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Sample Superannuation Borrowing Trust and Loan 29 July 2010



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THIS DEED is dated on the day referred to in the *Schedule*.

PARTIES: The **Lender.** (*Lender*)

The **Borrower.** (*Borrower*)

The **Security Trustee.** (*Security Trustee*)

BACKGROUND

- A. The *Borrower* intends to acquire the *Asset* with the legal title to that *Asset* being held by the *Security Trustee* as Trustee for the *Borrower*. The *Borrower* will acquire the beneficial interest in the *Asset*.
- B. The *Asset* is an investment of the *Borrower's* that is not a prohibited acquisition in that it is not being acquired from a related party of the *Superannuation Fund* within the meaning of section 66(1) Superannuation Industry (Supervision) Act 1993 (or otherwise prohibited by any other section or law from being acquired by the *Borrower*) unless it is an acquisition that falls within one of the exceptions referred to in that Act.
- C. The *Asset* is a single acquirable asset within the meaning of section 67A of the Superannuation Industry (Supervision) Act 1993.
- D. The *Borrower* has requested the *Lender* to make the *Loan* to the *Borrower* to assist the *Borrower* to acquire the *Asset*.
- E. The *Lender* has agreed to lend to the *Borrower* the *Principal Sum* referred to in the *Schedule* on the terms set out in this Deed for the purposes of the acquisition of the *Asset*.
- F. The *Principal Sum* shall be applied by the *Borrower* towards the cost of acquiring the *Asset* including if the *Borrower* so directs, the expenses incurred in connection with the borrowing, or acquisition or in maintaining or repairing the *Asset* but not expenses incurred in improving and the balance of funds required to acquire the *Asset*, shall be provided from the *Borrower's* own funds.
- G. The *Loan* referred to herein shall meet the requirements of Section 67 A Superannuation Industry (Supervision) Act 1993.
- H. The *Borrower* has a right under this Deed to acquire legal ownership of the *Asset* by making one or more payments after acquiring a beneficial interest in the *Asset*.
- I. The *Borrower* has the power to enter into this Deed under the governing rules of the *Superannuation Fund*.

OPERATIVE PROVISIONS

1. INTERPRETATION

1.1. In this Deed, unless otherwise indicated by the context:

- (a) *Asset* means the *Asset* referred to in the *Schedule*
- (b) *Borrower* means the *Borrower* named in the *Schedule* in their capacity as Trustee of the *Superannuation Fund* named in the *Schedule*.
- (c) *Default Event* means:
- (i) the *Borrower* fails to repay the *Loan*, interest or any other moneys when due in accordance with this Deed;
 - (ii) the *Borrower* fails to duly and punctually perform or comply with any of its obligations under this *Deed*;
 - (iii) any representation or warranty made by the *Borrower* in connection with this *Deed* proves to have been incorrect or misleading when made;
 - (iv) the *Borrower* becomes insolvent or subject to any arrangement, assignment or composition, or protected from any creditors or otherwise unable to pay their debts when they fall due or if the *Borrower* is a body corporate, an application is made for an order, a meeting is convened to consider a resolution, a resolution is passed or an order is made that the *Borrower* be wound up or otherwise dissolved and/or that an administrator, a liquidator or provisional liquidator of the *Borrower* be appointed;
 - (v) there occurs an event which is or may be, in the *Lender's* opinion have a material adverse effect on the *Borrower's* ability to make payments under this Deed;
 - (vi) the *Borrower* fails to duly and punctually perform or comply with any of its obligations under this Deed or otherwise breaches any of the terms or conditions of this Deed and that default is not remedied within 5 days after written notice from the *Lender* requiring rectification of the breach;
 - (vii) a representation or warranty made by the *Borrower* under this Deed or one or more of the provisions appearing under the heading "BACKGROUND" is found to have been materially incorrect or materially misleading to the *Lender* when made or at the date of this Deed;
 - (viii) a government, governmental agency, department, commission, or other instrumentality seizes, confiscates, or compulsorily acquires the *Asset*;
 - (ix) proceedings are taken that under which the *Asset* may be the subject of any order or ruling by a court or tribunal that may adversely affect the *Lender's* rights under this Deed;

