



Report to General Manager

Attachments:

1. Charitable Trust Deed - Wendy Whiteley Secret Garden Trust
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SUBJECT: Wendy Whiteley Secret Garden Trust

AUTHOR: Rob Emerson, Director Open Space & Environmental Services

ENDORSED BY: Adrian Panuccio, A/General Manager

EXECUTIVE SUMMARY:

The beautification lease for the Wendy Whiteley Secret Garden was executed on 28 February 2016. At the time of executing the lease it was determined that the Council and the NSW Government Department of Premier and Cabinet would work in collaboration to create a charitable trust arrangement to assist with the funding and management of the garden into the future.

The Charitable Trust Deed has now been completed and North Sydney Council is the appointed Trustee.

FINANCIAL IMPLICATIONS

Council will allocate the money it receives from booking and hire fees for social events and filming in the Wendy Whiteley Secret Garden (approximately \$15,000 per annum) to the Trust annually.

RECOMMENDATION:

1. **THAT** Council resolves to be the Trustee of the Wendy Whiteley Secret Garden Trust.
 2. **THAT** the Charitable Trust Deed be adopted by Council.
 3. **THAT** Council authorise its Official Seal to be affixed to the Trust Deed under the signature of the Mayor and the Acting General Manager.
 4. **THAT** Council allocate the money it receives from booking and hire fees for social events and filming in the Wendy Whiteley Secret Garden (approximately \$15,000 per annum) to the Trust annually.
 5. **THAT** Council celebrate the milestone of the long term lease with RailCorp and the finalisation of the of the Wendy Whiteley Secret Garden Charitable Trust Deed by hosting with Wendy an afternoon tea garden party for the community and friends of the garden prior to the end of this year.
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LINK TO DELIVERY PROGRAM

The relationship with the Community Strategic Plan is as follows:

Direction: 1. Our Living Environment

Outcome: 1.2 Quality urban greenspaces
1.5 Public open space, recreation facilities and services that meet community needs

BACKGROUND

Wendy Whitley's Secret Garden in Lavender Bay is a very much loved and beautiful garden created on unused railway land by local resident Wendy Whiteley over more than two decades. The transformation of the derelict land to the wonderful garden that exists today over this time has been incredible to witness and is an absolute credit to Wendy's creativity and commitment.

CONSULTATION REQUIREMENTS

Community engagement is not required.

SUSTAINABILITY STATEMENT

The sustainability implications are of a minor nature and did not warrant a detailed assessment.

DETAIL

On 9 October 2015, then NSW Premier Mike Baird announced a long term lease for the garden to North Sydney Council, and promised that a Trust would be established to secure the on-going future care of the Secret Garden, maintaining Wendy's vision. Premier Baird said at the time:

'This garden is a gift of Wendy's to the people of Sydney – it truly is a living Whiteley that is bursting with life and creativity. I'm delighted that a place which brings such joy to residents and visitors, has now been secured for future generations to enjoy.'

Successful negotiations with Rail Corporation NSW (RailCorp) for the Wendy Whiteley Secret Garden were then completed with the preparation of a lease between North Sydney Council and RailCorp that fundamentally provides long term tenure of the land that the garden exists upon and additional land for the expansion of the garden over time.

The term of the lease is 30 years commencing the 28 February 2016. The terminating date stated in the lease is the 28 February 2046. In addition to the 30-year term there is an option

to renew the lease for a further period of 30 years commencing 1 March 2046 and terminating on the 28 February 2076.

With the lease negotiations completed the Council's Solicitor in collaboration with the Department of Premier and Cabinet and Wendy have created a Charitable Trust Deed "Wendy Whiteley Secret Garden Trust" to assist with the funding and management of the garden into the future.

The draft Charitable Trust Deed has now been completed and North Sydney Council is the appointed Trustee.

Additionally, once the Council as the Trustee and Wendy Whiteley as the Settlor of the Trust execute the trust arrangement the NSW Premier Gladys Berejikian has pledged to provide \$30,000 to the Trust to assist with the garden.

It is envisaged that Council will allocate the money it receives from booking and hire fees for social events and filming in the garden (approximately \$15,000 per annum) to the trust annually and if the Trust can attain Charitable Purpose Status that has currently being applied for then the local and broader community may be encouraged to donate money to the Trust to assist with the management of the garden in the future.

Equally any future expenditure that the Council is required to expend as defined by the Trust Deed may be withdrawn from the trust account.

Additionally, and in celebration of the completion of the long term lease, the completion of the Trust arrangements and in recognition of the Council resolution of 8 October 2012:

THAT the garden be marked with a plaque and celebration when the naming is official.

It would be appropriate for the Council to host an afternoon tea garden party with Wendy for the local community and friends of the garden prior to the end of this year.

Charitable Trust Deed

Wendy Whiteley Secret Garden Trust

North Sydney Council

ABN 32 353 260 317

Trustee

Wendy Susan Whiteley

Settlor

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Charitable Trust Deed made at North Sydney on 2017

Between **North Sydney Council ABN 32 353 260 317**, 200 Miller Street, North Sydney NSW 2060 (the **Trustee**)

and **Wendy Susan Whiteley**, of Harbourview Crescent, Lavender Bay NSW 2060 (the **Settlor**)

Background

- A. The Settlor wishes to establish a charitable trust to be known as the "Wendy Whiteley Secret Garden Trust" to advance and promote the Charitable Purpose referred to in this Deed.
- B. The Trustee has consented to act as trustee of the charitable trust created by this Deed.
- C. The Settlor has paid to the Trustee prior to the execution of this Deed \$10.00 to be held by the Trustee as the initial assets of the charitable trust created by this Deed.

Operative Provisions

1. Definitions and Interpretation

1.1 Definitions

In this Deed, unless the context otherwise requires:

ACNC means the Australian Charities and Not-for-profits Commission.

