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Your Reference: Family Trust Deed Update – General Update  
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Monday, 15 March 2011

Marc Nguyen  
175 City Street  
Canberra ACT 2601  
Australia

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can help you complete the questions.

Adj Professor, Dr Brett Davies – Partner

## Updating the Big Nguyen Family Trust

Thank you for instructing us to prepare the attached Family Trust – General 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:

Marc Nguyen  
of 175 City Street, Canberra ACT 2601, Australia

### (Trustee)

as Trustee of the Big Nguyen Family Trust (Trust) constituted by a Deed of Trust settled by the settlor being Scott Middleton ("Trust Deed").

Legal documents need to be maintained on a regular basis. This is because there are constant changes to legislation, trust law, tax law and case law.

As an introductory point on the importance of having an appropriately updated Trust Deed, Chapter 31 of the CCH Australian Master Tax Guide states that:

"The law of Trusts, the provisions of [the Tax Act] and the Trust loss measures are complex. A lack of appreciation of the problems and an inadequately drafted Trust Deed can give rise to serious problems, sometimes long after the establishment of the Trust. Forward planning is particularly important, e.g. by identifying a class of beneficiaries that is appropriate not only for the Settlor(s) but also for their successors, and by including in the Trust Deed mechanisms to minimise or resolve any disputes that may occur.

Resettling the Trust or amending the Trust Deed may have undesirable stamp duty

consequences (although rectification of the Trust Deed is possible, to give effect to the true intention of the parties, e.g. Carlenka 95 ATC 4620)."

**We have updated your Trust for the following:**

- A. The general "Streaming provisions"
- B. Franking credits
- C. Attribution relating to distributing capital gains to beneficiaries
- D. The ongoing extension of the Capital Gains Tax regime since 1985
- E. The majority of Appointors being able to take all the proceeds of the trust over the minority
- F. The ability to indemnify out of the trust assets
- G. Further powers of amending the Trust Deed
- H. Asset preservation
- I. Bamford decision including defining "income" in regards to the ATO's latest views
- J. Loss recoupment

We have not updated your Family Trust for any other purposes such as trust losses, pension entitlements or transfer (stamp duty) exemptions. If you require us to consider other matters, then please let us know.

**The Streaming Provisions**

Since November 1992, the Commissioner of Taxation has issued rulings for the "streaming" of income. "Streaming" allows you to avoid unnecessary capital and income tax being payable by the Trustee and beneficiaries of the trust. For example whether the allocation of a franked dividend income to one beneficiary to the exclusion of another is effective for tax purposes depends on the terms of the trust instrument.

The fully updated streaming now in your Family Trust provides support so that income distributed to a beneficiary retains the character it had when it was first derived by the Trustee.

You, as the Trustee, may now place different classes of income into separate income accounts. Thus, it is possible to trace the source of each trust distribution to a particular beneficiary or to a particular class of beneficiary.

Unless the Trustee clearly reflects what it has actually done in accumulating the Trust income and in distributing it to particular beneficiaries, it will be most difficult to establish, after the event, what class of income was distributed to particular beneficiaries.

This has significant advantages for Family Trusts. However, the Commissioner has stated that the Trustee must be validly empowered to selectively allocate those components of Trust income to particular beneficiaries and exercise that discretion. That is, the Trust Deed itself must contain the ability to stream income.

**Here is one example:**

Your trust sells a rental property and realises a capital gain. This capital gain is received into the trust and is included in the net income of the trust for that financial year. Your

new streaming provisions in your trust allow that amount to be treated as a capital gain in the hands of a particular beneficiary you nominate from the trust. Now, if fully franked dividends were also part of the Trust's Income, you can ensure that the dividends are not "mixed" with the capital gains tax income.

Your advisers may suggest that the dividend (or foreign tax credit) be utilised by a resident individual beneficiary with high marginal tax rates. In contrast, net capital gains can be best utilised by another beneficiary with carry-forward capital losses, low income beneficiaries with carry-forward revenue losses and minor beneficiaries able to receive excepted Trust income.

In effect your new streaming allows you to distribute one type of income to one beneficiary and another type of income to a different beneficiary.