- (x) if the *Borrower* ceases to be the trustee of the *Superannuation Fund* or any step is taken to appoint another trustee of the *Superannuation Fund*, in either case without the *Lender's* consent.
- (d) *Drawdown Date* means the *Drawdown Date* referred to in the *Schedule*.
- (e) *Lender* means the *Lender* named in the *Schedule*.
- (f) *Loan* means the *Loan* agreement in Part B.
- (g) *Period* means the *Period* referred to in the *Schedule*.
- (h) *Principal Sum* means the *Principal Sum* referred to in the *Schedule*.
- (i) *Purchase Price* means the price of the *Asset* referred to in the *Schedule* and stamp duty (if any) and any other costs that are required to be paid in order to acquire the *Asset* and register the *Asset* in the name of the *Security Trustee* (if registration is necessary to perfect legal title)
- (j) *Secured Monies* means the *Principal Sum*, interest and expenses and all costs and liabilities incurred by the *Lender* including stamp duty and goods and services taxes in connection with this Deed and in connection with the security and in connection with the enforcement of this Deed and any other money properly payable by the *Borrower* to the *Lender* under this Deed.
- (k) *Security Trustee* means the *Security Trustee* named in the *Schedule*.
- (l) *Schedule* means the schedule forming part of this Deed.
- (m) *Specified Rate* means the *Specified Rate* referred to in the *Schedule*.
- (n) *Superannuation Fund* means the *Superannuation Fund* named in the *Schedule*.

1.2. In this Deed, unless otherwise indicated by the context:

- (a) words importing the singular include the plural and vice versa;
- (b) headings are for convenience only and do not affect interpretation of this Deed;
- (c) a reference to a clause, paragraph or schedule is a reference to a clause, paragraph or schedule of this Deed;
- (d) where any word or phrase is given a definite meaning in this Deed, any part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (e) an expression importing a natural person includes a body corporate, partnership, joint venture, association or other legal entity;
- (f) a reference to a statute, statutory provision or regulation includes all amendments, consolidations or replacements thereof;

- (g) a reference to a party to a document includes that party's legal personal representatives, successors and permitted assigns;
- (h) a covenant or agreement on the part of or for the benefit of two or more persons binds or benefits them jointly and severally; and
- (i) a reference to a body, whether statutory or not;
- (A) which ceases to exist; or
- (B) whose powers or functions are transferred to another body;
- is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

2. NOTICES

- 2.1 Unless otherwise permitted by this Deed, a notice or other communication required or permitted to be given by one party to another must be in writing and:
- 2.1.1 Delivered personally;
- 2.1.2 sent by pre-paid mail to the address of the addressee specified in this Deed; or
- 2.1.3 sent by facsimile transmission to the facsimile number of the addressee with acknowledgment of receipt from the facsimile machine of the addressee.
- 2.2 A notice or other communication is taken to have been given (unless otherwise proved):
- 2.2.1 if mailed, on the second Business Day after posting; or
- 2.2.2 if sent by facsimile before 4 pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt.
- 2.3 A party may change its address for service by giving notice of that change in writing to the other parties.

3. WAIVER OR VARIATION

- 3.1 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 3.2 The exercise of a power or right does not preclude:
- 3.2.1 Its future exercise; or
- 3.2.2 The exercise of any other power or right.
- 3.3 The variation or waiver of a provision of this Deed or a party's consent to a departure from a provision by another party will be ineffective unless in writing executed by the parties.

4. GOVERNING LAW AND JURISDICTION

- 4.1 This Deed is governed by the laws of the State or Territory of the residence or registered office, in the case of a body corporate, of the *Borrower*.
- 4.2 Each party irrevocably submits to the non-exclusive jurisdiction of the courts of the State or Territory of the residence or registered office of the *Borrower*.

5. FURTHER ASSURANCE

- 5.1 Each party will from time to time do all things (including executing all documents) necessary or desirable to give full effect to the applicable provisions of this Deed.

6. COUNTERPARTS

- 6.1 This Deed may be executed in any number of counterparts each of which will be an original but such counterparts together will constitute one and the same instrument and the date of the Deed will be the date on which it is executed by the last party.

