

Explanatory Memorandum - Discretionary Trust.

The popularity of discretionary trusts is largely due to their asset protection and family succession qualities. They also provide a wide range of taxation and other benefits to those who use them wisely.

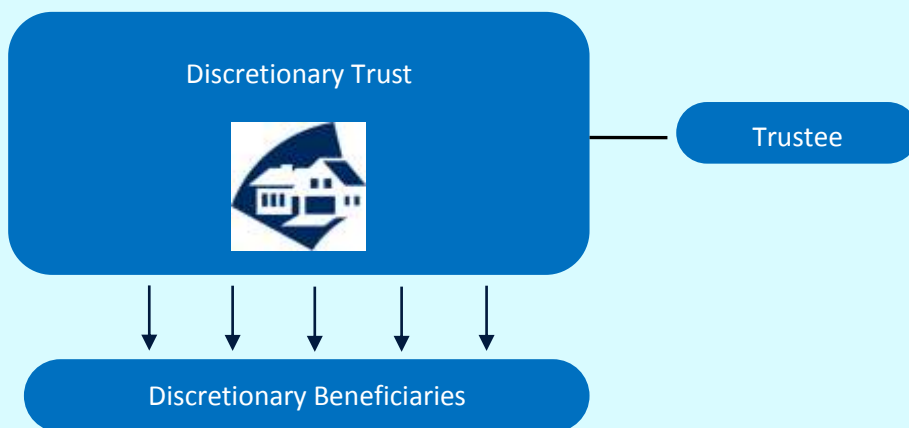
Explanatory Memorandums - Discretionary Trust

The following memorandum is provided as a guide to provide a general overview of the operation of a discretionary trust sourced from Macquarie Group Services. It is not intended to be an exhaustive nor complete statement, but should merely be viewed as an introduction to discretionary trusts in general (and ours in particular) and further reading is encouraged. Many accounting and legal matters have not been addressed, and the *Fringe Benefits Tax Assessment Act 1986* (Cth) and various other enactments, including the State and Territory stamp duty and land tax statutes, have implications which have not been exhaustively discussed here. Both Trustees and Beneficiaries should have an understanding of discretionary trusts, to enable them to exercise their rights, powers and duties in accordance with the Deed of Trust. The Deed of Trust should be read immediately by those parties, and any queries or concerns raised with their professional advisers.

Important Issues

To establish an effective discretionary trust careful consideration must be given to:

- Who and how many appointors there will be;
- Who will be the beneficiaries of the trust; and
- What powers will the trustee have in relation to investments and ability to determine who gets distributions of the profits of the trust.



Deed of Trust

A discretionary trust is usually established with the payment of an amount, called the Settlement Sum, to the Trustee to be held in accordance with the Deed of Trust for the benefit of the Beneficiaries. The Trustee is to hold all trust property (known as the Trust Fund) and invest such assets for the Beneficiaries. The Appointor may remove/replace the Trustee in accordance with the Deed of Trust.

The Deed of Trust provides for a Vesting Day on which the Trust is to terminate. On the Vesting Day, the Beneficiaries are entitled to the whole of the Trust Fund. Until that day, however, distributions of income or capital of the trust are made at the discretion of the Trustee, in accordance with the Deed of Trust.

Controller

Where a Controller of the Trust is named, that person is vested with the power to give the Trustee consent to act in various ways, eg. to appoint additional Beneficiaries, to determine an earlier Vesting Date and to vary the Deed of Trust. As the occupancy of this role is not mandatory, where its vacant the requirements for the Controller to provide such consent do not apply and the Trustee may generally act without constriction. The Family Court is likely to find that a Controller has control of the Trust for property settlement purposes.

Appointor

The Appointor has the power, exercisable by notice in writing and delivered to the Trustee, at any time and from time to time to remove any Trustee, and may also appoint any new or additional Trustee. This power is usually constrained by the inability of the Appointor to authorise the Settlor to be appointed as a Trustee.

