

# Schedule 10 – Discretionary Trust Deed: Wajarri Yamatji General Trust

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See Following

# Discretionary Trust Deed

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Wajarri Yamatji General Trust

**STATE OF WESTERN AUSTRALIA (Settlor)**

**[insert name of WY TRUSTEE COMPANY] (First Trustee)**

# Discretionary Trust Deed

## Wajarri Yamatji General Trust

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# Details

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## Date

## Parties

Name The **State of Western Australia** represented by the Office of Native Title, Department of the Attorney General of 2<sup>nd</sup> Floor, 197 St Georges Terrace, Perth WA, 6000

Short form name **Settlor**

Notice details Address: c/- Office of Native Title, Department of the Attorney General, 2<sup>nd</sup> Floor, 197 St Georges Terrace, Perth WA, 6000

Fax No: (08) 9222 9877

Name **[insert name of WY Trustee Company]**

Short form name **First Trustee**

Notice details Address: *[insert details]*

Fax No: *[insert details]*

## Recitals

A In accordance with the terms of the Murchison Radio-astronomy Observatory Indigenous Land Use Agreement (**MRO ILUA**) made on *[insert date]* between the Settlor, the Minister for Lands, the Commonwealth Scientific and Industrial Research Organisation, the Commonwealth of Australia represented by the Department of Innovation, Industry, Science and Research, Yamatji Marlpa Aboriginal Corporation and the registered native title claimant of the WY Claim, the Settlor wishes to establish a fund as outlined below.

B The Settlor has paid the Settled Sum to the First Trustee, to be held by the Trustee on trust subject to the terms of this Deed.

# Operative part

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## 1. Defined terms & interpretation

### 1.1 Defined terms

In this Deed unless the context requires otherwise:

**Annual Plan** means a plan for the activities of the Trust during a Year of Income prepared in accordance with clause 12.5.

**Annual Report** means the annual report of the Trust prepared in accordance with clause 12.6.

**Appointor** means the State of Western Australia or such other person or persons for the time being having the power to remove or appoint the Trustee under clause 11.

**Approved Auditor** means a person who is:

- (a) registered as a company auditor under the *Corporations Act 2001* (Cth) or an appropriately qualified member of the Institute of Chartered Accountants in Australia or of CPA Australia;
- (b) not a principal, member, shareholder, officer, agent, subcontractor, employee or related entity of the Trustee or of a related body corporate within the meaning of that term in the *Corporations Act 2001* (Cth); and
- (c) not the Trustee's or the Trust's Qualified Accountant.

**Approved Body Corporate** means [*insert name of Approved Body Corporate*] (ABN [*insert ABN*]) of [*insert address*], an Aboriginal and Torres Strait Islander corporation established in accordance with clause 8 of the MRO ILUA.

**Associate** means:

- (a) if the Trustee is or includes a corporation, any director or member of the Trustee;
- (b) a partner, joint venturer or other business associate of the Trustee; and
- (c) if the Trustee is trustee of any other trust fund, a co-trustee or beneficiary of that other trust fund.

**Australian Accounting Standards** refers to the standards of that name maintained by the Australian Accounting Standards Board created by section 226 of the *Australian Securities and Investments Commission Act 2001* (Cth).

**Australian Auditing Standards** refers to the standards made by the Auditing and Assurance Standards Board created by section 227A of the *Australian Securities and Investments Commission Act 2001* (Cth).

**Business Day** means a day that is not a Saturday, Sunday, bank holiday or public holiday in Western Australia, Australia.

**Business Hours** means from 9.00 am to 5.00 pm on a Business Day.

**Beneficiaries** means:

- (a) each member of the WY Claim Group;
- (b) each trust in which any of the members of the WY Claim Group is a beneficiary (present, contingent or prospective);

- (c) each corporation in which any of its shares are beneficially owned by any of the persons or trusts described in paragraphs (a) and (b);
- (d) the Approved Body Corporate; and
- (e) the Charitable Fund,

PROVIDED THAT the Settlor or any person claiming under or in right of the Settlor at any time will be excluded from the class of Beneficiaries.

**Charitable Fund** means the Wajarri Yamatji Charitable Fund established by deed dated *[insert date]*.

**Deed** means this deed as from time to time amended and in force.

**Determine** means determine in writing or at a meeting of which minutes are kept.

**Dispute** means a dispute in relation to the administration and operation of the Trust.

**Distributable Income** means the amount determined by the Trustee to be the Distributable Income of the Trust in relation to a Year of Income and may be at the discretion of the Trustee:

- (a) equal to the income of the Trust as determined by the application of recognised accounting principles;
- (b) equal to the net income of the trust estate for the purposes of section 95 of the Income Tax Assessment Act; or
- (c) an amount falling between the amounts calculated in accordance with (a) and (b) of this definition,

and if the Trustee fails to exercise its discretion shall be the lesser of the amounts calculated in accordance with (a) and (b) of this definition.

**Distribution Policy** has the meaning given in clause 4.6(a).

**Income** includes income of all kinds which may be or become subject to this Trust and which is or is liable to be assessed as income under the Income Tax Assessment Act, notwithstanding that all or part of that income may at trust law or under accountancy standards otherwise constitute capital.

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

**LEADR** means the dispute resolution organisation of that name. If LEADR ceases to exist as an organisation, then **LEADR** shall be taken to mean any other dispute resolution organisation with similar objects agreed by a majority of the parties to the relevant dispute or, if no majority agreement can be reached, decided by the party that first notified the relevant dispute.

**Liaison Committee** means the consultative committee established pursuant to clause 18 of the MRO ILUA

**MRO** has the meaning given in clause 1.1 of the MRO ILUA.

**MRO ILUA** means the Murchison Radio-astronomy Observatory Indigenous Land Use Agreement made on *[insert date]* between the Settlor, the Minister for Lands, the Commonwealth Scientific and Industrial Research Organisation, the Commonwealth of Australia represented by the Department of Innovation, Industry, Science and Research, Yamatji Marlpa Aboriginal Corporation and the registered native title claimant of the WY Claim and registered as an Indigenous Land Use Agreement on the Register of Indigenous Land Use Agreements established under section 199A of the NTA on *[insert date]*.

**Non-Native Title Parties** has the meaning given in clause 1.1 of the MRO ILUA.

**NNTT** means the National Native Title Tribunal established by section 107 of the NTA.

**NTA** means the *Native Title Act 1993* (Cth).

**Qualified Accountant** means a person who is a member of the Institute of Chartered Accountants in Australia or of CPA Australia.

**Ratification Deed** means the deed entered into between the Settlor, the Minister for Lands, the Commonwealth Scientific and Industrial Research Organisation, the Commonwealth of Australia represented by the Department of Innovation, Industry, Science and Research, Yamatji Marlpa Aboriginal Corporation, the registered native title claimant of the WY Claim, the Approved Body Corporate and the First Trustee on [*insert date*] in accordance with clause 11.2 of the MRO ILUA.

**Schedule** means a schedule to this Deed, and includes the schedule as amended or replaced from time to time by agreement in writing between the parties.

**Set Aside** means a decision of the Trustee to set aside or credit a Beneficiary with any moneys pursuant to this Deed. Immediately upon such a decision being made that Beneficiary shall be deemed to be presently entitled to those moneys even if:

- (a) that decision refers to a proportion and the amount of those moneys is not known until after that decision; or
- (b) the entry of the amount of those moneys to the credit of that Beneficiary in the books of account of the Trust Fund is not made until after that decision.

**Settled Sum** has the meaning set out in clause 2.2(a)(ii).

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

**Trust** means the trust created by this Deed and named in clause 2.1.

**Trustee** means any trustee or trustees for the time being of the Trust, whether the First Trustee or any additional or substituted trustee.

**Trustee Budget** has the meaning given in clause 8.3(a).

**Trustees Act** means the *Trustees Act 1962* (WA).

**Trust Fund** means:

- (a) the Settled Sum;
- (b) any money, investments or other property having the nature of either capital or Income paid, transferred, acquired or accepted by the Trustee as an addition to the Settled Sum;
- (c) any accumulations of Income;
- (d) all accretions to the Trust Fund; and
- (e) the money, investments and property from time to time being representing the above or into which they are converted,

and includes any part of the Trust Fund.

**Vesting Date** means 30 June 2088 or such earlier date as the Trustee determines pursuant to clause 15(c).

**WY Claim** means the native title determination application with NNTT file number WC04/10, Federal Court file number WAD 6033/98, and known as the Wajarri Yamatji native title claim.