7. WHOLE AGREEMENT

- 7.1 In relation to the subject matter of this Deed:
- 7.1.1 This Deed is the whole agreement between the parties as at its date; and
- 7.1.2 This Deed supersedes all oral and written communications by or on behalf of any of the parties.

PART A

This Part A constitutes a bare trust and is made between the *Security Trustee* and the *Borrower* only.

8. TRUST

- 8.1 The *Security Trustee* declares the trusts contained in this Deed.
- 8.2 The *Security Trustee* acknowledges that the *Security Trustee* has or will acquire the *Asset* and will hold or holds the *Asset* upon trust for the *Beneficiary* absolutely and to this end has or will enter into an agreement for the purchase of the *Asset* in its capacity as trustee for the *Borrower*.
- 8.3 The *Borrower* has or will enter into a contract or agreement to purchase the *Asset* and has provided or will provide all the *Purchase Price*, stamp duty, taxes and all other expenses for the purchase of the *Asset*.
- 8.4 The Trust may be known by the name referred to in the *Schedule* or such other name or without a specific name as the *Borrower* determines.
- 8.5 Nothing in this Deed entitles the *Security Trustee* to any beneficial interest in the *Asset*.
- 8.6 The *Security Trustee* must deal with the *Asset* in such manner as the *Borrower* directs.

- 8.7 An instruction or direction may be given by the *Borrower* to the *Security Trustee* verbally or in writing.
- 8.8 The *Borrower* is presently entitled to the income of the *Asset*.
- 8.9 The *Security Trustee* may be replaced by the *Borrower* at the direction of the *Borrower*.

PART B

This Part B constitutes a loan agreement and is made between the *Borrower* and the *Lender* only.

9. LOAN

- 9.1 The *Lender* will lend to the *Borrower* on the terms of this Deed the *Principal Sum* on the *Drawdown Date*.
- 9.2 The *Borrower* agrees to the terms of this Deed.
- 9.3 The *Borrower* and the *Lender* agree that the *Principal Sum* must be applied solely towards the *Purchase Price* of the *Asset* and such other expenses as may be permitted by section 67A and 67B of the Superannuation Industry (Supervision) Act 1993 and the *Borrower* must pay all other expenses and costs of acquiring the *Asset*.
- 9.4 The *Lender* will pay the *Principal Sum* in such manner as the *Borrower* in writing directs.

10. REPAYMENT OF THE PRINCIPAL SUM

Principal Sum

- 10.1. The *Principal Sum* must be repaid by the *Borrower* to the *Lender* on a date that is not later than the *Repayment Date* referred to in the *Schedule*.
- 10.2. To the extent that it is not inconsistent with paragraph 14.1, the *Borrower* may repay the *Principal Sum* or any part of it at any time prior to the *Repayment Date* together with interest calculated to the date of such repayment only.

11. PAYMENT OF INTEREST

11.1 Interest:

11.1.1 is payable at the *Specified Rate* and that rate shall be either a *fixed* rate if that is specified in the *Schedule* or a *variable* rate if that is specified in the *Schedule*. If neither a fixed nor variable rate is specified the rate is variable.

11.1.2 commences on the *Drawdown Date*.

11.1.3 is payable for the *Period* which may be yearly, quarterly or monthly in arrears as specified in the *Schedule* and the first payment of interest is payable on the first day of the next *Period* after the *Drawdown Date*.

11.1.4 for each *Period* accrues daily and is calculated for each *Period* on the balance of the *Principal Sum* outstanding each day.

11.2 The *Borrower* and the *Lender* may agree in writing to alter the specified rate to another rate and to alter the rate to a fixed or variable rate.

11.3 If interest is variable the *Specified Rate* will increase or decrease as follows:

11.3.1 if the "Cash Rate Target" (being the percentage (or maximum percentage) specified by the Reserve Bank of Australia as the Cash Rate Target) changes after the *Drawdown Date* then the *Specified Rate* varies (whether up or down) as from the date of change of the Cash Rate Target by the same number.

11.3.2 For clarity, if for example, the *Specified Rate* is 8.5% variable and the Cash Rate Target on that date is 4.50% and the Cash Rate Target increases by 0.25 to 4.75% then the *Specified Rate* becomes 8.75%.