ATO means Australian Tax Office.

Cash includes cheques, bank cheques, deposits at call and moneys standing to the credit of any bank account of the Trustee (held in that capacity).

Charitable Purpose has the meaning given in clause 3.1.

Charity means a charity registered with the ACNC.

Council means the local council established under Chapter 9 of the *Local Government Act* with responsibility for the area in which the Land is situated and known as North Sydney Council ABN 32 353 260 317.

Event of Insolvency means:

- (a) a controller, a trustee, administrator, receiver and/or manager or similar officer is appointed in respect of a person or any asset of a person;
- (b) a liquidator or provisional liquidator is appointed in respect of a corporation;
- (c) any application (not withdrawn or dismissed within fourteen (14) days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of:

- (i) appointing a person referred to in paragraphs (a) or (b) of this definition;
 - (ii) winding up or deregistering a corporation (otherwise than for the purpose of amalgamation or reconstruction); or
 - (iii) proposing or implementing a scheme of arrangement;
- (d) any event or conduct occurs which would enable a court to grant a petition, or an order is made, for the bankruptcy of an individual or his estate under any Insolvency Provision;
- (e) any application (not withdrawn or dismissed within fourteen (14) days is made to a court for an order, a meeting is convened, a resolution is passed or any negotiations are commenced, for the purpose of implementing or agreeing:
- (i) a moratorium of any debts of a person;
 - (ii) a personal insolvency agreement;
 - (iii) any other assignment, composition or arrangement (formal or informal) with a person's creditors; or
 - (iv) any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee,
- or any agreement or other arrangement of the type referred to in this paragraph (e) is ordered, declared or agreed to;
- (f) a corporation is taken (as a result of the operation of law) to have failed to comply with a statutory demand;
- (g) any writ of execution, garnishee order, mareva injunction or similar order, attachment or other process is made, levied or issued against or in relation to any asset of a person;
- (h) anything analogous to anything referred to in paragraphs (a) to (g) (inclusive) of this definition, or which has a substantially similar effect, occurs with respect to a person under any law; or
- (i) a person is, or admits in writing that it is, or is declared to be, or is taken under any applicable law to be (for any purpose), insolvent or unable to pay its debts.

Financial Year means each period of 12 months ending on 30 June (or such other date as the Trustee deems appropriate). The first Financial Year will be the period from the date of this Deed to 30 June 2017 and the last Financial Year will be the period ending on the Vesting Day and beginning on the day immediately preceding 1 July (or such other date as the Trustee deems appropriate).

Garden means the garden known as the Wendy Whiteley Garden situated on the Land.

Gardener Costs means the costs Council incurs in employing or contracting the services of gardeners to undertake works for the repair, maintenance, gardening and beautification of the Garden.

Government Agency means:

- (a) a government or government department or other body;
- (b) a Council;
- (c) a governmental, semi-governmental or judicial person; or
- (d) a person (whether autonomous or not) who is charged with the administration of the law.

Income means the net income of the Trust determined in accordance with accounting principles and practices applying by law as in effect from time to time.

Income Tax Exempt Status means an endorsed tax exemption in respect of all Income of the Trust granted by the Australian Taxation Office.

Income Tax Law means as applicable:

- (a) Income Tax Assessment Act 1936 (Cth) and Income Tax Assessment Act 1997 (Cth) or either of them; and
- (b) any imposition, collection or subordinate legislation connected with the foregoing.

Insolvency Provision means any law relating to insolvency, sequestration, liquidation, winding up or bankruptcy (including any law relating to the avoidance of conveyances in fraud of creditors or of preferences and any law under which a liquidator or trustee may set aside or avoid transactions) and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

Land means land at Harbour View Crescent, Lavender Bay, New South Wales and comprised in Lot 1 in Deposited Plan 1220077.

Lease means registered lease AK647064L of the Land for the purpose of 'beautification and passive recreation' from Rail Corporation New South Wales to the Council.

Property means real or personal movable or immovable property of any description and location including (without limiting the generality of the foregoing) Cash, choses in action, policies of any type and any beneficial interest in any of the foregoing.

Representative means, in relation to a person, that person's officers, employees, contractors and agents.

Schedule 1 means the Schedule 1 annexed to this Deed.

Schedule 2 means the Schedule 2 annexed to this Deed.

Schedule 3 means the Schedule 3 annexed to this Deed.

Tax includes all income tax, withholding tax, stamp and other duties, goods and services tax and other taxes, levies, imposts, deductions and charges whatsoever (including in respect of any duty imposed on receipts or liabilities of financial institutions any amounts paid in respect thereof to another financial institution) together with interest on them and penalties with respect of them (if any) and charges, fees or other amounts made on or in respect of them.

Trust means the charitable trust established pursuant to this Deed.

Trust Fund means all Property for the time being held by the Trustee upon the terms of the Trust including:

- (a) the initial \$10.00 settled on the Trustee by the Settlor (**Settled Moneys**);
- (b) any further Property as is from time to time donated to or settled upon the Trust; and
- (c) any proceeds of any of the foregoing.

Trustee means North Sydney Council or if North Sydney Council retires, resigns or is removed as trustee of the Trust, then any replacement trustee of the Trust.

Vesting Day means the first to occur of:

- (a) the 79th anniversary of the execution of this Deed; and
- (b) the date on which the Trust terminates in accordance with the terms herein.

