

**Dated 19<sup>th</sup> October 2018**

# **Deed of Retirement and Appointment**

**Crescent Wealth Superannuation Fund**  
ABN 71 302 958 449

## **Parties**

**Diversa Trustees Limited**  
ABN 49 006 421 638

**Equity Trustees Superannuation Limited**  
ABN 50 055 641 757

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## Deed of Retirement and Appointment

dated 19<sup>th</sup> October 2018

**Parties**      **Equity Trustees Superannuation Limited**  
ABN 50 055 641 757  
of Level 2, 575 Bourke Street, Melbourne VIC 3000  
(**Incoming Trustee**)

and

**Diversa Trustees Limited**  
ABN 49 006 421 638  
of Level 20, 357 Collins Street, Melbourne VIC 3000  
(**Retiring Trustee**)

## Recitals

- A. The Crescent Wealth Superannuation Fund (**Fund**) is governed by a trust deed dated 9 October 2012 as amended from time to time (**Trust Deed**).
- B. The Retiring Trustee is the current trustee of the Fund.
- C. The sponsor of the Fund is Crescent Wealth Funds Management (Aust) Limited (ABN 32 144 560 172) (**Sponsor**).
- D. Clause 19.3(b) of the Trust Deed provides that the trustee may agree to resign as trustee in the circumstances agreed between the trustee and the Sponsor.
- E. Pursuant to clause 10.1(f) of the Sponsor Agreement, the Sponsor requested the Retiring Trustee to retire as trustee of the Fund, and the Retiring Trustee has agreed to retire.
- F. The Sponsor has nominated the Incoming Trustee to replace the Retiring Trustee as trustee of the Fund.
- G. Subject to the terms of this Deed, the Incoming Trustee wishes to accept its appointment to act as trustee of the Fund.

## The parties agree

### 1. Definitions and Interpretation

#### 1.1 Definitions

In this Deed unless expressed or implied to the contrary:

- (1) **Administrator** means any person appointed by the trustee of the Fund to provide administration services for the Fund.
- (2) **Appointment Date** means 12:01am (Melbourne Time) on 19 October 2018 or such later date as agreed by the parties.
- (3) **APRA** means the Australian Prudential Regulation Authority.
- (4) **Business Day** means a day on which banks are open for general banking business in Melbourne, Victoria.
- (5) **Claim** means any:
  - (a) demands, claims, suits, actions, judgements, or proceedings; or
  - (b) any audit, examination, enquiry, investigation, hearing, subpoena, notice to produce a document or notice requiring disclosure of information conducted or issued by a Responsible Authority.
- (6) **Deed** means this deed, including any schedule or annexure to it.
- (7) **Deed of Novation** in respect of a Service Provider means a deed to be entered into between the relevant Service Provider, the Retiring Trustee and the Incoming Trustee in relation to the novation of the agreement with the Service Provider to the Incoming Trustee.
- (8) **Fund** has the meaning given in Recital A.
- (9) **Fund Liabilities** means:
  - (a) all losses, costs, charges, damages, expenses and any other liability (including any liability for taxation or other government impost) of or in respect of the Fund; and
  - (b) all other complaints, claims, demands, suits, legal proceedings, causes of action, proceedings or regulatory action or investigation

that may already have arisen or may arise in relation to the Fund whether direct or indirect,

including, but not limited to, any liability arising from or in respect of the retirement of the Retiring Trustee as trustee of the Fund.