Division 7A

11.4 Subject to paragraph 17.1, this paragraph 11.4 modifies the terms of this Deed in relation to the matters referred to in it if the *Lender* and the *Borrower* agree in writing that it is to apply.

If:-

11.4.1 the *Borrower* is at any relevant time a shareholder or associate of the *Lender*; or

11.4.2 there exists such other relationship between any relevant parties or persons such that the provisions of Division 7A of the Income Tax Assessment Act 1936 ("ITAA 1936") must be complied with to ensure that that the loan made under this Deed is not deemed a dividend under that Division 7A, then, unless the parties to this Deed agree in writing otherwise:

- (i) The *Borrower* must pay interest, calculated on the daily balance of the unpaid *Principal Sum*, for each *Year of Income* after the year in which the *Loan* is made for the term of the loan;
- (ii) The rate of interest for an *Income Year* is equal to the greater of the *Specified Rate* and the benchmark interest rate for that *Income Year* as defined in section 109J of the ITAA 1936;
- (iii) The *Borrower* must, where required by Section 109E, make *Minimum Yearly Repayments* to the *Lender* in accordance with section 109E of the ITAA 1936, for the term of the *Loan* and those payments must be paid on or before the last day of each *Year of Income*; and
- (iv) The *Borrower* must repay and finally discharge the *Loan*, including any interest accrued and unpaid on the *Loan* and all other amounts payable under this Deed and unpaid to the *Lender*, on or before the *Repayment Date*.

11.4.3 For the purpose of this paragraph 11.4 "*Year of Income*" means the period of 1 July to 30 June; *Loan* means the loan of the *Principal Sum* made pursuant to this Deed; "Minimum Yearly Repayment" means the minimum yearly repayment to be made by the *Borrower* in accordance with section 109E, ITAA 1936.

12. LIMITED RECOURSE

12.1 Despite any other provision of this Deed, the *Lender's* rights against the *Borrower* are limited to the *Lender's* rights and remedies against the *Asset* and the *Lender* has no recourse against the *Borrower*.

12.2 Without limiting the provisions of the previous paragraph the *Lender* must not:

- (a) exercise any right of set-off against the *Borrower*; or
- (b) seek an Order that the *Borrower* be wound up or otherwise dissolved or that an administrator, liquidator or provisional liquidator of the *Borrower* be appointed;
- (c) seek or appoint an Order for the appointment of a receiver, receiver and manager or similar officer for all or any part of the assets or revenues of the *Borrower* other than the *Asset*;
- (d) levy or enforce any execution, distress, attachment or similar process against all or any part of the business, assets or revenues of the *Borrower* other than the *Asset*;
- (e) obtain a judgment against the *Borrower* for the payment of money or damages, interest and to the extent only that it is necessary to enable the *Lender* to preserve or enforce its rights against the *Asset*.
- (f) do anything or omit to do anything that would amount to a failure by any relevant party to meet the requirements of Section 67A & 67B of the Superannuation Industry (Supervision) Act, 1993.

13. SECURITY INTEREST

13.1 On or before the *Drawdown Date* the *Borrower* must cause to be provided to the *Lender* such validly executed mortgage or other charge of the *Asset* securing all *Secured Monies* under this Deed.

14. RIGHT OF BORROWER TO TRANSFER OF ASSET

14.1 Subject to the of the Superannuation Industry (Supervision) Act, 1993 and in particular section 67A & B of the Superannuation Industry (Supervision) Act, 1993, by making one or more payments after acquiring its beneficial interest, the *Borrower* is entitled to have transferred to the *Borrower* the *Asset* provided that such payment or payments fully discharge all the *Secured Monies*.

14.2 The *Lender* must do all things necessary to give effect to the preceding paragraph and to extinguish any charge or mortgage in favour of the *Lender* in respect of the *Asset* and take all such action and sign all such documents as may be necessary and as may be reasonably required by the *Borrower* to transfer legal ownership in accordance with that provision and the *Borrower* must pay all necessary costs in order to give effect to this provision.