1.2 General Interpretation

In this Deed unless the context indicates a contrary intention:

- (a) the expression "**person**" includes an individual, the estate of an individual, a corporation, an agency and a statutory or other authority or association (incorporated or unincorporated);
- (b) a reference to any party includes that party's executors, administrators, successors, substitutes and assigns, including any person taking by way of novation;
- (c) a reference to any document or agreement is to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (d) a reference to any legislation or to any section or provision thereof includes any statutory modification or re-enactment or any statutory provision substituted therefore and all ordinances, by-laws, regulations and other statutory instruments issued thereunder;
- (e) words importing the singular include the plural (and vice versa) and words denoting a given gender include all other genders;
- (f) headings are for convenience only and do not affect interpretation;
- (g) a reference to a clause is a reference to a clause of this Deed; and

- (h) where any word or expression is given a defined meaning, any other part of speech or other grammatical form in respect of such word or expression has a corresponding meaning.

2. Establishment of the Trust

2.1 Appointment of Trustee

The Settlor hereby appoints the Trustee as the trustee of the Trust to hold the Trust Fund on trust for the Charitable Purpose on the terms and conditions set out in this Deed.

2.2 Acceptance of Appointment and Declaration of Trust

The Trustee accepts the appointment as trustee of the Trust and declares that it holds the Trust Fund on trust solely for the Charitable Purpose on the terms and conditions set out in this Deed.

2.3 Application of Trust Fund

- (a) Subject to the following, the Trust Fund will be applied solely in furtherance of the Charitable Purpose and no portion will be distributed directly or indirectly to the Trustee or to any member or officer of the Trustee except as bona fide compensation for services rendered or expenses incurred on behalf of the Trust.
- (b) Nothing in this clause 2.3 should be construed as limiting the Trustee's power to take any action under or in accordance with clauses 4.1(b), 4.2 or 4.3.

2.4 Name of the Trust

The Trust will be known as the "Wendy Whiteley Secret Garden Trust".

2.5 No reversion of Trust Fund

The Settlor hereby declares that no part of the Trust Fund shall ever revert to or become beneficially owned by the Settlor.

2.6 Not for profit entity

The Trust is established and must operate as a not-for-profit entity.

3. Purpose

3.1 Charitable Purpose

The Trustee must hold the Trust Fund and the Income of the Trust Fund derived in each Financial Year on trust solely for the purpose of:

- (a) beautification and gradual enhancement of the Garden generally in accordance with Wendy's Vision and Improvement Principles set out in Schedule 2;

- (b) passive recreational use of the Garden by members of the public;
- (c) providing stewardship to encourage the public to use and enjoy the Garden; and
- (d) such other purposes as determined by the Trustee provided that the purposes are for a public charitable purpose.

3.2 Charitable Purpose prevails

To the extent permitted by law, clause 3.1 above prevails over any other power, obligation or duty of the Trustee and any other provision of this Deed.

3.3 Background and References

Background and references to the Garden are set out in Schedule 3.

4. The Trustee

4.1 Powers of Trustee

- (a) **(General Powers of Legal & Beneficial Owner):** Subject to this Deed, and having regard to the Charitable Purpose, the Trustee has all the powers in respect of the Trust Fund that it could exercise if it were the absolute and beneficial owner of the Trust Fund.
- (b) **(Additional Powers):** Without limiting clause 4.1(a), the Trustee may from time to time exercise the following additional powers:
 - (i) to engage or authorise persons on a paid or unpaid basis to undertake works for the repair, maintenance, gardening and beautification of the Garden and to assist in the use and enjoyment of the Garden for passive recreation by members of the public;
 - (ii) to perform the obligations under the Lease, including payment of rent and outgoings;
 - (iii) to raise and collect funds, to invite and receive contributions, to accept contributions by way of gifts, donations, grants or other sums of money or property from members of the public, institutions or corporations or from any public or private source or person whatsoever and to give valid receipts for such contributions;
 - (iv) to pay any Tax incurred by or in respect of the Trust;
 - (v) to apply for Income Tax Exempt Status;
 - (vi) to exercise the powers set out in the Schedule 1;
 - (vii) any express and implied powers conferred upon a trustee by any legislation or other law in Australia;

- (viii) to apply for endorsement as a Charity; and
- (ix) to invest the Trust Fund in the manner set out below in clauses 4.2 and 4.3,

subject to the provisions of this Deed, in particular clause 3 and 4.4, and any restrictions contained in any legislation or other law in Australia as it relates to trusts.

- (c) **(Cumulative powers):** An express power conferred upon the Trustee under any provision of this Deed does not limit:

- (i) the general absolute powers conferred by clause 4.1(a); or
- (ii) any other express or implied power conferred by any provision of this Deed or by any legislation or other law in Australia,

subject to the provisions of this Deed and any restrictions contained in any legislation or other law in Australia as it relates to trusts.

- (d) If at any time during the continuance of the Trust it shall appear to the Trustee that either by reason of:

- (i) changes in the law affecting the administration of the Trust or the Trust Fund;
- (ii) changes in social, scientific or political conditions; or
- (iii) any defect or omission in any provisions of clause 4.1,

it would be more conducive to the better administration of the Trust and the Trust Fund that the Trustee should possess or be vested with any further administrative or other powers, then the Trustee is at liberty to alter or amend the provisions herein to such an extent as may (in the opinion of the Trustee) be requisite for the purpose of conferring on the Trustee such further administrative or other powers, provided always that nothing in this clause 4.1 shall authorise or be deemed to authorise any departure from or modification to the primary trusts declared hereby or the application of the Trust Fund or the Income thereof, otherwise than in conformity with the Charitable Purpose.

- (e) Notwithstanding clause 13.3, if at any time after setting up of the Trust Fund, certain objects, clauses or other provisions in this Deed require variation in order for the Trust to obtain or maintain endorsement for Income Tax Exempt Status or as a Charity, the Trustee will be at liberty to vary and/or include such objects or provisions accordingly.