- (10) **Indemnified Person** means:
- (a) the Retiring Trustee;
  - (b) all directors and officers of the Retiring Trustee as at the Appointment Date; and
  - (c) all previous directors and officers of the Retiring Trustee as at the Appointment Date.
- (11) **Investment Manager** means a person appointed by the trustee of the Fund to provide investment management services for the Fund or any Fund asset or portfolio of the Fund's assets.
- (12) **Promoter** means Crescent Wealth Funds Management (Aust) Limited ABN 32 144 560 172 or such other person appointed by the trustee of the Fund to promote, market and distribute interests in the Fund.
- (13) **Relevant Requirements** means any requirements imposed under the Superannuation Industry (Supervision) Act 1993, the Superannuation Industry (Supervision) Regulations, the Superannuation (Resolution of Complaints) Act 1993, the Income Tax Assessment Act 1936, the Income Tax Assessment Act 1997, the Family Law Act 1975, the Corporations Act 2001 and Regulations, the Anti-Money Laundering and Counter Terrorism Financing Act 2006 and Rules, the Privacy Act 1988 and any other present or future legislation or by a Responsible Authority:
- (a) on the trustee of a regulated superannuation fund; or
  - (b) which the Fund must satisfy in order to have the most favourable taxation treatment available to superannuation funds.
- (14) **Responsible Authority** means, as the case requires, APRA, the Australian Securities and Investments Commission (ASIC), the Commissioner of Taxation or any other regulatory body or government authority having responsibility for the administration of the laws, regulations or rules relating to regulated superannuation funds.
- (15) **RSE Licence** means responsible superannuation entity licence issued by APRA.
- (16) **Service Provider** means each Administrator, Investment Manager (excluding Crescent Wealth Funds Management (Aust) Limited ABN 32 144 560 172), Promoter and any other person agreed between the

Retiring Trustee and the Incoming Trustee as having been appointed by the trustee of the Fund to provide a material business activity in respect of the Fund.

- (17) **Sponsor Agreement** means the agreement dated 11 October 2012 between the Retiring Trustee and the Sponsor by which the Retiring Trustee agreed to become trustee of the Fund.
- (18) **Successor Fund** means any superannuation entity to which some or all of the assets of the Fund are transferred on a bulk basis and from which the Incoming Trustee has a right of indemnity.
- (19) **Trust Deed** has the meaning given in Recital A.

## 1.2 Interpretation

In this Deed, unless the context requires otherwise:

- (1) Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- (2) A reference to a party is a party to this Deed.
- (3) A reference to a party by its defined term includes its executors, administrators, delegates, agents, officers, employees and permitted assigns, as appropriate.
- (4) Other grammatical forms of defined words or expressions have corresponding meanings.
- (5) A reference to a person includes a natural person and a corporation.
- (6) The singular includes the plural and the plural includes the singular.
- (7) The words "in writing" include any communication sent by letter, facsimile transmission or email or any other form of communication capable of being read by the recipient.

## 2. Retirement of the Retiring Trustee

- 2.1 The Retiring Trustee retires as trustee of the Fund on and from the Appointment Date, subject to the terms of this Deed.
- 2.2 The Retiring Trustee acknowledges that it has retired at the request of the Sponsor due to a change in control of the Retiring Trustee giving rise to a right of the Sponsor to seek the Retiring Trustee's retirement pursuant to the Sponsor Agreement.

2.3 Subject to clause 9 and clause 19.5 of the Trust Deed, the Incoming Trustee releases and discharges the Indemnified Persons from:

- (1) all its duties and obligations as trustee under the Trust Deed on and from the Appointment Date; and
- (2) all of the Fund Liabilities arising from or incurred by the Retiring Trustee acting in its capacity as trustee of the Fund.

This release and discharge does not extend to any Fund Liability to the extent that it is caused by a breach of trust by the Retiring Trustee prior to the Appointment Date for which the Retiring Trustee is not entitled to be indemnified from the assets of the Fund.

### **3. Appointment of the Incoming Trustee**

3.1 The Retiring Trustee appoints the Incoming Trustee to be the new trustee of the Fund on the terms contained in this Deed and in accordance with the Trust Deed from the Appointment Date.

3.2 The Incoming Trustee accepts the appointment as trustee of the Fund from the Appointment Date,

3.3 On and from the Appointment Date, the Incoming Trustee has all the powers, rights, duties and obligations of the trustee under the Trust Deed as if it has been originally named as trustee under the Trust Deed. For the avoidance of doubt, on and from the Appointment Date, all trustee responsibility shall be vested in the Incoming Trustee and the Retiring Trustee will not retain any residual function or liability as trustee of the Fund.

### **4. Obligations of the Incoming Trustee**

4.1 In undertaking its role as trustee of the Fund, the Incoming Trustee is bound by all the terms of the Trust Deed on and from the Appointment Date, including without limitation, performing all the obligations of the trustee under the Trust Deed, trust law and Relevant Requirements.