**WY Claimants** means the applicant and registered native title claimant for the WY Claim. Where there has been a determination of native title made in respect of any part of the WY Claim that includes some or all of the MRO and if a registered native title body corporate (as defined in section 253 of the NTA) is determined to hold the rights and interests from time to time comprising the native title in trust for the WY Claim Group, then **WY Claimants** means that registered native title body corporate.

**WY Claim Group** means all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the native title claimed under the WY Claim and as described in the WY Claim.

**WY Contracting Entity** has the meaning given in clause 1.1 of the MRO ILUA.

**Year of Income** means (until otherwise decided by the Trustee pursuant to item 7.1 of Schedule 1) each period of 12 months ending on 30 June in each year but the period from the date on which this Deed is made until 30 June next occurring shall be deemed to be a Year of Income and the period commencing on 1 July next preceding the Vesting Date until the Vesting Date shall be deemed to be a Year of Income.

## 1.2 Interpretation

In this Deed, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, item or Schedule is to a clause or item of, or Schedule to, this Deed, and a reference to this Deed includes the Schedules;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (f) a reference to time is to Western Australia time;
- (g) a reference to a party is to a party to this Deed, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (j) the meaning of general words is not limited by specific examples introduced by including, 'for example' or similar expressions;
- (k) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (l) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (m) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Deed or any part of it; and

- (n) if any conflict arises between the terms and conditions contained in the clauses of this Deed and the Schedules, the terms and conditions of the clauses of this Deed prevail.

### 1.3 Headings

Headings are for ease of reference only and do not affect interpretation.

## 2. Establishment of trust

### 2.1 Name

The trust created by this Deed will be known as the Wajarri Yamatji General Trust (**Trust**)

### 2.2 Declaration of trust

For the purpose of establishing the Trust:

- (a) the Settlor:
- (i) appoints the First Trustee to be the trustee of the Trust; and
  - (ii) settles on the Trustee the sum of \$4,000,000.00 (**Settled Sum**) to be held on trust and subject to the terms and conditions of this Deed; and
- (b) the Trustee:
- (i) accepts appointment as the trustee of the Trust;
  - (ii) acknowledges receipt of the Settled Sum; and
  - (iii) declares that it holds the Settled Sum and will hold the Trust Fund on trust for the Beneficiaries subject to the terms and conditions of this Deed.

### 2.3 Objects of trust

The Trust is established solely for, and shall be maintained solely to, hold and receive Trust Funds for the benefit, promotion and advancement of the Beneficiaries and to distribute those Trust Funds equitably amongst the current and/or future generations of Beneficiaries having regard to the needs and priorities of the Beneficiaries both individually and collectively.

## 3. Beneficiaries

- (a) For the purpose of establishing whether a person or body is a Beneficiary, the inclusion of that person or body on:
- (i) the list of members of the Approved Body Corporate; or
  - (ii) the list of WY Contracting Entities compiled and provided under clause 13.2 of the MRO ILUA,

shall be determinative of that person's or body's status as a Beneficiary for the purpose of this Deed, provided that the Trustee is satisfied on a reasonable basis that the lists referred to in clauses 3(a)(i) and 3(a)(ii) were compiled on a just and fair basis having regard to the constitution of the Approved Body Corporate or the provisions of the MRO ILUA (as the case may be).

- (b) Where clause 3(a) does not apply, the Trustee may have regard to any material that the Trustee considers appropriate to determine, at the Trustee's absolute discretion, whether a person or body is a Beneficiary, including, but limited to,:
- (i) the findings of any genealogical or anthropological study conducted in relation to

- the WY Claim Group;
- (ii) a recommendation made by the directors of the Approved Body Corporate;
  - (iii) a resolution of the members of the Approved Body Corporate given at a general meeting of the Approved Body Corporate; or
  - (iv) the views expressed at the yearly meeting of members of the WY Claim Group referred to in clause 6.
- (c) Notwithstanding clauses 3(a) and 3(b), a person or body is a Beneficiary where a court or tribunal has made a determination or declaration to that effect.

## 4. Distribution of Trust Fund

### 4.1 Distribution of Income

- (a) Until the Vesting Date the Trustee may in each Year of Income:
- (i) determine that the Distributable Income (or any part of it) arising during that Year of Income will be applied in making good any loss or outgoing incurred in any previous Year of Income;
  - (ii) determine to accumulate the Distributable Income (or any part of it) arising during the Year of Income and any accumulation shall be dealt with as an accretion to the Trust Fund; and
  - (iii) pay, divide, apply or Set Aside at any time during the Year of Income the Distributable Income (or any part of it) to, or between, all or any one or more of the Beneficiaries in existence on the date of that decision in such proportions and manner as the Trustee may determine.
- (b) The Trustee must distribute so much of the Distributable Income as the Trustee has not dealt with pursuant to clause 4.1 to the Charitable Fund.

### 4.2 Capital Distributions

The Trustee may, at any time or times prior to the Vesting Date, pay out or apply the capital of the Trust Fund to, or for the benefit of, all or any one or more of the Beneficiaries in such proportions and in such manner as the Trustee thinks fit.

### 4.3 In specie distribution

The Trustee may appropriate any part of the Trust Fund in its actual condition or state of investment at the time of appropriation in, or towards, satisfaction of any interest or entitlement of any person in the Trust Fund.

### 4.4 No Distribution to Settlor

Despite any other provision of this Deed:

- (a) the Trust Fund must be held and enjoyed to the entire exclusion of the Settlor and of any benefit to the Settlor;
- (b) no part of the Trust Fund may be paid, transferred or distributed, directly or indirectly to or for the benefit of the Settlor; and
- (c) no power conferred upon the Trustee hereby or by law or otherwise is capable of being exercised in any manner directly or indirectly for the benefit of the Settlor.

## 4.5 No Distribution to Trustee

The Trust is to be carried out without purpose of profit or private gain for the Trustee or any directors or members of the Trustee. No part of the Trust Fund may be paid, transferred or distributed, directly or indirectly, to or for the benefit of the Trustee or any of its directors or members, PROVIDED THAT nothing in this clause shall prevent the payment by the Trustee in good faith of:

- (a) remuneration for goods supplied, or services rendered, to the Trust in the ordinary course of business;
- (b) remuneration for the Trustee, or any of its directors or members under clause 8; or
- (c) the Trust Fund to any one or more of the Beneficiaries, including the Charitable Fund.

## 4.6 Distribution Policy

- (a) In consultation with the Approved Body Corporate, the Trustee must make a distribution policy (**Distribution Policy**) that specifically applies to the Trust and the Trust Funds.
- (b) The first Distribution Policy must, following consultation with the Approved Body Corporate, be set out in a form substantially similar to that set out in Schedule 2.
- (c) Subject to clause 4.6(d), the Distribution Policy may at any time be amended by the Trustee, provided the amended Distribution Policy is consistent with the terms and conditions of this Deed and the objects of the Trust.
- (d) The Trustee must consult with the Approved Body Corporate before amending the Distribution Policy.
- (e) The amended Distribution Policy will apply to and replace the then current Distribution Policy from the date of signing until amended in accordance with this clause 4.6.
- (f) The Trustee may, but is not obliged to, accept any opinions, advice or recommendations of the Approved Body Corporate in relation to the Distribution Policy. For the avoidance of doubt, any opinions, advice or recommendations expressed by the Approved Body Corporate in respect of the Distribution Policy are recommendations only and do not bind the Trustee in any way.
- (g) Nothing in this clause 4.6 has the effect of fettering the absolute discretion of the Trustee in the discharge of the Trustee's duties.
- (h) For the purpose of this clause 4.6, if at any time the Approved Body Corporate enters into liquidation, or has a receiver, receiver and manager or administrator appointed or makes or enters into any composition or scheme or arrangement with its creditors, any requirement of the Trustee to consult with the Approved Body Corporate will be satisfied where the Trustee consults with the WY Claimants.

# 5. Trustee's powers and discretions

## 5.1 Powers of Trustee

- (a) In addition to the powers, duties, authorities and discretions vested in the Trustee by law, the Trustee has the powers, duties, authorities and discretions set out in the Schedules.
- (b) For the avoidance of doubt, the powers, duties, authorities and discretions vested in the Trustee under this Deed are to be treated as supplementary or additional to the powers, duties, authorities and discretions vested in the Trustee by law.

- (c) The Trustee has the power to do all other things as may be incidental to the exercise of the powers, duties, authorities and discretions conferred on the Trustee by this Deed.