There may be more than one Appointor at any given time and, upon the death or disability of a sole Appointor, their legal personal representative (if any) shall become the Appointor.

As the Appointor has effective control over the Trust, the Trust Fund is accountable in *Family Law Act 1975* (Cth) property settlement matters.

Settlor

A trust *inter vivos* (which means its formed during the life of its creator, as opposed to being formed under the Will of the creator) may be constituted either by a declaration of trust in respect of specified property, or by the settlement of money (the Settlement Sum) or other property by a person (the Settlor) upon the Trustee upon trust, to deal with it as provided in the Deed of Trust. Although its permitted, to avoid there potentially being serious taxation consequences, the Settlor should not be a Beneficiary of the Trust. For this reason, the Settlor is usually an unrelated person, eg. an employee of the solicitor or accountant's office, a relative or a friend, who provides the necessary funds to establish the Trust. The Settlor will relinquish their interest in the trust property and usually assume no further involvement in the affairs of the Trust – consequently, courts normally find that Settlers don't have control of trusts.

A liability to stamp duty usually arises in most jurisdictions when a trust is constituted and, therefore, consideration should be given to the amount of the Settlement Sum and any gifts or transfers of property to the Trust – the stamp duty liability will often be a function of the value of the gift or property transferred to the Trust.

Trustee

A trustee of an *inter vivos* express trust (which usually means that evidence for the creation of the trust exists in written or oral form) may be appointed:

- (1) by the settlor;
- (2) pursuant to an express power contained in the trust deed;
- (3) by the courts in certain instances; and
- (4) under the provisions of the various *Trustee Acts* of the States and Territories.

The Trustee of an MGS Discretionary Trust holds the legal title to the Trust Fund, and gains its powers from the Deed of Trust, legislation and from the common law.

The Trustee may be one or more individuals or a company (typically a \$2.00 corporate Trustee wherein the spouses or one of the spouses of a particular family unit are directors and shareholders).

Trustees owe a fiduciary duty to the Beneficiaries of the Trust, and also have various other duties, including the duty to: preserve the Trust Fund; keep and to render to the Beneficiaries full and candid accounts; act personally; acquaint and be familiar with the Deed of Trust; exercise reasonable care; act impartially between the Beneficiaries, subject to the terms of the Deed of Trust; act gratuitously and not to profit from the Trust; and the duty not to deal with the Trust Fund for their own benefit or otherwise to profit by the Trust.

While remedies are available for breach of duty, Beneficiaries generally do not have the power to compel the Trustee to exercise a discretion. The duties of a Trustee are many, and they may be held personally liable for debts incurred in their capacity as a Trustee. Nevertheless, the Trustee has the right of indemnity out of Trust assets for such liability, although it should be understood that it may sometimes occur that Trust assets are less than those liabilities.

A person or company may disclaim the Trust, if they do not wish to act as Trustee. However, to be effective, they must disclaim it in writing to the Settlor as soon as possible. A trusteeship may only be disclaimed before acceptance, and a Trustee may only retire after acceptance if:

- (1) they're authorised by the trust deed to do so;
- (2) a new Trustee is appointed in their stead;

- (3) if the conditions prescribed by a provision in a *Trustee Act* of a State or Territory are satisfied; or
- (4) if its permitted by a court.

If the Trust is a trading trust, then its advisable that the Trustee be a company rather than individuals. In all cases, however, resolutions should be signed and maintained when the Trustee makes a decision or takes an action.

The Trustee is to maintain proper accounting records (including books of accounts), which show all receipts, payments and distributions of income. A Profit and Loss Statement and a Balance Sheet should be prepared, and all relevant returns and statements lodged with the various revenue authorities where any relevant income is derived, assets held or activities are engaged in by the Trust.

