

**The NTAA's Guide to a Unitholders
Agreement**

Disclaimer

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Law

The law is as stated June 2018.

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What is a Unitholders Agreement?

A unitholders agreement is a contract between the unitholders of a unit trust (and typically also the trustee(s) of the trust) containing agreed terms as to how the trust is to be managed. The agreement may cover a range of matters, including the funding, structure, management or conduct of the business carried on by the trust, as well as the rights and obligations of the unitholders.

Given that the unitholders generally have the power to appoint and remove the trustee(s), it is also important that the trustee(s) be party to the agreement so that the trustee(s) (or directors of the trustee company) understand the terms that the unitholders (and the trustee(s)) have agreed to, and which the trustee(s)/directors (in running the trustee company) will also be required to consider (in addition to the unit trust deed and the trustee company constitution, if any, as noted below).

It is important to consider the reasons for having a unitholders agreement and whether it is suitable for the purpose you are trying to achieve. You should also check whether the trust deed already covers the matters that the unitholders are wanting to agree on. If you want to add to or change how certain things are dealt with in the trust deed but do not want to amend the trust deed, it may be possible to achieve this using NTAA Corporate's Unitholders Agreement.

Unitholders Agreement and the Trust Deed

The trust deed is a document that binds the trustee setting out how the trust should be managed, and which also specifies the rules governing the relationship between the trustee and unitholders (including the rights, powers and obligations of each and all of them). It is always important to read the Unitholders Agreement in conjunction with the trust deed (and, if the trustee is a company, the trustee's company constitution, or the 'replaceable rules', if the trustee company does not have a constitution).

If there is any inconsistency between the trust deed and the Unitholders Agreement, the provisions of the Unitholders Agreement are intended to prevail to the extent of the inconsistency. The same will also apply in the event that there is any inconsistency between the Unitholders Agreement and the trustee company's constitution. Refer to clause 2 of NTAA Corporate's Unitholders Agreement.

Some case law has confirmed that a unitholders agreement may prevail over the terms of the trust deed (refer, for example, to the case of *Arhangelschi v Ussher* [2013] VSC 253). However, to be certain, where an inconsistency is discovered, it may be necessary to amend the trust deed, as the trustee is required to operate the trust deed in accordance with the trust deed. NTAA Corporate's Unitholders Agreement states that the parties must amend the deed in such circumstances, if necessary, and they are also generally required to exercise their voting rights to give full effect to the terms of the agreement.

What can be covered by a unitholders agreement?

A unitholders agreement can cover any matter that the unitholders wish to agree on regarding the business or management of the trust.

For example, a unitholders agreement could cover one or more of the following issues:

- Composition of the trustee company's board of directors (and how to appoint them);
- Types of decisions requiring majority (50%), special (75%), unanimous (100%) or other approval;
- Who can be a unitholder;
- The meetings of the unitholders;

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- Voting rights of unitholders;
- Minority unitholder protection;
- Special rules for the issue, transfer or disposal of units, or rights or options in relation to units;
- Unitholder exit strategies;
- The consequences of a unitholder defaulting, and 'bad leaver' arrangements; and/or
- The management, structure or business plan of the trust.

The above is not an exhaustive list and it should be remembered that there are a range of matters that can potentially be covered by a unitholders agreement (and NTAA Corporate's Unitholders Agreement will **only** include the matters specifically instructed to be included).

WARNING – Drafting a Unitholders Agreement

NTAA Corporate's Unitholders Agreement is a simple agreement for unitholders to document certain matters that may not be covered in the trust deed or which the unitholders wish to vary (perhaps temporarily) from the trust deed. Details of these additional terms and conditions agreed between the parties can be set out in the instructions to prepare this agreement, and they will then be inserted in Schedule 3 of NTAA Corporate's Unitholders Agreement.

This wording should be carefully considered so as to be effective. For example, in the case of *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54, one of the parties to a unitholders agreement was effectively able to get around the provisions of the agreement by initiating action to wind up the trust.