## 5.2 Trustees Act powers

- (a) Subject to any provision to the contrary in this Deed, the provisions of the Trustees Act apply to the Trust.
- (b) The powers, duties, authorities and discretions in this Deed are in addition to, and do not derogate from, the powers, duties, authorities and discretions contained in the Trustees Act. In the case of any inconsistency between the powers, duties, authorities and discretions contained in the Trustees Act and those contained in this Deed, the powers, duties, authorities and discretions contained in this Deed prevail to the extent of that inconsistency.

## 5.3 Trustee's discretion

Subject to any express provision to the contrary in this Deed every power, duty, authority and discretion vested in the Trustee is absolute and uncontrolled, exercisable anywhere in the world at any time and may remain unexercised at the absolute and uncontrolled discretion of the Trustee. For the avoidance of doubt the Trustee is not bound to implement any opinions, advice, or recommendations expressed by, or any resolutions of any meeting of, the Approved Body Corporate, WY Claimants or the WY Claim Group.

## 5.4 Trustee corporation

The Trustee, where a corporation, may exercise any power, duty, authority or discretion conferred on the Trustee by this Deed:

- (a) by a resolution of its board of directors or governing body; or
- (b) by delegating the power to exercise the discretion or power to one or more of its directors or members of its governing body appointed unanimously by the board of directors or governing body for that purpose.

## 6. Consultation with WY Claim Group

- (a) The Trustee must consult with the WY Claim Group at least once in each Year of Income regarding the Trust's activities and may convene and pay out of the Trust Fund, the reasonable expenses of holding one (1) meeting of the WY Claim Group per Year of Income.
- (b) The meeting referred to in clause 6(a) shall be held at such time and place as the Trustee in its discretion determines.
- (c) The Trustee may, but is not obliged to, accept any information, opinions, advice or recommendations expressed by the WY Claim Group at the meeting referred to in clause 6(a). For the avoidance of doubt, any opinions, advice or recommendations expressed by the WY Claim Group at the meeting referred to in clause 6(a) are recommendations only and do not bind the Trustee in any way.
- (d) Nothing in this clause 6 has the effect of fettering the absolute discretion of the Trustee in the discharge of the Trustee's duties.

## 7. Liability and Indemnity of the Trustee

### 7.1 Liability for breaches of Trust

- (a) The Trustee is not liable for:
- (i) any loss, damage, liability or breach in relation to the Trust Fund occasioned by the exercise of, or failure to exercise, any power, duty, authority or discretion vested in the Trustee by this Deed or by law; or
  - (ii) any breach of duty or trust whatsoever
- unless the loss, damage, liability or breach (as the case may be) was proven to have been attributable to:
- (iii) the dishonesty of the Trustee; or
  - (iv) a wrongful or negligent act or omission of the Trustee.
- (b) For the avoidance of doubt, where the Trustee is liable for any loss, damage, liability or breach pursuant to clause 7.1(a), the Trustee is not entitled to be indemnified from the Trust Fund in respect of that liability.
- (c) Every person claiming any beneficial interest in the Trust Fund is deemed to take subject to, and with notice of, the protection conferred on the Trustee by clause 7.1(a).

### 7.2 Indemnity of Trustee from Trust Fund

- (a) Subject to clause 7.1(b), if the Trustee acts in good faith, the Trustee is entitled to be indemnified out of the Trust Fund in respect of:
- (i) all costs and expenses incurred by the Trustee relating to, or incidental to, the operation and administration of the Trust; and
  - (ii) all debts, damages, obligations or other liabilities incurred by the Trustee as a consequence of the exercise, or failure to exercise, of any of the powers, duties, authorities or discretions vested in the Trustee by this Deed or by law or by virtue of being the Trustee of the Trust.
- (b) The Trustee's right of indemnity is limited to the right described in clause 7.2(a) and, in particular, the Trustee has no right to be indemnified by any of the Beneficiaries against any liability incurred by the Trustee in exercising any power, duty, authority or discretion as trustee of the Trust.

## 8. Trustee remuneration and expenditure

### 8.1 Entitlement to remuneration and reimbursement

- (a) Subject to clause 8.1(b), the Trustee, and any director or member of the Trustee, is entitled to any remuneration, (including the reimbursement of any costs or expenses) that the Trustee considers fair and reasonable having regard to the work done and responsibility assumed in connection with the Trust created by this Deed.
- (b) The maximum remuneration chargeable by the Trustee, or any director or member of the Trustee, in respect of any Year of Income must not exceed an amount equal to the maximum remuneration chargeable by the Public Trustee of Western Australia (or any person succeeding to or substantially taking over those functions) as if the Public Trustee of Western Australia were to carry out or perform duties similar to those performed by the Trustee.

- (c) If the Trustee, or any director or member of the Trustee, is a solicitor, accountant or other professional person and is employed to transact any business or act in relation to the Trust, they shall be entitled to be paid all proper fees, costs, charges and expenses for that business or act that they would be entitled to receive if they were not the Trustee, or a director or member of the Trustee.
- (d) For the avoidance of doubt, the Trustee, or any director or member of the Trustee, is not entitled to remuneration both under clause 8.1(a) and to professional fees under clause 8.1(c) in respect of the same act or business.

## 8.2 Payment of remuneration

- (a) Subject to clause 8.2(b), any entitlement of the Trustee, or any director or member of the Trustee, to remuneration under clause 8.1(a) or to professional fees under clause 8.1(c) may be charged and paid out of the Trust Fund.
- (b) Until [*insert date of last payment to Approved Body Corporate*] any entitlement of the First Trustee, or any director or member of the First Trustee, to remuneration under clause 8.1(a) or to professional fees under clause 8.1(c) must be paid out of the payments made to the First Trustee by the Approved Body Corporate pursuant to clause 5 of the Ratification Deed. Only to the extent that these payments are insufficient to meet the remuneration of the First Trustee, or any director or member of the First Trustee, may any remuneration be charged and be paid out of the Trust Fund.

## 8.3 Trustee Budget

- (a) The Trustee must establish internal controls of expenditure and must compile a budget of expenses of the Trust for each quarter of each Year of Income (**Trustee Budget**).
- (b) The Trustee Budget must include the remuneration of the Trustee and any director or member of the Trustee.
- (c) The Trustee must monitor the expenditure of the Trust Fund in each quarter to ensure that the Trust expenses do not exceed the Trustee Budget
- (d) If the Trustee's expenditure exceeds the Trustee's Budget in any quarter, the Trustee must examine the Trust accounts and the Trust's activities in an effort to reduce the Trust expenditure.

# 9. Removal and appointment of Trustee

## 9.1 General powers of the Appointor

- (a) The Appointor has the power to do the following:
  - (i) appoint a new Trustee in place of a retiring Trustee in accordance with clause 9.2;
  - (ii) appoint a new Trustee where the office of Trustee is determined and vacated (as described in clause 10); and
  - (iii) appoint one or more additional Trustees in accordance with clause 9.3.
- (b) The decision of the Appointor to appoint a new Trustee under clause 9.1(a)(i) or 9.1(a)(ii) or to appoint one or more additional Trustees under clause 9.1(a)(iii) must be approved in writing by the Non-Native Title Parties of the MRO ILUA prior to any such appointment.
- (c) The Appointor must not appoint as a new Trustee:
  - (i) the Settlor;

- (ii) the Appointor; or
  - (iii) a person who settles money or other property on the Trust to be held as an accretion to the Trust Fund.
- (d) The Appointor may appoint a corporation to be a new or additional Trustee.
- (e) The power of the Appointor to appoint a new or additional Trustee under clause 9.1(a) may be exercised by memorandum under hand or by deed, and where the new or additional Trustee is a corporation must be approved by resolution of its directors.

## 9.2 Retirement of the Trustee and appointment of a new Trustee

- (a) The Trustee may retire as trustee of the Trust by giving not less than one month's prior notice to the Appointor.
- (b) Prior to the expiration of the notice period specified under clause 9.2(a), the Appointor and the Trustee must mutually agree on a new Trustee to be appointed as Trustee of the Trust.
- (c) The place of a Trustee who retires may be filled by a sole appointment or the appointment of more than one new Trustee.
- (d) If the Appointor and the Trustee cannot mutually agree on a new Trustee under clause 9.2(b) within one month of the Trustee notifying the Appointor of its intention to retire, a new Trustee will be appointed by the Appointor.
- (e) The retiring Trustee shall continue as Trustee under this Deed until appointment of a replacement, from which time the Trust Fund vests in the person without the necessity for any vesting, declaration, transfer, conveyance or other assurance.
- (f) The retiring Trustee shall on retirement:
- (i) do all things necessary to transfer the legal title in the assets of the Trust Fund to the new Trustee
  - (ii) deliver to the new Trustee all books, documents, records, evidence of title and any other property or things whatsoever belonging or relating to the Trust Fund or the Trust;
  - (iii) sign or give any necessary authorities or directions to give possession or control of Trust property to the new Trustee as may be in the hands of third parties; and
  - (iv) give such assistance as the new Trustee may reasonably require to put the new Trustee into full knowledge of the affairs of the Trust.

