

CIVIC PLACE TRUST

ATTACHMENTS:	1. CIVIC PLACE TRUST DEED 2. DEED OF VARIATION
RESPONSIBLE OFFICER:	DEBRA JUST – GENERAL MANAGER
AUTHOR:	MARNIE HILLMAN – GOVERNANCE MANAGER
CITY STRATEGY LINK:	6.1.1 A COUNCIL THAT IS OPEN, ACCOUNTABLE AND REPRESENTS ITS CONSTITUENTS
MEETING DATE:	14 JUNE 2016

Purpose of Report

The purpose of this report is to brief Council on amendments to the Civic Place Trust Deed and seek endorsement for the changes.

Background

This report follows *Report 9.3 Civic Place Trust* to the Cultural and Civic Committee on the 15 February 2016 and *Report 8.1 Civic Place Trust Strategy* to the Ordinary Council Meeting of 22 February 2016. These reports contemplated the expansion of the scope of the Civic Place Trust (the Trust) from Civic Place to the broader City of Willoughby, to include, but not be limited to the Council-owned Haven Amphitheatre. It has been proposed to revise the scope of the Fund to allow access for the purposes of fundraising for the promotion of Council-owned arts and cultural facilities across the whole City.

On the 22 February 2016 it was resolved by Council to:

- 1. defer progressing the appointment of trustees to the Civic Place Trust until such time as further advice is received regarding the appropriateness of the entity and the Deed for its proposed functions;*
- 2. seek specialised legal and other advice in relation to the appropriateness of the Civic Place Trust and the Deed for its proposed functions and other short-term options for donation collection for The Haven Amphitheatre stage;*
- 3. request that the General Manager convene a Councillor Briefing to inform Councillors of the various options available to achieve the objectives of the proposal;*
- 4. defer recommendations from report 12.1.7 Civic Place Trust (deferred Cultural and Civic Committee Report 9.3) pending further advice; and*
- 5. provide a full report on the Civic Place Trust by June 2016.*

In addition to the above resolution, several queries were raised by Councillors and the community regarding the governance arrangements for the Trust, as well as the process and expected qualifications for the appointment of trustees. In particular, areas of concern included:

- The appropriateness of the construction of the Trust and Deed for the new purpose proposed;
- Due diligence in regard to the process of appointment and removal of trustees; and
- Management of risk in the expansion from a narrowly scoped Fund, to a Fund that could receive high turnover.

Council engaged Clayton Utz who provided advice and drafted a Deed of Variation. A workshop was subsequently held for Councillors on the 16 May 2016 and from this workshop further amendments were identified. A new Deed of Variation was drafted by Clayton Utz (Attachment 2). This latest Deed of Variation is not yet endorsed by the Register of Cultural Organisations (ROCO).

Since the Councillor Briefing, legal advice has confirmed that any donations to the Trust are not refundable and cannot be earmarked for particular projects. This development requires consideration by Council as it has implications for community funding for The Haven which was resolved by Council to be shared on a dollar-for-dollar basis with the community through fundraising activities. It is important to resolve this issue ahead of confirmation of the operational plan and budget later this month.

Clayton Utz have advised that the general structure of the Trust and the Deed are appropriate for the expanded purpose proposed by Council. However, they have also advised of a number of improvements which have now been reflected in the attached Deed of Variation.

Proposed Improvements of the Deed

The proposed improvements are reflected in the attached Deed of Variation.

Inclusion of Responsible Person Criteria

The new Deed will include the requirement that a majority of trustees be “responsible persons”. This will assist to ensure that trustees meet the levels of competence and integrity expected by the community.

The definition of a responsible person is:

“a person who, because of their tenure of some public office or their professional standing, have a degree of responsibility to the general community as a whole. Such persons would include but would not be limited to: church authorities; school principals; judges; clergymen; solicitors; doctors; and other professional persons; mayors; councillors; general managers; members of parliament; persons who belong to a professional body (such as the Institute of Chartered Accountants, State Law Societies and Medical Registration Boards); appointees of a Chief Justice of the Supreme Court or a person awarded with an Order of Australia.”

Appointment, Resignation and Removal of Trustees

The improved provisions contain specific, stand-alone direction for the appointment, resignation and removal of trustees where previously it relied on referral to the Trustee Act. Further, there is provision to allow for removal of a trustee where their designation as a responsible person relies on holding a position of Mayor, General Manager or Councillor and that position is subsequently vacated.

Trustee Tenure

Provision has been introduced to limit trustee tenure to 4 years. This provision aligns with the Council cycle, effectively facilitating one appointment per trustee position per election cycle. It also provides the option for Council to appoint new trustees every four years in line with good governance practice. Trustees may retire prior to the end of their four years.

Trustee Decision-Making

The new provisions include clarification regarding the decision-making process for the Trust. This includes a requirement for unanimous determinations for amendment to the Trust Deed, a general majority rule and the option for arbitration where deadlock occurs.

Other Community and Councillor Queries

Earmarking of Funds and Refund of Donations

In order for the Trust to retain its Deductible Gift Recipient (DGR) status and registration with ROCO, there is no ability to refund any donations made to the Public Fund. The very nature of a donation is that it is a “gift”. Pursuant to the Tax Act, one of the requirements for the maintenance of a “public fund” is that all monies only be used for the principal purpose of the public fund. In the case of the proposed and revised Civic Place Trust, its principal purpose is the promotion of the arts and the provision of cultural facilities. Therefore, if the Public Fund were to offer refunds, not only would the donations not be tax deductible in the first instance, but the Public Fund would not be applying its funds for its principal purpose.