Note that NTAA Corporate's form of unitholders agreement should be used **only for simple and non-complex changes**. You should not use this agreement for changes requiring comprehensive clauses such as pre-emptive rights, drag-along rights, tag-along rights and complex restraint clauses. If you use NTAA Corporate's Unitholders Agreement to make such complex changes, there is a risk that there could be gaps in the agreement and that the provisions you have drafted may not cover all the consequences relating to the agreed matter. We will only include wording that we are specifically instructed the unitholders have agreed to include in Schedule 3. Therefore, for comprehensive changes, we strongly advise that you consult with an expert lawyer to draft a specific unitholders agreement suitable for your purposes.

Can the Unitholders Agreement be varied?

This Unitholders Agreement can only be varied by agreement in writing signed by all the parties (i.e., by unanimous agreement). Refer to clause 9.10 of NTAA Corporate's Unitholders Agreement.

What if there are other unitholder agreements in place?

If there are other unitholder agreements already in place, NTAA Corporate's Unitholders Agreement will supersede all prior such agreements unless it is specified in Schedule 3 that such agreements are to remain in force. Unless specified in Schedule 3, such prior agreements will be deemed to be terminated.

If there are any prior agreements to remain in force as specified in Schedule 3, it is important that such agreements be read in conjunction with NTAA Corporate's Unitholders Agreement (and the trust deed and trustee company's constitution, if any) to ensure that there are no provisions in the documents which are inconsistent. To the extent that there is any inconsistency between this Unitholders Agreement and any prior unitholder agreement, the provisions of NTAA Corporate's Unitholders Agreement should prevail to the extent of the inconsistency (refer to clause 3.2 of the Unitholders Agreement).

What if there are new unitholders after the agreement is executed?

Once the unitholders agreement has been executed, any person wanting to become a new unitholder (or trustee) must first deliver to the current trustee a signed 'Deed of Accession' in the form of Schedule 2 of the Unitholders Agreement, agreeing to be bound by the Unitholders Agreement.

The trustee and unitholders are prohibited from allowing the issue, transfer, transmission or conversion of units to any person, or allowing anyone else to become a trustee of the trust, until they have signed and delivered such a Deed of Accession.

Disputes between the unitholders

If there is a dispute between the unitholders arising out of the Unitholders Agreement, the unitholders must use their best efforts to resolve the dispute through mediation and, if still not resolved, to refer the dispute for decision by arbitration.

Note that disputes between the unitholders relating to matters outside the Unitholders Agreement will not be governed by the dispute resolution mechanism under clause 6 (unless specified in Schedule 3), but may still be governed by any relevant provisions in the trust deed.

Features of NTAA Corporate's Unitholders Agreement

The following are some of the features of NTAA Corporate's Unitholders Agreement. However, the agreement should be read in full, and in conjunction with the trust deed, to fully ascertain the relationship between the trustee and the unitholders.

- To the extent permitted under law, the provisions of the Unitholders Agreement will take priority over the trust deed (and the trustee company's constitution, if any) in the event of any inconsistency between those document and the Unitholders Agreement – refer to clause 2. If necessary, the parties are also required to amend the unit trust's trust deed (and/or the constitution of the corporate trustee) to resolve any such inconsistencies – refer to subclause 2.2. Each unitholder also agrees to exercise all voting rights to give full effect to the agreement (and do all other things as may be necessary or desirable to give full effect to every part of this agreement if asked in writing by one or more other unitholders to do so) – refer to subclause 9.1.
- The unitholders agree to be bound by the terms and conditions described in Schedule 3 of the agreement – refer to subclause 3.1.
- The unitholders agree that there are no other unitholders agreement in force prior to this agreement or, if there are (unless specified under Schedule 3), such agreements are deemed to be terminated – refer to subclause 3.2.
- Any new unitholder must sign and deliver a binding Deed of Accession to the trustee in the form of Schedule 2 – refer to clause 4.
- The agreement can only be varied by agreement in writing signed by all the parties – refer to subclause 9.10.
- The details of the **specific matters of agreement** between the unitholders (which may or may not differ from the equivalent provisions in the trust deed) are contained in Schedule 3.