Primary and other Beneficiaries

Where such a person is named, they become a Beneficiary of the Trust – all other Beneficiaries have that capacity by virtue of their relationship to the Primary Beneficiary. For example, the spouse, parent, grandparent and child of the Primary Beneficiary are all automatically included as beneficiaries of the Trust, without having to be specifically identified by any particular action or in any documentation. Although its not a requirement, the Primary Beneficiary may also be the “test individual” for the purposes of Family Trust Elections.

A Beneficiary does not have any proprietary interest in the Trust Fund (*Gartside v IRC* (1968) AC 553) and has no interest in the Trust Fund pending the completion of administration. Instead, the Beneficiary's interest is a *chose in action* which entitles them to a right of due administration, ie. to call upon the Trustee to deal appropriately with the income and or capital of the Trust. In other words,

the Beneficiaries have the right to secure proper administration of the Trust, including the proper management and exercise of the Trustee's power and discretions.

Distribution of Income

Distributions from a Trust may take many forms, and have different implications for a Trustee and a Beneficiary. The Trust Deed allows the Trustee various alternatives in dealing with the net Trust income earned in each financial year. These alternatives, and their taxation ramifications, are that:

- (a) the Trustee may distribute the net Trust income amongst the Beneficiaries, or any one or more of them, in such proportions as it determines. All the net trust income can be distributed to one Beneficiary to the exclusion of others, it can be distributed equally amongst them, or it can be distributed disproportionately.

If the whole of the net trust income is distributed to adult Beneficiaries, the amount received by each of them is taxable in their hands as an addition to their total assessable income. Thus, if a particular Beneficiary received a distribution of \$10 000 from the Trustee, and also earned salary/wages of \$40 000 in the same period, for example, then their total assessable income for the year in question would be \$50 000. Their tax liability would be the amount of tax personally payable by them on a total assessable income of \$50 000 less any deductions;

- (b) tax on income held on trust for, or applied for the benefit of, Beneficiaries under the age of 18 (or any other Beneficiary under a legal disability) is effectively paid by the Trustee on behalf of the Beneficiary. Special provisions apply where such a Beneficiary has income from other sources, and higher rates of tax apply to income held, applied or distributed to minors - in general, \$416 in

total may be safely distributed to an child Beneficiary without attracting the higher rates of tax;

- (c) in any particular year, the Trustee may determine not to distribute *any* proportion of the net income of the Trust, but, rather, to accumulate that income as an addition to the Trust Fund. In these circumstances, the Trustee is liable to pay tax on the net income of the trust at the highest personal rate.

Nevertheless, in exceptional circumstances, the Commissioner has a discretion not to apply the highest rate to accumulated trust income. Where his discretion is so exercised, the ordinary tax rates applicable to an individual earning salary or wages of an identical amount to the distribution is applicable.

Income accumulated by the Trustee in this way then forms capital of the Trust Fund and, when its distributed to the Beneficiaries on the Vesting Day, is not taxable in the hands of those Beneficiaries;

- (d) the Trustee may decide to distribute only a part of the net trust income and to accumulate the balance. In these circumstances, the amounts received by Beneficiaries would be taxable in their hands in the manner described in paragraphs (a) or (b) above, and the balance retained and accumulated by the Trustee would be taxable in the Trustee's hands in the manner described in paragraph (c) above; and
- (e) in the absence of any written determination by the Trustee to distribute or accumulate the net trust income in a particular year, that income is accumulated automatically as an addition to the Trust Fund and the tax consequences outlined in paragraph (c) above apply.

Distribution of Capital Gains

As a result of the existence of taxation on capital gains, careful consideration will need to be given to the consequences for the Trust of various types of transactions which may give rise to a taxable capital gain.

In particular, if the Trustee sells a trust asset to an arm’s-length person and realises a gain on the disposal, the gain will be included in the assessable income of the Trust to be distributed or accumulated in the same way as any other income. Capital losses may be subtracted from the gain (but not from any other type of income) before a net amount is included as assessable income of the Trust.