4.2 On and from the Appointment Date and at all times while it is trustee of the Fund, the Incoming Trustee must be insured under a policy of professional indemnity insurance (which may be a policy maintained by another company in the group of companies of which the Incoming Trustee is a member) that provides insurance of such amount and coverage as the Incoming Trustee in good faith believes a prudent trustee would consider appropriate, having regard to the Incoming Trustee's obligations as trustee of the Fund under the Trust Deed, the quantum of the assets of the Fund and also having regard to the other funds or trusts of which the Incoming Trustee is trustee and any obligations under the Relevant Requirements.

4.3 From the Appointment Date:

- (1) As soon as practicable, but at least within 14 days, of receiving any Claim which relates to the period when the Retiring Trustee was trustee of the Fund or which relates to or involves the Retiring Trustee, the Incoming Trustee must give written notice to the Retiring Trustee setting out full details of the Claim;
  - (2) Subject to Clause 4.3 (4), the Incoming Trustee will have carriage of any Claim referred to in Clause 4.3 (1) and must act in good faith to minimise any potential Claim under this clause 4.3. The Incoming Trustee must consult with the Retiring Trustee on a regular basis in relation to the conduct of any matter and keep the Retiring Trustee fully informed of any matter and, upon request, provide the Retiring Trustee with all applicable information;
  - (3) The Incoming Trustee must not accept, compromise or pay any Claim or agree to arbitrate, compromise or settle any Claim which may lead to liability on the part of the Retiring Trustee without written approval of the Retiring Trustee (which approval will not be unreasonably withheld);
  - (4) Where the Retiring Trustee has consented to take carriage of a Claim relating to the period when it was trustee of the Fund, the Incoming Trustee, its service providers or its successors must provide all reasonable assistance to the Retiring Trustee in defending any Claim against the Retiring Trustee, including providing access to relevant books, records, files, and documents, provided that where the Retiring Trustee would not be entitled to indemnity for such Claim out of the Fund or the Incoming Trustee would not be entitled to charge its costs of providing such assistance as an expense of the Fund, the Incoming Trustee will be entitled to charge the Retiring Trustee its reasonable costs for its assistance (including internal staff and management costs at hourly rates);
- 4.4 If the Incoming Trustee asks the Retiring Trustee to perform any services (other than services comprised within its obligations under clauses 5.1 (1),(4) & (5), 5.2, 5.3 and 5.4 ) after the Retiring Trustee has already properly vacated the office of trustee, the Retiring Trustee will be entitled to charge the Incoming Trustee, as an expense of the Fund, its reasonable costs for its assistance (including internal staff and management costs at hourly rates).
- 4.5 From the Appointment Date, the Incoming Trustee must not use, issue, distribute or publish any materials which contain any references to the Retiring Trustee without the Retiring Trustee's written consent provided that the Incoming Trustee is authorised to refer to the retirement of the Retiring Trustee in communications to members of the Fund and any Responsible Authority.
- 4.6 Nothing in this clause 4 renders the Retiring Trustee liable for any Claim if the Retiring Trustee is not otherwise liable and nothing in this clause 4 limits the rights of the Retiring Trustee under clause 8, 10 or 11 of this Deed.



## **5. Obligations of the Retiring Trustee**

### **5.1 From the Appointment Date, the Retiring Trustee must:**

- (1) comply with its obligations under clause 19.4(a) (ii) and clause 19.4(a)(iii) of the Trust Deed;
- (2) take all reasonable steps to mitigate any Fund Liability which relates to the period when the Retiring Trustee was trustee of the Fund, including pursuing any entitlement to indemnity under any contract of insurance arranged for the benefit of the Retiring Trustee, and claiming against any indemnity given to the trustee under a service agreement;
- (3) provide all reasonable assistance to the Incoming Trustee in defending any Claim or action against the Fund or the Incoming Trustee which relates to the period when the Retiring Trustee was trustee of the Fund, at the request of the Incoming Trustee and at the expense of the Fund;
- (4) provide any documents in the possession or control of the Retiring Trustee reasonably required by the Incoming Trustee to substantiate any Fund Liability which was incurred before the Appointment Date during the period when the Retiring Trustee was trustee of the Fund; and
- (5) notify the Incoming Trustee as soon as practicable after becoming aware of a Fund Liability which relates to the period when the Retiring Trustee was trustee of the Fund.

