records serve a dual purpose: to record the actions of the trustee for trust purposes (as they always did) and to substantiate the trustee’s compliance with the Streaming Rules. The term ‘accounts or records’ includes the trust deed, trustee resolutions or distribution statements (including schedules or notes to these), but will not include a trust’s tax records (e.g. a return, tax working paper or tax reconciliation) without anything more.

⁸ Defined in Section 115-228 of ITAA 1997 (as amended) for capital gains and 207-58 of ITAA 1997 (as amended) for franked dividends.

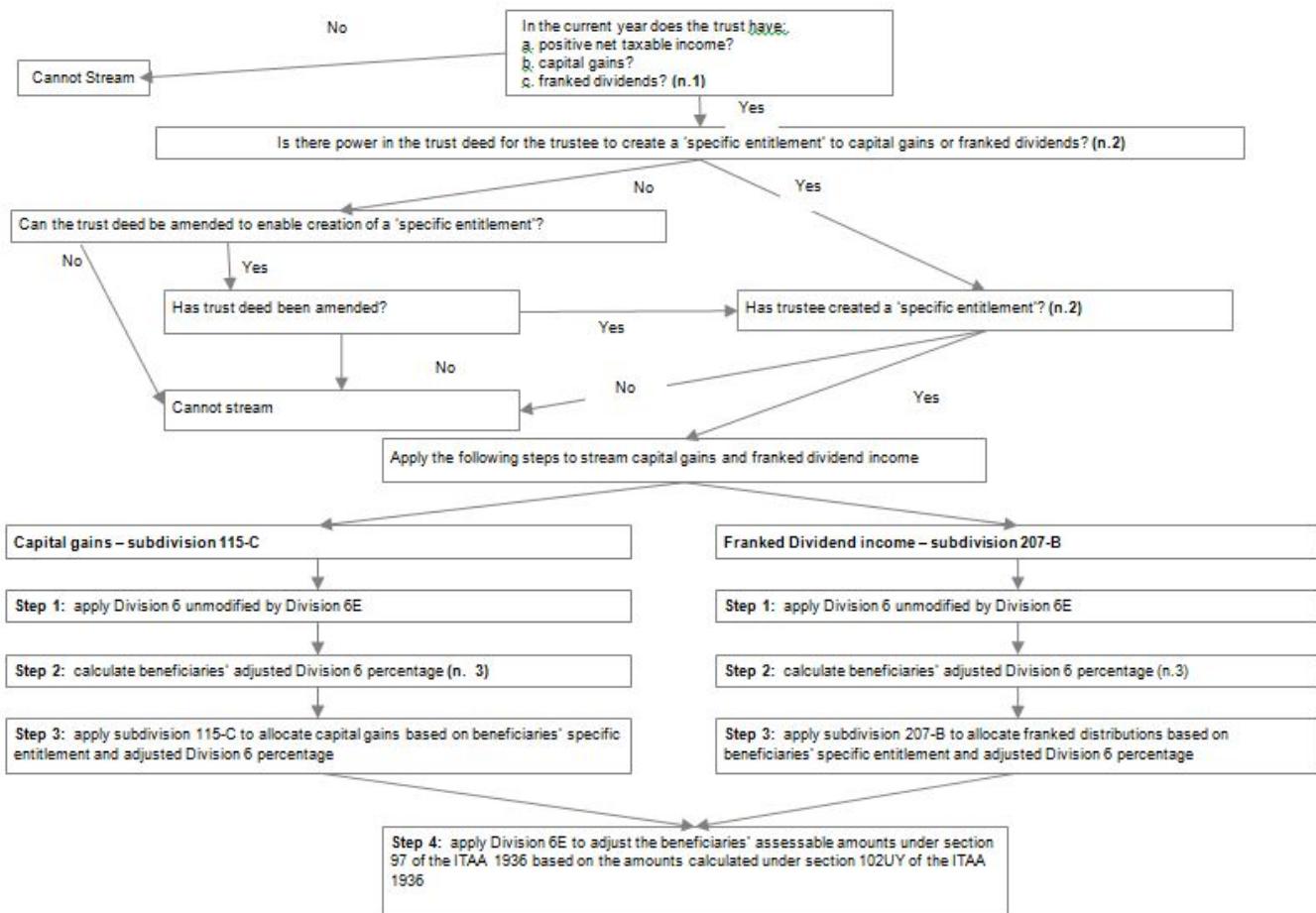
⁹ ATO press release, ‘Improving the taxation of trust income’, released July 2011.

For a distribution resolution¹⁰ (being the most direct record of an action taken by the trustee of a trust) to comply with the substantiation requirements of the proposed provisions, it will be critical that the resolution clearly shows or narrates:

- the particular power/s under the terms of the trust deed that have been relied on by the trustee to create the 'specific entitlement' to a capital gain or franked dividend in favour of the beneficiary
- that the capital gain or franked dividend is being specifically allocated to the relevant beneficiary in its character as a capital gain or a franked dividend
- the flow of funds that will enable payment of the amount of the 'financial benefit' referable to the capital gain and/or the franked dividends to which the beneficiary is 'specifically entitled'
- that this financial benefit is to be paid or, under the terms of the trust, held specifically for the sole benefit of the beneficiary under an automatic sub-trust.

¹⁰ That is, the resolution of individual trustees or a sole director corporate trustee and the minute of a meeting of the directors of a corporate trustee recording the trustee's resolution.

PART B: FLOWCHART – THE STREAMING RULES



Note 1

- In order to “pass go” on the Streaming Rules, the trust must have a positive amount of net taxable income and, obviously, have derived a capital gain and/or a franked dividend in a particular year: section 95AAA of ITAA 1936 and paragraph 2.31 of the Explanatory Memorandum to the *Tax Laws Amendment (2011 Measures No. 5) Bill 2001*.

Note 2

- The requirements to create a “specific entitlement” to a capital gain or a franked dividend are set out at sections 115-228(2) and 207-58(2) of ITAA 1997 (as amended). See further discussion at Part C.

Note 3

- The “adjusted Division 6 percentage” means the entity’s Division 6 percentage of the income of the trust calculated on the assumption that the amount of a capital gain or franked dividend to which any beneficiary or the trustee is “specifically entitled” were disregarded in working out the income of the trust: section 95(1) as amended.

PART C: SPECIFIC ENTITLEMENT – TRUST DEEDS AND RECORDING

C.1 LEGISLATIVE PROVISIONS

Below are the legislative provisions around the issues presented by the “specific entitlement” requirements for trust deeds, distribution minutes and other trust records.

Section 115-228 of ITAA 1997: Specifically entitled to an amount of a capital gain

- 1) A beneficiary of a trust estate is specifically entitled to an amount of a *capital gain made by the trust estate in an income year equal to the amount calculated under the following formula:

$$\frac{\text{Capital gain}^* \times \text{Share of net financial benefit}}{\text{Net financial benefit}}$$

Where:

Net financial benefit means an amount equal to the *financial benefit that is referable to the *capital gain (after any application by the trustee of losses, to the extent that the application is consistent with the application of capital losses against the capital gain in accordance with the method statement in subsection 102-5(1)).

Share of net financial benefit means an amount equal to the *financial benefit that, in accordance with the terms of the trust:

- the beneficiary has received, or can be reasonably expected to receive
- is referable to the *capital gain (after application by the trustee of any losses, to the extent that the application is consistent with the application of capital losses against the capital gain in accordance with the method statement in subsection 102-5(1))
- is recorded, in its character as referable to the capital gain, in the accounts or records of the trust no later than 2 months after the end of the income year.

Note: a trustee of a trust estate that makes a choice under section 115-230 is taken to be specifically entitled to a capital gain.

- 2) To avoid doubt, for the purposes of subsection (1), something is done in accordance with the terms of the trust if it is done in accordance with:
 - the exercise of a power conferred by the terms of the trust or
 - the terms of the trust deed (if any), and the terms applicable to the trust because of the operation of legislation, the common law or the rules of equity.
- 3) For the purposes of this section, in calculating the amount of the capital gain, disregard sections 112-20 and 116-30 (Market value substitution rule) to the extent that those sections have the effect of increasing the amount of the capital gain.

Section 207-58 of ITAA 1997: Specifically entitled to an amount of a franked distribution

- 1) A beneficiary of a trust estate is **specifically entitled** to an amount of a *franked distribution made to the trust estate in an income year equal to the amount calculated under the following formula:

$$\frac{\text{Franked distribution} \times \text{Share of net financial benefit}}{\text{Net financial benefit}}$$

Where:

Net financial benefit means an amount equal to the financial benefit that is referable to the franked distribution (after any application by the trustee of expenses that are directly relevant to the franked distribution).

Share of net financial benefit means an amount equal to the financial benefit that, in accordance with the terms of the trust:

- the beneficiary has received, or can be reasonably expected to receive
 - is referable to the franked distribution (after application by the trustee of any expenses that are directly relevant to the franked distribution)
 - is recorded, in its character as referable to the franked distribution, in the accounts or records of the trust no later than the end of the income year.
- 2) To avoid doubt, for the purposes of subsection (1), something is done in accordance with the terms of the trust if it is done in accordance with:
 - the exercise of a power conferred by the terms of the trust or
 - the terms of the trust deed (if any), and the terms applicable to the trust because of the operation of legislation, the common law or the rules of equity.

C.2 “SPECIFICALLY ENTITLED” – IMPLICATIONS FOR TRUST DEEDS AND TRUST RECORDS

| Sections 115-228(1) and 207-58(1) of ITAA 1997 – ‘net financial benefit’ | | |
|--|--|---|
| Comments | Trust deed | Records |
| <p>Net financial benefit is the ‘financial benefit’ that is referable to the capital gain (after capital losses have been applied) or the franked dividend (after directly relevant expenses have been applied).</p> <p>The term ‘financial benefit’ is already defined in the legislation at section 974-600 in very broad terms: it means anything of ‘economic value’ and most obviously cash or a cash equivalent (like a bank account).</p> <p>The net financial benefit referable to a capital gain will be the trust proceeds from the CGT Event reduced by the CGT Asset’s cost base and any trust losses of a capital nature. The amount of the capital gain sheltered by the 50% CGT discount is part of the ‘net financial benefit’ referable to the capital gain.</p> <p>In the case of franked dividends, the determination of what is a ‘directly relevant expense’ will require some judgement. The Explanatory Memorandum (EM) states (at para 2.53) that ‘directly relevant expenses’ can include:</p> <ul style="list-style-type: none"> - borrowing expenses/interest incurred in respect of the shares (allocated rateably against any franked and unfranked dividends from those shares) or - management fees incurred in respect of managing an investment portfolio of shares (allocated against dividend income as relevant). | <p>Financial Benefit: the ‘financial benefit’ referable to a capital gain or franked dividend is a creature of the statute rather than of the trust deed: it will be the cash or cash equivalent that the trustee receives in respect of the particular capital gain or franked dividend.</p> <p>Ability to allocate ‘directly relevant expenses’: in order to satisfy the requirement, the trust deed should make provision as part of its ‘streaming clause’ (see below) for expenses that are relevant to a particular type of income to be allocated against it.</p> <p>Sample clause</p> <p><i>The Trustee may establish in the accounting records of the Trust separate accounts and ledgers for each separate category or class of income showing the nature, source and accounting for the income and the expenses relating to that income made in the Accounting Period.</i></p> | <p>Trustee resolutions</p> <p>If the allocation of ‘directly relevant expenses’ is done in accordance with a power available to the trustee in the deed, then that allocation may (but does not necessarily have to be) set out in the distribution minute.</p> <p>It is recommended that the trustee resolution record the fact that the amount is a ‘financial benefit’ against which ‘directly relevant expenses’ have been applied and for the resolution to narrate the applicable trust deed provision pursuant to which this has been done.</p> <p>Other records</p> <p>The recording of the financial benefit and the allocation of ‘directly relevant expenses’ against franked dividend amounts can be recorded in a tax workpaper or accounting ledger of the trust.</p> |