## 9.3 Appointment of additional Trustees

The decision of the Appointor to appoint one or more additional Trustees must be approved by a resolution of the directors of the current Trustee prior to any such appointment.

## 10. Vacation of office

The office of Trustee will be determined and vacated if the Trustee:

- (a) being an individual, is of unsound mind or becomes bankrupt or makes an arrangement or composition with its creditors; or
- (b) being a corporation, enters into liquidation, whether compulsory or voluntarily (not being a voluntary liquidation for the purposes of amalgamation or reconstruction) or has a



receiver, receiver and manager or administrator appointed or makes or enters into any composition or scheme or arrangement with its creditors.

## 11. Retirement of Appointor

- (a) The Appointor may retire from office by giving written notice to that effect to the Trustee who must retain the notice with the other records of the Trust.
- (b) An Appointor may appoint one or more successors each of whom will have the power as an Appointor to remove and appoint Trustees and to appoint a successor.
- (c) If an Appointor dies or ceases to exist without appointing a successor then the power of removal and appointment of Trustees vested in that Appointor will vest in the surviving Appointor if there is one or, if there is not, in the Trustee.

## 12. Records and Books of Account

### 12.1 Accounts to be kept

- (a) The Trustee must establish and maintain complete and accurate records, books and accounts of the Trust, the Trust Fund and decisions of the Trustee, which, without limitation, accurately record all receipts and expenditures on account of the Trust Fund and separately record Income and capital in the categories selected by the Trustee including so as to enable:
  - (i) the preparation of financial statements in accordance with Australian Accounting Standards; and
  - (ii) the audit of those records, books and accounts in accordance with Australian Auditing Standards.
- (b) The Trustee may create a separate account in respect of particular parts of the Trust Fund and may take into account and record in those separate accounts the source and nature of any Income or capital.

### 12.2 Resolutions to be recorded

Any determination or resolution of the Trustee pursuant to this Deed must be recorded in a written minute signed by the Trustee or, if the Trustee is a corporation, by an officer or other person authorised by the corporation to sign that minute.

### 12.3 Preparation of financial accounts

- (a) Promptly after the close of each Year of Income the Trustee must have written financial statements (showing the financial position of the Trust and the Trust Fund) prepared by a Qualified Accountant in accordance with Australian Accounting Standards for that Year of Income, including a profit and loss account and balance sheet, a statement of Income and expenditure and a list of assets.
- (b) The Trustee must ensure that the Qualified Accountant is able to certify that the financial statements are a true and proper statement of the affairs of the Trust and the Trust Fund and set out all:
  - (i) Income;
  - (ii) capital;

- (iii) costs, expenses and other outgoings paid or payable out of the Trust Fund and chargeable against Income;
  - (iv) capital expenditure and liabilities chargeable against capital;
  - (v) investments, money and other property comprised in the Trust Fund;
  - (vi) amounts paid out of the Trust Fund to, or for the benefit of, all or any one or more of the Beneficiaries; and
  - (vii) the extent to which the Trustee may require, the separate recording of any category of Income or capital.
- (c) The Trustee may pay for the costs of the preparation of the written financial statements out of the Trust Fund.
  - (d) Subject to clause 12.8(c), as soon as practicable after the close of each Year of Income, and in any event, no later than twenty (20) Business Days after receipt of the financial reports referred to in clause 12.3(a), the Trustee must provide a copy of those financial reports to the Approved Body Corporate, the Settlor and the Liaison Committee.

#### **12.4 Audit**

- (a) The Trustee must arrange to have the financial statements prepared pursuant to clause 12.3 audited by an Approved Auditor in accordance with Australian Auditing Standards and a report provided by that Approved Auditor as to whether those financial statements are fair and accurate according to Australian Accounting Standards.
- (b) The report of the Approved Auditor must be endorsed on, or attached to, the balance sheet relating to the period in respect of which the Approved Auditor's report relates.
- (c) The Trustee may pay for the costs of audits out of the Trust Fund.
- (d) Subject to clause 12.8(c), as soon as practicable, and in any event, no later than twenty (20) Business Days after receipt of the report of the Approved Auditor, the Trustee must provide a copy of the report of the Approved Auditor to the Approved Body Corporate, the Settlor and the Liaison Committee.

#### **12.5 Preparation of Annual Plans**

- (a) The Trustee must formulate and publish an Annual Plan for the Trust for each Year of Income.
- (b) The Annual Plan may be in any form determined appropriate by the Trustee but must be prepared using plain English and in a manner which is appropriate for the Beneficiaries and must outline the activities of the Trust for the Year of Income and set out simple outcomes or goals for the Trust having regard to:
  - (i) the value and financial position of the Trust Fund from the previous Year of Income;
  - (ii) any anticipated accumulations of Income or accretions to the Trust Fund for the Year of Income;
  - (iii) the Distribution Policy and any anticipated distributions to be made during the Year of Income in accordance with the Distribution Policy; and
  - (iv) any other information that the Trustee considers relevant.
- (c) At least three (3) months before the end of the Year of Income, the Trustee, for the purpose of reviewing the current Annual Plan and formulating the new Annual Plan:

- (i) may consult with the Approved Body Corporate;
  - (ii) will consider previous Annual Reports; and
  - (iii) will consider the administration, overheads and operating expenses of the Trust and the Trust Fund
- (d) The Trustee may amend the Annual Plan during the Year of Income to which it relates provided that the Trustee follows a similar procedure to that outlined in clause 12.5(c).
  - (e) The Trustee will endeavour to finalise the Annual Plan for each Year of Income prior to the start of the Year of Income to which it relates.
  - (f) The Annual Plan, once finalised must be published by the Trustee and made available for viewing by any Beneficiary on request. Subject to clause 12.8(c), the Trustee must also provide a copy to the Approved Body Corporate, the Settlor, and the Liaison Committee.

## 12.6 Preparation of Annual Reports

- (a) Within three (3) months after the end of a Year of Income, the Trustee must conduct a review of the Trust's activities for that Year of Income and prepare a report (**Annual Report**), which includes:
  - (i) a review of the Annual Plan for that Year of Income, including whether the Annual Plan was carried out in accordance with its terms and this Deed;
  - (ii) a summary of the Trust's activities for that Year of Income;
  - (iii) the financial position of the Trust Fund;
  - (iv) details of the distributions made by the Trustee for that Year of Income from the Trust Fund and the projects to which the distributions were made;
  - (v) how the objects of the Trust were advanced; and
  - (vi) an evaluation of the performance of the Trust according to the aims set out in the Annual Plan and the outcomes actually achieved.
- (b) The Annual Report, once finalised must be published by the Trustee and made available for viewing by any Beneficiary on request. Subject to clause 12.8(c), the Trustee must also provide a copy to the Approved Body Corporate, the Settlor, and the Liaison Committee.

## 12.7 Deposit of documents and records

The Trustee may deposit any of the records, deeds, securities and other documents relating to this Deed, the Trust Fund or the Trust with any solicitor or bank.

## 12.8 Disclosure of documents and records

- (a) Subject to clause 12.8(b), the Trustee is not bound to disclose any document disclosing, or relating to, the deliberations of the Trustee as to the exercise, or non exercise, of any power, duty, authority or discretion vested in the Trustee or the reasons therefore.
- (b) Where this Deed, the MRO ILUA or the Ratification Deed provides that the Trustee must disclose any document relating to the Trust, the Trust Fund or the decisions of the Trustee to any person or entity, the Trustee must provide the relevant document to the relevant person or entity in accordance with the provisions of this Deed, the MRO ILUA or the Ratification Deed (as the case may be).
- (c) The obligation of the Trustee to provide any documents to the Settlor or the Liaison Committee pursuant to clauses 12.3(d), 12.4(d), 12.5(f) or 12.6(b), is for a period of six (6) years from the date of the Ratification Deed only.