It is sometimes the case that the “accounting” income of a Trust is not equal to its net income according to tax law – this often arises due to the difference in the treatment of consideration received on the disposal of CGT assets. The now judicially accepted “proportionate theory” (acknowledged by the Commissioner of Taxation in Practice Statement PS LA 2005/1 (GA)) essentially provides that where there are differences between accounting and tax law income for a Trust arising from the disposal of its CGT assets, the distribution (and assessability) of its realised capital gains to the Beneficiaries will be in the same proportion as the distribution of its ordinary income.

Other situations may give rise to deemed capital gains and, therefore, require careful consideration. For example, if Trust assets are appointed or distributed to any particular Beneficiary, the Trustee is regarded as having sold the asset to that Beneficiary at its then market value and a capital gain may arise (depending on the cost-base of the asset). Consideration needs to be given to whether the capital gain should be allocated to the same Beneficiary (usually the most appropriate person in the circumstances) or some other Beneficiary – the taxable capital gain will, thus, form part of the income of the Beneficiary to whom it is allocated, and its **Clause 3.1** of the Deed of Trust which permits the Trustee to make this allocation.

Other Distribution Matters and Distributions to Minors

Very importantly, a decision in relation to the income of the Trust should be made before 30 June in each and every year by the Trustee, and such decision recorded in a written resolution of the Trustee on or before that date (see Income Tax Ruling IT 347). The resolution may be prepared and signed after 30 June, provided that it records what actually took place on or before 30 June. Although the long-standing practice of the Commissioner of Taxation is to allow two months for such a decision to be made (ie. up until 31 August in each year), that stance is not law and may be ignored by the Australian Taxation Office (or any other revenue authority) without it having to provide any justification.

A problem obviously arises, then, in that until accounts for the Trust for a financial year have been prepared, it may well be impossible to estimate with accuracy the amount of the net income of the Trust. This difficulty can be overcome by the Trustee resolving on or before 30 June to distribute the income in proportions - for example:

Beneficiary	Proportion %
X	50
Y	30
Z	<u>20</u>
	<u>100</u>

Alternatively, if its desired to set aside a specific sum for a Beneficiary or Beneficiaries, its possible for the distribution resolution to be as follows:

- To Beneficiary V - the first \$5000 of the net Trust income.
- To beneficiary W - the next \$2000 of the net Trust income.

As to the balance of the net Trust income, to the following Beneficiaries in the following proportions:

Beneficiary	Proportion %
X	50
Y	30
Z	<u>20</u>
	<u>100</u>

After the exact amount of the net Trust income is known, and the proportion to which each Beneficiary is entitled has been calculated, those specific amounts should be recorded in further Trustee resolutions.

Notably, a distribution to a Beneficiary need not entail a physical payment to them. If the Trustee wishes to retain the money which it has decided to distribute to a particular adult Beneficiary, then it may, with the consent of the relevant Beneficiary, establish a loan account in the books of the Trust in their name, and then credit the amount of the distribution to that loan account. The Trustee can then deal with the amount of the loan in accordance with the powers given to it by the Deed of Trust, but the Beneficiary can call for payment of the amount credited to their account at any time in the absence of any arrangement to the contrary. It should be remembered, however, that the amount credited to the Beneficiary's loan account is assessable income to them and will also constitute "property" for the purposes of the *Bankruptcy Act 1966* (Cth).

Where the Trustee resolves to distribute part of the trust income to a Beneficiary who is a minor, the Deed of Trust provides for the Trustee to hold the amount of the distribution (and any future distributions to the same child) in trust for them until the child attains the age of majority. This trust is separate to the Discretionary Trust from which the child receives the initial income. The Trustee has no discretion as to the persons entitled to the income of the separate trust,

ie. its obliged to hold the trust fund for the particular child concerned. The whole of the capital and income of that separate trust belongs to the nominated child Beneficiary when they reach the age of majority.