Sections 115-228(1) and 207-58(1) of ITAA 1997 – ‘share of net financial benefit’: Part A – ‘the beneficiary has received, or can be reasonably expected to receive’

| Comments | Trust deed | Records |
|---|---|---|
| <p>An amount is ‘received’ by the beneficiary when it has been ‘credited or distributed to them or paid or applied on their behalf or for their benefit’.</p> <p>Alternatively, a beneficiary will ‘reasonably be expected to receive’ an amount if they have a present entitlement to it, a vested and indefeasible interest in trust property representing it or it has been ‘set aside’ for the beneficiaries exclusive benefit.</p> <p>The funds don’t need to be traced back to the actual proceeds received from the CGT event or dividend: it is sufficient if the beneficiary gets the equivalent amount. This means that the requirement can be met even if the actual proceeds from the CGT event or franked dividend have been re-invested or otherwise applied (if the trust has liquid funds). However, it does require the trustee to create an entitlement under the terms of the trust: a ‘notional allocation’ in the trust’s tax records (the tax return or tax reconciliation) will not be sufficient.</p> <p>‘Notional’ or zero amounts, which by definition cannot be ‘received’, so cannot be streamed. This includes franking credits (see paras 2.60 and 2.61 of the EM) – although they will flow with the franked distribution - and market value substitution capital gains.</p> | <p>To satisfy this requirement, the trust deed must contain a provision which allows the trustee to pay an amount to the beneficiary, or to apply or set aside an amount for their future benefit.</p> <p>Such a clause should be contained in most trust deeds and would usually take this form:</p> <p>Sample clause</p> <p>[When used in conjunction with a ‘streaming’ clause allowing income to be categorised and distributed by source]...<i>the trustee may pay, apply or set aside income from any category or categories or source or sources that the trustee deems fit.</i></p> <p>A separate trust fund is usually provided for funds ‘set aside’</p> <p>Sample clause</p> <p><i>Amounts set aside for any general beneficiary under [clause ref] will not form part of the trust fund as defined in [clause ref], but will, on being set aside, be held by the trustee as a separate trust fund on trust for that general beneficiary absolutely but on the same terms as this deed with power to the trustee pending payment to that general beneficiary to invest, apply or deal with that fund or any resulting income or any part in the manner provided for in [clause ref].</i></p> | <p>Trustee resolutions</p> <p>The trustee resolution should clearly state what has happened with respect to the amount: that is, that the trustee has paid it to the beneficiary or that it has been ‘set aside’ pursuant to a power in the trust deed (and the power should be specified) for the beneficiary’s benefit.</p> <p>If a beneficiary cannot be made presently entitled to the whole of the ‘financial benefit’ referable to the capital gain (i.e. the gross gain), e.g. because it is not included in the income of the trust available for distribution, it will be necessary to make a further distribution out of trust capital.</p> <p>Other records</p> <p>The Trust’s accounting records can record the payment to or application of an amount in the beneficiaries favour. For additional substantiation, if an amount is paid, evidence of the cash transfer (cheque, EFT) could also be maintained.</p> <p>Where an amount is ‘set aside’ for a beneficiary and the trust deed provides that this amount is to be held on a separate trust, there is usually no need to prepare separate stand-alone accounts for this amount as a ‘sub-trust’ as such and the Commissioner has not indicated that this would be a relevant consideration.</p> <p>Importantly, if the amount is ‘set aside’ for a beneficiary it must be shown in the accounts as a beneficiary entitlement and not as a loan.</p> |

| Sections 115-228(1) and 207-58(1) of ITAA 1997 – ‘share of net financial benefit’: Part B – is “referrable” to the capital gain/franked distribution after the application of any capital losses/directly relevant expenses | | |
|--|---|--|
| Comments | Trust deed | Records |
| <p>This provision requires the trust deed to provide for a connection between the amount of the capital gain or franked dividend received by the trustee and its character when it is distributed to the beneficiary.</p> <p>This must be ‘in accordance with the trust deed’: so the fact that the distribution resolution calls it ‘referrable’ will of itself not suffice, it must be the trust deed that makes the necessary connection.</p> <p>The EM makes an interesting point about a ‘financial benefit’ not needing to accrue at the time of the CGT event for it to be ‘referrable’ to the relevant gain. The capital gain can also be ‘referrable’ if the ‘financial benefit’ is provided to the beneficiary over the time the relevant asset has been held by the trust. This allows for distributions that have been made from unrealised gains arising on an asset revaluation to be streamed. See the example at paragraph 2.55 of the EM.</p> | <p>This is where the trust deed is critical. One way of clearly demonstrating that the amount dealt with by the trustee is ‘referrable’ to a capital gain or franked dividend is for the trust deed to make provision for income to be classified according to its type into separate accounts (and for directly relevant expenses to also be recorded against those account) and for distributions of income to then be made from those accounts.</p> <p>In the case of capital gains, in the absence of a ‘streaming’ clause, or even if there is one, an amount representing the ‘financial benefit’ can be distributed to a beneficiary under a power of capital distribution/advance – doing this should also satisfy the requirement that that amount is ‘referrable’ to the capital gain.</p> <p>Sample clause:</p> <p>Please refer to <i>Part E – Case study – sample trust deed and distribution minutes</i>, and in particular the ‘streaming’ and distribution provisions at clauses 3, 5.1 and 5.2 of that deed.</p> | <p>Trustee resolutions</p> <p>The trustee resolution prepared should:</p> <p>a) identify and narrate the provision/s in the trust deed that enable classification of the trust’s income by its type and distribution of that type of income to a specified beneficiary – if a full narration of the clauses is not provided, the resolution should recite that the trust deed was tabled at a directors’ meeting or viewed by the trustee, annexed to the minute and make specific reference in the body of the minute to the clauses that are being relied upon.</p> <p>b) depending on the terms of the particular deed, the resolution should record the decision of the trustee:</p> <ul style="list-style-type: none"> - to create an account for income representing capital gains and franked dividends - to allocate capital gains and franked dividends to the relevant account, once created - effect a distribution of an amount to the beneficiary from the account recording capital gains and franked dividends. - if required, recording that a further distribution of capital is made to a beneficiary, such that they receive the entire ‘financial benefit’ referrable to the capital gain. <p>For clarity, the distribution minute should also explicitly state that the distribution to the beneficiary (per above) is of an amount ‘in its character’ as a capital gain or a franked dividend.</p> <p>The distribution minute at Part E demonstrates this.</p> <p>Other records</p> <p>The trust’s ledgers should reflect the ‘accounts’ created under the deed.</p> |

| Sections 115-228(1) and 207-58(1) of ITAA 1997 – ‘share of net financial benefit’: Part C – is “recorded, in its character as referable to the capital gain/franked distribution in the accounts or records of the trust no later than: (i) two months of year end for capital gains; (ii) year end for franked dividends | | |
|--|---|---|
| Comments | Trust deed | Records |
| <p>The timing rules here are critical. For capital gains, you have two months from year end to make the relevant recordings but for franked dividends, they must be made by 30 June. For many trusts, this will give rise to practical issues, as the trustee may not have received all information relating to the distributions received during the income year.</p> <p>For the 2011 income year, the ATO has provided some administrative relief by requiring the distribution minutes for franked dividends to also be prepared by the end of August.</p> <p>The EM provides some guidance on what the Trustee may do to effectively ‘record’ a specific entitlement by reference to a ‘formula’ or as a ‘share’ (the total of which is to be determined later). However, on our reconciliation of the relevant parts of the EM, the thing to which the formula or share is to be applied must be the capital gain or franked dividend. The resolution cannot distribute unspecified amounts, e.g. <i>‘the balance of trust income’</i>, even if there is no income other than capital gains or franked dividends.</p> | <p>The recording required is not so much a function of the deed than one of the ordinary prudential and administrative obligations of the trustee.</p> <p>It is important that trustees and the practitioners advising them appreciate that under the Streaming Rules, the trust records required to be prepared must also fulfil a legislative purpose: that is, substantiating compliance with the requirements of the Streaming Rules.</p> | <p>Trustee resolutions</p> <p>Acceptable trustee resolutions where the precise amount to be distributed is unknown could include (according to the EM):</p> <ul style="list-style-type: none"> - fifty dollars referable to a franked distribution - half of the ‘trust gain’ realised on the sale of an asset - the amount of a franked distribution remaining after calculating directly relevant expenses and distributing \$10 to another beneficiary - thirty percent of a ‘net dividends account’ that includes all franked and unfranked distributions, less directly relevant expenses charged against the account (so long as their entitlement to net franked distributions can be determined) - the amount of (tax) capital gain included in the calculation of the trust’s taxable income remaining after the application of the capital gains tax (CGT) discount. <p>Other records</p> <p>It is not only in a distribution minute that the amount must be recorded ‘in its character as referable to the capital gain/franked dividend’: it must also be reflected in the trust’s accounting records and taxation working papers.</p> |

PART D: PRINCIPLES OF TRUST ADMINISTRATION FOR ACCOUNTANTS

D.1 OVERVIEW

In light of the Streaming Rules, many trustees and their professional advisors are considering amending their trust deeds to make the changes required for the trustee to satisfy the new legislative requirements.

Also, following the Bamford decision, other amendments are also being considered in order to make amounts that are recognised as being tax but not trust income available to the trustee for distribution, for example, by including a clause that equates trust income to tax income. Such amounts may include capital gains, which for tax purposes are subject to CGT but for trust purposes may be treated as an ‘accretion’ to the trust capital and not available for distribution by the trustee to beneficiaries through the ordinary income distribution powers.

Before making any amendments to trust deeds, it is important that practitioners make sure that the changes that they are proposing to make are permissible under the relevant trust deed and the risk that the amendments will cause a resettlement of the trust be considered. A resettlement of the trust may crystalize income tax and stamp duty liabilities, as the trust's assets are for legal purposes deemed to have been disposed of to a new trust.

D.2 TRUST POWER TO AMEND – THE PRACTICAL ISSUES

There are many legitimate tax, commercial or family related reasons why it may be necessary to consider making amendments to a trust deed. For example, the trustee's borrowing powers might need to be expanded, or a beneficiary may need to be removed following a family break-up.

In considering any change to the trust deed, there are two further issues that must be considered in addition to the risk of resettling the trust. These are:

Does the trust deed allow the trustee to do what it is proposing?

It is important to check the terms of the trust deed to ensure that any proposed amendment or appointment is permitted. Most trusts allow a trust deed to be varied, but some powers of variation, particularly in older trust deeds, may be subject to particular limitations.

A power to amend which states that: ‘... the trustee may revoke add to or vary the trusts of the settlement hereinbefore appearing’ arguably does not permit the trustee to introduce a new power such as a power to borrow or give guarantees. The reference to ‘trusts of settlement’ does not include the trustee’s powers, so would not of itself permit the introduction of new powers. This power would also not permit the trustee to alter a schedule to the trust deed appearing after (and not hereinbefore) the amendment clause.

Also, an unlimited power of amendment does not allow the trustee to amend the trust to introduce a ‘guardian’ whose consent is required before the trustee can exercise certain powers. As a general rule, trust law does not permit changes to a trust deed which place constraints on the trustee’s its ability to exercise its powers.

Should the trustee do what it is proposing?

If the amendment power is broad enough to allow the proposed amendment it does not automatically follow that the amendment should be made. From a trust law perspective, a power to amend must be exercised by the trustee in good faith and for the benefit of the beneficiaries as a whole. The trustee exercising the power must be satisfied the amendment is a proper exercise of the power by looking at the context in which the power was given to begin with.

