

Management report to Council

Agenda item 6.2

Melbourne Art Trust – amendment of trust deed

Council

Presenter: Keith Williamson, Manager Governance and Legal

27 November 2018

Purpose and background

1. To seek the consent of Council to amend the Deed of Trust (Deed) for the Melbourne Art Trust (MAT) to enable the Council to appoint other current Councillors as trustees.

Key issues

2. The Deed (Attachment 2) currently provides:
 - 2.1. the trustees of the MAT are the persons from time holding the positions of Lord Mayor, Deputy Lord Mayor and the Chair of the Committee of Council with the annual budget in its terms of reference (currently the Chair of the Finance and Governance portfolio of the Future Melbourne Committee)
 - 2.2. at least two trustees are required to form a quorum to carry out business.
3. When the Deputy Lord Mayor was appointed as the chair of the Finance and Governance portfolio of the Future Melbourne Committee on 29 November 2016 the number of trustees was reduced to two.
4. When the former Lord Mayor resigned on 5 February 2018, the Deputy Lord Mayor became the Acting Lord Mayor and the result was the MAT could not function until the new Lord Mayor was sworn in on 24 May 2018.
5. To avoid the risk of the MAT losing quorum in unforeseen circumstances in the future, management recommends that:
 - 5.1. the Deed be amended (Attachment 3) to remove the Chair of the Committee of Council with the annual budget in its terms of reference as a standing trustee and enable the Council to resolve to appoint other current councillors as trustees
 - 5.2. the Council resolve to appoint the Chair of the Arts, Culture and Heritage portfolio of the Future Melbourne Committee as a trustee of the MAT and, in the absence of the Chair, the Deputy Chair.

Recommendation from management

6. That Council:
 - 6.1. consents to the amendment to the Trust deed of the Melbourne Art Trust (MAT) as detailed in the Deed of Amendment of Trust (Deed) (Attachment 2)
 - 6.2. appoints the Chair of the Arts, Culture and Heritage portfolio of the Future Melbourne Committee (and, in the absence of the Chair, the Deputy Chair), as a trustee of the MAT, such appointments to take effect on the execution of the Deed.

Attachments:

1. Supporting Attachment (Page 2 of 15)
2. Consolidated version of current trust deed for the MAT (Page 3 of 15)
3. Proposed deed of amendment of trust (Page 12 of 15)

Supporting Attachment

Legal

1. The MAT was brought into effect by modifying an existing, dormant trust (the Henri Leon Wyler Foundation Trust).
2. The MAT is a separate entity to the Council and, unlike the Council, has deductible gift recipient status with the Australian Tax Office. Any donations, gifts of artworks or items of cultural significance made to the MAT entitle the donor to obtain a tax deduction and are assets of the MAT, not the Council.

Finance

3. No direct financial issues arise from the recommendation from management.

Conflict of interest

4. No member of Council staff, or other person engaged under a contract, involved in advising on or preparing this report has declared a direct or indirect interest in relation to the matter of the report.

Occupational Health and Safety

5. No Occupational Health and Safety issues or opportunities have been identified as arising from the recommendation from management.

Stakeholder consultation

6. Consultation has occurred with the chair of the Finance and Governance portfolio in developing the recommendation from management..

Environmental sustainability

7. No environmental sustainability issues or opportunities have been identified as arising from the recommendation from management.

Date / /

Melbourne Art Trust ABN 71 619 845 192 **Operative Provisions of the Trust Deed**

comprising operative provisions of the Declaration of Trust of 28 March 1980 as amended by:

- (a) Deed of Appointment of 5 April 2005;
- (b) Deed of Amendment of Trust of 15 December 2005; and
- (c) Deed of Amendment of Trust of 11 July 2006.