4.2 Investment powers

Without limiting the powers in clause 4.1 and subject to the other provisions of this Deed (and clauses 4.3 and 4.4 below in particular), the Trustee may invest, pay or apply the Trust Fund in any manner it deems fit, including:

- (a) **(General investment):** investment of any asset of the Trust Fund in any form of investment;

- (b) **(Investment transfer)**: sale, transfer, disposal, variation, surrender, termination, release or renewal of any investment comprised in the Trust Fund;
- (c) **(Property purchase)**: purchase or acquisition of any Property;
- (d) **(Marketable securities)**: purchase, subscription for or acceptance of any marketable securities issued by any company with consequential powers, including:
 - (i) exercise of any voting or other right and performance of any liability relating or incidental to the marketable securities;
 - (ii) creation of any agreement modifying any right or liability;
 - (iii) creation of any agreement relating to any debt arrangement, increase or reduction of the capital or share buyback of or by any company;
 - (iv) creation of any agreement relating to, or in the course of, the voluntary administration, any deed of company arrangement, scheme of arrangement or the liquidation of any company;
 - (v) deposit, transfer or release of the marketable securities, or the legal or equitable interest in the marketable securities, for any purpose; and
 - (vi) payment of any call, contribution or other cost in relation to the marketable securities, or legal or equitable interest in the marketable securities;
- (e) **(Bank deposits)**: deposit or credit with any bank or other financial institution, whether at call or for a fixed term and whether deriving interest or otherwise;
- (f) **(Business assets)**: purchase of any assets or share or interest in any business or company;
- (g) **(Business activities)**: performance or termination of any business or business activity of any nature or description in any business capacity, including:
 - (i) as a sole principal or on its own account;
 - (ii) in partnership, joint venture or association with any other person;
 - (iii) as an agent for any other person; or
 - (iv) as a beneficiary or unitholder under any trust,

provided always that where endorsement for Income Tax Exempt Status is granted, in any year of assessment for income tax purposes, not more than twenty five per cent (25%) of the accumulated funds as at the beginning of the basis period for that year of assessment is used for the carrying on of, or participation in, a business, and the profits or incomes derived from the

business activity are used solely for the Charitable Purpose. For avoidance of doubt, the restriction of twenty five percent (25%) is not applicable, if:

- (aa) the business carried on is in the course of discharging the primary Charitable Purpose of this Trust; or
 - (bb) the work relating to the business is mainly carried on by persons whose benefit this Trust was established for.
- (h) **(Reversions)**: purchase of any reversionary or deferred property or right of any nature or description;
- (i) **(Insurances)**: procurement or termination of any sinking fund, term, accident or other insurance of any nature or description and at or subject to any premium, whether single or payable periodically, and with or subject to any rights or provisions of any nature or description, or exercise of any right relating to any insurance; and
- (j) **(Asset retention)**: retention of any property comprised in the Trust Fund, without sale, conversion or alteration, for any period.

4.3 Investment assessment

In the exercise of any investment power, including the investment powers set out above in clause 4.2, the Trustee:

- (a) **(Investment factors)**: acting prudently and with due caution, shall have regard to matters, so far as they are appropriate to the circumstances of the Trust, including:
- (i) the Charitable Purpose;
 - (ii) the desirability of diversifying investments of the Trust Fund;
 - (iii) the nature of, and the risk associated with, existing assets comprising the Trust Fund;
 - (iv) the need to maintain the real value of the capital or income of the Trust;
 - (v) the risk of capital or income loss or depreciation;
 - (vi) the potential for capital appreciation;
 - (vii) the likely income return and the timing of income return;
 - (viii) the length of the term of the proposed investment;
 - (ix) the probable duration of the Trust;
 - (x) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
 - (xi) the aggregate value of the Trust Fund;

- (xii) the effect of the proposed investment in relation to the tax liability of the Trust;
 - (xiii) the likelihood of inflation affecting the value of the proposed investment or other trust property of the Trust;
 - (xiv) the costs, including commission, fees, charges and duties payable, of making the proposed investment; and
 - (xv) the results of any review of existing investments comprised in the Trust Fund, whether individually or as a whole and whether on an annual or other basis; and
- (b) **(Investment advice, management and other services):** having regard to the size and nature of the Trust, may:
- (i) obtain and consider advice reasonably required by the Trust or for the investment of the Trust Fund or the management of the investment;
 - (ii) outsource investment management to an appointed advisor who will manage any finance risk and advise on investment and financial matters in relation to the investment of the Trust Fund or the management of the investment;
 - (iii) engage service providers to provide services to the Trust; and
 - (iv) pay out of the Trust Fund any reasonable costs incurred in obtaining advice or in outsourcing investment, management and obtaining other services.

4.4 Absolute Negative Powers

The Trustee will not have and will not exercise powers in relation to any of the following:

- (a) **(Charitable Purpose):** any dealing or use whatsoever with the Trust Fund which is not in accordance with or in furtherance of the Charitable Purpose; and
- (b) **(Encumbrances):** to create, purport or attempt to create or permit to exist any mortgage, charge, pledge, lien, encumbrance or other security interest in favour of any person whatever its ranking over any Property forming part of the Trust Fund (other than the Trustee's right of indemnity from the Trust Fund).

5. Application of Income

5.1 Distribution

Until the Vesting Day, and subject to clause 4.4, the Trustee will in each Financial Year disburse, pay or apply all or any part of the Income of the Trust Fund for the Charitable Purpose in the proportions that the Trustee thinks fit.

5.2 Accumulation

The Trustee may, in a Financial Year, accumulate and retain for any period that it thinks appropriate for the furtherance of the Charitable Purpose, but not greater than the period permitted by law, all or any part of the Income of the Trust Fund derived during that Financial Year.

5.3 Characterisation of income and capital

Before the end of each Financial Year, the Trustee may determine whether any item is to be treated as being on income or capital account.