D.3 TAKING RESETTLEMENT RISK INTO ACCOUNT IN AMENDING TRUST DEEDS

To evaluate the risk of a resettlement occurring, it is helpful to consider, as a starting point, the threshold questions and sources of authority outlined below. As you will see, none of these sources provide a definitive response or solution: each amendment must be reviewed on its facts and in its particular context. In the event that there is any uncertainty over the risk that the amendments to the trust deed being proposed would cause a resettlement leading to material income tax or stamp duty liabilities crystalizing, expert legal advice should be obtained.

Threshold questions

As a starting point to evaluating the risk of a resettlement arising from an amendment to a trust deed, specifically one to introduce provisions that will allow a trustee to comply with the Streaming Rules, it is useful to consider the answers to the questions outlined below:

- **Have the existing provisions of the trust deed been relied upon to ‘stream’ trust income in prior years under the ATO’s previous accepted administrative practices?**

‘Streaming’ is essentially a trust law/deed concept and it always has been: even under existing practice, to effectively ‘stream’ income (including, but not just limited to, capital gains and franked dividends); it has been necessary for that ‘streaming’ to have been permissible under the terms of the relevant trust deed. If a trustee’s trust deed has permitted the streaming of trust income in the past, there is a strong probability that the trust deed will contain the necessary enabling provisions to allow the trustee to satisfy the Streaming Rules and the requirements to create a ‘specific entitlement’ in respect of capital gains and franked dividends. This assumption, however, should not be a substitute or a short-cut to a comprehensive review of the trust deed.

- **How old is the trust deed?**

As a general observation, the older the trust deed the greater the probability that the terms of the trust deed will not support ‘streaming’ or the creation of a ‘specific entitlement’ in respect of capital gains and franked dividends. More modern deeds, on the other hand, have tended to incorporate the concept of income ‘streaming’, which has been a mainstream tax planning strategy for several decades.

- **How complicated is the trust?** If the trust deed is a relatively ‘vanilla’ family discretionary trust and beneficiaries have no specific or fixed interests to particular types of trust income (for example, specific income or capital beneficiaries), there is again a relatively lower risk that an amendment to the terms of the trust will affect the underlying beneficial entitlements of beneficiaries and therefore trigger a resettlement. Again, however, this should not be assumed and should not replace a detailed and careful consideration of the terms of the trust deed and the consequences of the changes that are sought to be made to the trust deed.

- **What exactly is the trustee looking to ‘stream’ under the Streaming Rules, and do the terms of the trust deed enable a ‘specific entitlement’ to be created without making amendments to the trust deed?**

In many instances, if the trustee is looking to create a ‘specific entitlement’ to the amount of a capital gain, it may be entirely possible to do so pursuant to a power to pay or ‘advance’ the trust’s capital (also called ‘corpus’ in some deeds). In many cases, depending on what the trustee wishes to create a ‘specific entitlement’ to, it may be unnecessary to amend the trust deed to insert a specific streaming provision.

- **What is the materiality of any capital gain or stamp duty liability that may crystalize in the event of a resettlement?**

If there is no real or other dutiable property held by the trust or embedded capital gains in CGT assets are immaterial, then a resettlement may happen if the terms of the trust deed are amended, but the consequences of this happening may be minimal or inconsequential. From a practical perspective, trustees may consider this in evaluating a risk of resettlement.

Again, none of these threshold tests provide an automatic clearance that there is no resettlement risk and trustees make any assumptions on the terms of the trust deed and the chance of a resettlement arising at their own risk. However, using these threshold tests sensibly may provide the trustee (and their advisors) with a ‘reality check’ of the risk of a resettlement arising.

D.4 RESETTLEMENT RISK IN LIGHT OF CLARK'S CASE AND TD 2012/21

Taxation Determination TD 2012/21 was issued on 24 October 2012 in response to the Full Federal Court's decision in Clark's case.

The key message for practitioners after Clark and the Commissioner's view in the TD are:

- in most cases, provided a trustee validly exercises an existing power of amendment under the trust deed, or the trust deed is amended with the approval of the Court, CGT events E1 or E2 will not occur
- the exception is where the variation terminates an existing trust, or causes trust assets to be held on a separate charter of rights and obligations (such as trust assets of a discretionary trust subsequently becoming held on trust for a specific beneficiary)
- reading and following the terms of the trust deed is critical to ensure the amendment power is properly exercised.

The TD states the Commissioner's position (in the context of CGT events E1 and E2) that the majority of amendments to trust deeds, where an amendment power exists and is validly exercised, or the amendment is approved by the Court, will not create a new trust over the trust assets. This includes changes to beneficiaries, insertion of income and streaming provisions, and extending the vesting date. It must be remembered that other CGT events may apply, as well as stamp duty liability, in certain circumstances.

Further, the TD focused on taxation issues. Trust law implications should also be considered, such as where a variation power is not validly exercised, or does not give the trustee power to vary the deed as it has. If the power has not been validly exercised, it will be ineffective and not bind the parties. If the power does not exist to the extent used, it will be a fraud on the power and also be invalid. Trust law implications are discussed further shortly.

A survey of ATO private rulings after the Statement of Principles was withdrawn reinforces the focus on the scope of the variation power:

- In **PR 1012192981472**, the trust deed in question did not contain a variation power. It was proposed to insert a broad variation power, and then use this power to extend the vesting date. The Commissioner stated that the proposed extension would not trigger CGT event E1 where a broad variation power existed. However, as there was no variation power in the relevant trust deed in the first place, the Commissioner ruled that the insertion of the variation power itself changed the essential nature of the trust, and would result in CGT event E1. Had the variation power existed in the trust deed, there would have been no CGT event E1.
- In **PR 1012421855509**, the trustee of a testamentary trust considered applying to the court to extend the vesting date of the trust. The issue was whether changing the vesting date of the trust estate would trigger a CGT event. The Commissioner ruled that changing the vesting date would not cause a CGT event, as CGT events E1 to E9 describe CGT events happening due to the creation of new trusts and changes in assets / beneficiaries of the existing trusts.
- In **PR 1012441729326**, the issue was whether an amending deed which, amongst other things, varied a trust to define 'vesting day' as meaning 'the day that the trustee determines by deed to be the vesting day' would create a new trust and trigger CGT event E1. The Commissioner ruled that it would not and stated that CGT event E1 would have no application.

In explaining the ruling, the Commissioner stated that the amendments did not create a new trust or trigger CGT event E1 since the alterations were contemplated in the original trust deed. There was also a continuity of property and membership of the trust. The Commissioner observed that the proposed changes were authorised by a clause of the trust deed, and there were no specific provisions preventing the trustee from amending the definition of vesting day or extending the term of the trust. The Commissioner further stated that as the trustee has the power to terminate the trust at any time, 'a particular vesting day is not a fundamental feature of this trust.'

- In **PR 1012447455036**, the vesting day of the trust was defined in the trust deed to mean the earlier of 1 July 2025 and the tenth anniversary of the last survivor of King George VI. The Trustee proposed to amend the trust deed by deleting 1 July 2025 from the vesting day clause so that the trust would not vest in 2025. The

Commissioner observed that the trustee had the power to amend the definition under the trust deed and that CGT events A1, E1 and E2 would not occur by reason of such an amendment.

The Commissioner also considered Part IVA and concluded that it did not apply as the proposed amendments were consistent with a continuing trust and went to the management of the trust, and therefore the taxpayer did not enter into the scheme for the dominant purpose of obtaining a tax benefit.

- In PR 1012548198754, this ruling considers a complex set of circumstances involving a number of deeds of revocation and resettlement. The relevant part of this ruling relates to a deed of variation which expanded the trustee's powers to distribute income and extended the vesting date of the trust. The Commissioner accepted that the trustee had power to amend its powers with respect to distribution of income but not to change the vesting date (as the trust deed expressly stated that the trustee was prevented from making changes to the definition of vesting date). The Commissioner states that 'no new trust was settled; there is continuity of the trust instrument, trust property and membership... [a]lthough the trustee did not have the power to amend the vesting date, the trustee has continued to manage the trust property in accordance with the terms of Deed 4 after the vesting day passed. In effect, on the vesting date an implied trust was created over the trust property the object of the trust.'

TD2012/21 also indicates that CGT events E1 and E2 will not occur in instances where there is no variation power in a trust deed the vesting date is extended by a Court order.

While these rulings are not binding other than for the individual taxpayer to whom they are issued, they demonstrate the Commissioner's attitude to variations.

D.5 WHAT HAPPENS IF THE TRUST DEED IS LOST?

A lost trust deed is a serious issue. All avenues must be taken and exhausted before taking any steps in relation to the lost deed. Check the offices of banks, accountants, lawyers and all other advisers who in the past may have had cause to touch the deed.

If the deed cannot be located, clients will request that a 'deed of confirmation' or similar be prepared to confirm the terms of the trust. Often this is the case where a copy of the deed has been located. This deed is intended to confirm that the copy deed attached represents the terms of the trust effectively confirming the copy as the original form of trust deed.

Even if a deed of confirmation is executed, there is a risk that a third party dealing with the trust (such as a purchaser of trust assets or a bank) or a statutory authority (such as the ATO or a State Revenue Office) may take the view that the deed of confirmation is not sufficient in the absence of the original executed trust deed. There may then be an argument with serious consequences as to whether a trust ever existed.

An alternative to executing a deed of confirmation is to make an application to the court for guidance under the provisions of the *Trustee Act 1958* (Vic) (equivalent provisions exist in other States and Territories), which allows a trustee to seek a declaration from the court varying the terms of the trust deed. A declaration of this nature would have two benefits:

- it would limit the exposure of the trustees or directors of the trustee for the trust, in respect of any claim brought by a beneficiary that they have acted outside their powers in the management of the trust
- it would give greater certainty when dealing with third parties in relation to the trust assets.

This approach is obviously unlikely to be favoured by the client given the cost involved, but it is the safest option. This is particularly the case where no copy of the deed can be located.

PART E: CASE STUDY – SAMPLE TRUST DEED AND DISTRIBUTION MINUTES

E.1 SCENARIO

Facts

The Corleone Family Trust (**Trust**) is a discretionary trust.

The trustee is Vito Pty Ltd (**Trustee**). Family patriarch Vito Corleone and his wife Carmela are the directors of the Trustee.

The Trust's deed is attached (**Deed**).

There are four primary beneficiaries (all Australian residents):

- Vito
- Michael
- Santino ('Sonny')
- Alfredo ('Fredo') (deceased).

Genco Pty Limited (**Genco**) is a General Beneficiary of the Trust under clause 1.1 of the Deed and has over the years received distributions from the Trust as a corporate beneficiary. Vito, Michael and Sonny are all shareholders in Genco.

The Trust operates an olive oil trading business and also owns the family's property and share investments.

In the 2015 financial year, the Trust derived the following:

| Item | \$ |
|--|--|
| Profit from business operations (Trading Profit) | 200,000 |
| Capital gain | |
| Example 1: a net capital gain from sale of warehouse – CGT discount does not apply. | 900,000 |
| Example 2: a capital gain from sale of warehouse – CGT discount does apply. | 1,800,000 Net capital gain, after applying 50% CGT discount – 900,000 |
| Fully franked dividend (Franked Dividends) from a portfolio of ASX listed shares (Telstra, Woolworths, AMP, Wesfarmers, Westpac and CBA) | Dividends: 210,000 Franking credits: 90,000 |

Assume:

- the Trust has no carried forward capital losses
- given the simplicity of the Trust's portfolio, the Trustee has not engaged a full-service stockbroker and has not incurred any investment management expenses.

