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Your Reference: Family Trust – Trustee Update  
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Tuesday, 16 March 2022

Castellanos Holdings Pty Ltd  
2 East Court Street  
Camberwell VIC 3124  
Australia

Dear Trustee,

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the questions.

Adj Professor, Dr Brett Davies – Partner

## Updating the Castellanos Family Trust Deed of Variation for the Change of Trustee Update

Thank you for instructing us to prepare the attached Family Trust Trustee Update.

### How to print your document

When you are satisfied that the document is according to your instructions please:

1. Download the PDF (Don't print directly from the browser.)
2. Print the PDF Printer settings: A4 paper  
100% scale (turn off 'fit to page')
3. Print single sided (NOT duplex).
4. Once signed keep this covering letter with the document  
(However, do not staple the covering letter to the document.)

We confirm that we act for:

Castellanos Holdings Pty Ltd ACN 498 454 874  
2 East Court Street, Camberwell VIC 3124, Australia  
(Trustee)  
as Trustee of the Castellanos Family Trust (Trust).

### Can I have one or many Trustees?

You can have any number of humans and companies as Trustees, as your Accountant sees fit. There is no minimum or maximum number.

### Any stamp duty or CGT?

If your trust owns bank accounts, shares and real-estate then you transfer these into the names of the new trustees. There is generally no stamp duty (State law) or Capital Gains Tax (Federal law) on the transfer from one trustee to another, especially if you use our Deed. However, NSW and the ACT apply stamp duty on the transfer of real-estate.

### **Does the Deed of Variation need to be registered anywhere?**

An advantage of Family Trusts over companies is that Family Trusts are mostly unregulated, while companies are heavily overregulated. You don't need to lodge your Family Trust or any Deeds of Variation anywhere. However, you and your accountant need to keep a complete set of the Family Trust Deed and any Deeds of Variation, including this Deed of Variation.

### **What happens if the Trustee is dead or of unsound mind?**

If a Trustee has died (or the Corporate Trustee company is wound up) then that person can no longer be a Trustee.

If the Trustee is dead, then the Executor or legal personal representative signs on the Trustee's behalf. Alternatively, if there is power in the Family Trust to do so, then the Appointor or one of the Appointors can sign on the outgoing Trustee's behalf.

If the Trustee is of unsound mind, then the person holding the Power of Attorney or Administration Order signs for the Trustee.

### **Are there any resettlement issues?**

When the resettlement of a trust occurs, the trustee is considered to have disposed of the assets in the old trust and accordingly, have created a new trust.

A resettlement results in significant tax implications, such as *ad valorem* stamp duty and capital gains tax (CGT).

Our law firm has reviewed the cases dealing with resettlement. They are as follows:

*Australian Securities Investments Commission v. Rich*  
(2009) 75 ACSR 1  
[2009] NSWSC 1229

*Cajkusic v. Federal Commissioner of Taxation*  
(2006) 155 FCR 430  
2006 ATC 4752  
64 ATR 676

*Re Bowmil Nominees Pty Ltd*  
[2004] NSWSC 161

*Chief Commissioner of Stamp Duties (NSW) v. Buckle*  
(1998) 192 CLR 226  
98 ATC 4097  
37 ATR 393

*Commissioner of Taxation v. Everett*  
(1980) 143 CLR 440  
10 ATR 608  
80 ATC 4076

*Federal Commissioner of Taxation v. Bamford*  
(2010) 240 CLR 481  
2010 ATC 20-170  
[2010] HCA 10  
75 ATR 1

*Federal Commissioner of Taxation v. Commercial Nominees of Australia Ltd*  
(2000) 43 ATR 42  
[1999] FCA 1455  
99 ATC 5115

*Federal Commissioner of Taxation v. Commercial Nominees of Australia Ltd*  
(2001) 75 ALJR 1172  
[2001] HCA 33  
47 ATR 220

*Howey v. Federal Commissioner of Taxation*  
(1930) 44 CLR 289  
[1930] HCA 45

*Octavo Investments Pty Ltd v. Knight*  
(1979) 144 CLR 360

*Salt v. Marquess of Northampton*  
[1892] 2 AC 1

*Stewart Dawson Holdings Pty Ltd v. Commissioner of Taxation*  
(1965) 39 ALJR 300

*Commissioner of Taxation v. David Clark; Commissioner of Taxation v. Helen Clark*  
Full Federal Court  
[2011] FCAFC 5  
(2011) 190 FCR 206  
2011 ATC 20-236  
79 ATR 550  
High Court  
[2011] HCATrans 236  
(2011) 80 ATR 20

In particular, the 2001 High Court authority of *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [2001] HCA 33; 75 ALJR 1172; 179 ALR 655 significantly reduces the risk of resettlements.