## 13. Dispute Resolution

### 13.1 Trust operations to continue

Despite the existence of a Dispute, the Trust must continue to operate and any person with powers, duties, authorities or discretions under this Deed must, to the extent practicable, continue to fulfil their obligations.

### 13.2 Notification

A person claiming a Dispute has arisen must give the other parties to the Dispute notice setting out details of the Dispute.

### 13.3 Parties to resolve Dispute informally

If notice of a Dispute is given under clause 13.2, each party to the Dispute must use its reasonable efforts to resolve the Dispute on an informal basis and in good faith, having regard to the spirit and intent of the Trust and this Deed.

### 13.4 Formal Dispute resolution

If the Dispute is not resolved in accordance with clause 13.3 within ten (10) Business Days after the date of the notice given under to clause 13.2, the Trustee may pursue the resolution of the Dispute by mediation in accordance with clause 13.5.

### 13.5 Mediation

- (a) If Trustee considers it appropriate, and the other parties to the Dispute agree, the Trustee may refer the Dispute to mediation.
- (b) If a dispute is referred to mediation by the Trustee in accordance with clause 13.5(a), the parties to the Dispute must appoint a mediator having experience in dealing with matters the subject of the Dispute.
- (c) If the parties to the Dispute cannot agree on a mediator within five (5) Business Days after the Trustee has referred the matter to mediation in accordance with clause 13.5(a), the chairman of LEADR or the chairman's nominee will appoint a mediator at the request of the Trustee.
- (d) The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a party to the Dispute except if the party agrees in writing.
- (e) Any information or documents disclosed by a party under this clause 13.5:
  - (i) must be kept confidential; and
  - (ii) may only be used to attempt to resolve the Dispute.
- (f) Subject to clause 13.5(g) each party to a Dispute must pay its own costs of complying with this clause 13.5.
- (g) The reasonable costs of the Trustee and the mediator's fees will be paid out of the Trust Fund.
- (h) The parties to the Dispute will engage in the mediation process in good faith and with the aim of reaching a resolution of the Dispute.
- (i) If the parties to the Dispute fail to achieve a resolution of the Dispute by mediation within twenty (20) Business Days of the appointment of a mediator under this clause 13.5, or such further time as is agreed by the parties within the twenty (20) Business Days, the

Trustee may take such action as it considers appropriate, including (subject to clause 13.6) referring the matter to arbitration or commencing legal proceedings.

### 13.6 Arbitration

- (a) If the Trustee considers it appropriate and the other parties to the Dispute agree, the Trustee may refer the Dispute to arbitration under the *Commercial Arbitration Act 1984* (WA).
- (b) The arbitration will be held in Perth, Western Australia or any other place agreed by the parties.
- (c) The parties will appoint a person agreed between them to be the arbitrator of the Dispute.
- (d) If the parties fail to agree on a person to be the arbitrator under clause 13.6(c) then the parties must request the President of the Law Society of Western Australia to appoint an arbitrator who has experience in the area of the Dispute and in Indigenous cultural matters.
- (e) Subject to clause 13.6(f) each party to a Dispute must pay its own costs of complying with this clause 13.6.
- (f) The reasonable costs of the Trustee and the arbitrator's fees will be paid out of the Trust Fund.

### 13.7 Legal Proceedings

The Trustee is entitled to commence or maintain legal proceedings relating to any Dispute notwithstanding the processes outlined in this clause 13.

## 14. Variation of Deed

- (a) At any time the Trustee may, subject to the agreement in writing of the Approved Body Corporate, the Appointor and the Non-Native Title Parties of the MRO ILUA, by deed:
  - (i) revoke, add to or vary the Trust;
  - (ii) declare any new or other trusts in relation to the Trust;
  - (iii) declare any new or other powers, duties, authorities or discretions concerning the management control or investment of the Trust Fund; and
  - (iv) make any amendment, variation or addition to this Deed which the Trustee thinks proper,

PROVIDED THAT that deed:

  - (v) does not infringe the rule against perpetuities;
  - (vi) is not in favour of the Settlor;
  - (vii) does not affect the interests of, or the beneficial entitlement to any amount paid, divided, applied, Set Aside or held for, any Beneficiary; and
  - (viii) is not inconsistent with the provisions of the MRO ILUA (whilst that agreement remains in force).
- (b) For the purpose of clause 14(a), if at any time the Approved Body Corporate enters into liquidation, or has a receiver, receiver and manager or administrator appointed or makes or enters into any composition or scheme or arrangement with its creditors, the Trustee must instead seek the agreement in writing of the WY Claimants, the Appointor and the

Non-Native Title Parties of the MRO ILUA to exercise any powers contained in clause 14(a).

## 15. Termination

- (a) The Trust will continue until the Vesting Date.
- (b) From the Vesting Date the Trustee shall hold the Trust Fund upon trust:
  - (i) for all, or any one or more, of the Beneficiaries in existence at the Vesting Date in such proportions and in such manner as the Trustee may appoint by instrument in writing on or before the Vesting Date; and
  - (ii) any part not dealt with pursuant to clause 15(b)(i):
    - (A) for the Charitable Fund; or
    - (B) if the Charitable Fund is no longer in existence on the Vesting Date, to pay or apply to one or more charitable funds, authorities or institutions having objects that are similar to, or objects which include objects that are similar to, the purposes of the Charitable Fund and which are endorsed as exempt from income tax under Subdivision 50-B of the Tax Act..
- (c) The Trustee may agree in writing with the Appointor to appoint any date earlier than the Vesting Date specified in clause 1.1 of this Deed to be the Vesting Date.

## 16. Governing law

- (a) This Deed and the Trust created by it is governed by and must be construed in accordance with the laws in force in Western Australia.
- (b) The Settlor, Trustee and each Beneficiary or any other person having any claim under this Deed or in respect of the Trust Fund submits to the non-exclusive jurisdiction of the Courts of Western Australia including courts of appellate jurisdiction.

## 17. Notices

- (a) A notice demand, consent, approval of communication under this Deed (**Notice**) must be in writing, in English and signed by a person duly authorised by the sender and hand delivered or sent by prepaid post or facsimile to the recipient's address for Notices as follows, as varied by any Notice given by the recipient to the sender:
  - (i) The Settlor:
    - Address: c/- Office of Native Title, Department of the Attorney General,  
2<sup>nd</sup> Floor, 197 St Georges Terrace, Perth WA, 6000
    - Fax: (08) 9222 9877
    - Attention: Executive Director, Office of Native Title
  - (ii) The First Trustee:
    - Address: [insert]
    - Fax: [insert]
    - Attention: [insert]
  - (iii) The Appointor:
    - Address: c/- Office of Native Title, Department of the Attorney General,  
2<sup>nd</sup> Floor, 197 St Georges Terrace, Perth WA, 6000

Fax: (08) 9222 9877  
Attention: Executive Director, Office of Native Title

- (b) A Notice given in accordance with this clause 17 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:
- (i) if hand delivered, on delivery;
  - (ii) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);
  - (iii) if sent by facsimile when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight (8) Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice,
- but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day in the place that it is received, the Notice is taken to be received at 9.00 am on the next Business Day.

# Schedule 1 - Powers of Trustee

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## 1. Investment of the Trust Fund

### 1.1 Authorised investments

- (a) Except as otherwise provided in this Deed and subject to item 1.1(b), the Trustee may invest the Trust Fund in any form of investment.
- (b) The Trustee must invest the Trust Fund only in a way in which trustees are permitted to invest under the laws of Australia or of any relevant State or Territory of Australia.

### 1.2 Variation and realisation of investments

The Trustee may, at any time, change an investment or vary the terms and conditions on which an investment is held, realise an investment (or any part of it) or re-invest the proceeds of any realised investment into any other form of investment authorised by this Deed.

## 2. General powers of administration and investment

### 2.1 Power and acts of ownership

- (a) The Trustee may generally do anything which a natural person could do with, or in relation to, the assets comprising the Trust Fund as if the Trustee were the absolute owner of them.
- (b) The Trustee may generally perform all acts of ownership to the same extent and with the same effect as if the Trustee were the beneficial owner of the Trust Fund and this Deed had not been made.
- (c) The Trustee may consult with the Settlor in relation to the distribution or use of the Trust Fund or the exercise of other powers, duties, authorities or discretions of the Trustee under this Deed.

### 2.2 Generally deal with Trust Fund

The Trustee may sell, call in, convert into money, grant options or rights to purchase, mortgage, charge, sub-charge, or otherwise deal with, dispose of or transfer any item or asset comprising the Trust Fund or otherwise held by the Trustee under the terms of the Trust for such consideration and on such terms as the Trustee considers appropriate.