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Melbourne Art Trust - Operative Provisions

1. DEFINITIONS

In this Declaration unless there be something in the context or subject inconsistent therewith the singular shall include the plural and vice versa, any gender shall include all genders and the following expressions shall have the meanings hereinafter mentioned:

- 1.1 **Authorised Investments** means any of the modes of investment for the time being authorised or permitted by the laws of Australia or any of the States for the investment of trust monies.
- 1.2 **The Fund** mean:
- (i) the investments set out in the Second Schedule hereto;
 - (ii) other assets accepted by the Trustees to be held on the trusts of this Declaration;
 - (iii) all investments into which assets referred to in paragraphs (i) and (ii) may from time to time be covered;
 - (iv) the proceeds of the sale, redemption or repayment of any such investment;
 - (v) any net income which is not distributed;
 - (vi) all investments and property into which the above may be converted or which by the exercise of any of the powers herein contained or otherwise may accrue or otherwise become subject to the trusts hereof;
 - (vii) the Collection.
- 1.3 **The Trust** means The Melbourne Art Trust constituted by this Declaration.
- 1.4 **The Trustees** means the Trustees named herein or any other person or persons appointed or acting in the place or stead of the Trustees from time to time.
- 1.5 **the Accounting Period** means each period of 12 months ending on the 31st day of December in each year **PROVIDED** that the period commencing on the first day of July prior to the Vesting Day and ending on the Vesting Day shall be an Accounting Period.
- 1.6 **the Arts Strategy** shall mean such strategy as is set down, adopted or approved from time to time by the Trustees or the Council in relation to the City of Melbourne's role in the Arts.
- 1.7 **the Collectables** means works of art and shall include, but not be limited to, paintings, small scale indoor sculptures, documents, works on paper, photographs, textiles, historic furniture and fittings, decorative arts, craft, heritage objects and plaques which relate to themes identified in the Collection Policy.

- 1.8 **the Collection** means the Collectables and any other such property purchased or transferred to and accepted by the Trustees as additions to the Fund in accordance with the Collection Policy of the Trust as set down or adopted by the Trustees from time to time.
- 1.9 **the Collection Policy** shall mean such policy as is set down, adopted or approved from time to time by the Trustees in relation to the acquisition or commission of the Collectables and shall include De-accession Guidelines in relation to the disposal of Collectables by sale or otherwise.
- 1.10 **the Council** shall mean the Melbourne City Council and its successors in law.
- 1.11 **Cultural Purpose** shall mean that purpose as defined in section 30-300 of the *Income Tax Assessment Act 1997*, which purpose includes the promotion of any of the following: literature, music, one or more of the performing arts, one or more of the visual arts, a craft, design, film, video, television, radio, community arts, Aboriginal arts or moveable cultural heritage.
- 1.12 **the Vesting Date** means the first to occur of:
- 1.12.1 any perpetuity period applicable to the trusts of this Deed, and
- 1.12.2 a date appointed by the Trustees.
- 1.13 **the Public Fund** means the Melbourne Art Trust Public Fund established pursuant to clause 6 which is to be listed on the Register of Cultural Organisations.

2. THE TRUSTEES

- 2.1 The Trustees shall hold the Fund upon the trusts of and subject to the powers and provisions contained in this Declaration.
- 2.1A The Trustees shall hold the Fund and the Income thereof on trust for Cultural Purposes.
- 2.2 The Trustees shall consist of the persons for the time being occupying the following offices:
- 2.2.1 the Lord Mayor of Melbourne;
- 2.2.2 Deputy Lord Mayor, and
- 2.2.3 the Chair of the Council's Finance and Governance Committee, but if that Committee is abolished or ceases to exist, the Chair of the Committee of Council responsible for the annual budget in its terms of reference.
- 2.3 A Trustee shall be deemed to have vacated office if he shall:
- 2.3.1 Resign from the office of trustee;
- 2.3.2 Become bankrupt;
- 2.3.3 Become lunatic or of unsound mind;

- 2.3.4 retire from or otherwise cease to hold one of the offices referred to in clause 2.2.
- 2.4 The continuing or surviving Trustees may act notwithstanding any vacancy for the time being in their number but so that if the number falls below two the continuing or surviving Trustees shall not act except for the purpose of the collection of income.
- 2.5 The Trustees may meet together for the despatch of business adjourn and otherwise regulate their meetings and proceedings as they see fit. any question or discretion shall be determined by the vote of the majority of the Trustees and in the case of an equality of votes the Chairman of the meeting (if one shall have been elected) shall have a second or casting vote.
- 2.6 Two Trustees shall constitute a quorum for the transaction of business.

3. INVESTMENT OF THE FUND

- 3.1 The Fund shall be invested by the Trustees in authorised investments chosen by the Trustees.
- 3.2 Any authorised investments may at any time be sold by the Trustees but in this case the proceeds of such sale shall be reinvested as soon as convenient in the acquisition of authorised investments.