6. Trustee's obligations

The Trustee must:

- (a) **(Act Continuously)**: act continuously as trustee until the Trust is wound up or until the Trustee has retired or been removed, in accordance with this Deed;
- (b) **(No Financial Services)**: not act as a financial adviser, tax advisor or in any capacity that would require a full financial services license;
- (c) **(Standard of Care)**: exercise reasonable care, skill and diligence in carrying out its functions and exercising rights and performing its obligation under this Deed in the utmost good faith having regard to the Charitable Purpose;
- (d) **(Legal Compliance)**: comply with any applicable law in Australia relating to accumulation of trust income in the exercise of any power under this Deed;
- (e) **(Not Dispose)**: except as provided in this Deed, not dispose of, encumber or part with possession of the Trust Fund;
- (f) **(Proceedings)**: subject to being indemnified to its satisfaction, institute, prosecute, defend and compromise any legal, administrative and arbitral proceedings related to its obligations as Trustee, in such places and jurisdictions as the Trustee thinks fit; and
- (g) **(Retire)**: retire when required to do so under this Deed.

7. Proceedings of Trustee

7.1 Systems and procedures

The Trustee may establish rules, policies, systems and procedures to assist with determining whether to apply any part of the Trust Fund to any fund, authority or institution in accordance with the Charitable Purpose, and may amend or revoke any such rules, policies, systems and procedures subject to the terms and conditions herein.

7.2 Records and accounts

The Trustee shall:

- (a) keep accurate minutes, records and accounts of its trusteeship and all receipts and outgoings in relation thereto, including such records required by law and as to ensure that the Property of the Trust is at all times distinct and identifiable from any other Property not subject to the Trust; and
- (b) have the accounts audited annually at the expense of the Trust Fund by a chartered accountant selected by the Trustee.

8. Assistance for Trustee

8.1 Engagement of Experts

The Trustee may engage, from time to time, any barrister, solicitor, accountant, contractor, qualified adviser, banker, fund manager or other person in Australia who it considers necessary or desirable for the purpose of assisting it in carrying out its functions, exercising its rights and performing and observing its obligations under this Deed.

8.2 Acting on Advice

- (a) **(Advice of Experts)**: The Trustee may act upon the advice or information obtained from any person appointed pursuant to clause 8.1, such person believed by the Trustee in good faith and upon reasonable grounds to be competent in relation to the matters upon which they are consulted by the Trustee.
- (b) **(No Liability)**: The Trustee will not be liable for anything done or suffered to be done in good faith in reliance upon any such advice or information, except to the extent that the liability is as a result of the Trustee's fraud, negligence or wilful default.

8.3 Delegation

The Trustee may delegate any of its powers, duties and discretions to any person or organisation including, without limitation, in respect of the administration of the Trust. The Trustee will be liable for the acts or omissions of a delegate or agent only in circumstances where, and to the extent that, the Trustee did not select that delegate or agent in good faith and with due care.

8.4 Committees

- (a) The Trustee may establish one or more committees for purposes or functions relating to the Charitable Purpose (**Committees**);
- (b) The Trustee may appoint and remove, or make provision for the appointment and removal of, members of the Committees. Each Committee may consist of a single individual or the number of individuals that the Trustee decides.
- (c) The Trustee may specify for each Committee:

- (i) the manner in which proceedings of the Committee are to be conducted;
- (ii) the matters which the Committee must have regard to in carrying out its functions; and
- (iii) any other matters concerning the Committee or its functions that the Trustee decides.

9. Liabilities of Trustee

9.1 Limitation of Liability of Trustee

The Trustee and its Representatives are not liable for any liability, loss, costs or expenses caused or contributed to by any act or omission of the Trustee or its Representatives including without limitation:

- (a) **(Failure to Check)**: its failure to check any information, document, form or list supplied or purported to be supplied to it by any person;
- (b) **(Good Faith)**: anything done by it in good faith in reliance upon any instrument except when it has reason to believe that the instrument is not genuine and not to have been passed or signed by the proper parties;
- (c) **(Prevented by Law)**: any failure to do anything because it is prevented or hindered from doing it by law;
- (d) **(Tax)**: payments made by it in good faith to a Government Agency in relation to Tax relating to the Trust;
- (e) **(Failure by others)**: a failure by any person to carry out an agreement with the Trustee in relation to the Trust; and
- (f) **(Event of Insolvency)**: a failure to comply with this Deed in circumstances where it has become impossible or impracticable to do so because of an Event of Insolvency of any person,

except a liability, loss, cost or expenses attributable to:

- (a) **(Dishonesty)** the dishonesty of that Trustee or Representative;
- (b) **(Gross Negligence)** gross negligence or recklessness of that Trustee or Representative; and
- (c) **(Deliberate Breach)** a deliberate act or omission known by that Trustee or Representative to be a breach of the obligations of the Trustee under this Deed.

10. Reimbursement of Trustee

10.1 Payment of bona-fide costs and expenses

Subject to the provisions of this Deed, the Trustee may reimburse itself out of the Trust Fund only for reasonable liabilities, costs or expenses (including, without limitation, any Taxes and Gardener Costs, but excluding costs of employees or officers of the Trustee (as a Council) in their capacity as an employee or officer of the Council in the performance of the Trustee's administrative duties or obligations under this Deed or as members or attendees of any Committees) which it incurs in its capacity as trustee of the Trust Fund.

10.2 Limitation

The Trustee shall not be entitled to any reimbursement or indemnity from the Trust Fund for costs, expenses and liabilities:

- (a) arising from or in connection with any malicious, bad faith, fraudulent or illegal act or omission, negligence or wilful or reckless disregard of the terms of this Deed by the Trustee;
- (b) incurred by the Trustee other than in its capacity as trustee of the Trust Fund; or
- (c) incurred other than in furtherance of the Charitable Purpose.