### 2.3 Trustee power to deal with itself

Notwithstanding any rule of law to the contrary, the Trustee may acquire as property of the Trust Fund real or personal property the beneficial interest in which is, at the date of acquisition, the absolute property of the Trustee in its own right or as trustee of another fund, provided that any property so acquired is acquired for a consideration being not greater than the current market value of the property and upon acquisition the beneficial interest in the property will be held by the Trustee upon the trusts contained in this Deed.

### 2.4 Power to accept or decline gifts

- (a) The Trustee may accept, decline or otherwise refuse to accept as part of, or in favour of, the Trust Fund, any gifts (by will or otherwise), donations, settlements or other dispositions in money, money's worth or property from any person as an addition to the Trust Fund, whether subject to liabilities or not.



- (b) Where the Trustee accepts any gifts, donations, settlements or other dispositions the Trustee holds them upon the trusts created in this Deed and may either retain them in their original form without selling or converting them into money, or invest, apply, or deal with them in any way that the Trustee may invest, apply or deal with the Trust Fund under this Deed.

## **2.5 Power of sale**

- (a) The Trustee may sell or otherwise dispose of the Trust Fund by public auction, tender, private treaty or otherwise, upon any terms and conditions as the Trustee thinks fit including, but not limited to, price, manner and terms of payment (including deferred payment with or without interest).
- (b) The Trustee may join with any other co-owner or partner in any sale or disposal referred to in item 2.1(a).
- (c) Where the Trustee sells any real estate for an estate in fee simple the Trustee may contract that the whole, or any part of, the purchase money will be secured by a mortgage of that real estate.

## **2.6 Power to lease**

The Trustee may let, sub-let, lease or sub-lease the whole (or any part) of any real or personal property comprised in the Trust Fund on any terms and conditions the Trustee thinks fit including as to period, rental and whether with or without a bond or other security or an option of renewal or purchase.

## **2.7 Power to take on a lease**

The Trustee may purchase, take on, lease, sub-lease, hire or otherwise acquire any share, estate or interest in any real or personal property (including any licence or permit) subject to any terms or conditions that the Trustee thinks fit including, but not limited to, price, premium, rental charge, payment, fee or other consideration.

## **2.8 Power to trade in shares debentures, unit trusts or other interests**

The Trustee may acquire, purchase, apply for, take up and accept and pay calls in respect of:

- (a) any share, debenture or debenture stock or other interest in any corporation and may acquire any corporation or may promote, or take part in promoting, any corporation and may execute any Constitution and other documents to the corporation; or
- (b) any unit or other interest in a unit trust scheme undertaking or enterprise (whether or not listed on a stock exchange) in respect of which there is an approved deed.

## **2.9 Powers regarding corporations**

- (a) The Trustee may exercise all rights and privileges, perform all duties and do all things in relation to any share, stock or debenture comprised in the Trust Fund as the Trustee could do if the Trustee were the beneficial owner, or were personally interested or concerned in, the relevant corporation.
- (b) Without limitation item 2.9(a), the Trustee may:
  - (i) assent to any arrangement modifying the rights, privileges or duties referred to in item 2.9(a);
  - (ii) agree to any scheme or arrangement for the reconstruction of, or the increase or reduction of, the capital of the corporation; or

- (iii) make any agreement in respect of, or in the course of, the winding up of the corporation,

and for that purpose, may deposit, surrender or exchange any share, stock or debenture (or the title thereto) and may pay any calls or contributions or other necessary expenses in connection with any such share, stock debenture or title.

## **2.10 Responsibility regarding corporations**

If the Trustee invests any part of the Trust Fund in the stock or shares of any corporation the Trustee is:

- (a) only responsible for so much of the stock or shares and the dividends and income from them as are actually transferred and paid to the Trustee;
- (b) under no obligation to investigate the accounts, management or control of that corporation and no neglect or omission in this respect is chargeable as a breach of trust; and
- (c) the Trustee is expressly excused from attending general meetings of the corporation and is authorised to appoint a proxy to represent the Trustee at any such general meeting.

## **2.11 Power to grant options**

The Trustee may grant options of all kinds in respect of the Trust Fund for any consideration and on any terms or conditions for any period (not expiring later than the Vesting Date) to any person.

## **2.12 Power to acquire insurance/assurance policies**

- (a) The Trustee may purchase or acquire any:
  - (i) reversionary or deferred property or rights of any description;
  - (ii) superannuation fund; or
  - (iii) policy of insurance or assurance,
 on any terms and conditions as the Trustee thinks fit, including as to premium, term, payment and whether with, or subject to, any options, rights, benefits, conditions or provisions.
- (b) The Trustee may pay out of the Trust Fund all sums payable from time to time for:
  - (i) any premium or payment necessary to effect or maintain any policy or interest referred to in item 2.12(a) (whether owned by the Trustee or otherwise); or
  - (ii) the exercise or enjoyment of any option, right or benefit under any policy or interest referred to in item 2.12(a).
- (c) Any surrender of a policy or interest referred to in item 2.12(a) shall, for all the purposes of this Deed, be deemed to be a sale of it.

## **2.13 Power to carry on business**

The Trustee may carry on, either alone or in partnership, any farming, grazing or primary production activity or any commercial or business activity including, without limitation, the businesses of manufacturers of, and wholesale and retail buyers, sellers, merchants, importers, exporters, dealers, brokers and agents in all kinds of commodities, merchandise, choses in action and articles of commerce of any kind.

## **2.14 Power to partition or subdivide property**

The Trustee may partition, agree to the partition of, subdivide, or agree to the subdivision of, any real or personal property comprised in the Trust Fund and may give or receive any consideration by way of equality of partition.

## **2.15 Power to repair property**

- (a) The Trustee may repair, maintain, upkeep, renovate or develop or make any improvements to any real or personal property comprised in the Trust Fund and without limitation the Trustee may construct, re-construct, alter, add to, renovate, improve, develop or demolish buildings, fences, dams and other structures of any kind.
- (b) In exercising the powers, duties, authorities and discretions referred to in item 2.15(a) the provisions of section 30(1)(c) of the Trustees Act do not apply and it is not necessary for the Trustee to apply for any consent to exceed any such limitation.

## **2.16 Power to allow the use of trust property by a Beneficiary**

- (a) The Trustee may allow any Beneficiary to have the use, occupation or custody of any real or personal property comprised in the Trust Fund at any rental (including none) and upon any terms as the Trustee sees fit.
- (b) The Trustee is not liable for any loss or damage which may occur to any property during, or arising out of, such use, occupation or custody except where that loss or damage arises from the conscious and wilful default or neglect of the Trustee.

## **2.17 Power to appropriate the Trust Fund**

- (a) The Trustee may appropriate all of the Trust Fund (or any part of it) in its then actual condition or state of investment towards the satisfaction of any Income or capital entitlement of a Beneficiary, whether contingent, expectant, presumptive or vested and for that purpose may conclusively determine the value of the Trust Fund (or any part of it) in any manner.
- (b) Every such appropriation and valuation made by the Trustee pursuant to item 2.17(a) binds all persons interested in the Trust Fund (whether in the entitlement in respect of which the appropriation and valuation is made or in any other entitlement or interest in the Trust Fund) even if:
  - (i) those persons may not be in existence, may be under a legal disability or cannot be found or ascertained at the relevant time; or
  - (ii) the Trustee is, or may be, beneficially interested (directly or indirectly) in the result of the exercise by the Trustee of the power contained in 2.17(a),

and sections 30(1)(k) and 50 of the Trustees Act do not apply.

## **2.18 Power to provide for debts or liabilities**

The Trustee may provide out of the Trust Fund, any sum of money that the Trustee considers to be available, or necessary for, and may pay or apply the same in, or towards, the discharge or reduction of any encumbrance, debt or other liability (contingent or actual) affecting the Trust Fund.

## **2.19 Powers in respect of expenses incidental to management of Trust Fund**

The Trustee may pay out of the Trust Fund all costs, charges and expenses of, or incidental to, the management of the Trust Fund or to the exercise of any powers, duties, authorities or discretions vested in the Trustee by this Deed or by law which the Trustee incurs including, but not limited to, all:

- (a) income tax or other taxes payable in respect of the Trust Fund;
- (b) costs connected with the preparation, execution or amendment of this Deed; and
- (c) amounts which the Trustee is required to pay as probate, succession, estate, settlement, gift, stamp or other revenue duties in respect of this Deed or the Trust Fund on the happening of any event,

even if those moneys, or any part of them, may not be recoverable from the Trustee or the Trust Fund by legal process.