4. DUTIES OF THE TRUSTEES

- 4.1 The Trustees shall manage the Fund and without in any way limiting the generality of the foregoing the Trustee shall:
- 4.1(a) Use their best endeavours to ensure that the management of the Fund is carried on and conducted in a proper and efficient manner;
 - 4.1(b) Ensure that adequate insurance is maintained in respect of any property capable of so being insured acquired from time to time by the Trustees;
 - 4.1(c) Deposit all receipts of income and other monies relating to or derived from the Fund in a separate bank account in the name of and under the control of the Trustees;
 - 4.1(d) Pay all current expenses and outgoings with respect to the administration of the Trust and the Fund and provide such reserves for future and contingent liabilities as they shall consider necessary;
 - 4.1(e) Keep or cause to be kept proper books of account of all sums of money received and expended by or on behalf of the Trust and the matters in respect of which such receipt and expenditure takes place and of all sales and purchases of investments and of the assets and liabilities of the Fund and shall cause these records to be kept in such manner as to enable them to be conveniently and properly audited.
- 4.2 The Trustees shall at the end of each calendar year determine the net income of the Trust Fund arising during that calendar year having regards to the clause 4.3 hereof.

- 4.3 The Trustees shall at any time prior to the expiration of any Accounting Period which ends before or upon the Vesting Day determine with respect to all or any part or parts of the net income of the Fund for such Accounting Period:
- 4.3.1 to pay or set aside the same for the purposes of the Trust.
- 4.3.2 to accumulate the same
- and insofar as there is no determination with respect to any income then the same shall be accumulated.
- 4.4 Any income which the Trustees shall accumulate shall be dealt with as an accretion to the capital of the Fund but the Trustees may at any time or times resort thereto and may pay or apply the whole or any part thereof as if it were current income of the Trust Fund.

5. POWERS OF THE TRUSTEE

The Trustees shall in addition to the powers otherwise conferred upon the Trustees under other clauses of this Deed have the following powers **PROVIDED THAT** said powers shall be exercised so that, the maintenance of the Public Fund as a public fund, the Deductible Gift Recipient status of the Public Fund and the maintenance of the Public Fund on the Register of Cultural Organisations is not affected.

- 5.1. To apply and invest all moneys at any time forming part of the Fund in any such investments whether involving liabilities or not or upon person credit with or without security and upon such terms and conditions as the Trustees shall in the Trustees' absolute discretion think fit and to the intent that the Trustees shall have the same powers in all respects as if they were absolute owner beneficially entitled including without diminishing the generality of the foregoing the subscription for the taking up on allotment and the purchase of any shares stocks bonds mortgages debentures obligations or securities of any government authority or company incorporated in any part of the world and the purchase or acquisition of any real or personal property wheresoever situate or any part or share or interest therein including items for use for Cultural Purposes in accordance with the collection Policy and such furniture equipment and effects that the Trustees may from time to time deem expedient to acquire to assist in the administration of the Trust and notwithstanding that the same not be income producing or be of a wanting or speculative nature and to exercise all rights and privileges and perform all duties and obligations appertaining or incidental thereto;
- 5.2 To make or purchase any such investments for cash or otherwise and upon such terms and conditions as the Trustees shall in the Trustees' absolute discretion think fit and it may make or purchase any such investment for a sum greater than the amount of the Trust Fund for the time being and it may agree to pay for any such investment wholly or in part from any future moneys which may come into the Trustees' hands including dividends profits interest or other income paid or payable in respect of any such investments;