15. TRUSTEESHIP OF THE SUPERANNUATION FUND

15.1 The *Borrower* agrees that that until the *Lender* has been paid the *Secured Monies* as provided in this Deed, or until the *Lender* has exercised its right of recourse to the *Asset*, whichever is the earlier, the *Borrower* will not without the prior written consent of the *Lender* direct the *Security Trustee* to transfer the *Asset* or cease (otherwise than by death) to be the trustee of the *Superannuation Fund* named in the *Schedule* or permit its holding of that office to be terminated or do anything which would disqualify it from holding that office.

15.2 Without prejudice to the *Lender's* rights, if there is a *Default Event*, the *Borrower* agrees with the *Lender* that it will, within 7 days of being requested by the *Lender* so to do, furnish to the *Lender* a Statutory Declaration made by the *Borrower* or if the *Borrower* is a company, a director of the *Borrower* stating:

15.2.1 whether or not since the date of this Deed there has been any amendment of or modification to the Deed governing the Trust and, if so, giving full particulars thereof;

15.2.2 whether or not the *Borrower* is still the Trustee of the *Superannuation Fund* and if not, giving full particulars of its ceasing to be such trustee.

15.3 If the *Borrower* (or any of them) cease to be a Trustee of the *Superannuation Fund* the *Lender* may agree in writing with any substitute and or continuing Trustee of the *Superannuation Fund* to such variations, amendments or replacement of this Deed as the *Lender* and the *Borrower* or the substitute Trustee and or the continuing Trustee may in writing agree.

16. REPLACEMENT OF SECURITY TRUSTEE

16.1 Subject to the Superannuation Industry (Supervision) Act, 1993, if the *Lender* and *Borrower* agree in writing on the terms of replacement, the *Security Trustee* may be replaced by a replacement *Security Trustee*.

17. SECTION 67A SUPERANNUATION INDUSTRY (SUPERVISION) ACT, 1993

17.1 The provisions of this Deed as regards the obligations, rights and powers between the *Lender* and the *Borrower* are subject to the Superannuation Industry (Supervision) Act, 1993 and in particular to section 67A and the parties shall to the extent necessary on each party's part, do all such things or refrain from doing such things as may be necessary to ensure compliance with that Act. This provision prevails over all other such provisions binding the *Borrower* and the *Lender* inter se.

18. DEFAULT EVENT

18.1 If a *Default Event* occurs the *Lender* may if it so determines and despite any waiver of and without limiting its other rights including its rights under any mortgage or charge of the *Asset* declare by written notice to the *Borrower* that there has been a *Default Event* and in that case the *Principal Sum*, interest and all other money payable under this Deed by the *Borrower* to the *Lender* becomes immediately due and payable without further action.

18.2 Following a *Default Event*, the *Lender* may cause the *Asset* to be sold and the proceeds of sale must be applied firstly in satisfaction of the costs and expenses incurred or payable by the *Lender* or the *Security Trustee* in connection with the sale of the *Asset*, then in satisfaction of costs incurred and arising from the *Borrower's* default, then in satisfaction of interest, then in satisfaction of any other monies payable by the *Borrower* under this Deed and then in payment of the *Principal Sum*., If after such sale a balance remains this amount shall be held for the *Borrower* and that sum shall be paid to the *Borrower* in full discharge of all liability of the *Lender* to the *Borrower*.

18.3 If there is a shortfall of any amount after the sale of the *Asset* then in accordance with this Deed the *Borrower* is released from any liability to pay any such shortfall.

18.4 The *Lender* is not answerable for any involuntary losses or irregularities which may occur in, or by, the exercise or non-exercise of any of the powers, rights or remedies conferred on the *Lender* by this agreement or the security.

18.5 If pursuant to this Deed, the doing or execution of any act, matter or thing by the *Borrower* is dependent upon the consent or approval of the *Lender* that consent or approval may be given on terms or may be withheld by the *Lender* in its discretion, unless this Deed provides otherwise.

19. WARRANTIES

19.1 The *Borrower* warrants to the *Lender* that it is the Trustee of the *Superannuation Fund* and enters into this Deed in that capacity and that:

(a) The *Superannuation Fund* benefits from this Deed.

(b) the *Borrower* is liable under this Agreement in its capacity as trustee of the *Superannuation Fund*;

(c) the *Borrower* has the power to enter into and comply with the *Borrower's* obligations under this Deed.