### **Franking Credits**

At times your trust may include gross income from franked dividends. A resident beneficiary in your Family Trust (other than a Trustee of another trust estate) is entitled to a franking rebate if:

1. a share of net Trust Income is included in the assessable income of the Beneficiary; and
2. some or that entire share of net Trust Income is attributable to a franked dividend included in the assessable income of the trust estate.

Notwithstanding wide discretionary powers being conferred on a Trustee, a Trustee's discretion to selectively allocate dividend income to a beneficiary to the exclusion of another may be fettered by the terms of the trust or by trust law operative in the relevant jurisdiction. You do not want that. Therefore, we have inserted a clause in your Trust Deed which expressly empowers you to selectively allocate particular types of income to Beneficiaries.

Your accountant may suggest that you distribute that part of the net income to those Beneficiaries who are able to take the greatest advantage of franking, foreign tax and any other non-refundable tax credits and rebates available to the trust. Those Beneficiaries who have made a loss or are at a low tax rate (especially if lower than the company tax rate) may derive little benefit from these credits.

### **Attribution to distribute capital gain to beneficiaries**

When the trust derives a net capital gain in the net income of the trust, then the Trustee needs the power to distribute that part of the net income to certain Beneficiaries. The Beneficiaries are treated by the Commissioner of Taxation as having accrued a capital gain. It may be that one Beneficiary has carried forward capital losses and another has carried-forward revenue losses. In this case there are tax advantages in distributing the net capital gain to the Beneficiary who has suffered the prior capital losses.

For some Family Trusts the Commissioner may take the view that either:

1. both Beneficiaries are treated as having been presently entitled to a proportionate amount of the net capital gain and other net Trust Income; or
2. the net capital gain loses its character and therefore no part of the trust distribution is characterised as being a net capital gain.



Both outcomes are generally unfavourable.

You now have the power to attribute.

### **Ongoing extension of the Capital Gains Tax regime**

Your Deed of Variation allows you to account separately and keep separate any funds received from different sources. Your Trust Deed is amended to allow the Trustee to account separately and keep separate any funds received from different sources. For example, sources may include:

- capital gains
- any dividend income (of all natures)
- income having an allowance for depreciation (inclusive of depreciation of buildings and plant and equipment)
- income from superannuation investments or annuities
- income from deceased estates and trusts (including testamentary trusts) whether trading, investment or otherwise
- franked distributions
- income from trading (including on credit)
- interest
- primary production income
- income from personal exertion
- rents and other property income
- royalties
- foreign source income

### **Majority of Appointors take all trust assets over minority**

Over the 80-year life of your family trust the trust may have for example, three or more Appointors at one time. If this is the case, then there is opportunity for a majority of Appointors to give themselves all the proceeds of the Trust. This leaves the minority with nothing.

Your trust is amended so that the Appointors act, at all times, unanimously.

### **Trustee Power to Indemnify**

The Trustee's ability to act is governed by each state's legislation (under Trustees Acts) and by the terms of the Trust Deed. The Trustee has now been given stronger powers to guarantee and indemnify the performance of contracts and debts and obligations of all kinds to any person and to mortgage or charge the Trust's property in support of any guarantee and indemnity.

The power to guarantee allows the Trustee to become personally liable for the specific amount of the contract or debt and obligations. The power to indemnify allows the Trustee to become personally liable for any loss or legal costs that the other party may suffer from the contract or debt and obligations.

Banks usually require that family trusts provide for both powers before they will loan money to a family trust.

Your family trust fully allows the Trustee to guarantee the performance of contracts and debts and obligations.

### **Definition of Net Income**

A Trust distribution often allows you to pay less tax. You normally distribute to the family members that are on the lowest tax rates. If you fail to distribute, then the Trustee (as the tax payer) pays the tax at the highest marginal tax rate.

You distribute Trust Income to the pool of potential Beneficiaries. If you don't distribute any part of the Trust Income, then the Trustee is assessed on that part of the 'net income' at the highest marginal tax rate.

As the court in *Bamford v Commissioner of Taxation* [2009] FCAFC 66 said:

"The only purpose of the concept of "income of the Trust estate" in section 97(1) is to determine the extent of the apportionment as between the beneficiaries and the Trustee. It is not, in itself, a metric by which tax is imposed."

There is a difference between 'Trust Income' within the taxation legislation. Net income of the trust estate is the taxable income of the Trust. A Beneficiary is entitled to the Trust Income. But they are taxed, instead, on the net income.