Notably, the Trustee has certain additional powers given to it, in respect of separate trust funds for child Beneficiaries. In particular, it may apply money held for such Beneficiaries in payment of education, clothing and other similar expenses which are for the maintenance, education or benefit of the Beneficiary, reducing the actual amount due to the Beneficiary. Alternatively, it can pay the whole or any part of the money held to the parent or guardian of the child. The receipt of a parent or guardian for money paid to them on behalf of their child is a sufficient receipt for the Trustee, and the Trustee is not required to concern itself as to the way in which the parent or guardian then deals with the money paid to them.

The Trustee may loan the separate trust fund back to the main Trust, or invest it in any investment authorised by the Deed of Trust - but if any income is earned as a result of that investment, it is assessable income of the child Beneficiary and tax is payable at higher rates than under normal circumstances (as discussed above).

The situation could arise where an child Beneficiary approaching the age of majority is entitled to receive a substantial amount from the Trustee, the payment of which would be a matter of some difficulty. If this situation arises, its possible to avert the necessity for the Trustee to actually make a payment of the amount due, and discussions with professional advisers at the appropriate time are recommended.

Distribution of Corpus

On the winding-up of the Trust on the Vesting Day, or at any time before, the Trustee may exercise its discretion as to the manner in which the corpus (sometimes referred to as the "capital") of the Trust Fund will be distributed to the various Beneficiaries in accordance with the Deed of Trust. Corpus usually includes amounts settled on the Trust, or amounts that do not form part of its net income, eg. depreciation.

From the Vesting Day, any assets belonging to the Trust or constituting the Trust Fund are held by the Trustee until payment or transfer specifically for the Beneficiaries, and in the proportions in which the Trustee has exercised its discretion. Failing the exercise of that discretion, payments or transfers are made in accordance with the default clauses of the Deed of Trust.

The Trustee need not realise the assets of the Trust on the Vesting Day and distribute monies to the Beneficiaries – indeed, the Trustee may transfer those assets to the Beneficiaries *in specie*, ie. in kind.

Entering into Contracts

It is the Trustee who enters into contracts on behalf of the Trust and, although the Trustee is not required to state its capacity, it is advisable to do so and avoid confusion as to the beneficial ownership of assets and rights. If asked whether a person or entity is acting in the capacity of Trustee, it would be advised that responses be both factual and in good faith.

Resolutions

When undertaking any transactions, including the acquisition of assets or making distributions from the Trust, the Trustee should evince its intention to do so by way of resolution. Resolutions should be filed in the Trust binder, and maintained as a record of the decisions and agreements affecting the Trust Fund and/or its net income. As noted above, a resolution by the Trustee to distribute the net Trust income should be made on or before 30 June each year.

Memorandum of Wishes

A Memorandum of Wishes should be used where a person establishes a Discretionary Trust which will hold property which would otherwise form part of their assets (see the sample at the end of this document).

As the assets of a Trust do not form part of their estate, Beneficiaries should express a wish that their Executor administer the Trust as if the Trust Funds

were assets forming a part of their estate, ie. in accordance with their Will.

It must be emphasised that such a Memorandum of Wishes is not binding on the Executor, the Trustee, the Beneficiaries nor the Estate, and care should be taken to ensure that the Executor is someone who will honour the Beneficiaries' wishes in respect of the administration of the Trust.

Income Streaming

Trust income retains its character when it is distributed to Beneficiaries. Therefore, if a Trust derives interest income, trading income and capital gains, each Beneficiary who receives a distribution of net Trust income will receive a proportion of each of those types of income, and the tax paid by them must be calculated accordingly.

Trust distributions can be made more tax-effective by employing the process known as streaming. Streaming is the distribution of different types of income and capital gains to particular Beneficiaries, in order that the overall tax payable by all Beneficiaries and the Trustee is minimised.