11. Retirement of the Trustee

11.1 Retirement for cause

The Trustee will immediately retire as trustee of the Trust if the Trustee fails or neglects to carry out or satisfy any duty imposed on the Trustee by this Deed.

11.2 Resignation of Trustee

The Trustee may resign from office upon providing 90 days (or such lesser period as is agreed between the Trustee and the new Trustee) prior written notice of its proposed retirement.

11.3 Appointment of Trustee

The retirement of the Trustee pursuant to clause 11.1, or resignation of the Trustee pursuant to clause 11.2, is subject to the appointment of a successor Trustee, which must be a Government Agency.

11.4 Trust Fund to be vested in new Trustee

The Trustee will on retirement, resignation or removal, vest the Trust Fund or cause it to be vested in such new Trustee, will deliver to such new Trustee all books, documents, records and other property whatsoever relating to the Trust Fund and must execute and deliver any documents and do every other thing which is necessary or desirable to effect the appointment of the new Trustee. The reasonable costs and expenses of and incidental thereto and incurred by the outgoing Trustee or the new Trustee will be met from the Trust Fund.

11.5 Release of outgoing Trustee

Upon retirement, resignation or removal, the outgoing Trustee will be released from all further obligations under this Deed provided always that no release under this clause will extend to any existing or antecedent fraud, neglect or default on the part of the outgoing Trustee or any existing or antecedent breach of its duties imposed by this Deed, statute or rule of law.

11.6 New Trustee to execute deed

- (a) The new Trustee will execute a deed whereby such new Trustee will undertake all the obligations of the retiring Trustee under this Deed.
- (b) The new Trustee will and may from the date of its appointment exercise all the powers and enjoy all the rights and will be subject to all duties and obligations of the Trustee under this Deed as fully as though such new Trustee had originally been named as a party to this Deed.

11.7 Appointment of other Trustees

In the event it is a requirement of the ATO for the endorsement for Income Tax Exempt Status that more trustees are required, the Trustee is at liberty to appoint such further number of trustees as are required provided always that such new trustees accept the terms and conditions of this Deed including anything supplemental thereto.

12. Termination

12.1 Term of the Trust

The Trust begins on the date of this Deed and ends on the Vesting Day unless terminated earlier in accordance with clause 12.3 below.

12.2 Realisation of the Charitable Trust Fund

- (a) **(Realisation):** As soon as practicable after the Vesting Day but in any event within 180 days of the Vesting Day the Trustee will realise the Trust Fund in accordance with clause 12.2(b).
- (b) **(Priority of Proceeds):** The proceeds of realisation of the Trust Fund and any net income of the Trust Fund for the Financial Year ending on the Vesting Day will be applied in the following order of priority:
 - (i) in payment of or provision for the debts, costs, charges, liabilities (whether actual or contingent), expenses, claims and demands incurred or anticipated by the Trustee in relation to the Trust including fees of any agent, solicitors, bankers or other persons whom the Trustee employs in relation to the dissolution of the Trust and any Taxes;
 - (ii) in payment to the Trustee of any moneys owing to the Trustee under this Deed; and

- (iii) in payment to charitable institutions selected by the Trustee for the Financial Year ending on the Vesting Day, for the Charitable Purpose.

12.3 Winding up of the Trust by Trustee

The Trust terminates at any time after the date of this deed if any of the following occurs:

- (a) **(No Relevant Property)**: the Trust Fund does not contain any Property for a period exceeding 12 months;
- (b) **(Diminution of Trust Fund)**: the Trust Fund consists of no material Property;
- (c) **(Termination of or variation to Lease)**: the Lease is terminated or the terms of the Lease are varied, and as a result of the termination or variation, the Trustee ceases to be able to carry out the Charitable Purpose or
- (d) **(Transfer to another charity)**: it is considered, in all the circumstances, in the best interests of the Charitable Purpose for the Trust to be wound up, provided always that such a winding up must only occur where the Trust Fund is to be transferred to:
 - (i) a charity which will operate in furtherance of the Charitable Purpose or has a similar purpose to the Charitable Purpose; and
 - (ii) has rules prohibiting the distribution of its assets and income to its members; and
 - (iii) to which income tax deductible gifts can be made:
 - A. gifts of money or property for the principal purpose of the Trust Fund;
 - B. contributions made in relation to an eligible fundraising event held for the principal purpose of the Trust Fund; and
 - C. money received by the organisation because of such gifts and contributions.

12.4 Winding up of the Trust Fund and endorsement as a deductible gift recipient

At the first occurrence of:

- (a) the winding up of the Trust Fund; or
- (b) the revocation or cessation of the Trust Fund's endorsement as a deductible gift recipient;

any surplus assets of the Trust Fund, remaining after payment of liabilities attributable to it must be transferred to another charity of a type described in 12.3(d).

13. Amendments to the Trust

13.1 Voluntary

Subject to the provisions of this clause 13 the Trustee may, by deed poll, amend, vary, add or delete any provision of this Deed if:

- (a) **(Compliance with any Law)**: in the opinion of the Trustee or of a barrister or solicitor instructed by the Trustee it is necessary or expedient to comply with the provisions of any Law or the requirement of any relevant Government Agency including without limitation, the ATO for purposes of the endorsement for Income Tax Exempt Status or the ACNC for the purposes of endorsement as a Charity; or
- (b) **(Trustee's Opinion)**: in the opinion of the Trustee it:
 - (i) is made to correct a manifest error or ambiguity or is of a formal technical or administrative nature only;
 - (ii) will enable the provisions of this Deed to be more conveniently or advantageously administered; or
 - (iii) it is otherwise expressly authorised by this Deed.