Your Deed of Variation allows you to:

1. define Trust Income appropriately; and
2. make valid distributions.

### **Loss Recoupment**

The Trustee has the power to determine not to recoup carried forward capital losses, to have distributable income, which can be applied to various beneficiaries. If you did not have that power, there could be a situation arising where there is no income of the Trust estate to distribute. According to the ATO, the Trustee is assessed on the capital gain. To make matters worse a corporate Trustee is taxed on the grossed up capital gain, without recourse to the tax legislation.

### **Other matters - Asset Preservation**

While you have not sought any advice on asset protection, people often ask the question "if I go bankrupt are the assets in the family trust lost?" This question is complex and needs us to meet together to work out an answer. Asset protection cannot be done in isolation. It is a wider issue that needs careful planning.

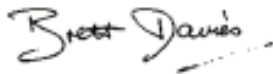
However, I am happy to make one generic comment. The person that suffers the burden of holding directorships and risky assets, like a trading business, often won't hold assets in their own name. Let's call that person the husband (man of straw). The wife (woman of substance) holds the shares, all of the family home and other assets in her name. If a person follows this strategy then, in the family trust, the husband holds the position of Trustee (or is sole director of the corporate Trustee) and the wife holds the position of Appointor. The Appointor is god and can sack the Trustee at whim. If the Trustee goes feral or bankrupt, then the Appointor merely sacks the Trustee. This is simplistic and is generic advice only.

What if the wife runs away with the assets? It doesn't much matter to the Family Court that the assets are currently under the wife's control. The Family Court divides the assets according to what is equitable under the Family Act. This is often 50/50 if you have been together for over 10 years and there are no children or the children no longer live at home. Let me know if you need your legal rights explained further.

We make special mention of the enclosed Minute regarding you needing to hold and retain, forever, original deeds. If you do not retain original signed deeds, you will not be able to open bank accounts or borrow money. Copies are not good enough. Ensure that both you and your accountant retain original deeds. They are precious and usually impossible to replace.

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

Yours sincerely,



Adjunct 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.....

Trustee full name(s) ("Trustee"):

Marc Nguyen  
of 175 City Street, Canberra ACT 2601, Australia

**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 that 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 (**Person chairing the meeting**).

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

1. the Trustee adopts the duly executed Deed of Variation to amend the Big Nguyen 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 to be kept by the Trustee of the Big Nguyen 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

**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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## **General & Taxation Deed of Variation to update the Big Nguyen Family Trust**

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This Deed of Variation is made by:

Marc Nguyen  
of 175 City Street, Canberra ACT 2601, Australia

(Trustee)

## 1 Background

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- 1.1 The Big Nguyen Family Trust was created by a deed dated 22 October 2004 as settled by the Settlor being Scott Middleton, 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 trusts constituted by the Trust Deed.
- 1.3 The funds in the Big Nguyen Family Trust are not vested.
- 1.4 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 Marc Nguyen in the capacity of Appointor.

## 2 Dictionary

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Appointor(s) being:

Marc Nguyen

and persons appointed as Appointor under the Trust Deed from time to time, references and other terms used for persons who control the Trustee and can be a Trustee and includes such expressions as Appointor, Principal, Guardian, No Decider

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

Categories a category, character, type, class, part, item or source, including (but not limited to) the categories: Net Capital Gains, Net Capital Losses; gains, profits or any losses of capital or of a capital nature treated as assessable income or allowable deductions under the Tax Act for the Trust Income for any Financial Year; gains and profits or any losses of capital or of a capital nature that are not treated as assessable income or allowable deductions for taxation purposes for the Trust Income for any Financial Year; any income, receipts, gains or profits or any losses, disbursements or outgoings of income or on income account that are or are treated as assessable income or allowable deductions for taxation purposes in relation to the Trust Income for any Financial Year; any income, receipts, gains or profits or any losses, disbursements or outgoings of income or on income account whether treated as assessable income or allowable deductions for taxation purposes for any Financial Year; any income, receipts, gains or profits that are exempt or otherwise not liable to tax under the Tax Act or any other act or regulation; Franked Dividends; Unfranked Dividends; any foreign income, foreign income tax credit, other tax credit, interest; any royalties, minors and others with