### **5.2 The Retiring Trustee must:**

- (1) use reasonable endeavours to have in place, prior to the Appointment Date, insurance cover of an amount and scope as the Retiring Trustee in good faith believes a prudent trustee would consider appropriate, having regard to the Retiring Trustee's obligations as trustee of the Fund under the Trust Deed prior to the Appointment Date, such insurance cover to be effective from the Appointment Date; and
- (2) on and from the Appointment Date use its best endeavours to maintain such cover for a period of no less than 5 years.

### **5.3 As soon as practicable after the Appointment Date, the Retiring Trustee must:**

- (1) deliver to or at the direction of the Incoming Trustee, all books and other records relating to the Fund within its possession which are reasonably required for the purposes of ongoing administration of the Fund, including but not limited to:
  - (a) documents of title relating to the Fund assets,
  - (b) the Fund's accounting and member records,

- (c) the Fund's disclosure documents, and
- (d) copies of minutes of meetings of the Board of the Retiring Trustee and any Board committee (to the extent that they relate to the Fund) but limited to minutes of meetings held during the period of 6 years prior to the Appointment Date plus anything prior to that which is or was at the time in the reasonable opinion of the Retiring Trustee material to the management, operation or administration of the Fund.

For the avoidance of doubt, this clause relates only to Fund books and records in the Retiring Trustee's possession.

- (2) as soon as practicable after the execution of this Deed execute such documents and do all things lawfully required to vest the assets of the Fund in the Incoming Trustee (or in any custodian appointed by the Incoming Trustee) with effect on and from the Appointment Date or as soon as practical after that date.
- (3) provide all reasonable assistance to the Incoming Trustee to assist with the transfer.

5.4 The Retiring Trustee assigns its rights and subject to the consent of the Service Provider novates its obligations and liabilities under and in respect of each contractual arrangement with a Service Provider to the benefit of the Incoming Trustee with effect from the Appointment Date.

The Retiring Trustee and Incoming Trustee must use all reasonable endeavours to obtain the consent of each Service Provider to the novation of each contractual arrangement with that Service Provider.

At least 10 Business Days prior to the Appointment Date, the Incoming Trustee must deliver to the Retiring Trustee deeds of novation for each contractual arrangement with the Service Providers prepared by the Incoming Trustee, to assign or novate any contractual arrangement with a Service Provider to the benefit of the Incoming Trustee with effect from the Appointment Date subject to exercise of its duty of members' best interest.

The Retiring Trustee must within 5 Business Days of receipt of the deeds of novation execute and return them to the Incoming Trustee.

The Retiring Trustee's retirement as trustee of the Fund is subject to and conditional upon the execution by the Service Providers, the Incoming Trustee and the Retiring Trustee of the deeds of novation prior to the Appointment Date.

## **6. Reporting Obligations**

- 6.1 The parties must co-operate in good faith to ensure that the Fund's financial statements and member reporting for the year ending 30 June 2018 are completed, distributed and lodged in accordance with Relevant Requirements including:
- (1) finalisation of the annual Fund audit;
  - (2) seeking input and responses from relevant third parties including Service Providers;
  - (3) receipt and acceptance of the final auditor's management letter;
  - (4) lodgement of the financial statements with APRA; and
  - (5) preparation and lodgement of the APRA annual return.
  - (6) reviewing and providing sign off on the annual member statements
  - (7) reviewing and providing sign off on the Fund's annual report.
- 6.2 The Retiring Trustee is entitled to any fees (including core trustee fees and non-core trustee fees) payable to it, and reimbursement for any expenses incurred, as trustee of the Fund, up to and including the Appointment Date.
- 6.3 The Retiring Trustee's retirement as trustee of the Fund is subject to and conditional upon all fees (including core trustee fees and non-core trustee fees) payable to it and expenses incurred as trustee of the Fund are paid in full on or prior to the Appointment Date.
- 6.4 The Incoming Trustee is entitled to any fees payable to, and reimbursement for any expenses properly incurred by it as the trustee of the Fund after the Appointment Date.
- 6.5 The Retiring Trustee acknowledges and agrees that fees payable to the Retiring Trustee in respect of the period ending on the Appointment Date cover the services to be provided by the Retiring Trustee under clause 6.1 and that the Retiring Trustee is not entitled to any additional fee for assisting with the completion of the financial statements and member reports for the year ended 30 June 2018.