2014-15 distributions

In June 2015, the Trustee determined that the trust income would be distributed as follows:

- Michael, recently appointed head of the family business, would receive the Capital Gain
- Sonny would receive the Franked Dividends
- Genco would receive the Trading Profit.

Vito, who is retired and now spends his time gardening with his grandchildren and keeping abreast of the latest developments in the taxation of trusts, seeks to prepare the necessary trustee resolutions (in his capacity as a director of the Trustee) to give effect to these distributions in accordance with the requirements in the Streaming Rules.

E.2 THE CORLEONE FAMILY TRUST DEED

Date This deed is made the day stated in item 1

Parties

The person named and described in item 2 as settlor (**Settlor**)

The person or persons named and described in item 3 as the trustee or trustees (**Trustee**)

Recitals

- A. The Settlor desires to provide for the Primary Beneficiaries and the General Beneficiaries.
- B. For the purpose of giving effect to that desire, the Settlor has settled or is about to settle on the Trustee the sum set out in item 6 to establish the trust named in item 8 (**Trust**).
- C. The Trustee has consented to become the trustee of the Trust in accordance with the powers and subject to the provisions of this deed.

The parties agree

1. Definitions and interpretation

1.1. Definitions

In this deed:

Accounting Period means any one of the following:

- (a) the period commencing on the Commencement Date and ending on the following 30 June
- (b) each subsequent 12 month period ending on 30 June
- (c) the period commencing on 1 July prior to the Vesting Day and ending on the Vesting Day or
- (d) any other period determined by the Trustee,

provided that no Accounting Period will commence prior to the Commencement Date and no Accounting Period will end after the Vesting Day.

Appointor means the person or persons named or described in item 7 or any other person or persons who are appointed to hold that position under this deed.

Child and Children (as the case may be) includes:

- (a) a natural child, an adopted child, an ex-nuptial child, a step child and a former step child
- (b) a person who is or was at any time under the guardianship or foster care of a person
- (c) a person accepted as a member of the family by the Trustee in writing and approved by the Appointor (if any) in writing.

Commencement Date means the date of this deed.

General Beneficiary and General Beneficiaries (as the case may be) include:

- (a) the Primary Beneficiary or the Primary Beneficiaries (as the case may be)
- (b) the parents, grandparents, brothers, sisters, Spouses, uncles, aunts and Children of the Primary Beneficiary or the Primary Beneficiaries, the Spouses, Children and grandchildren of those parents, grandparents, brothers and sisters, the Spouses, Children, grandchildren and great grandchildren of the

Children of the Primary Beneficiary or the Primary Beneficiaries and the Children and grandchildren of the Spouses of the Primary Beneficiary or Primary Beneficiaries

- (c) any corporation wherever incorporated or resident of which any General Beneficiary is a member and whether or not that corporation is in existence at the Commencement Date
- (d) a trustee (in that trustee's capacity as that trustee) of any trust or settlement in which any General Beneficiary has an interest, whether absolute or contingent or by way of expectancy and whether liable to be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the numbers of members of the class to which that General Beneficiary belongs, whether or not that trust or settlement is in existence at the Commencement Date
- (e) any relative by blood or marriage of the Appointor
- (f) any corporation, a share in which is beneficially owned or held by the trustee or trustees for the time being of any trust or settlement under which any General Beneficiary has an interest, whether absolute or contingent, and whether liable to be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the number of members in the class to which that General Beneficiary belongs, whether or not that trust or settlement is in existence at the Commencement Date
- (g) the persons, corporations, entities and trusts (if any) that are named, described or defined in item 5 as additions to the class of General Beneficiaries
- (h) any institution, body or organisation from time to time having objects which are charitable at law
- (i) the trustee of any superannuation fund in or under which a General Beneficiary is a member or is entitled to benefit, whether vested or contingent
- (j) any executor or trustee of a will of a General Beneficiary in their capacity as executor or trustee of the will;
- (k) any employee or former employee of the Trustee or any General Beneficiary
- (l) any godchild of a General Beneficiary who is nominated as a General Beneficiary by the Trustee in writing and approved by the Appointor (if any) in writing
- (m) any other person, corporation, trust or entity from time to time nominated in writing by the Trustee with the consent of the Appointor (if any),

provided however that the following persons are excluded from being or becoming General Beneficiaries unless specifically named or defined in item 4 and item 5 respectively:

- (n) the Settlor
- (o) any Child of the Settlor
- (p) any person claiming through the Settlor,
*(the persons within categories (n), (o) and (p) being called **Excluded Persons**)*
- (q) any corporation and the trustee of any settlement or trust (in its capacity as trustee of that settlement or trust and in its own right) in or under which any Excluded Person has an actual or contingent beneficial interest so long as that interest continues.

Primary Beneficiary and **Primary Beneficiaries** means the person or persons named, described or defined in item 4.

Set Aside in relation to a General Beneficiary includes placing sums to the credit of that General Beneficiary in the books of the Trust Fund.

Spouse of a particular person includes their:

- (a) legally married spouse
- (b) widow or widower
- (c) former spouse
- (d) de facto partner or same sex partner who is living or has lived with the person, although not legally married to that person, on a bona fide domestic basis as though legally married to that person.

The expressions **Primary Beneficiaries** and **General Beneficiaries** include persons who from time to time until the Vesting Day come within:

- (a) the category described in item 4 and item 5
- (b) the foregoing definitions,

despite the fact that those persons may not be in existence or have not come into the defined category at the Commencement Date.

Tax Acts means the *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth).

Trust Fund means the settled sum stated in item 6 and paid or to be paid by the Settlor to the Trustee, together with all money, investments and property paid or transferred to and accepted by the Trustee as additions to the Trust Fund, the accumulations of income empowered to be made under this deed, all accretions to the Trust Fund and the investments and property from time to time representing the money, investments, property, accumulations and accretions or any part or parts of them respectively.

Trustee includes any additional or successor trustee or trustees of the Trust appointed under this deed.

Vesting Day means the first date to occur of the following dates:

- (a) 80 years less one day from the Commencement Date
- (b) where the rule of law commonly known as the rule against perpetuities would render void any of the dispositions of trusts of this deed relating to any property comprising part or the whole of the Trust Fund, the date of expiration of that perpetuity period or
- (c) the date the Trustee appoints in writing.

ITAA 1936 means the *Income Tax Assessment Act 1936* (Cth).

1.2. Name of Trust

The trust created by this deed will be known by the name stated in item 8.

1.3. Interpretation

In this deed, headings are inserted for convenience only and do not affect the interpretation of this deed and unless the context otherwise requires:

- (a) the singular includes the plural and vice versa
- (b) a gender includes the other gender
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning
- (d) the meaning of general words is not limited by specific examples introduced by 'includes', 'including', 'for example', 'such as' or similar expressions
- (e) a reference to a document, including this deed, is to the document or instrument as amended, varied, novated, supplemented or replaced from time to time
- (f) a party includes the party's successors and permitted transferees and assigns and if party is an individual, includes executors and personal legal representatives
- (g) a reference to a person includes an individual, a partnership, a corporation or other corporate body, a joint venture, a firm, a trust, an association (whether incorporated or not), a government and a government authority or agency
- (h) a reference to a statute, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them
- (i) all monetary amounts are in Australian dollars unless otherwise stated and a reference to payment means payment in Australia dollars
- (j) a reference to a part, clause or party is a reference to a part or clause of, or a party to, this deed
- (k) a reference to this deed includes the recitals and any schedules, annexures, exhibits or attachments to this deed
- (l) item numbers refer to those items in the schedule.

2. Declaration of trust

The Settlor and the Trustee declare that the Trustee will, from the Commencement Date, stand possessed of the Trust Fund and of the income of the Trust Fund on the trusts and with the powers and subject to the provisions of this deed.

3. Trust accounts

3.1. Establishment of separate accounts - income and expenses

The Trustee may establish in the accounting records of the Trust separate accounts and ledgers for each separate category or class of income showing the nature, source and accounting for the income and the expenses relating to that income made in the Accounting Period.

3.2. Establishment of separate accounts - deductions, credits and rebates

If the Trustee establishes in the accounting records of the Trust separate accounts and ledgers for separate categories or classes of income and expenses, the Trustee may in the accounting records of the Trust also establish separate accounts and ledgers to determine and allocate any deductions, credits or rebates that are allowable or available in accordance with relevant taxation legislation at the time of any determination or allocation including credits and rebates in respect of franked dividends, the flow on franking amount, payments that have been subject to PAYG withholding, PAYG credits, and income derived when there are foreign beneficiaries and foreign income.

3.3. Capital receipts

Despite clauses 3.1 and 3.2, the Trustee may establish, in the accounting records of the Trust, separate accounts and ledgers for capital receipts showing the nature, source and accounting for the capital and the attributable expenses relating to that capital and the Trustee may also establish any further accounts that it considers appropriate or necessary to discharge its obligations under this deed or under any legislation that may require the Trustee to maintain that account.

3.4. Deposit into separate funds

On receipt of income or capital into the Trust Fund, the Trustee may deposit each separate category or class of income or capital into the separate fund that is established in accordance with clauses 3.1 to 3.3.

3.5. Accounting records

Without limiting the powers of the Trustee, the Trustee may, in the accounting records of the Trust for any Accounting Period, establish any separate accounts and ledgers that are required to determine and allocate the whole or a part of the income or any capital gain of the Trust Fund allocated to each class or category of income or capital to one or more beneficiaries or for the purposes of the accumulation of that income under clause 5.5.

3.6. Allocation to beneficiaries

Despite anything to the contrary contained in this deed or otherwise provided in this clause, the Trustee may from time to time apply the sums to the credit of any account for any income or capital category or class to the credit of any other one or more accounts of any income or capital categories or classes and to allocate the whole or a part of that net combined income or net capital gain attributable to those accounts for separate categories or classes of income or capital to one or more General Beneficiaries or for the purposes of accumulation without having regard to the different categories or classes of income or capital.

4. Income

4.1. Collection

The Trustee will receive and collect all dividends, interest, rents and all other income of the Trust Fund.

4.2. Payment of expenses

The Trustee must pay out of the gross income of the Trust Fund all costs and disbursements, commissions, fees, tax (including any goods and services tax, land tax or income tax), management charges and other proper outgoings in respect of the investments and administration of the Trust Fund.

4.3. Nature of receipts

The Trustee may determine whether any receipt, profit, gain (whether realised or unrealised) payment, loss, outgoing, provision or reserve or any sum of money or investment in an Accounting Period is or is not to be treated as being on income or capital account and whether and the extent to which any provisions or reserves need to be made for the Accounting Period.

4.4. Trustee must determine the income of Trust Fund

The Trustee must determine the income of the Trust Fund for each Accounting Period.

4.5. No determination

If no determination is made or to the extent to which no determination is made under clause 4.4 prior to the end of an Accounting Period, then the income for that Accounting Period is calculated in the same manner as net income is calculated under the Tax Acts for that Accounting Period, provided that where, in calculating the net income under the Tax Acts, it is necessary to:

- (a) gross up any amount of income (for example tax offsets such as foreign tax credits or franking credits)
- (b) include any amount of deemed assessable income or
- (c) make any deemed deduction,

then the grossing up or deemed assessable income (excluding net capital gains included in assessable income) or deemed deduction must not be included in calculating the net income of the Trust Fund for the Accounting Period unless the Trustee determines otherwise before the end of the Accounting Period.

5. Distributions prior to vesting

5.1. Distribution of income

The Trustee may, in each Accounting Period, pay, apply or Set Aside the whole or any part that the Trustee deems fit of the income of the Trust Fund of that Accounting Period for any charitable purposes and/or for the benefit of all or any one or more exclusive of the other or others of the General Beneficiaries living from time to time in any proportions and in any manner that the Trustee deems fit and without being bound to assign or disclose any reason.