*In a Family Trust you 'stream' different categories of trust income to particular beneficiaries. But only if you have the streaming & Bamford update. This reduces your overall tax.*

proceeds from deceased estates, superannuation funds and life insurance and additional categories set out in any minutes

Plus, categories mentioned in any Australian Taxation Office publication, from time to time; and any combination or part of the above

**Default Beneficiaries** as that term or similar terms such as 'takers in default', 'primary beneficiaries', 'specified beneficiaries' is used or defined in the Trust Deed

**Insolvency Event** is where the person or company receives a legitimate writ of litigation for over \$250,000, goes into liquidation, insolvent under administration (including under section 9 *Corporations Act*), is declared bankrupt or is unlikely to be able to pay his, her or its debts as and when they fall due

**Financial Year** 1 July in a year to 30 June in the next year or the lesser period ending on 30 June after the date of the Trust Deed; and 1 July until the termination of the trust before 30 June of the next year or otherwise as the Trustee decides (as directed by the Appointor)

**Tax Act** *Income Taxation Assessment Act 1936* and *Income Tax Assessment Act 1997* as applicable

**Trust Income** unless the Trustee otherwise determines from time to time, the net income of the trust as defined in section 95(1) *Income Tax Assessment Act 1936*

**Trust Fund** includes the settled sum, additional property, undistributed Trust Income, accretions and additions to the Trust Fund from any source and any accumulation of Trust Income

**Trustee** being:

Marc Nguyen

If a person can access a tax concession then you distribute to that beneficiary. You hunt down beneficiaries that reduce your overall tax.

**Vesting Day** the date that the Big Nguyen Family Trust vests as set out in the Trust Deed

### **3 Failure to distribute Trust Income or capital**

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Where the Trustee fails to distribute any:

- 3.1 Trust Income by 30 June in a Financial Year; or
- 3.2 unapplied and undistributed income before the Vesting Day

then such income and capital are held by the Trustee in trust for the Default Beneficiaries who are alive. If more than one, then equally as tenants in common. If they are all dead then such income and capital is held for the next of kin of the Default Beneficiaries equally as tenants in common.

### **4 Trustee Powers**

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Only exercisable with the Appointor's prior approval or direction, but otherwise, with absolute discretion, the Trustee has all the maximum possible powers of both a natural person and of a Trustee, as though the Trustee was both the legal and beneficial owner of the Trust Fund, including dealing as principal, agent or otherwise, and such power includes to:

## Change Beneficiaries

- 4.1 add, remove, redefine, exclude and change Beneficiaries, Default Beneficiaries and classes of Beneficiaries
- 4.2 receive a request from a Beneficiary for that Beneficiary to be removed as such, and either accept or reject such requests under any terms the Trustee deems fit to apply

## Distribute

- 4.3 distribute any part of the Trust Income in any Financial Year and part or all of the Trust Fund and any other capital, asset or right, to any Beneficiary in any proportion and to exclude a Beneficiary
- 4.4 distribute any part of the Trust Fund for a Beneficiary's current or future maintenance, education, advancement or benefit of that person in any manner
- 4.5 distribute to a Beneficiary's parent, guardian or legal personal representative without being responsible for what that person does with the distribution
- 4.6 not be responsible for what is done with any distribution
- 4.7 make an *in specie* distribution
- 4.8 redefine the definition of Trust Income before or after 30 June
- 4.9 accumulate Trust Income and treat it as Trust Fund capital
- 4.10 at any time before 30 June in a Financial Year, decide that a distribution of income for that year is to be made solely from income that the Trustee regards as a particular class of income
- 4.11 decide when a Beneficiary becomes entitled to the income or capital Categories of that entitlement
- 4.12 distinguish between income of a particular nature or character or from a particular source (whether referred to in the Tax Act or not) and deal with income of a particular nature or from a particular source in one manner and income of any other nature or character or from any other source in a different manner and classify and create a separate account for any type of income including into any Categories
- 4.13 distribute an amount to a Beneficiary by setting the amount aside in a separate account in the books in the name of the Beneficiary and that amount may be held on a separate trust for such Beneficiary if so determined by the Trustee, as an amount owed to the Beneficiary as an interest free debt at call to determine that the Trust Income for a Financial Year, whether, and to what extent, a receipt or outgoing is on account of income or capital or to hold the money as an unpaid present entitlement
- 4.14 separately allocate all or part of the Trust Income or capital whether distributed or accumulated