13.2 Trustee not to Benefit

Subject to this Deed, the Trustee will not be entitled to any interest or benefit in or arising from the Trust Fund by resulting trust or otherwise, and any acts by the Trustee purporting to create such interest or benefit will be void.

13.3 Limitation on Variations of Trust

No alteration, variation or modification to the Trust will be capable of being made if it:

- (a) varies or revokes this clause 13.3;
- (b) makes the Trustee a beneficiary under the Trust or capable of becoming a beneficiary;
- (c) has the effect that the trust upon which the Trust Fund is held is deemed not to be for the Charitable Purpose; or
- (d) varies or revokes the definition of "Charitable Purpose".

13.4 Notification

Where an endorsement for Income Tax Exempt Status is given, no addition, alteration or amendment to this Deed shall be made unless prior written notice is given to the ATO.

14. Limited Recourse

14.1 Limitation on Trustee's Liability

The Trustee enters into this Deed only in its capacity as trustee of the Trust and in no other capacity. A liability incurred by the Trustee acting in its capacity as trustee of the Trust arising under or in connection with this Deed is limited to and can be enforced against the Trustee only to the extent to which it can be satisfied out of the Trust Fund out of which the Trustee is actually indemnified for the liability. This limitation of the Trustee's liability applies despite any other provision of this Deed (other than clause 14.3) and extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Deed.

14.2 Claims against Trustee

No party may sue the Trustee in respect of liabilities incurred by the Trustee acting in its capacity as trustee of the Trust in any capacity other than as trustee of the Trust, including seeking the appointment of a receiver (except in relation to the Trust Fund), a liquidator, an administrator, or any similar person to the Trustee or prove in any liquidation, administration or arrangements of or affecting the Trustee (except in relation to the Trust Fund).

14.3 Breach of Trust

The provisions of this clause 14 will not apply to any obligation or liability of the Trustee to the extent that it is not satisfied because under this Deed or by operation of law there is a reduction in the extent of the Trustee's indemnification out of the Trust Fund as a result of the Trustee's fraud, negligence or wilful default.

14.4 Acts or omissions

No act or omission of the Trustee (including any related failure to satisfy its obligations or any breach of representation or warranty under this Deed) will be considered fraudulent, negligent or a wilful default for the purpose of clause 14.3 to the extent to which the act or omission was caused or contributed to by any failure by any person appointed by the Trustee under this Deed (other than a person whose acts or omissions the Trustee is liable for in accordance with this Deed) to fulfil its obligations in relation to the Trust or by any other act or omission of any such person.

14.5 No obligation

The Trustee is not obliged to do anything or refrain from doing anything under or in connection with this Deed (including incur a liability) unless the Trustee's liability is limited in the same manner as set out in this clause 14 or otherwise in a manner satisfactory to the Trustee in its absolute discretion.

The provisions of this clause 14 apply notwithstanding any other provisions of this Deed.

15. Governing Law and Jurisdiction

15.1 Governing Law

This Deed is governed by and will be construed in accordance with the laws of New South Wales.

15.2 Jurisdiction

The parties irrevocably and unconditionally submit to the non exclusive jurisdiction of the Courts of New South Wales and any Courts which have jurisdiction to hear appeals from any of those Courts and the parties waive any right to object to any proceedings being brought in those Courts because the venue is inconvenient, the Courts lack jurisdiction or any other reason.

16. Miscellaneous

16.1 Saving of Charitable status

If at any time any purpose constituting a Charitable Purpose is found not to be a charitable purpose, then the definition of "Charitable Purpose" will be construed as if such non-charitable purpose was not included within that definition and the Trust will be construed and given effect to in the same manner in all respects as if no application of the Trust Fund or any part thereof to or for such non-charitable purpose has been or could be deemed to have been so directed or allowed.

16.2 Rights Cumulative

The rights provided in this Deed are cumulative and not exclusive of the rights provided by law independently of this Deed.

16.3 Notices

Every notice, direction or other communication of any nature whatsoever required to be served, given or made under or arising from this Deed:

- (a) shall be in writing in order to be valid;
- (b) shall be deemed to have been duly served, given or made in relation to a party if it is:
 - (i) delivered to the last known address of that party (or at such other address as may be notified in writing by that party to the other party from time to time); or
 - (ii) posted by prepaid registered post to such address; or
 - (iii) sent by facsimile to the last known facsimile number of that party (or to such other number as may be notified in writing by that party to the other party from time to time);
- (c) shall be sufficient if executed by the party giving service or making the same or on its behalf by any attorney, director, secretary or other duly authorised officer of such party;

- (d) shall be deemed to be given, served or made:
- (i) **(in the case of email)**: upon receipt by the sender of delivery (including confirmation of delivery notification from an email server or written acknowledgement from the recipient); and
 - (ii) **(in the case of prepaid registered post)**: on the fifth business day after posting; and
 - (iii) **(in the case of delivery by hand)**: on delivery.

16.4 Trustee's receipt

The receipt in writing of the Trustee will be effectual discharge to any person paying or transferring any money or property to it and that person will not be bound to see to the application of any such money or property.

16.5 Severability of provisions

Any provision of this Deed which is illegal, void or unenforceable will be ineffective to the extent only of such illegality, voidness or unenforceability without invalidating the remaining provisions.

16.6 Counterparts

This Deed may be executed in a number of counterparts and all such counterparts taken together will be deemed to constitute one and the same instrument.

Executed as a deed.