5.2. Distribution from categories

In exercising the discretion in clause 5.1, the Trustee may pay, apply or Set Aside income from any category or categories or source or sources that the Trustee deems fit.

5.3. Default distributions

Immediately prior to the end of each Accounting Period, the Trustee will be deemed to hold so much of the income of the Trust Fund for each Accounting Period as has not been the subject of an effective determination in relation to that Accounting Period in trust successively for the same persons and in the same proportions as the Trustee would hold the Trust Fund under clause 6 as if the last day of that Accounting Period were the Vesting Day.

5.4. Separate trust fund

Amounts Set Aside for any General Beneficiary under clauses 5.1 and 5.3 will not form part of the Trust Fund as defined in clause 1.1, but will, on being Set Aside, be held by the Trustee as a separate trust fund on trust for that General Beneficiary absolutely but on the same terms as this deed with power to the Trustee pending payment to that General Beneficiary to invest, apply or deal with that fund or any resulting income or any part in the manner provided for in clause 9(d).

5.5. Accumulation

Despite the provisions of clauses 5.1 to 5.4, the Trustee may, at any time or times prior to the Vesting Day, so long as permitted by law, accumulate the whole or any part of the income of the Trust Fund, and add that income to the capital of the Trust Fund but so that the Trustee may at any time or times prior to the Vesting Day

resort to those accumulations and pay or apply the whole or any part or parts for any charitable purposes and/or for the benefit of any or any one or more exclusive of the other or others of the General Beneficiaries living from time to time in any proportions and in any manner that the Trustee deems fit and without being bound to assign any reason.

5.6. Powers in relation to capital

The Trustee will have the powers in relation to capital of the Trust Fund conferred on the Trustee by this deed.

6. Distributions on vesting

6.1. On the Vesting Day, the Trustee will stand possessed of the Trust Fund on trust for any charitable purposes and/or for any of the General Beneficiaries for any interests and in any proportions and for one to the exclusion of the other or others as the Trustee may appoint and in default of and subject to any appointment:

- (a) on trust for any of the Primary Beneficiaries who are living on the Vesting Day and, if more than one, as tenants in common in equal shares absolutely, provided that if any Primary Beneficiary dies prior to the Vesting Day leaving a Child or Children living at the Vesting Day, the Child or Children will stand in the place of the deceased Primary Beneficiary and take, if more than one, as tenants in common in equal shares the share which the deceased Primary Beneficiary would have taken had he or she survived to the Vesting Day or
- (b) if any part or parts of the Trust Fund are not effectively or validly disposed of by the trusts declared by this deed or by any deed in force varying, altering or adding to those trusts, the Trustee will stand possessed of that part or those parts of the Trust Fund on trust for any charitable purposes that the Trustee may determine, any resulting trust to the Settlor being negative.

7. Benefits

Any benefits conferred on any General Beneficiary will be in addition to and not in substitution for any provision which may be made by the Settlor for the General Beneficiary, whether by settlement or will or otherwise.

8. Trustee considerations

8.1. No obligation to review investment performance

Despite anything to the contrary contained in this deed or otherwise provided, the Trustee will, for the purposes of section 6(3) of the *Trustee Act 1958* (Vic), be under no obligation at any time to review the performance of investments of the Trust Fund.

8.2. No obligation in relation to section 8 of the *Trustee Act 1958* (Vic)

Except to the extent required by law, the Trustee will not be obliged to have regard to any matter considered in section 8 of the *Trustee Act 1958* (Vic) nor to give reason for any decision made in respect of the Trustee's exercise of its power of investment under this deed.

9. Trustee's specific powers

The Trustee will, despite anything to the contrary contained in this deed or otherwise provided, have the power:

- (a) at any time and from time to time before the Vesting Day, out of the income or the capital of the Trust Fund, but not out of any money referred to in clause 9(d), to raise any sum or sums and pay the same to any one or more of the General Beneficiaries for their own use and benefit in addition to any income or capital or share of income or capital to which they may from time to time be entitled or to apply that sum or those sums to or for the benefit of the General Beneficiary or General Beneficiaries in any manner that the Trustee deems fit

- (b) at any time and from time to time before the Vesting Day, to lend any sum or sums out of the Trust Fund and any money held in trust under this deed to any person being one of the General Beneficiaries either with or without security and on any terms and conditions as to repayment and with or without interest that the Trustee deems fit
- (c) at any time and from time to time, to pay or apply the whole or any part of the capital or the whole or any part of any income, or accrued or accumulated income, to which any infant beneficiary is either absolutely or contingently entitled in any manner that the Trustee deems fit for the benefit of that infant and, without limiting the generality, in particular for the maintenance, education or advancement of that infant and in the exercise of that power the Trustee may pay the same to a parent or guardian of that infant without being bound to see to the application by that parent or guardian
- (d) while any General Beneficiary is under any legal disability, on behalf of that General Beneficiary, to invest any income which the Trustee may decide to Set Aside for or pay to that General Beneficiary under clause 9(a) and the resulting income from that investment in any of the investments authorised by this deed, including any of the investments authorised by clause 10, but the Trustee may at any time and from time to time resort to any part of the income and pay, apply or deal with the same or any part in any manner that the Trustee deems fit for the benefit of that General Beneficiary under and in the terms of the power in clause 9(c)
- (e) at any time and from time to time, to raise any sum or sums out of the income or capital of the Trust Fund and pay the same or transfer any portion of the Trust Fund in its existing form of investment to or for the advancement or benefit of any General Beneficiary, if he or she is of full age, or to a parent or guardian of any infant General Beneficiary (whether absolutely or by way of resettlement on any trusts that the Trustee deems fit), freed and discharged from the trusts of this deed and the receipt of the General Beneficiary of any money or property so paid or transferred will constitute a full and final discharge to the Trustee in relation to the trusts of this deed
- (f) to allow any General Beneficiary to occupy, have custody of or use and grant to any General Beneficiaries the right to occupy and use any immovable property or chattels for the time being forming part of the Trust Fund, on any terms or conditions as to inventories, repair, replacement, insurance, outgoings or otherwise that the Trustee deems fit and so that the Trustee will not be liable for any loss or damage which may occur to any property so forming part of the Trust Fund during, or by reason of, any occupation, custody or use except insofar as that loss or damage is occasioned by the conscious and willful default or neglect of the Trustee
- (g) in any condition or circumstance which the Trustee deems expedient, to appoint, either in respect of the whole of the Trust Fund or any part of the Trust Fund, a new trustee in any country of the world, including Australia, and to transfer, assign and set over the investments for the time being representing the Trust Fund or any part of the Trust Fund to that new trustee on the same or similar trusts and subject to the same or similar terms and conditions to those declared in this deed and either subject to the control of the Trustee or to the exclusion of that control
- (h) to invest the Trust Fund or any part of it in investments that are speculative in nature
- (i) to discriminate and act partially between General Beneficiaries and different classes of General Beneficiaries without any obligation to assign or disclose any reason
- (j) to determine:
 - (i) whether any property or any increase or decrease in the number or value of any property or holdings of property or any receipts or payments from, for or in connection with any property, will be treated as capital or income
 - (ii) generally all matters as to which any doubt, difficulty or question may arise under or in relation to the execution of the trusts and powers of this deed,
 provided that every determination of the Trustee in relation to any of the matters referred to in this clause 9(j), whether made on a question formally or actually raised or implied in any of the acts or proceedings of the Trustee in relation to the Trust Fund, will bind all parties interested in that determination and will not be objected to or questioned on any ground
- (k) to do all acts and things permitted under the Trustee Act 1958 (Vic) and general law
- (l) to do all acts and things that a natural person can do by law as if the Trustee were the absolute beneficial owner of the assets of the Trust Fund.

10. Trustee's general powers

The Trustee will, in addition to the powers and privileges otherwise conferred on the Trustee by law, have the following powers:

- (a) to apply and invest all money at any time forming part of the Trust Fund in any investments, whether involving liabilities or not and with or without security and on any terms and conditions that the Trustee deems fit and to the intent that the Trustee will have the same power in all respects as if the Trustee were the absolute owner beneficially entitled, including the subscription for, the taking up on allotment and the purchase of any shares, stocks, bonds, mortgages, debentures, obligations or securities of any government authority or corporation incorporated in any part of the world and in the units or sub units of any fixed or flexible trust which is established or managed by any company and the taking of and the purchase of the whole or any part or share or interest (including a minority part or share or interest) in any business or partnership and the goodwill and assets of that business or partnership and the purchase of any real or personal property, wheresoever situate, and to exercise all rights and privileges and perform all duties and obligations appertaining or incidental to those rights and privileges and the Trustee may make or purchase any of those investments for cash or in consideration of an annuity or otherwise and on any terms and conditions that the Trustee deems fit and the Trustee may make or purchase that investment for a sum greater than the amount of the Trust Fund for the time being and the Trustee may agree to pay for that investment wholly or in part from any future money which may come into the Trustee's hands, including dividends, profits, interest or other income paid or payable in respect of that investment
- (b) to advance and lend money to and to borrow and raise money from and to secure by mortgage or otherwise the payment of money to any persons, firms, corporations, governmental or municipal bodies on any terms, with or without security or interest, that the Trustee deems fit, including the power to join with any other company or person in executing any mortgage or other document for the purpose of securing the payment of money to the Trustee jointly with any other person or company or for the purpose of securing the payment of money to any other person or company and, without in any way limiting the generality of the foregoing, to invest the whole or any part of the Trust Fund in mixed contributory mortgages secured over real estate through the agency or in the name of the nominee or nominees acting in that capacity for the contributors to that mortgage
- (c) to give any guarantee or indemnity or both for payment of money or the performance of any contract, obligation or undertaking by any person, firm, corporation, association or trust on any terms, with or without security, that the Trustee deems fit and to secure that guarantee by mortgaging or charging (by fixed or floating charge or otherwise) any undertaking of the Trustee or all or any part of the Trust Fund, including any property which may subsequently be acquired by the Trustee, so that it will form part of the Trust Fund and the rights of the mortgagee or chargee will take priority in all respects over the rights of the beneficiaries and all other persons
- (d) to vary or transpose any investments into or for any other or others of any nature and to vary the terms of or property comprised in any security
- (e) to construct or demolish buildings and to hold, use, purchase, maintain, repair, renovate, reconstruct, develop, redevelop, improve, sell, transfer, convey, surrender, let, lease, exchange, take and grant options or rights, alienate, mortgage, charge, pledge, reconvey, release, discharge or otherwise deal with any real or personal property
- (f) to purchase, sell, transfer, surrender, exchange, charge, take and grant options or rights in any stocks, shares, debentures, units or securities of any kind with or without deferred, restricted, qualified or special rights attaching
- (g) to purchase or acquire or to sell or transfer to any person any reversionary or deferred property or rights of any description or any interest in any property for the life of any person or any life or life endowment or sinking fund or term or other policy or policies of insurance of any nature and at or subject to any premium or premiums, whether single or payable periodically and with or subject to any option, rights, benefits, conditions or provisions and the Trustee will have power to pay out of the income or capital of the Trust Fund, as the Trustee deems fit, all sums payable from time to time for premiums or otherwise for the effecting or maintenance of any policy or policies of insurance (whether owned by the Trustee or otherwise) or for the exercise or enjoyment of any option, right or benefit under that policy or those policies and any surrender of any of those policies will for all the purposes of this deed be deemed to be a sale