Income streaming equally applies to Hybrid Discretionary, Discretionary, Hybrid Unit and Unit Trusts, and all types of trust income can be streamed. It is simply a matter of analysing the Beneficiaries' tax positions, and then streaming the various types of income to different Beneficiaries to minimise the overall tax payable.

Income Streaming Possibilities

Capital gains to Beneficiaries who can apply capital losses against them.

Capital gains to Beneficiaries on low marginal tax rates. Capital gains from collectibles to Beneficiaries who can apply capital losses from collectibles against them.

Interest income, royalties and unfranked dividends to non-resident Beneficiaries to make use of the lower

withholding tax rates.

Trading income, dividends, etc. to Beneficiaries on low marginal rates of tax or who have carry-forward income losses.

Foreign source income to non-resident Beneficiaries so that no tax is payable.

Refinancing

As with all other types of Trusts, the “refinancing principle” from *FC of T v. Roberts & Smith* 92 ATC 4380, would allow the Trustee of a Discretionary Trust a deduction for interest expenses incurred on funds borrowed and used to reduce or extinguish a Beneficiary’s interest in the corpus, or which is used to discharge a liability to pay a Beneficiary a share of the income of the Trust.

Family Law Acts and Trusts

It is not proposed to discuss in any detail the impact which certain provisions of the *Family Law Act 1975* (Cth) may have on trusts. The following is intended only as an alert to the possibility of interference by the Family Court in plans or arrangements which may be contemplated by a person whose marital situation is not secure. In any such case, it would be prudent to seek legal advice from someone well-versed in the *Family Law Act 1975* (Cth) before executing any trust, particularly one which is intended to preclude or limit claims which may be made by a (former) spouse or partner. Nevertheless, brief mention should be made of several of the powers which the Family Court has and which, in certain circumstances, may affect provisions contained in a trust, and the exercise of discretionary powers conferred by the Deed of Trust upon the Trustee.

Problems would usually only arise where there is a marital or relationship break-up. When this occurs, the Family Court has wide powers in relation to the property of the parties to the marriage or relationship. The pitfall, into which the unwary may fall, is to believe that if income-producing assets are transferred to a Discretionary Trust, the exercise of the discretionary powers by the

Trustee is immune from interference by the Family Court.

For example, where there is a Trust the ultimate Beneficiaries of which are the children of the Settlor, the Court’s considerable powers in regard to the maintenance of those children will generally include the ability to appoint or remove Trustees (paragraph 80(1)(e) of the *Family Law Act 1975* (Cth)). Thus, for example, the Court could remove the existing Trustee and appoint the divorced spouse or former partner to that role. Again, if a person who fears that their marriage or relationship is about to break-up transfers assets to a Discretionary Trust, in the hope that it will prevent their spouse or partner from making claims against them, this may prove to be false hope. Under subsections 90AF(1) and 90AF(2) of the *Family Law Act 1975* (Cth), the Family Court has power to make any order or to grant any injunction that directs a third-party to do a thing in relation to the property of a party to a marriage, or which alters the rights, liabilities or property interests of a third-party in relation to a marriage.

As a result, even if a person causes assets and/or income to be held by a Discretionary Trust simply for tax-planning reasons, and with no thought of avoiding any claim by their spouse or partner, the provisions of the Trust may not be inviolate. This may be so, even if the assets were never the property of that person or the subject of any disposition made by that person. In other words, where the Trust Fund can be applied for the benefit of a couple and their children, it appears that the Family Court would be able to treat it as family property and would have wide powers in relation thereto.

