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Head Office
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Nedlands WA 6009

T: 1800 141 612

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Your Reference: Unit Trust Deed – Trustee Update
Enquiries: Adj Professor, Dr Brett Davies
Direct Telephone: 1800 141 612
Email: brett@legalconsolidated.com

Wednesday, 17 March 2022

Two Brothers Nominees Pty Ltd
227 Vincent Place
West Perth WA 6005
Australia

Dear Trustee,

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Adj Professor, Dr Brett Davies - Partner

Updating the Auto Holding Unit Trust

Deed of Variation for the Change of Trustee Update

Thank you for instructing us to prepare the attached Unit 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:

Two Brothers Nominees Pty Ltd ACN 516 846 203
227 Vincent Place, West Perth WA 6005, Australia

(Trustee)

as Trustee of the Auto Holding Unit Trust (Trust).

Can I have one or many Trustees?

You can have any number of humans and companies as Trustees, as you see 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 ACT applies stamp duty on the transfer of real-estate.

Does the Deed of Variation need to be registered anywhere?

An advantage of Unit Trusts over companies is that Unit Trusts are mostly unregulated. While companies are heavily overregulated. You don't need to lodge your Unit Trust deed or any Deeds of Variation anywhere. However, you do keep yourself and also with your accountant a complete set of the Unit Trust Deed, 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 Unit Trust to do so, then the Unitholders 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
[*Australian Securities Investments Commission v. Rich*
(2009) 75 ACSR 1
[2009] NSWSC 1229

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.

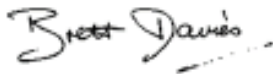
Having considered the authorities, the important considerations in contemplation of whether a trust fund is at risk of resettlement include:

- 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
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This is a sample of the document you are building on our law firm's website.

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*Dr Brett Davies
Partner
Legal Consolidated Barristers & Solicitors*

Resolution by the Trustees

Held at

On day of 20.....

Two Brothers Nominees Pty Ltd ACN 516 846 203
227 Vincent Place, West Perth WA 6005, Australia

(Trustee)

as Trustee of the Auto Holding Unit 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 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.

Upon tabling the fully executed Deed of Variation (in duplicate) that varies the Auto Holding Unit Trust IT WAS RESOLVED that:

1. the Trustee adopts the duly executed Deed of Variation to amend the Auto Holding Unit 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 Auto Holding Unit 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.

Steven Davidson
(Outgoing Trustee) Date: / / 20.....

Two Brothers Nominees Pty Ltd
(New Trustee) Date: / / 20.....



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Adj Professor, Dr Brett Davies - Partner

Deed of Variation to Update the Auto Holding Unit Trust

Trustee Update

This Deed of Variation is made by:

Outgoing Trustee:

Steven Davidson
25 McCourt Road, Subiaco WA 6008, Australia

New Trustee:

Two Brothers Nominees Pty Ltd ACN 516 846 203
227 Vincent Place, West Perth WA 6005, Australia

Build a Deed of Variation to change the trustee of a Unit Trust. The update of the Unit Trust's trustee cleans up who the trustee is for your Unit Trust. You are changing the trustee to suit your needs

1. Background

- 1.1 The Trust was created by a deed dated , together with any am (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 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 in the capacity of Unitholders.

2. Dictionary

Unitholders as defined in the Trust Deed under the word 'unitholders', 'unitholder' or similar terms

3. Trustee

- 3.1 The Unitholders 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.
- 3.2 Each Trustee irrevocably appoints and provides a non-renounceable:
 - 3.2.1 power of attorney, even if dead or no longer in existence; and
 - 3.2.2 permission and right to sign and execute

for the Unitholders 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 Unitholders desire.

- 3.3 A Trustee may resign as trustee. However, unless there is a remaining trustee, unless the Unitholders deem otherwise, the resignation is effective when a new trustee is appointed.
- 3.4 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.

- 3.5 Upon ceasing to be a Trustee, the Trustee hands back books, accounts, titles, transfers ownership.
- 3.6 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.
- 3.7 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.
- 3.8 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 controlling positions:

Steven Davidson
25 McCourt Road, Subiaco WA 6008, Australia

(Outgoing Trustee)

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

New Trustee:

The following be appointed to the position of Trustee.

Two Brothers Nominees Pty Ltd ACN 516 846 203
227 Vincent Place, West Perth WA 6005, Australia

(New Trustee)

The New Trustees accept the appointment.

Update the Unit Trust Trustee where:

- 1. the trustee retires, dies, goes bankrupt or insolvent*
- 2. you go from a human trustee to a corporate trustee (the company becomes the new trustee)*
- 3. you go from a corporate Trustee to a human trustee*
- 4. you want a single trustee only*

4. No Partnership

The Trust Deed does not create the relationship of partners, or of principal and agent, between the Trustee and the Unitholders or as between each other.

5. Severing

The Trust Deed and this Deed of Variation is 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.

The Trust Deed and this Deed of Variation is to be read down so that no mandatory taxation law or impost (both State and federal), from time to time, is contravened that 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 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 Unitholders.

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 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: individual (wherever incorporated); body politic; association of persons (whether or not incorporated or unincorporated) partnership; trust; person in the capacity as the Personal Representative of an estate and superannuation fund
- 11.3 the plural includes the singular and vice versa and a reference to a gender includes every other gender
- 11.4 a reference to the Deed of Variation includes a reference to a novation, variation, supplemental deed or replacement from time to time
- 11.5 a reference to any party to this Deed of Variation includes a reference to that party's assigns
- 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

You don't lodge the Unit Trust or any Deeds of Variation of the Unit Trust (such as the one you are building) anywhere. However, keep the Unit Trust deed and all Variations of the Unit Trust somewhere safe. And make sure your accountant holds an original as well.

statute includes all subordinate legislation and instruments made under that statute

Executed as a Deed on 20

SIGNED, SEALED AND DELIVERED by
Steven Davidson

Steven Davidson

(Signature of witness)

(Name of witness)

You can build this document here:
<https://www.legalconsolidated.com.au/unit-trust-trustee-update/>

EXECUTED for and on behalf of
Two Brothers Nominees Pty Ltd
ACN 516 846 203

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 2nd)