- (h) to pay out of the Trust Fund, or the income, all costs, charges and expenses incidental to the management of the Trust Fund or to the exercise of any power, authority or discretion contained in this deed or in carrying out or performing the trusts which the Trustee may at any time incur, including all income tax or other taxes payable in respect of the Trust Fund, costs in any way connected with the preparation and execution of this deed and all money which the Trustee may be required to pay as probate, estate, gift, stamp or revenue duties including stamp, gift or settlement duties payable in respect of the Trust Fund
- (i) where the Trustee determines to invest any part of the Trust Fund in the subscription for or the taking up on allotment or the purchase of any shares, stock or debentures in any corporation, to exercise the following powers in addition to the powers authorised by law:
- (i) to pay calls on any shares or to permit those shares to be forfeited and sold
 - (ii) to purchase any further shares, stock or debentures and to take up any shares, stock or debentures of a new issue of any corporation
 - (iii) to lend money to any corporation, whether secured by debentures or in any other way, or not secured and at any rate of interest and on any terms that the Trustee deems fit
 - (iv) to hold any shares, stock or debentures acquired by the Trustee under the powers conferred by statute or otherwise by law or by this clause for as long as the Trustee deems fit
 - (v) to sell any shares, stock or debentures held by the Trustee at any price that the Trustee deems fit (whether or not that price is less than the sum that appears from the accounts of the corporation to be the value of those shares, stock or debentures) and on any terms with or without security that the Trustee deems fit
 - (vi) to assent to or join in any arrangement relating to the sale or transfer or exchange of any of those shares, stock, debentures or interests or modifying any rights or privileges or interests in relation to them and to agree to any scheme or arrangement for the increase in or reduction of the value or amounts of any shares or stock or of the capital of any corporation and for any of those purposes to deposit, surrender or exchange any scrip or document of title relating to them and to pay out of the capital of the Trust Fund or the income any contribution or incur any necessary expense in connection with that scheme or arrangement and generally to manage and deal with those shares, stock or investments as if the Trustee owned them beneficially
 - (vii) to enter into any agreement in respect of the winding up of any corporation in which the Trustee holds shares or is otherwise concerned or interested and to agree with the liquidator or with any member or members of that corporation or any other person on any matters that the Trustee deems fit, for the division or partition in kind or specie of the assets or property of any nature of the corporation and to accept any of those assets and property in payment or satisfaction of any interest of the Trustee in the corporation with power to pay any money by way of division or partition
- (j) to carry on anywhere in Australia or elsewhere and either alone or in partnership, any business or businesses including any business or businesses of manufacturers, wholesale and retail buyers, sellers, merchants, importers, exporters, dealers, brokers and agents in any kind of commodities, merchandise, choses in action and articles of commerce and of farmers, graziers and agriculturalists and any other form of business which the Trustee deems fit
- (k) to agree to the partition, subdivision or exchange of any land or other property which forms part of the Trust Fund and to pay any money by way of equality of partition, division or exchange
- (l) to establish, promote or acquire any corporation or join in the promotion, establishment or acquisition of any corporation
- (m) to appropriate, without obtaining any of the consents required by statute or otherwise by law, any part or parts of the Trust Fund, either in the actual condition or state of investment or by setting apart or crediting in the books or accounts of the Trust any sum or sums in or towards the satisfaction of any share or shares, whether vested or contingent, to which any person is or may be entitled in the Trust Fund, and for that purpose to make or cause to be made a valuation or valuations of the Trust Fund or any part or parts of the Trust Fund or of any interest in the Trust Fund that the Trustee may deem necessary either by the Trustee or by any person or persons whether duly qualified or not that the Trustee may appoint in any manner and at any respective times that the Trustee considers just and proper and every valuation and every appropriation made by the Trustee will bind all persons interested whether in the share to which the appropriation is made or in any other shares or otherwise interested in the Trust Fund, despite the fact that those persons may not be in existence or may be an

infant or subject to any other legal disability at the time of that appropriation or that the Trustee or any person who is a director or shareholder of the Trustee making the appropriation is or may be beneficially interested, either directly or indirectly, in the property appropriated or may benefit, either directly or indirectly, as a result of the exercise by the Trustee of the power of appropriation referred to in this clause

(n) to sell the whole or any part or parts of the investments or property for the time being comprised in the Trust Fund at any time or times and on any terms and conditions that the Trustee deems proper, including the power to sell life or reversionary interests in those investments or property

(o) for any purpose of or incidental to the administration of the trusts or provisions of this deed or the exercise of any power or authority vested in the Trustee:

(i) to raise and borrow money by sale, mortgage, charge, pledge, exchange or deposit of any property comprised in the Trust Fund for any amounts and on any terms and conditions that the Trustee deems fit, without any liability for any loss or injury arising from the exercise of that discretion

(ii) to grant securities over the Trust Fund of all types and forms, including for the purpose of raising money or to secure the money advanced or to be advanced to any other person, firm, corporation, association or trust

(p) to invest all or any money capable of being invested in accordance with this deed in any of the modes of investment for the time being and from time to time permitted by law of the Commonwealth of Australia or any of the states for the investment of trust money

(q) to invest all or any money capable of being invested in accordance with this deed on deposit in any trading bank or savings bank or other financial institution in Australia

(r) to open any account or accounts with any bank or banks and to operate by and in all usual ways any account or accounts

(s) to exercise any power capable of being conferred on a trustee or trustees by any valid trust instrument and, without derogating from the generality of the foregoing, to dispense, insofar as it is lawful so to do, with the necessity of obtaining any order of the courts of the place of administration of the trusts created by this deed for the purpose of effecting or validating any transaction

(t) to remunerate any General Beneficiary who is at any time employed by the Trustee to the same extent and in the same manner as if that General Beneficiary were not a General Beneficiary under this deed and all bona fide payments made by the Trustee to that General Beneficiary, in the form of remuneration for services rendered or to be rendered or on account of expenses in connection with that employment, will not be or be deemed to be payment to the General Beneficiary of or on account of his or her share in the Trust Fund or in the income

(u) if any probate, succession, estate or other duties, fees or taxes become payable in any part of the world in respect of the Trust Fund or any part of the Trust Fund on the death of the Settlor or on the death of any General Beneficiary or any other person, to pay all or any part of those duties, fees and taxes out of the Trust Fund, despite the fact that those duties, fees or taxes or some part of them are not or may not be recoverable by the revenue authorities from the Trustee or from the Trust Fund by legal process in the place where the same became payable

(v) to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading and other negotiable or transferable instruments, to transact any business or enter into any facilities or other arrangements concerning any promissory notes, bills of exchange, bills of lading or other negotiable or transferable instruments and, for the purpose of carrying out any of these powers, the Trustee will be entitled to execute any documents or perform any acts incidental to the exercise of those powers

(w) to grant options in respect of any assets held subject to the trusts under this deed to any person, firm or country

(x) to deal or trade in derivatives, manage or hedge financial risks and deal or trade in future contracts and options

(y) to enter into any option agreement relating to any lending or financing facility, agreement or transaction

(z) to identify and separately record income and capital of different categories and from different sources

(aa) to grant to any legal person, whether natural or otherwise, a power of attorney for the purposes of exercising any of the powers of the Trustee

(bb) to take and act on the opinion or advice given by lawyers, accountants or any other persons in relation to the interpretation or the effect of this deed or any other document or any statute or as to the administration of

the Trusts or the powers of the Trustee, without being liable to anyone in respect of any act done by the Trustee in accordance with that opinion or advice

- (cc) to make an election that the Trust is a family trust under schedule 2F, section 272-80 of ITAA 1936
 - (dd) to make an election that the Trust is an interposed entity under schedule 2F, section 272-85 of ITAA 1936
 - (ee) to make an election and application to the Federal Commissioner of Taxation that the Trust is a member of any GST group under Subdivision 48-A of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and corresponding regulations
 - (ff) to delegate the exercise of all or any of the powers or discretionary authorities conferred on the Trustee by this deed and to execute any powers of attorney or other instruments necessary to effectuate that purpose
 - (gg) to vest the Trust by so appointing in writing.
-

11. Trustee as a director

11.1. Appointment

The Trustee may become a director of or appoint any person to act as a director on the Trustee's behalf of any corporation in which any money forming part of the Trust Fund is from time to time invested and may receive the remuneration attached to that office, or permit the Trustee's representative to receive that remuneration, without being liable to account.

11.2. Holding of shares

Any representative of the Trustee may become qualified to act as a director in accordance with clause 11.1, if the constitution (if any) and any replaceable rules so allow, by holding in his or her name shares held by the Trustee, provided that the representative executes a declaration of trust in favour of the Trustee generally accompanied by the certificates of those shares and accounts to the Trustee for all dividends and bonuses paid.

12. Trustee's personal interest

The Trustee may exercise or concur in the exercising of, all powers and discretions under this deed or by law, despite the fact that the Trustee or any person being a director or shareholder of the Trustee has or may have a direct or personal interest in the mode or result of exercising that power or discretion or may benefit either directly or indirectly, as a result of the exercise of that power or discretion and despite the fact that the Trustee for the time being is the sole Trustee.

13. Trustee's manner of acting

13.1. Acting personally

The Trustee will not be bound to act personally.

13.2. Employment of others

The Trustee will be at full liberty to act as manager or to employ any manager, solicitor, accountant, clerks, contractors, workmen, employees, servants or any agents to transact all or any business of any nature required, including the receipt and payment of money, and the Trustee must determine the remuneration, charges and expenses to be allowed and paid.

14. Liability of Trustee

The Trustee will not be personally liable for the consequence of any error or omission, whether of law or of fact, on the part of the Trustee or the Trustee's legal or other advisers, or generally for any breach of duty or trust, unless it is proved to have been committed, made or omitted in fraudulent bad faith by the Trustee and all

persons claiming any beneficial interest in, over or to the Trust Fund will be deemed to have notice of the provisions of this clause.

15. Blending of money

The Trustee will have power:

- (a) to blend, for the purposes of investment, any money which the Trustee holds on separate trusts (whether that money is subject to any other settlements or declarations of trust)
 - (b) to join with any other person or persons in making common investments.
-

16. Trustee's exercise of discretion

16.1. Absolute and uncontrolled discretion

Subject always to any express provision to the contrary contained in this deed, every discretion vested in the Trustee will be absolute and uncontrolled and every power vested in the Trustee will be exercisable at the Trustee's absolute and uncontrolled discretion and the Trustee will have the like discretion in deciding whether or not to exercise any power.

16.2. No responsibility for loss

The Trustee will not be responsible for any loss or damage suffered by the exercise of any discretion or power conferred on the Trustee or by the failure to exercise any discretion or power.

17. Expenses

Any Trustee for the time being who is a solicitor or accountant or any firm of which the Trustee may be a member will be entitled to make all usual and proper charges for both professional and other services in the administration of the Trust to the same extent that the Trustee would have been entitled to make if the Trustee were not a trustee under this deed.

18. Variation of deed

The Trustee, for the time being, may at any time and from time to time by deed, with the written consent of the Appointor (if any), revoke, add to or vary all or any of the provisions of this deed, including this clause, and any variation, alteration or addition made to this deed from time to time, and may by the same or any other deed or deeds, declare any new or other trusts or powers concerning the Trust Fund or any part or parts but so that the rule against perpetuities is not infringed as a result and so that the variation, alteration or provision will not affect the beneficial entitlement to any amount Set Aside for any General Beneficiary prior to the date of the variation, alteration or addition.

19. General Beneficiary ceasing to be General Beneficiary

19.1. Request to be excluded

The Trustee may at any time, at the request or with the consent in writing of any General Beneficiary who has legal capacity, declare in writing that the General Beneficiary will, from that point onwards, not be a General Beneficiary for the purpose of the trusts constituted by this deed.

19.2. Effect of declaration to exclude

On a declaration under clause 19.1 being made, this deed will be read and the trusts constituted by this deed given effect, as if that person were not named or described in the definition of General Beneficiaries, provided

however that the declaration must not affect any beneficial entitlement of that person to any amount Set Aside for or paid to him or her or it prior to the date of that declaration.