Signed sealed and delivered by **North Sydney Council**

by its authorised delegate in the presence of:

Signature of Delegate

Signature of Witness

Name of Delegate

Name of Witness in full

Signed sealed and delivered by **Wendy Susan Whiteley**

in the presence of:

Signature

Signature of Witness

Name of Witness in full

Schedule 1

Other Administrative Powers

Pursuant to clause 4.1(b)(vi), the Trustee may from time to time exercise the following additional powers:

- (a) to procure and obtain support and assistance financial or otherwise, from organisations, associations, corporations and institutions and other bodies in the implementation and execution of the policies and decisions of the Trustee and of this Trust;
- (b) to organise and co-ordinate activities in furtherance of the Charitable Purpose and to procure financial assistance in this respect;
- (c) to hire, employ or enter into contract of services with any person, corporation, Government Agency or other organisation on such terms as the Trustee deems fit in furtherance of the Charitable Purpose;
- (d) to negotiate and to co-operate with the appropriate authorities in Australia and elsewhere in relation to any activities in furtherance of the Charitable Purpose;
- (e) to effect or concur in effecting any transaction concerning or affecting any part of the Trust Fund if the Trustee deems the transaction is for the benefit of the Trust;
- (f) to keep any property whether immovable or movable forming part of the Trust Fund insured against such risks and for such amount as the Trustee deems fit with a reputable insurance company or companies;
- (g) to open and operate bank accounts including placing monies on fixed deposit;
- (h) to enter into agreements and contracts in any manner and on such conditions as the Trustee may deem necessary in pursuance of the Charitable Purpose;
- (i) to sign and to execute agreements, contracts and any other deed or instrument or in relation to and for the purpose of the Trust;
- (j) to appoint, employ, remove or suspend or remunerate staff, servant or agents, office-bearers and officials and to terminate their services, draw up conditions of employment, enter into service agreements, define their duties, determine their salaries, compensations, allowances and other benefits and remuneration, provide for pensions and superannuation schemes on behalf of the employees and/or widows or widower and/or dependants;
- (k) to establish and support or aid in the establishment and support of any association, institution or other bodies in any way connected with the Charitable Purpose of the Trust or calculated to further the Charitable Purpose;

- (l) to act in any other legitimate manner in order to realise the Charitable Purpose;
- (m) to sue and be sued, settle any claim or proceedings, submit any claim for mediation or arbitration or appeal against any decision or make any application to the courts to determine any power, discretion or any matter related to or incidental to this Deed, the Trust and the Trust Fund or to seek the direction of the courts;
- (n) to cause the accounts of the Trust to be audited annually or at such other intervals as the Trustee deems fit;
- (o) to make rules and regulations for the management and administration of the Trust Fund or any part thereof and for matters connected with the Trust and its objects;
- (p) to accept as good discharge and receipt, a written receipt from the treasurer or secretary or any authorised officer of the recipient of any funds, grants, donations, gift, or other payment from the Trust;
- (q) to do all such lawful acts and things in furtherance of the Charitable Purpose and in so far as is necessary to do such things in collaboration with any person, body, institution, authority or otherwise, provided that no part of the Trust Fund save for expenses permitted herein shall be used or applied for a purpose outside the Charitable Purpose;
- (r) generally to do all such other lawful business and things as are incidental to or conducive to the attainment of all or any of the Charitable Purpose;
- (s) to enter into a lease, licence or other agreement of the Land for the Charitable Purpose and perform the obligations under the lease, licence or other agreement;
- (t) to enter into a sublease, licence or other agreement to allow the Land to be used by other persons or corporations in connection with the Charitable Purpose with the net payment received forming part of the Trust Fund; and
- (u) to convey, assign, transfer, lease, sublease, surrender or otherwise deal with, dispose or part with possession of, or create or permit to exist any other interest in any part of the Property forming part of the Trust Fund with or without valuable consideration.

Schedule 2

Wendy's Vision and Improvement Principles

Wendy's Vision and Improvement Principles are as follows:

- To maintain and expand the Garden in its current design form in order to ensure that the gardens retains it unstructured, whimsical, enchanted charm and beauty.
- To engage suitably qualified gardeners to maintain the existing combination of plants, colours, light and shadows and the rhythm of the Garden so that the Garden's character and legacy is maintained into the future.
- That any significant proposed improvements to the Garden are consistent with the design and creation of the garden as articulated in the publication *Janet Hawley, Wendy Whiteley and the Secret Garden*, (Penguin Books Australia, 2015).
- To protect the garden as a significant public asset and Wendy Whiteley's intended legacy for future generations.

Schedule 3

Background and References

'Climb down to the floor of the garden and it is easy to forget the storybook views of Sydney Harbour. The bright panoramas of Clark Park, the leafy views of the Sydney Harbour Bridge and Luna Park have gone. The garden gathers itself here, leans in and becomes a single swath of green, hiding the map of pathways and the people drawn to this private space. Here there is room to run and explore, to contemplate and sleep protected beneath the arc of the garden.

There is no single signature to the design; too many details to connect and frame for a single story. At times it can seem impenetrable, a maze of plants and dead ends. At other times it leads you around until the last light of the day- watching, waiting, promising one more glance of golden light to fill the garden with life." Jason Busch (Janet Hawley, Wendy Whiteley and the Secret Garden, (Penguin Books Australia, 2015).

"I've loved making this garden. It's been a great gift to my life. It let me find myself again, and it's my gift to share with the public" Wendy Whiteley.

Reference material illustrating the gardens creation, design character and story includes the following:

Digital video recordings:

Australian Story: Wendy's Way (Directed by Helen Grasswill, Australian Broadcasting Corporation, 2015) 00:08:23 <<http://www.abc.net.au/austory/content/2015/s4305485.htm>>.

Wendy Whiteley and the Secret Garden (Penguin Books Australia, 2015)
<<https://www.youtube.com/watch?v=3t0CxII4-UE>>.

Publications:

Janet Hawley, Wendy Whiteley and the Secret Garden (Penguin Books Australia, 2015).

<http://www.athomeinnorthsydney.com.au/wendy-whiteley.html> At home in North Sydney: an architectural history of a locality, North Sydney Council. [c.2015]