## **2.20 Power to obtain valuations**

The Trustee may, at any time, obtain a valuation of any property of the Trust Fund from a person who the Trustee considers appropriately qualified or experienced and the Trustee may rely on that valuation in exercising any of the Trustee's powers under this Deed.

## **2.21 Powers regarding legal proceedings**

The Trustee may take any action necessary for the protection of the Trust Fund including instituting and defending proceedings at law or by way of mediation or arbitration and may pursue them to their final determination or to compromise them as the Trustee thinks advisable.

# **3. Banking, borrowing and lending powers**

## **3.1 Bank Accounts**

The Trustee may open accounts of every description with any bank or other financial institution on such terms and conditions as the Trustee thinks fit;

- (a) to conduct and operate those accounts in such manner as the Trustee thinks fit in accordance with the customs, usages and practices of the relevant financial institution including, but not limited to, the power to operate any account in overdraft;
- (b) to agree to the institution debiting any account with interest, costs, charges, expenses and liabilities incurred by the institution at any time on behalf of the Trustee; and
- (c) to borrow or raise money and to secure the payment of that or any other money in such manner as the Trustee thinks fit or to secure the repayment or performance of any debt, liability, contract, guarantee, indemnity or other engagement incurred or entered into by the Trustee in any way with any financial institution.

## **3.2 Borrowing powers**

The Trustee may:

- (a) borrow or raise any sum of money for any period, with or without any security over the whole of the Trust Fund (or any part of it) or any other property, at any rate of interest and upon any terms or conditions as the Trustee thinks fit;
- (b) in respect of the borrowing or raising of money referred to in item 3.2(a), give and execute first or subsequent mortgages, charges, pledges or other securities or encumbrances over the whole of the Trust Fund (or any part of it) or any other property as the Trustee thinks fit; and
- (c) join with any person in executing any document for securing or evidencing the borrowing or raising of money referred to in item 3.2(a).

### 3.3 Lending powers

- (a) The Trustee may advance or lend any sum of money, or provide any financial accommodation, facility or security of any kind, to any person (other than the Settlor), for any period, with or without any security, at any rate of interest and on any terms and conditions as the Trustee thinks fit.
- (b) The Trustee may join with any person in advancing or lending and money, or providing any financial accommodation, facility or security, referred to in item 3.3(a)
- (c) The Trustee is not obliged to obtain a valuation of any security given pursuant to item 3.3(a) and section 26 of the Trustees Act shall not apply.

### 3.4 Guarantee and Indemnity

- (a) The Trustee may guarantee or indemnify, or give any guarantee or indemnity, in respect of the:
  - (i) the payment of any money; or
  - (ii) the compliance with, or performance of, any contract, covenant or other obligation of any person (other than the Settlor),
 in connection with the Trust, in any manner the Trustee may think fit.
- (b) The Trustee may secure any guarantee or indemnity given under item 3.4(a) in any manner authorised in this Deed in relation to the securing of any borrowing by the Trustee.

### 3.5 Negotiable instruments

The Trustee may make, draw, accept, endorse, issue or discount bills of exchange, promissory notes, letters of credit, bills of lading or any other negotiable or transferable instruments.

## 4. Provisions relating to the Trustee generally

### 4.1 Release of powers

The Trustee may be deed renounce and release any power conferred on the Trustee under the Trust in respect of the whole or part of the Trust Fund. When the renunciation and release comes into effect, the power is to be taken to be at an end and no longer exercisable by the Trustee.

### 4.2 Exercise of powers and discretions with others

The Trustee may exercise, or concur in exercising, any or all of the powers, duties, authorities and discretions vested in the Trustee jointly, as tenant in common, in partnership or otherwise in conjunction with any other person or persons (whether those persons act on their own behalf or as trustee of any other trust).

### 4.3 More than two Trustees

If at any time there are more than two Trustees, the powers, duties, discretions and authorities vested in the Trustee by this Deed may be exercised by a simple majority of them.

### 4.4 Delegation of powers

- (a) To the extent permitted by, and in accordance with the requirements of any applicable law, the Trustee may delegate in writing to any person, for any period, the exercise of any of the powers, duties, authorities or discretions vested in the Trustee.

- (b) The Trustee may execute any power of attorney or other instrument necessary for the delegation pursuant to item 4.3(a).

#### 4.5 Custodian trustees or nominees

The Trustee may appoint any person to act as custodian of the Trust Fund or permit the Trust Fund (or any part of it) to be held or registered in the name of any nominee or agent of the Trustee.

#### 4.6 Personal Interest of Trustee

- (a) Subject to items 4.6(c) to 4.6(e), notwithstanding any doctrine of law or equity the Trustee, and any director or member of the Trustee may, acting honestly for the purposes of the Trust, exercise or concur in exercising, all powers, duties, authorities and discretions given by this Deed, or by law, even though the Trustee or any director or member of the Trustee:
- (i) has, or may have a direct or indirect interest or conflict of fiduciary duty in the method or result of exercising the power, duty, authority or discretion; or
  - (ii) may benefit either directly or indirectly from the exercise of any power, duty, authority or discretion,
- and even if the Trustee is a sole Trustee.
- (b) Without limiting the generality of item 4.6(a) above, the Trustee may, acting honestly for the purposes of the Trust:
- (i) sell, transfer, hire, lease, grant options over, lend, advance or dispose of any part of the Trust Fund on any terms to the Trustee or an Associate;
  - (ii) buy, transfer, acquire, hire, lease, acquire an option over or borrow any real or personal property from the Trustee or an Associate;
  - (iii) carry on or carry out any profit making undertaking or scheme in partnership with the Trustee or an Associate;
  - (iv) generally deal with the Trustee or an Associate; and
  - (v) sell to the Trustee in the Trustee's capacity as trustee of any other trust fund (either for cash or upon any terms) any share, estate or interest in any real or personal property where any other share in the same corporation, or another joint or undivided interest in the same real or personal property, is held by the Trustee in their other capacity and to divide assets in specie between the Trust Fund and such other trust fund in any manner.
- (c) Where the Trustee, or any director or member of the Trustee has, or may have, a material personal interest in a contract or arrangement, or a proposed contract or arrangement, or in a matter being considered or about to be considered by the Trustee, the Trustee, or the director or member of the Trustee, must give notice of that material personal interest.
- (d) The notice required by item 4.6(c) must:
- (i) give details of:
    - (A) the nature and extent of the interest; and
    - (B) the relationship of the interest to the affairs of the Trust;
  - (ii) be given at a meeting of the Trustee (or the board of directors of the Trustee where the Trustee is a corporation) as soon as practicable after the Trustee, or director or

- member of the Trustee, becomes aware of the interest; and
- (iii) be recorded in the minutes of that meeting.
- (e) The Trustee, or any director or member of the Trustee, who has disclosed an interest under item 4.6(c) must not be present during any deliberation, or take any part in any decision, about that matter unless the Trustee (or the board of directors of the Trustee where the Trustee is a corporation) has passed a resolution that:
- (i) identifies the Trustee, or director or member of the Trustee (as the case may be), the nature and extent of their interest in the matter, and its relationship to the affairs of the Trust; and
  - (ii) states that the Trustee (or those directors of the Trustee who do not have an interest in the matter where the Trustee is a corporation) are satisfied that the interest should not disqualify the Trustee, or director or member of the Trustee from being present during any deliberation, or taking any part in any decision, about that matter (as the case may be).

## 5. Determinations by the Trustee

### 5.1 Determinations of the Trustee

- (a) The Trustee may Determine, from time to time, generally all matters as to which any doubt, difficulty or question may arise:
- (i) under, or in relation to the execution of the Trust and the powers, duties, authorities and discretions vested in the Trustee by this Deed or by law; or
  - (ii) in the course of management, administration, realisation, liquidation, partition or winding up of the Trust Fund.
- (b) Every determination of the Trustee in relation to any of the matters referred to in item 5.1(a), whether made upon a question formally or actually raised, or implied in any of the acts or proceedings of the Trustee in relation to the Trust Fund, may not be objected to, or questioned on any ground whatsoever, and is conclusive and binding on all Beneficiaries and others who in the future acquire any interest under this Deed.