## **7. Representations, warranties and undertaking**

- 7.1 Each party represents and warrants to the other that:
- (1) the entering into and performance of its obligations under this Deed has been duly authorised; and

- (2) all authorisations and consents required by it in connection with the execution and performance of this Deed have been obtained and are in full force and effect; and
- (3) as at the time of execution of a Deed of Novation, all authorisations and consents required by it in connection with the execution and performance of the Deed of Novation have been or will be obtained and will be in full force and effect at the relevant time.

7.2 The Incoming Trustee represents and warrants to the Retiring Trustee that on the date of execution of this Deed and on the Appointment Date, the following statements are and will remain true:

- (1) It is a constitutional corporation (within the meaning of the Trust Deed) which satisfies the Relevant Requirements (within the meaning of the Trust Deed) for trustees of regulated superannuation funds;
- (2) it has the skills, facilities, capacity and staff necessary, internally or by using external service providers, to perform the duties and obligations of the trustee under the Trust Deed;
- (3) it has, or has access to, sufficient competent management staff experienced in trustee duties and administration who will have charge and conduct of, and will maintain close supervision of, the Fund;
- (4) it is a holder of an Australian Financial Services Licence (**AFSL**) which contains all authorisations necessary for it to act as trustee of the Fund, including but not limited to authorisations to:
  - (a) provide general financial product advice in respect of superannuation products; and
  - (b) issue superannuation products in relation to regulated superannuation funds;
- (5) it is a holder of an **RSE Licence** authorising it to act as trustee of employer sponsored, corporate or public offer superannuation funds;
- (6) it otherwise holds all licenses, approvals, certifications and registrations necessary to act as trustee of the Fund;
- (7) it is not a disqualified person under the Relevant Requirements, and will take all reasonable steps to ensure that it does not become a disqualified person under the Relevant Requirements;
- (8) none of its responsible officers are disqualified persons under the Relevant Requirements;
- (9) it is qualified to be appointed as trustee of the Fund;

- (10) subject to clause 7.2(11), all authorisations and consents required by it in connection with the execution and performance of this Deed have been obtained and are in full force and effect;
- (11) as far as it is aware, there are no material outstanding issues relating to the Incoming Trustee involving a Responsible Authority that have not been notified in writing to the Retiring Trustee that would materially affect the ability of the Incoming Trustee to act as trustee of the Fund; and
- (12) is not the subject of any dispute and there is no litigation, arbitration or administrative proceedings taking place, pending or, to its knowledge, threatened against it as at the date of this Deed of which a prudent existing trustee could reasonably expect would be disclosed to it or which could have a material adverse effect on the Incoming Trustee's ability to perform its obligations as trustee of the Fund.

7.3 Subject to clause 7.4, the Retiring Trustee represents and warrants to the Incoming Trustee that, as at the date of execution of this Deed and on the Appointment Date:

- (1) the Trust Deed, in the form presented to the Incoming Trustee, is complete, valid and properly executed;
- (2) having made reasonable enquiries, it is unaware that it is the subject of any legal proceedings in respect of the Fund (other than any legal proceedings the existence of which has been disclosed to the Incoming Trustee in writing prior to the Appointment Date);
- (3) having made reasonable enquiries, it is unaware of any complaints made by members of the Fund (other than any complaints the existence of which has been disclosed to the Incoming Trustee in writing prior to the Appointment Date);
- (4) having made reasonable enquiries, it is unaware that it is the subject of any regulatory action or investigation by a Responsible Authority in respect of any material issue with the Fund (other than any action or investigations the existence of which has been disclosed to the Incoming Trustee in writing prior to the Appointment Date);
- (5) having made reasonable enquiries of the Administrator, the Investment Manager, the Sponsor and the Promoter, it has disclosed to the Incoming Trustee details of any issues in respect of the Fund which, in its reasonable opinion, would be material to be known by an Incoming Trustee of the Fund; and
- (6) for the purposes of this warranty:
  - (a) information is not "material" unless it is reasonable to expect that, had the Incoming Trustee known that information and acted reasonably, it is reasonably likely that it would have decided not to accept appointment as trustee of the Fund;