### Vary the Trust Deed

- 4.15 vary the Trust Deed and this Deed of Variation at any time, in any way, including revoking all the trusts it establishes and changing vesting dates, however, such amendments do not benefit the Settlor or affect a Beneficiary's beneficial entitlement already set aside

### Jurisdiction

- 4.16 declare the law of the jurisdiction that governs the Trust Deed, from time to time, and while no declaration is made in the Big Nguyen Family Trust Deed then the Settlor's State as it appears in the Settlor's address in the Trust Deed

### Terminate Trust Deed earlier than the Vesting Day

- 4.17 terminate the Trust Deed before the Vesting Day

### Dealings with the Trust Fund

- 4.18 invest in anything, whether or not authorised by the law for investment of trust funds including; life, life endowment, term, trauma or other policy, trusts and common funds, deposits and loans (with or without security), hire purchase, bill of sale, real and personal property (whether income earning or otherwise and whether wasting or not), shares (unlisted or listed on any stock market), stocks, notes, options, debentures and other securities, options, hedging contracts, derivatives, futures contracts, hedging, currency exchanges, warrants and other financial instruments
- 4.19 advance or lend money to any person, with or without any security, on any commercial or non-commercial terms and at any interest rate, including a zero interest rate
- 4.20 borrow and raise money from any person, on a full or non- or without security, mortgage or charge, including via an ov
- 4.21 provide any guarantee or indemnity for payment of money o performance of any person's contractual obligations
- 4.22 mortgage, lien, pledge, charge, guarantee or otherwise pro for security for any borrowing, raising, facility, guarantee, in other contractual obligation, whether such contractual oblig Trust or not
- 4.23 give and execute any mortgage, charge or other security o parts of the assets of the Trust Fund as may be required to or the performance of any contractual obligation under or in any transaction
- 4.24 deposit securities or documents of title to any real property bank, trust, company, investment broker or like institution in world
- 4.25 purchase, acquire, sell, transfer, hire, lease, dispose of, manage, divide, encumber or otherwise deal with any chose in action, real or personal property and any Trust Fund

*The Streaming Rules came into effect on 29 June 2011. They set out the requirements for capital gains and franked dividends to be 'streamed' by the trustee of a trust to specific beneficiaries. No longer can trustees automatically stream income. This is unless the Family Trust deed expresses empowers the trustee to stream.*

- 4.26 enter into any contract, arrangement or agreement with any person (including a Beneficiary or Trustee) for the sale, letting or other dealing with the Trust Fund, or to provide any goods or services by or from that person
- 4.27 pay any person (including a Beneficiary and Trustee) for administering the Trust Fund and including paying such persons their usual rate if they are providing professional services
- 4.28 pay out of the Trust Fund any outgoings, costs, charges, taxes, duties and expenses of the Trust whether related to the Trust or not, and allocate such to any income or capital Categories
- 4.29 exercise all rights and perform all duties of holding shares, stock or debentures in any company
- 4.30 establish, purchase, acquire, promote or conduct any company, business, undertaking or scheme, either in the Trustee's own capacity or in its capacity as Trustee (or both), and either solely or with any person and to sell, transfer, dispose of or wind-up any such company, business, undertaking or scheme
- 4.31 employ any person (including a Beneficiary or Trustee) to carry on any business or to do anything (whether in connection with matters under this deed, or otherwise), for remuneration or otherwise
- 4.32 appropriate, wholly or partly, any asset of the Trust Fund to satisfy any interest a person may have in the assets of the Trust or any benefit determined to be paid to or apply for the benefit of a Beneficiary
- 4.33 open and operate bank accounts, to draw, make, accept, endorse, discount, execute, issue or otherwise deal with all forms of negotiable or transferable instruments and to enter into any bill facilities or other form of banking facilities
- 4.34 give receipts, including for money received
- 4.35 underwrite shares, securities or other obligations
- 4.36 grant options (including put and call) including for any
- 4.37 become a director, or appoint any person as a director independently paid for such a position
- 4.38 receive any chose in action, real or personal property by gift or by will as additions to the Trust Fund
- 4.39 grant, cancel or redeem an annuity
- 4.40 divide the assets in their own particular form, without first realising those assets, between the Trust Fund and any other trusts established
- 4.41 take any action to protect the Trust Fund
- 4.42 enter into, manage and vary any arrangement relating to currency exchange, interest rates, interest rate caps, collars, floors or swaps, any currency forward rate agreement and any other financial risk management agreement, derivative or hedge