- 5.3 To advance and lend moneys and to borrow and raise moneys from and to secure by mortgage or otherwise howsoever the payment of money to any persons firms companies corporations or governmental or municipal bodies and upon such terms with or without security or interest as the Trustees shall deem fit and the Trustees are hereby expressly empowered to join with any Company or natural person in executing any mortgage or the document for the purpose of securing the payment of the money to the Trustees jointly with any company or natural person or for the purpose of securing the payment of money to any company or natural person.
- 5.4 To vary or transpose any investments into or for any other or others of any nature whatsoever and to vary the terms of or property comprised in any security;
- 5.5 To hold use purchase contract demolish maintain repair renovate reconstruct develop improve sell transfer convey surrender let lease exchange take and grant options or rights in any mortgage charge pledge reconvey release discharge or otherwise deal with any real or personal property and in particular with items collected in accordance with the Collections Policy **PROVIDED ALWAYS** that the sale or disposal of items collected in accordance with the Collection Policy shall only be disposed of in accordance with the De-accession Policy of the Trust as is adopted from time to time;
- 5.6 To purchase or acquire any reversionary or deferred property or rights of any description or policy or policies of insurance of whatsoever nature and at or subject to any premium or premiums whether single or payable periodically and with or subject to any options rights benefits conditions or provisions whatsoever and to pay out of the income or capital of the Trust Fund as the Trustees in the Trustees' absolute discretion thinks fit all sums payable from time to time for premiums or otherwise for the effecting of maintenance of any policy or policies of insurance (whether owned by the Trustees or otherwise) or for the exercise or enjoyment of any option right or benefit thereunder and any surrender of any such policy or policies shall for all the purposes of this settlement be deemed to be a sale thereof.
- 5.7 To pay out of the Fund or the income thereof all costs charges and expenses incidental to the management of the Fund and to the exercise of any power authority or discretion herein contained or in carrying out or performing the trusts hereof which may at any time be incurred and whether or not the Trustees shall be liable therefore including all income tax or other taxes payable in respect of the Trust Fund costs in any way connected with the preparation and execution of these presents and all moneys which may be required to be paid as settlement gift stamp or revenue duties in respect of the Trust Fund or any application thereof or any accretion or addition thereto or on these presents and to give effect to the Trustee's power to pay Income Tax or other taxes payable in respect of the Trust the Trustees may exercising an absolute discretion set aside in respect of any amount of income aid applied or set aside for Cultural Purposes under any part of this Deed pay a sum out of the income of the Trust Fund as is in the opinion of the Trustees sufficient to meet the obligations of the Trustees for income tax for that financial year on that amount pursuant to any law which imposes income tax on the Trustees and;
- 5.7.1 to the extent that any sum so set aside is inadequate to meet the tax actually assessed the Trustees may without prejudice to any other rights given to the Trustees by law or by this Deed resort to the income of the Trust Fund for any subsequent financial year or may recover the amount of any inadequacy from any funds held by the Trustees on behalf of the Trust.

- 5.7.2 whenever it shall appear to the Trustees that any sum so set aside was in excess of any income tax liability of the Trustees the excess shall be credited in the books of account of the Trust Fund

PROVIDED THAT nothing in this clause shall oblige the Trustees to set aside any sum aforesaid or affect any rights of the Trustees in the event of any assessment of tax being made against the Trustees in respect of any amount so paid or applied or set aside for the benefit of Cultural Purposes under this Deed.

6. ESTABLISHMENT AND MAINTENANCE OF THE PUBLIC FUND

- 6.1 The Trustees shall establish and maintain the Public Fund as a public fund:
- 6.1.1 to which gifts of money or property for the purposes of the Trust are to be made;
 - 6.1.2 to which any money received because of such gifts is to be credited;
 - 6.1.3 that does not receive any other money or property; and
 - 6.1.4 that is used solely for the purposes set out in clause 2.1A.
- 6.2 The Trustees shall use and administer the Fund, as a Public Fund, in accordance with the Collection Policy and the Arts Strategy.
- 6.3 The Trustees shall provide to the Department of Communication, Information Technology and the Arts (or such other department as is responsible for the Arts from time to time) (**Department**) with such information as it may request in respect of such donations and shall otherwise comply with any rules and regulations relating to the administration of the Public Fund imposed from time to time by the Department.
- 6.4 The Trustees shall provide to the Department, at 6 monthly intervals, statistical data about gifts to the Fund during the previous 6 month period and shall comply with any rules made from time to time by the Federal Treasurer and the Federal Arts Minister to ensure that Gifts to the Fund are used only to support its Cultural Purposes.
- 6.5 The Public Fund shall be called the Melbourne Art Trust Public Fund.