- (b) for the avoidance of doubt, actual knowledge excludes constructive knowledge; and
  - (c) the Retiring Trustee will be deemed to have disclosed information to the Incoming Trustee if that information has been disclosed to the Incoming Trustee by a person other than the Retiring Trustee.
- 7.4 The Retiring Trustee will not be in breach of a warranty or representation made by it under clause 7.3 where:
  - (a) information which would have been the subject of a warranty or representation under clause 7.3 is not disclosed by the Retiring Trustee to the Incoming Trustee; and
  - (b) that information is not within the knowledge of the Retiring Trustee.
  - (c) that information is within the knowledge of the Sponsor (whether in its capacity as Sponsor, Investment Manager or Promoter of the Fund); and
  - (c) the Sponsor has not disclosed that information to the Retiring Trustee.
- 7.5 The Retiring Trustee undertakes to immediately give written notice to the Incoming Trustee if, before the Appointment Date, it becomes aware of any matter which makes or, with the effluxion of time, may make a warranty given under clause 7.3 untrue or invalid in any material respect if it were to be given after the date of execution of this Deed.
- 7.6 Each representation, warranty and undertaking given in this clause 7 continues in force after the Appointment Date.

## **8. Indemnities by the Incoming Trustee**

- 8.1 Subject to clauses 8.2, and 11, the Incoming Trustee agrees to indemnify and keep indemnified the Indemnified Persons in respect of the Fund Liabilities, whether suffered or incurred before or after the Appointment Date.
- 8.2 If at any time on or after the Appointment Date the Incoming Trustee's access to assets of the Fund is limited for any reason, including as a result of:
  - (1) the Incoming Trustee ceasing to be trustee of the Fund; or
  - (2) some or all of the assets of the Fund being transferred to a Successor Fund or another superannuation entity on a bulk basis (from which the Incoming Trustee does not have a right of indemnity),

the Incoming Trustee must:

- (3) inform the replacement trustee or Successor Fund trustee of its ongoing obligation to the Indemnified Persons under clause 8.1; and

- (4) use all reasonable endeavours to obtain the benefit of an indemnity from the replacement trustee or Successor Fund trustee,

and the Incoming Trustee will otherwise not be liable under the indemnity in clause 8.1 to the extent that its access to assets of the Fund is so limited.

- 8.3 The indemnity provided by this Clause 8 is a continuing obligation separate and independent from the other obligations set out in this Deed and survives termination of this Deed.

## **9. Indemnity by the Retiring Trustee**

- 9.1 Subject to clause 11, the Retiring Trustee agrees to indemnify and keep indemnified, the Incoming Trustee against the Fund Liabilities whether incurred before or after the Appointment Date including after the Incoming Trustee ceases to be a trustee of the Fund, arising from:

- (1) a breach by the Retiring Trustee or any of its officers, employees, delegates, or agents of any obligation imposed on the Retiring Trustee under the Relevant Requirements or the Trust Deed before the Appointment Date;
- (2) a breach by the Retiring Trustee or any of its officers, employees, delegates, or agents of any obligation imposed on the Retiring Trustee under this Deed; or
- (3) the dishonest, fraudulent, intentional or reckless misconduct of the Retiring Trustee or any of its officers, employees, delegates or agents,

before the Appointment Date (even if the liability arises after the Appointment Date) provided that the indemnity does not extend to any Fund Liabilities:

- (4) in respect of which the Incoming Trustee has provided an indemnity to the Retiring Trustee pursuant to clause 8.1;
- (5) which have been agreed to be paid by another person;
- (6) the Retiring Trustee would be entitled to be indemnified from the assets of the Fund (whether under the SIS Act, the Trust Deed or at law)
- (7) to the extent that it is an accepted claim under an insurance policy and is paid by the insurer.

- 9.2 For the avoidance of doubt, clause 9.1 includes an indemnity relating to any of the following:

- (1) any legal proceedings;
- (2) complaints; and

- (3) regulatory action or investigation.

## **10. Overriding Indemnity**

Notwithstanding any provision of this Deed, the parties acknowledge and agree that the Retiring Trustee has a continuing right of indemnity under the Trust Deed and general law, which is not limited in any way by this Deed.

## **11. Limitation of Liability**

- 11.1 The liability of the party providing an indemnity (**Indemnifying Party**) in favour of another party (**Indemnified Party**), its officers or agents or any other person under or arising out of this Deed or the transactions contemplated under it is limited to the aggregate of:

- (1) the amount that the Indemnifying Party is entitled to receive in the exercise of its right of indemnity against the Fund (or, in the case of the Retiring Trustee, would have been entitled to receive if it had continued to act as trustee of the Fund) but subject to (and in any event no greater than) the extent of the assets in the Fund as at the time the indemnity is sought to be called upon; and
- (2) any amount that the Indemnifying Party actually receives under a policy of insurance held by or on behalf of the Indemnifying Party in respect of liabilities incurred by it as trustee of the Fund (after allowing for costs incurred in making and pursuing any claim).