Your Deed of Variation is drafted with reference to these above cases. Provided you have not changed the beneficiaries we are of the view that this Deed of Confirmation does not constitute resettlement.

In support of this we also cite:

- An amendment to a trust fund, in accordance with its deed, will not terminate the trust, assuming there is continuity of property and membership of the trust.

The Federal Court case: *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [1999] FCA 1455 is the leading authority on this proposition:

55. To determine whether losses of particular trust property are allowable as a deduction from income accruing to that trust property in a subsequent income year, it will be necessary to establish some degree of continuity of the trust property or corpus that earns the

income from the income year of loss to the year of income. It will also be necessary to establish continuity of the regime of trust obligations affecting the property in the sense that, while amendment of those obligations affecting the property in the sense that, while amendment of those obligations might occur, any amendment must be in accordance with the terms of the original trust.

56. So long as any amendment of the trust obligations relating to such trust property is made in accordance with any power conferred by the instrument creating the obligations, and continuity of the property that is the subject of trust obligation is established, there will be identity of the 'taxpayer' for the purposes of section 278 and sections 79 E(3) and 80 (2), notwithstanding any amendment of the trust obligation and any change in the property itself.

- The High Court of Australia in *Commissioner of Taxation v Commercial Nominees of Australia Ltd* [2001] HCA 33 at [36] stated:

The three main indicia or continuity for the purpose of Pt IX are the constitution of the trusts under which the fund (if a trust fund) operated, the trust property, and membership. Changes in one or more of those matters must be such as to terminate the existence of the eligible entity, or to produce the result that it does not derive the income in question, to destroy the necessary continuity.

- The Full Federal Court in *Commissioner of Taxation v Clark* [2011] FCAFC endorsed the High Court's approach in *Commercial Nominees*, extending its reasoning, at [87]:

When the High Court in *Commercial Nominees* spoke of trust property and membership as providing two of the indicia for the continued existence of the eligible entity or trust estate, the Court was not suggesting that there had to be a strict or even partial identity of property for the first and objects for the second. It was speaking more generally: that there had to be a continuum of property and membership, which could be identified at any time, even if different from time to time; and without severance of one or both leading to the termination of the trust in question. In the present case the Commissioner never contended, nor on the evidence would he, that there was a severance in the continuum of trust property and object of the CU Trust.

Their identity changed from time to time, but not their continuum.

We confirm there is continuity of your Fund's membership and property, and no resettlement applies.

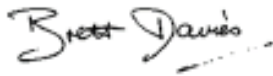
Having considered the authorities, the important considerations in contemplation of whether a trust fund is at risk of resettlement include:

- amendments of the trust obligations relating to trust property is made in accordance with the power conferred by the trust deed
- continuum of the trust property
- continuum of the trust membership

- changes in identity of the trust objects and property, from time to time, does not by itself constitute a severance of continuum
- where a severance in the continuum of trust property and membership is proven, the risk of resettlement is high

This now concludes the matter. Thank you for your instructions.

Yours sincerely,



Adj Professor, Dr Brett Davies, CTA, AIAMA, BJuris, LLB, LLM, MBA, SJD  
National Taxation Partner  
LEGAL CONSOLIDATED BARRISTERS & SOLICITORS

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*Dr Brett Davies  
Partner  
Legal Consolidated Barristers & Solicitors*

Resolution by the Trustees

Held at .....

On .....day of .....20.....

Castellanos Holdings Pty Ltd ACN 498 454 874  
2 East Court Street, Camberwell VIC 3124, Australia  
(Trustee)  
as Trustee of the Castellanos Family Trust (Trust).

**Quorum:** It was noted that a quorum was present at the meeting.

**Notice of Meeting:** It was noted that all Trustees received notice of this meeting and they all consent to the meeting being held and waive any requirement for any specified period of the notice of the meeting. It was resolved unanimously that the meeting is validly constituted regardless of any failure to give notice as required under any rules, constitutions or the *Corporations Act*.

**Person chairing the meeting:** It was resolved that the person signing these minutes be the person chairing the meeting.