7. WINDING UP OF THE PUBLIC FUND

- 7.1 Subject to the earlier termination of the Public Fund by the application of all of its assets for the objects set out in Clause 2.1A of the Public Fund shall continue until the Vesting Date.
- 7.2 If, upon the winding up or dissolution of the Public Fund listed on the Register of Cultural Organisations, there remains after satisfaction of all its debts and liabilities, any property, the property shall not be paid to or distributed among its members, but shall be given or transferred to some other fund, authority or institution having objects similar to the objects of the Public Fund and whose rules shall prohibit the distribution of its or their income among its or their members, such fund, authority or institution is to be eligible for tax deductibility of donations under sub-division 30B, section 30-100 of the *Income Tax Assessment Act 1997*.

8. WINDING UP OF THE TRUST

- 8.1 Subject to the earlier termination of the Trust by the application of all of its assets for the objects set out in clause 2.1A, the Trust shall continue until the Vesting Date.
- 8.2 If, on the winding up of the Trust there remains after satisfaction of all of its debts and liabilities, any property, the property shall not be paid to or distributed among its members, but shall be given or transferred to some other fund, authority or institution having objects similar to those contained in clause 2.1A and whose rules prohibit the distribution of its or their income among its or their members.

9. ANNUAL REPORT

- 9.1 The Trustees shall make an annual report to the Council of the City of Melbourne concerning the activities of the Trust.

10. AMENDMENT OF DECLARATION

- 10.1 The Trustees with the consent of the Council of the City of Melbourne for the time being may by Deed make any amendment or addition to this Declaration.

11. NAME OF TRUST

- 11.1 The trust established by this Declaration shall be known as "The Melbourne Art Trust".

12. PROPER LAW

- 12.1 This Declaration shall be governed by the laws of the State of Victoria.

Date / /2018

Deed of amendment of Trust

Sally Capp in her capacity as Lord Mayor of the Melbourne City Council

and

Deputy Lord Mayor, Arron Wood

Draft : 17 October 2018

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Deed of amendment of Trust

DATE / / 2018

BETWEEN

SALLY CAPP in her capacity as Lord Mayor of the Melbourne City Council
(Council)

AND

ARRON WOOD in his capacity as Deputy Lord Mayor of the Council and the Chair
of the Finance and Governance Portfolio of the Council's Future Melbourne
Committee (responsible for the annual budget in its terms of reference)
(Trustees)

RECITALS

- A. By a declaration of trust dated 28 March 1980 (**Trust Deed**), a trust known as the Henri-Leon Wyler Foundation Trust (**Trust**) was established with Ralph Angelo Bernardi, Irvin Rockman, Linton Roy Lethlean, Francis Henry Rogan and Kenneth Clarence Charles Stanley as founding trustees.
- B. The Trust Deed was amended by:
- B.1 Deed of Appointment dated 5 April 2005
- B.2 Deed of Amendment dated 15 December 2005 and made with the consent of Melbourne City Council by resolution made on 25 October 2005
- B.3 Deed of Amendment dated 11 July 2006.
- C. The Trustees are the current trustees of the Trust.
- D. Clause 9.1 of the Trust Deed provides that:
- 'The Trustees with the consent of the Council of the City of Melbourne for the time being may, by Deed, make any amendment or addition to this Declaration.'
- E. The Trustees have resolved to amend the Trust Deed in the manner contained in this Deed.
- F. The amendments of the Trust Deed contained in this Deed are made with the consent of the Council by resolution made on 27 November 2018.

1. INTERPRETATION

Words defined in the Trust Deed have the same meaning in this Deed unless the context otherwise requires.

2. AMENDMENT OF TRUST DEED

From the date of this Deed, the Trustees resolve to amend the Trust Deed as follows:

2.1 By deleting clauses 2.2.2 and 2.2.3 and inserting the following in lieu thereof:

2.2.2 the Deputy Lord Mayor of Melbourne; and

2.2.3 such other current Councillors of the Council as appointed from time by time by resolution of the Council.

3. GOVERNING LAW AND JURISDICTION

This document is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and waives any right to object to proceedings being brought in those courts.

EXECUTED as a Deed

SIGNED by **LORD MAYOR SALLY CAPP** in the presence of:

)
)
)
Signature of Sally Capp

.....
Signature of witness

.....
Name of witness (block letters)

SIGNED by **DEPUTY LORD MAYOR ARRON WOOD** in the presence of:

)
)
)
Signature of Arron Wood

.....
Signature of witness

.....
Name of witness (block letters)