- 11.2 Further to clause 11.1, the Indemnified Party may enforce its rights under this Deed against the Indemnifying Party only to the extent of the Indemnifying Party's right of indemnity (or the right which it would have had) out of the assets of the Fund.

- 11.3 If the Indemnified Party does not recover all money owing to it by enforcing the rights referred to in clause 11.2, it may not seek to recover the shortfall by:

- (1) bringing proceedings against Indemnifying Party in its personal capacity; or
- (2) applying to have Indemnifying Party wound up or proving in the winding up of the Indemnifying Party.

- 11.4 The limitation in clause 11.1 does not apply to the extent that any liability arises from an act or omission which is not indemnified or not able to be indemnified under the Trust Deed or at law. For these purposes, it is agreed that the Indemnifying Party cannot be regarded as having acted in a manner which is not able to be indemnified to the extent to which so acting has been caused or contributed to by a failure by the Indemnified Party to fulfil its obligations under this Deed or any other act or omission of the Indemnified Party.



- 11.5 Nothing in this clause 11 shall make Indemnifying Party liable to any claim for an amount greater than the amount which the Indemnifying Party would have been able to claim and recover from the assets of the Fund in relation to the relevant liability if the Indemnifying Party's right of indemnification out of the assets of the Fund had not been prejudiced by the Indemnified Party's failure to properly perform its duties.
- 11.6 The Indemnifying Party is not obliged to do or refrain from doing anything under this Deed (including incur any liability) unless the Indemnifying Party's liability is limited in the same manner as set out in clauses 11.1 to 11.3.
- 11.7 This clause 11 applies:
- (1) without limiting the Retiring Trustee's right under the law to be indemnified from the Fund notwithstanding its retirement; and
  - (2) despite any other provision in this Deed and extends to all liabilities and obligations of the Indemnifying Party in any way connected with any representations, warranty, conduct, omission, agreement or transaction related to this deed.

In the event of any inconsistency, this clause 11 prevails.

- 11.8 The Indemnified Party must:
- (1) take all reasonable steps to mitigate costs, expenses and other liabilities; and
  - (2) diligently pursue any rights of indemnity that it has from any other person (in the case of the Incoming Trustee, including but not limited to any replacement trustee or Successor Fund trustee) or under any policy of insurance,
- before claiming any indemnity under clause 8.1 or 9.1 (as the case may be), provided that nothing in this clause 11.8 shall reduce or limit any liability of the Indemnifying Party.

## **12. Confidentiality**

- 12.1 Neither party may directly or indirectly disclose to any other person, or use or permit to be disclosed or used for any purpose other than a purpose contemplated by this Deed any information that may be acquired by the party under or for the purposes of this Deed and each party must keep all such information confidential.
- 12.2 Clause 12.1 does not apply to the extent that:
- (1) disclosure of the information is required by law;

- (2) the other party gives its written consent to the disclosure or use of the information;
  - (3) disclosure or use of the information by a party is necessary or desirable for the performance of its obligations under this Deed, the Trust Deed or the law by its officers, employees or agents;
  - (4) the information is publicly available other than by breach of this Deed.
- 12.3 Without limiting clause 12.1 but subject to clause 12.2, the Incoming Trustee covenants and agrees with the Retiring Trustee that all information (whether verbal or written) relating to the actions of the Retiring Trustee as trustee of the Fund provided or made available to the Incoming Trustee or its representatives by the Retiring Trustee is confidential information and in relation to this confidential information the Incoming Trustee:
- (1) will keep such information strictly confidential;
  - (2) will not, without the prior written consent of the Retiring Trustee in each instance, be disclosed or divulged to any third party (including service providers to the Fund) in any manner whatsoever; and
  - (3) will not, without the prior written consent of the Retiring Trustee, be photocopied or reproduced in any way,
- provided that the Incoming Trustee is not required to keep such information confidential to the extent doing so may:
- (4) cause the Incoming Trustee to breach its obligations as trustee of the Fund;
  - (5) cause the Incoming Trustee to breach any Relevant Requirement;
  - (6) impair or limit the Incoming Trustee's ability to exercise its rights as trustee of the Fund; or
  - (7) reduce or limit any right of indemnity to which the Incoming Trustee would otherwise be entitled or cause the Incoming Trustee to incur any liability for which it would not otherwise be liable.