20. Change of Trustee

20.1. Power to remove and appoint

The Appointor or any other person or persons who have been appointed to act as Appointor will be entitled by instrument in writing at any time and from time to time:

- (a) to remove any Trustee
- (b) to appoint any additional Trustee or Trustees
- (c) to appoint a new Trustee or Trustees in the place of any Trustee removed under this clause or who resigns the trusteeship or ceases to be Trustee by operation of law,

provided that, if there is no person holding the office of appointor or if the Appointor for the time being is under any legal disability, the statutory and other rights of removing and appointing a trustee will, to the exclusion of any other person or persons, be exercised by the person or persons granted power to do so by the *Trustee Act 1958* (Vic).

20.2. Retirement of Trustee

Any Trustee and any person who may by succession become a Trustee may retire by written notice to the continuing Trustee and the Appointor (if any), at which time the person giving the notice will immediately cease to be a Trustee, or to be a person who may by succession become a Trustee (as the case may be), provided that if at any time there is no Appointor entitled to exercise the powers set forth in clause 20.1, a sole surviving Trustee must not retire except on appointing a new Trustee in the Trustee's place.

20.3. Vacation of office of Trustee

The office of Trustee will be immediately vacated if that Trustee:

- (a) being an individual, dies or is found to be a lunatic or of unsound mind or
- (b) being a company, enters into liquidation, whether compulsory or voluntary (not being merely a voluntary liquidation for the purposes of amalgamation or reconstruction),

and if that Trustee is the sole surviving Trustee, the new Trustee must be appointed by the Appointor or, failing that appointment, must be appointed in accordance with statutory provisions for appointing a trustee.

20.4. No obligation for multiple trustees

There will be no obligation for the Trust to have more than one Trustee.

20.5. Notices of changes to Trustee

A copy of all notices of changes in the trusteeship must be kept with this deed or included in a deed or deeds varying this deed and every notice will be sufficient evidence to any person having dealings with the Trustee as to the facts to which it relates.

20.6. Reliance on notices

Any person dealing with the Trustee may rely on a copy of this deed and of the notices kept with this deed or of a deed or deeds varying this deed certified by the Trustee to the same extent as he or she might rely on the original.

20.7. Acceptance of accounts and property

Any person becoming a Trustee may accept the accounts and the property delivered to the Trustee by the continuing Trustee or predecessors in office without being bound to enquire further as to the assets of the Trust Fund and any person ceasing to be a Trustee may be given a full and complete discharge by the Appointor.

20.8. Decisions of Appointor

If the office of Appointor is held by more than one person, every decision or exercise of a power capable of being made by the Appointor will be valid only if made unanimously by all persons then holding the office of Appointor.

21. Appointment of successor Appointors

21.1. Nomination of successor Appointor

Any Appointor, including a successor Appointor may, by deed in writing:

(a) from time to time, with the unanimous consent of all other persons acting as Appointor (if any), revocably or irrevocably, nominate any person or persons to be the successor or successors to the position of Appointor on, in the case of an individual, their death or resignation, and in the case of a corporation, the corporation resigning or entering into liquidation whether compulsorily or voluntarily (not being merely a voluntary liquidation for the purposes of amalgamation or reconstruction)

(b) resign from the position of Appointor.

21.2. Revocation

A revocable appointment of a successor made under clause 21.1(a) may be revoked by the Appointor who made the nomination by deed in writing.

21.3. Further nominations after revocation

An Appointor revoking, under clause 21.2, a nomination made under clause 21.1 will not prevent the Appointor from making a further nomination or nominations under clause 21.1(a).

21.4. Copies of nominations and resignations

A copy of all nominations and resignations made under clause 21.1 and revocations made under clause 21.2 must be provided to the Trustee and kept with this deed and every nomination, resignation or revocation will be sufficient evidence to any person having dealings with the Appointor and the Trustee as to the facts to which it relates.

22. Accretions to fund

The Trustee will have the power, at any time prior to the Vesting Day, to accept any further or additional property which any person may in any way donate to or vest or cause to be vested in the Trustee to be held on the trusts set forth in this deed and, on that acceptance, all of that property will become part of the Trust Fund and be held by the Trustee accordingly.

23. Exercise in writing

Any determination by the Trustee in exercise of any power, discretion or authority conferred on the Trustee by this deed may, but need not, be made in writing.

24. Trustee disagreements

If the office of Trustee is held by more than one person or corporation, any disagreement between them as to any matter affecting the Trust Fund or as to the exercise, omission or abstention from exercising any of the Trustee's powers and discretions must be referred to a vote of all of those persons or corporations (either at a meeting of them or by post) and, if there is a 75% majority for or against a particular proposal, effect must be given to the wishes of that majority as if it were a unanimous decision by all of those persons or corporations.

25. Trustee contracts and right of indemnity

25.1. No rights against beneficiaries

The Trustee has no power or authority to enter into any contract that will bind or affect a General Beneficiary personally nor call on any General Beneficiary for any payment.

25.2. Trustee indemnity

The Trustee will be entitled to an indemnity out of the Trust Fund against any and all liabilities which the Trustee may incur or to which the Trustee may be subject.

25.3. Enforcement of contracts

Any contract made by the Trustee will be enforceable only against the Trust Fund and all persons or corporations extending credit to, contracting with or having any claims against the Trustee in respect of the Trust Fund must look only to the Trust Fund for the payment of that contract or claim or for the payment of any debt, damage, judgment or decree or of any money that may otherwise become due or payable from the Trustee so that, in that event, neither the Trustee nor any General Beneficiary will be personally liable for that debt, damage, judgment or decree.

26. Trustee commission

Any Trustee may, from time to time, charge and retain out of the capital profits, accretions to capital and the income of the Trust Fund any commission that is agreed between the Trustee and the Appointor (if any) or otherwise as determined solely by the Trustee.

27. Governing law and jurisdiction

27.1. Governing law

This deed is governed by the laws in force in Victoria.

27.2. Jurisdiction

The parties submit to the non-exclusive jurisdiction of the courts of Victoria and the Federal Court of Australia and any courts that may hear appeals from those courts about any proceedings in connection with this deed.

EXECUTED as a deed.

SCHEDULE

1 **Date of making this deed**

The 1st day of January 2005

2 **Settlor**

Salvatore Tessio of 1 Brando Crescent, Melbourne, Victoria 3555

3 **Trustee**

Vito Pty Limited ACN 222 333 444 of 2 Coppola Drive, Melbourne 3000

4 **Primary Beneficiaries**

Vito Corleone of 2 Coppola Drive, Melbourne 3000

Michael Corleone of 4 Coppola Drive, Melbourne 3000

Santino Corleone of 6 Coppola Drive, Melbourne 3000

Alfredo Corleone of 8 Coppola Drive, Melbourne 3000

5 **Additional members of the class of General Beneficiaries**

Nil

6 **Settled sum**

\$10

7 **Appointor(s)**

Vito Corleone of 2 Coppola Drive, Melbourne 3000

8 **Name of Trust**

The Corleone Family Trust

SIGNING PAGE

**SIGNED SEALED AND DELIVERED by)
SALVATORE TESSIO in the presence of:)**

.....
Signature of witness

.....
Signature of **SALVATORE TESSIO**

.....
Name of witness (*please print*)

**THE COMMON SEAL of VITO PTY LTD ACN)
222 333 444 was affixed in accordance with the)
Corporations Act 2001 in the presence of:)
))
))
))**

.....
Signature of director

.....
Signature of director / company secretary

.....
Name of director (*please print*)

.....
Name of director / company secretary
(*please print*)

E.3 THE CORLEONE FAMILY TRUST 2014/15 YEAR DISTRIBUTION MINUTES

MINUTES OF MEETING OF DIRECTORS

VITO PTY LTD

AS TRUSTEE OF THE CORLEONE FAMILY TRUST

ACN 222 333 444

(Company)

| Date | | Explanatory notes [NB: not part of the minutes] |
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| Time | | |
| Place | | |
| Present | | |
| In attendance | | |
| Chair | The meeting appointed Vito Corleone as the Chair of the meeting. | <i>As the Trustee is a company, it will be necessary to comply with the requirements of the company's constitution for convening Board meetings (including quorum requirements).</i> |
| Quorum | The Chair informed the meeting that a quorum was present. | |
| Eligible beneficiaries under the Trust Deed | <p>The Chair noted:</p> <p>(a) that the Company acts as trustee of the Corleone Family Trust (Trust) established by deed dated 1 January 2005 (Trust Deed).</p> <p>(b) that the 'Primary Beneficiaries' of the Trust are relevantly defined in the Schedule to the Trust Deed and are as follows:</p> <p style="padding-left: 40px;">'Vito Corleone of 2 Coppola Drive, Melbourne 3000 Michael Corleone of 4 Coppola Drive, Melbourne 3000 Santino Corleone of 6 Coppola Drive, Melbourne 3000 Alfredo Corleone of 8 Coppola Drive, Melbourne 3000'</p> <p>(c) that the 'General Beneficiaries' of the Trust are relevantly defined in Clause 1.1 of the Trust Deed as follows:</p> <p style="padding-left: 40px;">(i) the Primary Beneficiaries... (ii) any corporation, a share in which is beneficially owned or held by the trustee or trustees for the time being of any trust or settlement under which any General Beneficiary has an interest, whether absolute or contingent, and whether liable to</p> | <p><i>This is a formal preliminary step confirming all of the proposed recipients of distributions in the 2014-15 income year are 'beneficiaries' of the trust – this is replicated in the part of the minutes dealing with distributions.</i></p> <p><i>Care should be taken to confirm that an entity that meets the definition of a 'general beneficiary' of the trust (or whatever wording is used in the trust deed) is not excluded from being a beneficiary under a different clause in the deed (e.g. a clause defining 'excluded beneficiaries').</i></p> |

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| | <p><i>be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the number of members in the class to which that General Beneficiary belongs, whether or not that trust or settlement is in existence at the Commencement Date'</i></p> <p>(d) that pursuant to the provisions of Clause 1.1 of the Trust Deed:</p> <ul style="list-style-type: none"> (i) Michael Corleone (Michael) is a General Beneficiary of the Trust. (ii) Santino Corleone (Santino) is a General Beneficiary of the Trust. (iii) Genco Pty Limited (Genco) is a General Beneficiary of the Trust. | |
| Determination of income under the Trust Deed | <p>The Chair noted that under clause 4.4 of the Trust Deed the Trustee must determine the income of the Trust for each Accounting period.</p> <p>The Chair proposed that, for the purposes of clause 4.4 of the Trust Deed, the Trustee determined that the income of the Trust for the Accounting Period ending 30 June 2015 is the amount that would be the income of the Trust under if no determination was made and clause 4.5 applied.</p> | <p><i>As a formal step, the income is being determined, in accordance with 4.4.</i></p> <p><i>The effect of this determination is to treat the trust income to be section 95 income, but to exclude 'notional amounts' from the income (e.g. franking credits, deemed assessable income and deemed deductions): as noted above, in Draft TR 2012/D1, the Commissioner states his view that 'notional' amounts cannot be distributable income of a trust.</i></p> <p><i>This particular wording is based on clause 4.5 of the Corleone Family Trust deed. Other ways of expressing the determination of income could be:</i></p> <p><i>a. To equalise trust income with section 95 net income:</i></p> <p><i>'The Chair proposed that under clause 4.4 of the Trust Deed the income of the Trust for the Accounting Period be the amount that is determined as the net income of the Trust for the purposes of the Income Tax Assessment Act 1936'.</i></p> <p><i>Note that, of itself, such a determination would not exclude 'notional' amounts from trust income.</i></p> <p><i>b. To treat trust income as 'accounting' income:</i></p> <p><i>'The Chair proposed that under clause 4.4 of the Trust Deed the income of the Trust for the Accounting Period be the amount that is determined as the income of the trust for accounting purposes and recorded in the Trust's statement of financial position'.</i></p> |