Upon tabling the fully executed Deed of Variation (in duplicate) that varies the Castellanos Family Trust IT WAS RESOLVED that:

1. the Trustee adopts the duly executed Deed of Variation to amend the Castellanos Family Trust
2. authority is given to allow the Deed of Variation to be provided to any relevant lending institutions, as required
3. the Deed of Variation be lodged for stamp duty, if required
4. because of its value and that banks will generally not open bank accounts or provide loans if the bank does not cite original Deeds, the two duly executed Deeds of Variation were protected and stored as follows:
  - a. one Deed of Variation to the accountant
  - b. and the other Deed of Variation is to be kept by the Trustee of the Castellanos Family Trust in the secretary folder
5. the Trustee conducts an audit to ensure that it has original Deeds of the following
  - a. the Trust Deed that established the Trust
  - b. any subsequent Deeds of Variation
6. the Appointor consents to the Deed of Variation being so executed and adopted

**Closure:** There being no further business the meeting was declared closed.

Signed as a true and correct record of the meeting immediately after the meeting.

.....Person chairing the meeting



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*Adj Professor, Dr Brett Davies - Partner*

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## **Deed of Variation to Update the Castellanos Family Trust Trustee Update**

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This Deed of Variation is made by:

**Outgoing Trustee:**

APC Holding Pty Ltd ACN 168 465 164  
24 Esplanade Street, Port Melbourne VIC 3207, Australia

**New Trustee:**

Castellanos Holdings Pty Ltd ACN 498 454 874  
2 East Court Street, Camberwell VIC 3124, Australia

*In this Deed of Variation, you are cleaning up who the Trustees are in your Trust. You are changing the Trustees to suit your needs.*

## 1 Background

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- 1.1 The Castellanos Family Trust was created by a deed dated 18 March 2010 as settled by the Settlor being Timothy Barek, together with any amending deeds (Trust Deed).
  - 1.2 The Trustee has examined the Trust Deed (or sought legal advice) and the Trustee is satisfied that there is power to revoke, add to and vary the terms of the trust constituted by the Trust Deed.
  - 1.3 The funds in the Castellanos Family Trust are not vested.
- The Trustee seeks to vary the Trust Deed from the date of this Deed of Variation or as otherwise stated by minute and there is consent to do so by the Appointors.

## 2 Dictionary

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**Appointor** being:

Sofia Castellanos

Michael Castellanos

and persons appointed as Appointor under the Trust Deed from time to time, including all references and other terms used for persons who control the Trustee and can appoint the Trustee and includes such expressions as an Appointer, Principal, Guardian, Nominator and Decider.

**Beneficiary** as defined in the Trust Deed under the word 'beneficiary' or similar terms such as 'general beneficiary'

## 3 Trustee

---

The Appointor may replace, add, remove or appoint a Trustee at any time without justification or reason, verbally, in writing, by deed, by minute, by Will or any other method, with or without any notification to any outgoing Trustee with no requirement to provide indemnities or similar to any outgoing Trustee.

- 3.1 Each Trustee irrevocably appoints and provides a non-renounceable:
  - 3.1.1 power of attorney, even if dead or no longer in existence; and
  - 3.1.2 permission and right to sign and executefor the Appointor or its agent to execute any documents, deeds or attend to any matters to allow the removal of the Trustee or any other similar matters to which the Appointor desires.



- 3.2 A Trustee may resign as trustee. However, unless there is a remaining trustee, or the Appointor deems otherwise, the resignation is effective when a new trustee is appointed.
- 3.3 The Trustee's appointment automatically terminates if the Trustee is of unsound mind, becomes bankrupt, is wound up or makes an arrangement or composition with creditors.
- 3.4 Upon ceasing to be a Trustee, the Trustee hands back books, accounts, titles and transfers ownership.
- 3.5 No person dealing with the Trustee need be concerned to inquire into the adequacy of the powers of the Trustee for any dealing or the exercise by the Trustee of any of the Trustee's powers, authorities and discretions.
- 3.6 No security given is invalid because of an error or omission whether of law or fact on the part of the Trustee or its legal adviser or any breach of duty or trust whatsoever.
- 3.7 The parties so vary the Trust Deed from the date of this Deed of Variation or as otherwise stated by minute.

#### **Outgoing Trustee:**

The following resign or are removed from the position of Trustee and all other similar controlling positions:

APC Holding Pty Ltd ACN 168 465 164  
24 Esplanade Street, Port Melbourne VIC 3207, Australia  
(Outgoing Trustee)

Where an Outgoing Trustee is unable to sign because of death or incapacity, a legal representative, legal personal representative or another Trustee or signatory signs on their behalf under the authority of the Trust Deed.