### **13. Dispute Resolution**

- 13.1 A party must not start court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute arising out of this Deed ("**Dispute**") unless it has complied with this clause.
- 13.2 A party claiming that a Dispute has arisen must notify each other party to this Deed, giving details of the Dispute.

- 13.3 Within seven days after a notice is given under clause 13.2, each party to the Dispute ("**Disputant**") must nominate in writing a representative authorised to settle the Dispute on its behalf.
- 13.4 During the seven day period after a notice is given under clause 13.3 (or longer period agreed in writing by the Disputants) ("**Initial Period**") each Disputant must use its best efforts to resolve the Dispute.
- 13.5 If the Disputants are unable to resolve the Dispute within the Initial Period, they must, within an additional seven days, refer the Dispute to an agreed mediator (in the absence of agreement, a mediator nominated by the then President of the Law Society of Victoria) which mediator shall assist the parties to resolve the Dispute.
- 13.6 The mediator may engage other consultants to advise them if they consider that necessary.
- 13.7 Each Disputant must bear its own costs of complying with this clause.
- 13.8 Except to seek urgent interlocutory relief, neither party will be entitled to commence or maintain any action relating to a disputed matter until it has been referred and determined as provided in this clause.

#### **14. Notice**

- 14.1 In this Agreement, a 'notice' means:
- (1) a notice; or
  - (2) a consent, approval or other communication required to be in writing under this Agreement.
- 14.2 A notice must be in writing and signed by or on behalf of the sender addressed to the recipient and:
- (1) delivered by hand to the recipient's address as shown in clause 15.4;
  - (2) sent by pre-paid mail to the recipient's address as shown in clause 15.4; or
  - (3) sent by email to the email address of the recipient as shown in clause 15.4.
- 14.3 A notice given to a person in accordance with this clause is treated as having been given and received:
- (1) if delivered by hand, on the day of delivery if delivered before 5.00pm on a Business Day, otherwise on the next Business Day;
  - (2) if sent by pre-paid mail, on the fifth Business Day after posting;

- 14.4 Notices are to be delivered in accordance with the following:

Attention: Simon Duncan

Attention: Mark Blair

delivered by e-mailing a portable document format copy of the executed counterpart to the other party.

**19. Stamp Duty**

The Incoming Trustee must pay all stamp duty imposed on this Deed or any document executed or transaction entered into pursuant to this Deed or to give effect to this Deed.

**20. Entire Agreement**

This Deed is the entire agreement between the parties about its subject matter.

**21. No Waiver**

A party's failure to insist another part perform any obligation under this Deed is not a waiver of that party's right:

- (1) to insist the other party perform, or to claim damages for breach of, that obligation; or
- (2) to insist the other party perform any other obligation, unless the waiving party acknowledges the waiver in writing.

**EXECUTED** as a Deed by the parties

Executed by **DIVERSA TRUSTEES LIMITED** in accordance with section 127 of the *Corporations Act 2001*:

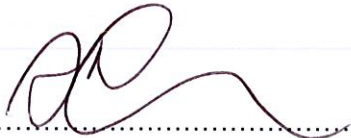
\_\_\_\_\_  
Director/company secretary

\_\_\_\_\_  
Director

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Name of director/company secretary  
(BLOCK LETTERS)

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Name of director  
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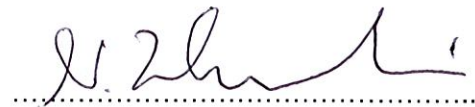
EXECUTED by **EQUITY TRUSTEES  
SUPERANNUATION LIMITED** ACN 055  
641 757 by its Attorneys under Power of  
Attorney dated 27th May 2016 in the  
presence of:



Signature of witness

Maria Carbone

(Print name)



Signature of Attorney

**Vasko Zdraveski**  
Authorised Signatory (Schedule II)

Office & Name of Attorney



Signature of Attorney

**Lydia De Saram**  
Authorised Signatory (Schedule III)

Office & Name of Attorney