Nevertheless, the Court will not find that a party has control of a Trust merely by virtue of being a Beneficiary *per se*. Although a Beneficiary has a right to call upon the Trustee to deal with the Trust Fund in a manner appropriate to the due administration of the Trust, which is an equitable *chose in action* which is itself “property” in the strict sense, the Beneficiary has no interest, vested or contingent, in the Trust

Fund itself, nor in any particular asset of the Trust. Thus, unless the Trust was the Beneficiary's alter ego or "puppet" the only property of the Beneficiary is their equitable *chose in action* (*Shaw and Shaw* (1989) FLC ¶92-030 at p 77,416). In fact, the Family Court has given an extremely wide meaning to the word "property" (see *Duff and Duff* (1977) FLC ¶90-217 at p. 76,127), and it may not avail a person to contend that, as a discretionary Beneficiary of the Discretionary Trust, their right or interest is not "property" within the meaning of the *Family Law Act 1975* (Cth).

Further, as stated above, as the Appointor has effective control over the Trust, the Trust Fund is accountable in *Family Law Act 1975* (Cth) property settlement matters, and it is also likely that the Family Court would find that a Principal has control of the Trust for property settlement purposes.

Minors

Careful consideration must be given when distributing either income or capital to minors (who, for the purposes of the Income Tax laws are natural persons under 18 years of age). This is because of the penal rates of tax that apply to such distributions, which are as follows.

Where the eligible taxable income of a resident minor is less than a threshold (\$417 for the 2009/2010 financial year) the special (higher) rates do not apply; instead the general rates applicable to resident adults apply to the whole of the taxable income. Resident minors may also be eligible for the rebate for low income-earners, which effectively increases this threshold, if the minor has no other income.

Where the eligible taxable income of a resident minor is within a certain band (ie. in excess of \$416 and less than \$1308 for the 2009/2010 financial year), then the tax on the eligible taxable income is the greater of:

- (1) 66% of the excess over the lower threshold; and
- (2) the difference between tax on the whole of the taxable income and the tax on the taxable income other than the eligible taxable income.

Where the eligible taxable income exceeds the upper threshold (\$1307 for the 2009/2010 financial year), tax is payable on the whole of the eligible taxable income at the highest marginal rate.

However, this is not the case where the Trust is a Capital Vested (or Child Maintenance) Trust, in which case income distributed to minors is taxed at non-penal adult rates. Capital Vested Trusts are created at the death of a person or upon a marriage or relationship break-up, whereby the assets of the Trust must vest in the Capital Vested Beneficiaries. Before any distributions are made to any minors, the Trustee should consult their accountant or financial adviser.

Stamp Duty and Land Tax

Most State/Territory statutes dealing with the imposition of land tax provide for special non-concessional rates of such an impost for land held in trusts that are not "fixed." Although the definitions of what constitutes a "fixed" trust for these purposes varies between the jurisdictions, it usually requires that all of the interests to the income and capital of the relevant trust are vested and indefeasible – this cannot be said of a Discretionary Trust.

If any queries exist or a further explanation is required following reading the above together with the Deed of Trust, please contact your professional adviser.

MEMORANDUM OF WISHES

- A. This Memorandum is made with a view to indicating to the Executors of my estate the manner in which they should deal with the assets and affairs of Trust *inter vivos* which are effectively controlled by me during my lifetime.

The Memorandum is signed in the knowledge at my Executors will not be bound by the terms of this Memorandum; in the expectation however that my Executors will use their best endeavours to ensure that the terms of this Memorandum will be implemented as nearly as may be possible and prudent in the light of circumstances generally and circumstances in respect of the persons I wish to see benefit from those Trusts in particular as those circumstances emerge from time to time during the administration of the Trusts in question.

- B. Subject to the foregoing, **I EXPRESS MY WISH** that after my death the assets of the Trust specified below be so administered as to pass to the Beneficiaries of that trust in such a way as to ensure, as nearly as possible, the distribution of the Trust Fund of a that trust to the persons entitled to my personal estate in pursuance of my Will in the proportions specified in my Will and in all respects (including the timing of any distribution) as if the assets of that trust were assets of my personal estate.

TRUST:

DATED:

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