*Build Family Trust streaming and Bamford update:*

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- 4.43 mix the Trust Fund with any other money, funds or property, including other trusts' money, funds or property and join with any other person or the Trustee in its personal capacity or as Trustee or any other trust fund or both of them in making common investments
- 4.44 make any election required or permitted at law
- 4.45 appoint attorneys and managers and delegate the exercise of powers or discretionary authorities
- 4.46 register the Trust Fund in the name of a nominee and not be co-trustee if the Trust Fund is not registered in the Trustee's name
- 4.47 grant a power of attorney for fee, remuneration and reward on behalf of the Trust
- 4.48 take or not take legal proceedings against a co-trustee for an act done in the Trust
- 4.49 for the Trustee to receive remuneration in any form including fee, commission or other remuneration, payable out of the Trust Fund or the income
- 4.50 if the Trustee is engaged in a profession or business, charge the Trust for any work done by the Trustee in that capacity or a professional, partner or employee of the Trustee
- 4.51 add additional powers by way of minutes (provided that those powers are only then exercisable with the Appointor's prior approval or direction)

*Before the Bamford case, the ATO assumed that you could do the above. After Bamford, the ATO withdrew its Rulings. The new ATO ruling said that you can't stream unless you have that exact power in your Family Trust Deed. This is the streaming and Bamford update.*

even though and irrespective of the fact that the Trustee or a director, member, associate, Beneficiary or relative of the Trustee has or may have a direct or indirect interest in the method or result of exercising the power or discretion, or may benefit directly or indirectly from its exercise;

notwithstanding anything to the contrary, the Trustee may enter into any relationship (legal or otherwise) irrespective of whether there is a direct or personal interest, with any person, including related parties (even if the Trustee is a sole trustee) to do all things (including all things set out in this clause) in such manner, and on any terms (favourable, unfavourable or otherwise), whether there is a conflict or not, as the Trustee thinks fit; all such powers can be exercised orally, in writing, by action or by any other means.

## **5 Powers augment the Trust Deed powers**

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The above Trustee powers are in augmentation and do not reduce the Trustee's powers set out in the Trust Deed.

## **6 Trustee**

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- 6.1 The Appointor may replace, add, remove and 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.
- 6.2 Each Trustee irrevocably appoints and provides a non-renounceable:



- 6.2.1 power of attorney, even if dead or no longer in existence; and
- 6.2.2 permission and right to sign and execute

for 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.

- 6.3 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.
- 6.4 The Trustee's appointment automatically terminates if the Trustee is of unsound mind, becomes bankrupt, is wound up or makes an arrangement, composition with creditors or suffers an Insolvency Event.
- 6.5 Upon ceasing to be a Trustee, the Trustee hands back books, accounts, titles and transfers of ownership.
- 6.6 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.
- 6.7 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.

## **7 Appointor**

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- 7.1 Where there is more than one Appointor they act unanimously in all matters and at all times.
- 7.2 An Appointor may decide to cease to act as an Appointor and relinquish that position at any time.
- 7.3 The Appointor may fetter its discretion in general or in relation to any assets of the Trust or any class of assets
- 7.4 The Appointor may amend, in any way, the terms of this Trust Deed.
- 7.5 Appointor's declarations, decisions, directions, authorities, minutes and records can be given and retained verbally, electronically or in any other way, except if the law otherwise requires.
- 7.6 The Appointor may appoint and amend (including by will) a person as an additional, replacement or Backup Appointor and may change, remove or replace a Backup Appointor as the Appointor sees fit. This is on any terms before the appointment is made, including the fettering of such an Appointor's powers.

### **Automatic Removal**

- 7.6.1 If a human Appointor suffers an Insolvency Event, dies, or loses mental capacity, then that person ceases to be an Appointor. Except that, if a sole surviving Appointor loses mental capacity then the Appointor's legal

personal representative becomes Appointor, in a fiduciary capacity, for so long as that incapacity continues or that Appointor dies.