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| Distribution of income under the Trust Deed | <p>The Chair noted that:</p> <p>(a) that Clause 5.1 of the Trust Deed provides:</p> <p><i>'The Trustee may, in each Accounting Period, pay, apply or Set Aside the whole or any part that the Trustee deems fit of the income of the Trust Fund of that Accounting Period for any charitable purposes and/or for the benefit of all or any one or more exclusive of the other or others of the General Beneficiaries living from time to time in any proportions and in any manner that the Trustee deems fit and without being bound to assign or disclose any reason.'</i></p> <p>(b) that Clause 5.2 of the Trust Deed provides:</p> <p><i>'In exercising the discretion in clause 5.1, the Trustee may pay, apply or Set Aside income from any category or categories or source or sources that the Trustee deems fit.'</i></p> | <p><i>This is a formal recording in the minutes of the relevant provision of the trust deed which deals with the distribution of income to beneficiaries, and the ability to distribute income from specific categories or sources - which is a necessary requirement for income to be 'streamed' in its character as a capital gain of franked dividend.</i></p> |
| Distribution of capital under the Trust Deed (required when streaming discount capital gain – sheltered component) | <p>The Chair noted that clause 9 of the Trust Deed provides:</p> <p><i>The Trustee will, despite anything to the contrary contained in this deed or otherwise provided, have the power:</i></p> <p>(a) <i>at any time and from time to time before the Vesting Day, out of the income or the capital of the Trust Fund, but not out of any money referred to in clause 9(d), to raise any sum or sums and pay the same to any one or more of the General Beneficiaries for their own use and benefit in addition to any income or capital or share of income or capital to which they may from time to time be entitled or to apply that sum or those sums to or for the benefit of the General Beneficiary or General Beneficiaries in any manner that the Trustee deems fit.</i></p> | <p><i>In these minutes, the 'income' of the trust has been determined to be its section 95 (i.e. tax determined income).</i></p> <p><i>This means that, under Example 2 - where the Trust makes a discount capital gain - the part of the gross capital gain sheltered by the discount (i.e. \$900,000) will not be included in the 'income' of the trust and so cannot be distributed.</i></p> <p><i>As such, in order to distribute the discount-sheltered part of the gross capital gain (so that Michael can have the entire 'financial benefit' referable to the capital gain), it will be necessary to make a capital distribution of the discount-sheltered part of the capital gain.</i></p> <p><i>If a capital distribution is required, check the trust deed closely to ensure that:</i></p> <ul style="list-style-type: none"> <i>a. there is a capital distribution power in the trust deed (which is why it pays to recite it in the minutes, as shown)</i> <i>b. that there is no limitation or consent required to capital being distributed from the trust (e.g. the consent of the guardian).</i> |
| Power of the Trustee to create trust accounts in relation to capital gains and franked dividends | <p>The Chair noted:</p> <p>(a) that Clause 3.1 of the Trust Deed provides:</p> <p><i>'The Trustee may establish in the accounting records of the Trust separate accounts and ledgers for each separate category or class of income showing the nature, source and accounting for the income and the expenses relating to that income made in the Accounting Period.'</i></p> <p>(b) that Clause 3.2 of the Trust Deed provides:</p> <p><i>'If the Trustee establishes in the accounting records of the Trust separate accounts and ledgers for separate categories or classes of income and expenses, the Trustee may in the</i></p> | <p><i>In this part of the minute, the Trustee is narrating the powers in the deed which enable separate accounts in the Trust's financial accounts based on the source of character of this income received. This makes it clear those capital gains and franked dividends are being 'streamed' in their character as such, and that this is reflected in the trust's accounting records.</i></p> |

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| | <p><i>accounting records of the Trust also establish separate accounts and ledgers to determine and allocate any deductions, credits or rebates that are allowable or available in accordance with relevant taxation legislation at the time of any determination or allocation including credits and rebates in respect of franked dividends, the flow on franking amount, payments that have been subject to PAYG withholding, PAYG credits, and income derived when there are foreign beneficiaries and foreign income.'</i></p> <p>(c) that Clause 3.3 of the Trust Deed provides:</p> <p><i>'Despite clauses 3.1 and 3.2, the Trustee may establish, in the accounting records of the Trust, separate accounts and ledgers for capital receipts showing the nature, source and accounting for the capital and the attributable expenses relating to that capital and the Trustee may also establish any further accounts that it considers appropriate or necessary to discharge its obligations under this deed or under any legislation that may require the Trustee to maintain that account.'</i></p> <p>(d) that Clause 3.4 of the Trust Deed provides:</p> <p><i>'On receipt of income or capital into the Trust Fund, the Trustee may deposit each separate category or class of income or capital into the separate fund that is established in accordance with clauses 3.1 to 3.3.'</i></p> <p>(e) that Clause 3.5 of the Trust Deed provides:</p> <p><i>'Without limiting the powers of the Trustee, the Trustee may, in the accounting records of the Trust for any Accounting Period, establish any separate accounts and ledgers that are required to determine and allocate the whole or a part of the income or any capital gain of the Trust Fund allocated to each class or category of income or capital to one or more beneficiaries or for the purposes of the accumulation of that income under clause 5.5.'</i></p> <p>(f) that Clause 3.6 of the Trust Deed provides:</p> <p><i>'Despite anything to the contrary contained in this deed or otherwise provided in this clause, the Trustee may from time to time apply the sums to the credit of any account for any income or capital category or class to the credit of any other one or more accounts of any income or capital categories or classes and to allocate the whole or a part of that net combined income or net capital gain attributable to those accounts for separate categories or classes of income or capital to one or more General Beneficiaries or for the purposes of accumulation without having regard to the different categories or classes of income or capital.'</i></p> | |
| Creation of trust accounts in relation to capital gains | <p>The Chair proposes that, pursuant to an exercise of the power available to the Company as trustee for the Trust under clause 3.1 of the Trust Deed, the Company establish in the accounting records of the Trust (which are attached to this resolution) separate accounts and ledgers, and record in these separate accounts and ledgers, income of the trust representing capital gains derived by the trust in the income year ended 30 June 2015 (2015 Year).</p> | <p><i>This is the operative part of the minute, where the Trustee is taking action to make a separate recording in the Trust's accounting records of capital gains (in their character as such).</i></p> |

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| Creation of trust accounts in relation to franked dividends | The Chair proposes that, pursuant to an exercise of the power available to the Company as trustee for the Trust under clause 3.1 of the Trust Deed, the Company establish in the accounting records of the Trust (which are attached to this resolution) separate accounts and ledgers, and record in these separate accounts and ledgers, income of the trust representing franked dividends derived by the trust in the 2015 Year. | As per above - but for franked dividends this time. |
| Distribution to Michael – income of the trust | <p>The Chair proposed that the Company as trustee for the Trust:</p> <p>(a) specifically allocate to Michael (in his capacity as a General Beneficiary of the Trust), in accordance with clause 3.6, the amount of \$900,000 representing a capital gain received by the trust in the 2015 Year and recorded in its character as a capital gain in the accounting records of the trust pursuant to clause 3.1</p> <p>(b) distribute to Michael (in his capacity as a General Beneficiary of the Trust) in accordance with clause 5.1 and 5.2 of the Trust Deed the amount referred to at (a), in its character as a capital gain</p> <p>(c) do all things necessary to pay the amount of \$900,000 to Michael as soon as practicable after a resolution in favour of this proposal is made.</p> | <p><i>In these minutes, the ‘income’ of the trust has been determined to be its section 95 (i.e. tax determined income).</i></p> <p><i>Under Example 1, where the net capital gain is \$900,000 and the CGT discount does not apply, the whole amount of the capital gain is included in the Trust’s income. As such, a ‘present entitlement’ to the whole amount of the capital gain, and to the ‘financial benefit’ referable to the capital gain, can be created just through a distribution of income.</i></p> <p><i>Under Example 2, where the gross capital gain is \$1,800,000 and the CGT discount does apply, the taxable part of the capital gain (\$900,000) is included in the Trust’s income and Michael can be made ‘presently entitled’ to this part of the capital gain, and the ‘financial benefit’ referable to the capital gain, through a distribution of income along these lines. However, a second step is required, to make Michael presently entitled to the CGT discount sheltered part of the capital gain (see below).</i></p> |
| Distribution to Michael – distribution of capital (required when streaming discount capital gain – sheltered component) | <p>The Chair proposed that the Company as trustee for the Trust:</p> <p>(a) distribute to Michael (in his capacity as a General Beneficiary of the Trust), in accordance with clause 9(a) of the Trust Deed the amount of \$900,000 of the capital of the Trust (that amount being a financial benefit referable to a capital gain made by the Trust but which is not included in the income of the Trust as determined by the Trustee for the Accounting Period ending 30 June 2015)</p> <p>(e) do all things necessary to pay the amount referred to at (a) to Michael as soon as practicable after a resolution in favour of this proposal is made.</p> | <p><i>As noted above, under Example 2, a capital distribution is required in order to get the part of the trust’s gross capital gain of \$1,800,000 that has been sheltered by the 50% CGT discount out to Michael, so that he gets the ‘financial benefit’ that is referable to the whole capital gain.</i></p> <p><i>As such, in this case, a second step is required i.e. a distribution to Michael from the trust capital.</i></p> |
| Distribution to Santino | <p>The Chair proposed that the Company as trustee for the Trust:</p> <p>(a) specifically allocate to Santino (in his capacity as a General Beneficiary of the Trust), in accordance with clause 3.6, the amount of \$210,000 representing franked dividends received by the trust in the 2015 Year and recorded in their character as franked dividends in the accounting records of the trust pursuant to clause 3.1</p> <p>(b) distribute to Santino (in his capacity as a General</p> | <p><i>This part of the minutes has been drafted to reflect that ‘franked dividends’ are being ‘streamed’ to Santino in their character as such and that he will receive the ‘financial benefit’ that is referable to these franked dividends.</i></p> <p><i>Note that, because of the way the determination of income has been made in</i></p> |

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| | <p>Beneficiary of the Trust) in accordance with clause 5.1 and 5.2 of the Trust Deed the amount referred to at (a), in its character as franked dividends</p> <p>(c) do all things necessary to pay the amount of \$210,000 to Santino as soon as practicable after a resolution in favour of this proposal is made.</p> | <p><i>these minutes, the franking credits themselves are (as a notional amount) not part of the trust income and so are not distributed. Based on the Commissioner's views in Draft TR 2012/D1, even if they were part of the trust's 'income', the franking credits could not be effectively distributed anyway and a 'specific entitlement' cannot be created to franking credits. This does not affect Santino's ability to utilise the franking credits.</i></p> |
| Distribution to Genco | The Chair proposed that the Company as trustee for the Trust distribute the income of the Trust other than the capital gain and franked dividends which have been specifically recorded, allocated and distributed as set out in this minute to Genco in its capacity as a General Beneficiary of the Trust. | <p><i>Note that the specific amount of Genco's distribution is not set out. According to the Commissioner's public pronouncements, this would be an acceptable resolution, on the basis that it provides a methodology by which Genco's distribution amount can be readily determined.</i></p> |
| Resolved | The meeting considered the Chair's proposals and resolved in favour of them. | |
| Secretary to do certain things | The Chair instructed the Secretary to do all things as were necessary to give effect to the resolutions passed at the meeting. | |
| Closure | There being no further business the Chair declared the meeting closed. | |
| Signed as a true and correct record. | | |
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| Chair | | |