(d) the *Borrower* is able to pay its debts as and when they become due and payable.

(e) if the *Borrower* is a body corporate it is a constitutional corporation within the meaning of the Superannuation Industry (Supervision) Act 1993.

(f) all resolutions have been passed as are required by law and the governing rules of the *Superannuation Fund* and any other action necessary to authorise the execution and performance of this Deed has been taken;

(g) the *Borrower* in entering into and performing its obligations under this Deed does not violate in any respect any statute, decree, rule or regulation or any determination, order or award of any court or any governmental, judicial or public body or authority applicable to the *Borrower*.

(h) no *Default Event* has occurred and continues to subsist.

19.2 The representations and warranties in this provision will survive the execution of this Deed and will be deemed to be repeated (updated as appropriate) on each date that a payment is due under this Deed.

19.3 The *Borrower* and the *Lender* warrant respectively that they each have the power to enter into and perform their obligations under this Deed, that they are respectively duly incorporated in accordance with their constituent documents if they are a body corporate and that in entering into and performing their respective obligations under this Deed they do not violate in any respect any statute, decree, rule or regulation or any determination, order or award of any court or any governmental, judicial or public body or authority applicable to them respectively.

20. INSURANCE

- 20.1 The *Borrower* will cause the *Asset* to be insured and keep insured the *Asset* to the extent that it is of an insurable nature and the rent (if any) against loss or damage by fire or any other risk that the *Lender* may require to be insured against in the full insurable value and the *Borrower* will punctually pay all premiums and sums necessary for effecting and keeping up every such insurance and at the *Lender's* request give to the *Lender* every policy and receipt relating to that insurance and comply with the terms of that insurance.

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SCHEDULE

PARTIES:

Lender:

Lender Company Pty Ltd
A.C.N. 000 999 860
Unit 4
4 Gladstone Road
Castle Hill NSW 2154

Borrower:

JONES Bill
6 Prince Street
Smithville NSW 2000

JONES Betty
6 Prince Street
Smithville NSW 2000

Security Trustee:

Security Trustee Pty Ltd
A.C.N. 058 086 169
Unit 4
4 Gladstone Road
Castle Hill NSW 2154

Date of Deed:

Asset:

Unit 1, 12 Harris Street, Smithville NSW 2000

Drawdown Date:

Name of this Trust:

Sample Superannuation Borrowing Trust and Loan 29 July 2010

Period:

Quarterly unless the Lender, the *Borrower* and the Security Trustee agree in writing otherwise.

Purchase Price:

\$300,000.00

Principal Sum:

(Amount of Loan)

\$250,000.00

Repayment Date:

15 years from the Drawdown Date
However despite this Repayment Date, if the provisions appearing under the sub-heading **Division 7A** apply (so that the *Loan* made under this Deed is not deemed a dividend under that Division 7A) and subject to those provisions under that sub-heading then the repayment date is such that the maximum term is 25 years if:

(i) 100% of the value of the *Loan* is secured by a mortgage over real property that has been registered in accordance with a law of a State or Territory; and

(ii) when the *Loan* is first made, the market value of that real property (less the amounts of any other liabilities secured over that property in priority to the loan) is at least 110% of the amount of the loan.

If the provisions of (i) and (ii) are not met then the maximum term is 7 years.

Specified Rate: 9.00% Variable

Superannuation Fund: Jones Superannuation Fund

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EXECUTED AS A DEED

Executed for and on behalf of

Security Trustee Pty Ltd
A.C.N. 058 086 169

in accordance with Section 127(1) of the Corporations Act 2001 by authority of the Directors:

.....
Director Secretary

.....
OR Sole Director and Secretary

Signed Sealed and Delivered by
JONES, Bill
in their capacity as Borrower in the presence of:

.....
Signature of Witness Signature

.....
Name of Witness

Signed Sealed and Delivered by
JONES, Betty
in their capacity as Borrower in the presence of:

.....
Signature of Witness Signature

.....
Name of Witness

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Executed for and on behalf of

Lender Company Pty Ltd
A.C.N. 000 999 860

in accordance with Section 127(1) of the Corporations Act 2001 by authority of the Directors:

.....
Director

.....
Secretary

.....
OR Sole Director and Secretary

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