- 7.6.2 If a company is an Appointor and enters into compulsory or voluntary liquidation (except for the purposes of amalgamation or reconstruction), or has an administrator, receiver, controller or receiver and manager appointed to any part of its assets or suffers an Insolvency Event, or ceases to exist then that Appointor ceases to be an Appointor.
- 7.7 If a sole surviving Appointor dies or ceases to exist or suffers an Insolvency Event without a replacement or Back up Appointor, then the Default Beneficiaries become the Appointors.
- 7.8 If a person becomes an Appointor or is designated to become an Appointor but can not do so because they are a minor, then the minor's guardian takes on the position of Appointor. But the guardian's power is fettered so that the guardian must have regard to and act in the best interests of that minor at all times. Upon the minor coming of age the minor immediately becomes the Appointor without any such fettering of discretion.
- 7.9 Subject to the Appointors agreeing otherwise, the Backup Appointors can only take up their appointment once the current Appointors all cease to act in that capacity for whatever reason.

## 8 Beneficiaries

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- 8.1 No Beneficiary has any interest, claim, right, estate or title in any part of the Trust Fund, Trust Income or any of its income.
- 8.2 Neither a Beneficiary nor any other person may challenge a power or a failure to exercise it, or require a reason for its exercise.
- 8.3 No person, including a Beneficiary, may require, and the Trustee is not obliged to give, any account, report or information on the Trust Fund or the entitlement of any Beneficiary, except as required by law.
- 8.4 The Trustee is not liable to the Beneficiaries for any loss.
- 8.5 No Beneficiary is under any obligation to personally indemnify the Trust or any sub-trust established under this Deed of Variation for any liability, loss, damage or expense either incurred or suffered by the Trust. The Trustee is unable to exercise against a Beneficiary the right of subrogation or indemnity.

*Almost all 2011 and older trust deeds must be updated. Amend your trust deed if it does not contain adequate streaming powers. The amendment has no adverse tax consequences. It is not a 'resettlement' of the Family Trust. Our letter confirms this.*

## 9 No Partnership

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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.

## 10 Severing to reduce tax and stamp duty

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- 10.1 The Trust Deed and this Deed of Variation are interpreted to reduce taxes, imposts, duties and stamp duty (including State and federal) (Taxes) and avoid

any illegality. If any clause nonetheless fails to reduce Taxes or is illegal, it is severed, read down or fettered, as required, from the Trust Deed or Deed of Variation to the extent of the illegality or in the furtherance of the reduction of the Taxes.

10.2 The Trust Deed and this Deed of Variation is read down so that no mandatory taxation law or Taxes, from time to time, is contravened that would lead to an unfavourable taxation position.

10.3 For land ownership registration requirements, including where there is a change of Trustee then all powers in the Trust Deed and this Deed of Variation are severed, read down or fettered, as required, and vesting restricted, as required to allow for minimal duty or stamp duty in the relevant jurisdiction.

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

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

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

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Unless the context otherwise requires, the expressions and expressions of similar import 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 the Beneficiaries.

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

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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 Big Nguyen Family Trust then the applicable words are read down so as not to constitute a resettlement.

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

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Unless otherwise stated in any minutes, this Deed of Variation takes effect on the date of this Deed of Variation.

## **15 Decision making in more than one place and Notices**

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15.1 This Deed of Variation may be executed in different locations by signing identical documents and all counterparts together constitute the Deed of Variation.

15.2 Meetings and decision making can be conducted in more than one place via telephone, the Internet or other means.

15.3 Notices may be provided via the post or email.



## 16 Interpreting the Deed of Variation

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

- 16.1 headings are for convenience only and do not affect interpretation
- 16.2 a reference to a 'person' includes a reference to: individual; body corporate (wherever incorporated); body politic; association of persons (whether incorporated or unincorporated) partnership; trust; person in the capacity as a trustee; person in the capacity as the Personal Representative of a deceased estate and superannuation fund
- 16.3 the plural includes the singular and vice versa and a reference to any gender includes every other gender
- 16.4 a reference to the Deed of Variation includes a reference to any amendment, novation, variation, supplemental deed or replacement from time to time
- 16.5 a reference to any party to this Deed of Variation includes successors or permitted assigns
- 16.6 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
- 16.7 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 the ..... day of ..... 20 .....

SIGNED, SEALED AND DELIVERED by  
**Marc Nguyen**

\_\_\_\_\_  
**Marc Nguyen**

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Name of witness)

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