The Public Fund must obtain immediate and unconditional right of custody and control of the property transferred. The Public Fund must be entitled to deal with the property in its own right to the entire exclusion of the giver. If this is not the case, the transfer of property will not be tax-deductible for the giver. There is a risk that the DGR status of the Public Fund could be revoked and removed from the Register for failing to adhere to the legislative requirements regarding “public funds”.

Investment of Trust Funds

The Trustee Act states that a trustee may invest trust funds in any form of investment and at any time vary any investment. There are no express prohibitions in the current Deed that prevent the trustee from making any specific investments. The Trust Deed allows for investments that are sanctioned by law in any State or Territory for the investment of Trust Funds. This includes investments in real estate (purchase or improvement) in Australia, provided that a qualified real estate valuer has provided a written opinion confirming the suitability of the investment.

Trustees are required to exercise care, diligence and skill in exercising this power and must review the performance of all trust investments at least once a year.

In addition to the above mentioned statutory duties imposed on the trustee when exercising the power of investment, the Trust Deed also sets out some additional powers. For example, with respect to land, the Deed allows the trustee to sell, lease, demise, let, mortgage, charge, licence and generally manage and deal with land forming part of the trust property.

For this reason it is advisable to have at least one representative from the Council on the Trust to assist in ensuring its interests are protected.

Asset Wind-up

If the Trust is wound up, any surplus assets remaining (after satisfaction of the Trust's liabilities) are required to be transferred to another fund, authority or institution which has similar objects to the Civic Place Trust (i.e., to another fund whose principal purpose is the promotion of the arts and the provision of cultural facilities), provided that the entity also has DGR status and is registered with ROCO. This is provided for in clause 14 of the Trust Deed. Please note that this clause cannot be altered or deleted as it is a requirement for all public funds.

Number of Trustees

The current Trust Deed requires a minimum of three trustees and does not stipulate a maximum number. The Trustee Act expressly states that the total number of trustees cannot exceed four. Therefore, the Trust can appoint three or four trustees under current arrangements. Additional trustees can only be appointed by the Court.

Next Steps

If agreed, it is proposed to execute the Deed of Variation in Financial Year 2016/17. After execution of the Deed, an Expression of Interest process will be undertaken to identify and appoint appropriate long term trustees. This is expected to occur in October, 2017.

It is important in terms of timing that at least three trustees are validly appointed to the Trust in the interim prior to executing the Deed of Variation; this is because the Deed of Variation will require three trustees to execute it. As such, it is proposed to appoint interim trustees under the current Deed on the basis that they will retire at such time as a full process is undertaken for appointment of trustees.

New trustees will take their positions through a deed of appointment.

Interim Trustees

Given the uncertainty created by a potential amalgamation, it is proposed that interim trustees be appointed until such time as new Councillors are elected. This will allow the Trust to function while still providing the flexibility for a newly elected Council to appoint trustees. Please note that the arrangement below will satisfy the requirements of the Deed and allow all trustees to continue if the Mayor and/or the General Manager are no longer public officers for the interim period.

It is proposed that the following persons are appointed as interim trustees:

- Mayor Gail Giles-Gidney: qualified as a responsible person by virtue of her position and has a strong personal understanding of the relevant community interests;
- General Manager Debra Just: qualified as a responsible person both by virtue of her role as a General Manager and personal qualification as a *Fellow of the Planning Institute of Australia* and Member of the *Australian Institute of Company Directors*.
- Independent Member with an extensive Arts Background (preferably Resident)

It is proposed that Council form a selection panel in order to recommend the interim independent trustee to the Trust. The selection criteria for the independent trustee should be as follows:

- Meets the criteria as a responsible person;
- Professional background in arts or arts administration;

- Strong understanding of the role of the Concourse as a performing arts institution and its position as a cultural asset on the North Shore;
- Tertiary qualifications in a technical area that would enhance the administration of the trust; and
- An understanding of the responsibilities of trust management.

Register of Cultural Organisations (ROCO)

The proposed amendments are yet to be approved by the Register of Cultural Organisations. In the event that ROCO reject any of the amendments, the Deed will need to be adjusted in order to be executed.

Further, the Department will also need to be notified in writing of the proposed trustee changes and should be sent a copy of the Deed of Appointment and Resignation of Trustees.

Conclusion

Legal advice has confirmed that the current structure of the Civic Place Trust is broadly appropriate to the expansion of its objects to include arts and cultural assets across Willoughby City. The improvements described in this report will address any previous concerns regarding the qualification requirements of trustees, as well as improving general governance and oversight.

OFFICER'S RECOMMENDATION

That Council:

- 1) endorse the attached Deed of Variation to the Civic Place Trust for execution;**
- 2) delegate authority to the General Manager to adjust the Deed of Variation in line with any conditions by the Register of Cultural Organisations and to make other necessary notifications;**
- 3) endorse the nomination of Mayor Gail Giles-Gidney and General Manager Debra Just to the Trust, given their agreement to resign from the Trust at such time as the newly elected Council sees fit after amalgamation;**
- 4) nominate a selection panel consisting of Mayor Gail Giles-Gidney and Deputy Mayor Michelle Sloane (including delegation to continue to execute their responsibilities as the panel should they no longer hold these positions after proclamation) to select the independent interim trustee; and**
- 5) agree to the broad selection criteria for the independent interim trustee as outlined in the report.**

[Civic Place Trust Deed Current.pdf](#)

[Deed of Variation - Civic Place Trust - Received 9 June 2016](#)