### 5.2 Determination of Income and expenditure

Without limiting the generality of item 5.1, the Trustee may Determine from time to time:

- (a) the amount of the Distributable Income of the Trust;
- (b) whether the whole, or any part of, any:
  - (i) real or personal property;
  - (ii) increase or decrease in amount, number or value of any property; or
  - (iii) profit, gain, rebate, credit or receipt by, or payment, expenditure, loss or outgoing from, or in connection with, the Trust Fund,
 shall, notwithstanding its nature or character, be treated as and credited or debited to capital or to Income, or otherwise dealt with;
- (c) that the whole, or any part of, any rebate or credit which is allowable for the purposes of the Tax Act or the Income Tax Assessment Act as a rebate or credit, be treated, allocated or otherwise dealt with as a rebate or credit in respect of any tax payable by or in relation to the Trust Fund;

- (d) that the whole, or any part of, any rebate or credit of a particular nature or character be distinguished from, and allocated or otherwise dealt with differently from, any rebate or credit of the same or any other nature or character;
- (e) that the whole, or any part of, any Income of a particular nature or character from one source be distinguished from, and allocated or otherwise dealt with differently from, any Income of the same nature or character from the same or any other source;
- (f) that the whole, or any part of, any expenditure, payment, loss or outgoing of a particular nature or character on any account be distinguished from, or allocated or dealt with differently from, any expenditure, payment, loss or outgoing of the same nature or character on the same or any other account;
- (g) that part of the Trust Fund against which any payment, expenditure, loss or outgoing incurred by or in relation to the Trust Fund is to be paid set off allocated or otherwise dealt with; and
- (h) to set aside out of the Income or capital of the Trust Fund such money as the Trustee considers appropriate to meet any debt or obligation relating to the Trust.

## 6. Professional and other assistance

### 6.1 Employment of trade persons

Without limiting item 6.2, the Trustee may employ or contract, on such terms and conditions as the Trustee thinks fit, appropriate tradesmen, workmen and others for the purposes of the repair, maintenance, upkeep, protection, renovation or development of any real or personal property comprised in the Trust Fund.

### 6.2 Employment of persons

The Trustee may employ or contract, on such terms and conditions as the Trustee thinks fit, any person, professional or other assistance as the Trustee thinks necessary for any purpose, transaction or business authorised by this Deed or to assist the Trustee in the discharge of the duties of the Trustee and the Trustee is not bound to act personally.

### 6.3 Advice from professionals or experts

- (a) The Trustee may obtain, and act on, any opinion, advice or information provided by any financial adviser, lawyer, accountant, valuer, surveyor, broker, auctioneer or other expert or professional.
- (b) The Trustee is not responsible for any loss, depreciation or damage occasioned by acting or not acting in accordance with that opinion, advice or information.
- (c) Nothing in item 6.3(a) or (b) shall prevent the Trustee or any Beneficiary from applying to any Court.

### 6.4 Advice from the WY Claim Group

- (a) The Trustee may, but is not obliged to, obtain, and act on, any information, opinions, advice or recommendations provided by the WY Claimants, the Approved Body Corporate or the WY Claim Group.
- (b) The Trustee is not responsible for any loss, depreciation or damage occasioned by acting or not acting in accordance with that information, opinion, advice or recommendation.



## 7. Other

### 7.1 Changed Year of Income

During a Year of Income the Trustee may nominate any date not more than 18 months after the date of commencement of the then current Year of Income as the last day of that Year of Income. Thereafter “Year of Income” means each succeeding 12 month period commencing on the day following the nominated date until the anniversary of that nominated date immediately preceding the Vesting Date and then the period until the Vesting Date.

### 7.2 Receipts by others

The receipt of the person purporting to be the treasurer, secretary or other proper officer of any recipient of a payment or application of Income or capital from the Trust Fund under this Deed is a sufficient discharge to the Trustee and the Trustee need not see to the application of the payment or application.

# Schedule 2 - Distribution Policy

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## 1. Definitions

In this Schedule 2, unless the context requires otherwise:

**Distribution Priorities** has the meaning given in item 3.

**Eligible Project** means a project which is, or will be for the benefit of one or more Beneficiaries and is consistent with this Distribution Policy, this Deed and the objects of the Trust.

**Funding Application** has the meaning given in item 4.1(a).

## 2. Distribution

If the Trustee determines that a project for which an application has been submitted in accordance with item 4 of this Schedule 2 is an Eligible Project then it may, in its absolute discretion allocate Trust Funds for distribution, having regard to the Distribution Priorities for that Year of Income, other Eligible Distributions and the value of the Trust Fund in a particular Year of Income and subject to any terms or conditions that the Trustee considers appropriate.

## 3. Priorities

The priorities of this Distribution Policy (**Distribution Priorities**) are:

- (a) *[Priorities to be inserted by the Trustee]*

## 4. Application

### 4.1 Application for funding

- (a) A person or entity may make an application (**Funding Application**) to the Trustee to receive assistance from the Trust in respect of an Eligible Project
- (b) The Trustee may encourage and identify projects which may be Eligible Projects and may invite Funding Applications for such projects.
- (c) Every Funding Application submitted to the Trustee must include:
- (i) full details of the project including timelines;
  - (ii) the type and amount of assistance sought from the Trust;
  - (iii) the expected Beneficiaries of the project;
  - (iv) the manner in which the project is to be acquitted, its objects and outcomes;
  - (v) details of any other public or private contributions that are being, or may be made, to the project; and
  - (vi) any other information required by the Trustee or considered relevant to the Funding Application by the applicant.

## 4.2 Assessment of Funding Applications

- (a) The Trustee must review every Funding Application submitted to the Trustee and determine:
  - (i) whether the Funding Application relates to an Eligible Project and will benefit one or more Beneficiaries;
  - (ii) whether there are any other public or private funding programs that are, or may be, providing assistance to the expected Beneficiaries of the project in a manner similar to that contemplated by the project;
  - (iii) the priority of the Funding Application in relation to any other pending Funding Applications; and
  - (iv) the success of the Funding Application (which determination must be conveyed to the applicant).
- (b) The Trustee may, but is not obliged to, receive recommendations from the Approved Body Corporate regarding the assessment of Funding Applications and Eligible Projects. For the avoidance of doubt, any recommendations received from the Approved Body Corporate are recommendations only and do not bind the Trustee in any way.
- (c) The Trustee is to be impartial in the assessment of Funding Applications and the distribution of Trust Funds in accordance with this Distribution Policy and is not to favour any particular Beneficiaries or section of Beneficiaries. However it is recognised that some Beneficiaries may receive some distributions of Trust Funds before others because of the limited financial resources of the Trust Fund in any particular Year of Income. It is also recognised that different Beneficiaries may enjoy benefits of different kinds

## 5. Financial Accountability

The Trustee may, where the Trustee considers it appropriate, require the recipient of any distribution of Trust Funds pursuant to this Distribution Policy to:

- (a) provide to the Trustee on or before the end of the Year of Income, or such other time as the Trustee determines, a certificate from a Qualified Accountant stating the amount of the distribution spent, or committed to be spent, for the purpose of the distribution;
- (b) keep proper records, books and accounts in relation to the use of the distribution, including so as to enable:
  - (i) all income and expenditure in relation to the distribution to be identified in the recipient's records, books and accounts;
  - (ii) the preparation of financial statements in accordance with Australian Accounting Standards; and
  - (iii) the audit of those records, books and accounts in accordance with Australian Auditing Standards;
- (c) provide all information, records and documents as may be reasonably requested by the Trustee from time to time; and
- (d) report to the Trustee within 12 months of the distribution, or such other time or times as the Trustee determines, detailing the outcome of the Eligible Project and comparing the outcome with the objectives and anticipated outcomes of the Eligible Project as stated in the Funding Application

# Signing page

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**EXECUTED** as a deed

**SIGNED** for and on behalf of **THE** )  
**STATE OF WESTERN AUSTRALIA** )  
by the [*insert name*], in the presence of: )  
)

\_\_\_\_\_  
[*insert name*]

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Date

\_\_\_\_\_  
Full name of Witness (print)

\_\_\_\_\_  
Address of Witness

\_\_\_\_\_  
Occupation of Witness

The **Common Seal** of [*insert name of* )  
*First Trustee*], was hereunto affixed with )  
the authority of its Board in the presence )  
of: )  
)

\_\_\_\_\_  
**DIRECTOR / COMPANY SECRETARY**  
(delete as applicable)

\_\_\_\_\_  
**DIRECTOR**

\_\_\_\_\_  
Full name (print)

\_\_\_\_\_  
Full name (print)

\_\_\_\_\_  
Date