#### **New Trustee:**

The following be appointed to the position of Trustee.

Castellanos Holdings Pty Ltd ACN 498 454 874  
2 East Court Street, Camberwell VIC 3124, Australia  
(New Trustee)

The New Trustees accept the appointment.

## **4 No Partnership**

The Trust Deed does not create the relationship of partners, or of principal and agent, between the Trustee and the Beneficiaries nor as between each other.

## **5 Severing**

The Trust Deed and this Deed of Variation are interpreted to avoid any illegality. If any clause is nonetheless illegal, it is to be severed from the Trust Deed or Deed of Variation to the extent of the illegality.

*From an asset protection point of view, one Trustee is best. The Trustee is an 'at risk' person. What happens if the Family Trust goes insolvent? The Trustee often goes down with the Family Trust.*

The Trust Deed and this Deed of Variation are to be read down so that no matter how the applicable taxation law or impost (both State and federal), from time to time, are construed, the result would lead to an unfavourable taxation position.

## **6 What isn't varied?**

All the other terms contained and implied in the Trust Deed remain in full force and effect.

## **7 Do we use the definitions in the Trust Deed?**

Unless the context otherwise requires, the expressions and expressions of persons contained in this Deed of Variation have the same meanings as in the Trust Deed. This Deed of Variation does not alter the rights or entitlements of any classes of Beneficiaries.

## **8 Deed of Variation versus the Trust Deed**

This Deed of Variation is supplemental to the Trust Deed within the meaning of the applicable Property Law Act. If any of the terms of the Trust Deed are inconsistent with the terms of this Deed of Variation, then the terms of this Deed of Variation prevail.

**HOWEVER**, this Deed of Variation in no way constitutes a resettlement of the Trust Deed or any part of the Trust Fund. If anything in this Deed of Variation would otherwise establish a resettlement of the Castellanos Family Trust then the applicable words are read down so as not to constitute a resettlement.

## **9 When does this Deed of Variation take effect?**

Unless otherwise stated in any minutes, this Deed of Variation takes effect on the day it is signed.

## **10 Signing the Deed of Variation in different locations**

This Deed of Variation may be executed in counterpart by signing identical documents.

## **11 Interpreting the Deed of Variation**

In this Deed of Variation unless the context indicates a contrary intention:

- 11.1 headings are for convenience only and do not affect interpretation
- 11.2 a reference to a 'person' includes a reference to: an individual; body corporate (wherever incorporated); body politic; association of persons (whether incorporated or unincorporated) partnership; trust; person in the capacity as a trustee or the capacity as the Personal Representative of a deceased estate and superannuation fund
- 11.3 the plural includes the singular and vice versa and a reference to any gender includes every other gender
- 11.4 a reference to the Deed of Variation includes a reference to any amendment, variation, supplemental deed or replacement from time to time
- 11.5 a reference to any party to this Deed of Variation includes successors or permitted assigns

*Does your Family Trust own bank accounts, shares and real estate? Transfer these from the old to the new Trustee. For the transfer of land, you need to get the transfer 'stamped' before you can lodge it at the titles office.*

*There is generally no stamp duty (State law) or Capital Gains Tax (Federal law). However, NSW and ACT may apply stamp duty if you are not careful.*

- 11.6 a reference to laws in this Deed of Variation refers to those laws as amended or replaced as consistent with the overall purpose of the Deed of Variation and does not lead to an anomaly
- 11.7 a reference to any statute, or any subordinate legislation or instrument includes all statutes, subordinate legislation or instruments amending, modifying, consolidating, re-writing, re-enacting or replacing them and a reference to a statute includes all subordinate legislation and instruments made under that statute

Executed as a Deed on ..... 20 .....

EXECUTED for and on behalf of  
**APC Holding Pty Ltd**  
ACN 168 465 164

Member, by authority of its Directors in  
accordance with section 127  
*Corporations Act 2001 (Cth)*

\_\_\_\_\_  
Signature of Director or Secretary

\_\_\_\_\_  
Signature of Director (if a 2<sup>nd</sup>)

EXECUTED for and on behalf of  
**Castellanos Holdings Pty Ltd**  
ACN 498 454 874

Member, by authority of its Directors in  
accordance with section 127  
*Corporations Act 2001 (Cth)*

\_\_\_\_\_  
Signature of Director or Secretary

\_\_\_\_\_  
Signature of Director (if a 2<sup>nd</sup>)

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