#### SUPREME COURT OF QUEENSLAND

Registry: Brisbane Number: BS3383/2013

Applicant:

RAYMOND EDWARD BRUCE AND VICKI PATRICIA

**BRUCE** 

**AND** 

First Respondent:

LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED), ACN 077 208 461, IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND

AND

**Second Respondent:** 

THE MEMBERS OF THE LM FIRST MORTGAGE

**INCOME FUND ARSN 089 343 288** 

#### **AFFIDAVIT**

**HUGH DANIEL COPLEY**, of Level 20, 240 Queen Street, Brisbane, Queensland, Solicitor, states on oath:

- 1. I hold the position of Litigation Counsel within the Queensland Regional Office of the Australian Securities and Investments Commission (ASIC), the applicant in this proceeding. In this role I act as ASIC's solicitor on the record for civil proceedings commenced in Queensland.
- 2. On 26 April 2013, Ginette Muller and John Park of FTI Consulting (the Administrators), on behalf of LM Investment Management Limited (LMIM), called a meeting of unit holders of the The LM First Mortgage Income Fund (FMIF). Exhibited hereto and marked "HDC-1" is a copy of a Notice of Meeting & Explanatory Information document issued to the unit holders of the FMIF dated 26 April 2013 (the FMIF Meeting).
- 3. The FMIF Meeting was originally to be held on 30 May 2013.

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Deponent:

Witness

**AFFIDAVIT** 

Filed on behalf of the Australian Securities and Investments Commission

Form 46, Version 1

Uniform Civil Procedure Rules 1999

Rule 431

Australian Securities and Investments

Commission

Level 20, 240 Queen Street BRISBANE, QLD, 4000

Phone No: (07) 3867 4700 Fax No: (07) 3867 4790

Ref: 13-40003

- 4. On 27 May 2013, the Administrators published a document entitled "Questions & Answers" on www.lminvestmentadministration.com, a website created and maintained by the Administrators containing information regarding LMIM and its funds. Exhibited hereto and marked "HDC-2" is a copy of the Question & Answers document.
- 5. Thereafter the Administrators advised that the FMIF Meeting was to be adjourned to "allow members time to consider the additional information included in the Question and Answer Document". Exhibited hereto and marked "HDC-3" is a copy of the website located at http://lminvestmentadministration.com/fmif\_and\_feeder\_funds as at 4 June 2013.
- 6. Exhibited hereto and marked "HDC-4" is a copy of the webpage located at http://lminvestmentadministration.com/litigation as at 7 June 2013.
- 7. Exhibited hereto and marked "HDC-5" are copies of the following documents published on www.lminvestmentadministration.com:
  - (a) Circular to Advisors in the LM First Mortgage Income Fund dated 17 May 2013; and
  - (b) Circular to Investors in the LM First Mortgage Income Fund and Feeder Funds dated 31 May 2013.
- 8. The FMIF Meeting has now been adjourned to 13 June 2013.

#### ASIC Correspondence with LMIM and the Administrators

9. Exhibited hereto are copies of the following items of correspondence between the Australian Securities and Investments Commission (ASIC) and the solicitors for LMIM and the Administrators (Russells and Norton Rose) concerning the FMIF Meeting:

Exhibit	Correspondence	Date
HDC-6	Letter from ASIC to Russells	08/05/2013
HDC-7	Letter from Norton Rose to ASIC	10/05/2013
HDC-8	Letter from ASIC to Norton Rose	17/05/2013
HDC-9	Email from Norton Rose to ASIC	22/05/2013
HDC-10	Email from ASIC to Norton Rose	23/05/2013
HDC-11	Email from ASIC to Norton Rose	27/05/2013
HDC-12	Email from Norton Rose to ASIC	27/05/2013
HDC-13	Letter from ASIC to Norton Rose	28/05/2013

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HDC-14	Email from Norton Rose to ASIC	30/05/2013
HDC-15	Email from ASIC to Norton Rose	30/05/2013
HDC-16	Email from Norton Rose to ASIC	30/05/2013
HDC-17	Email from ASIC to Norton Rose	30/05/2013
HDC-18	Email from Norton Rose to ASIC	04/06/2013
HDC-19	Email from ASIC to Norton Rose	06/06/2013
HDC-20	Email from Norton Rose to ASIC	09/06/2013

#### Correspondence with The Trust Company (PTAL) Ltd

- 10. The Trust Company (PTAL) Ltd (**The Trust Company**) is the custodian of the assets in both the FMIF and the LM Feeder Funds.
- 11. Exhibited hereto and marked "HDC-21" are copies of the following items of correspondence between ASIC and The Trust Company concerning the FMIF Meeting:

Correspondence	Date
Letter from ASIC to The Trust Company	29/05/2013
Letter from The Trust Company to ASIC	30/05/2013
Email from ASIC to The Trust Company	30/05/2013
Email from The Trust Company to ASIC	30/05/2013

12. All the facts and circumstances deposed to in this affidavit are within my own knowledge except where they have been deposed to from information only and my means of knowledge and sources of information appear in my affidavit.

SWORN by HUGH DANIEL COPLEY on 11 June 2013 at Brisbane in the presence of:

Hugh Daniel Copley

Witness

#### SUPREME COURT OF QUEENSLAND

Registry: Brisbane Number: BS3383/2013

**Applicant:** 

RAYMOND EDWARD BRUCE AND VICKI PATRICIA

BRUCE

**AND** 

First Respondent:

LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED), ACN 077 208 461, IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE

LM FIRST MORTGAGE INCOME FUND

**AND** 

**Second Respondent:** 

THE MEMBERS OF THE LM FIRST MORTGAGE

**INCOME FUND ARSN 089 343 288** 

#### **CERTIFICATE OF EXHIBIT**

Bound and marked "HDC-1" to "HDC-21" are the exhibits to the affidavit of HUGH DANIEL COPLEY sworn 11 June 2013.

Exhibit	Description	
HDC-1	Notice of Meeting & Explanatory Information dated 26 April 2013	1-13
HDC-2	Question & Answers documents	14-19
HDC-3	Webpage: http://lminvestmentadministration.com/fmif_and_feeder_funds	20-21
HDC-4	Webpage: http://lminvestmentadministration.com/litigation	22-24

#### **CERTIFICATE OF EXHIBIT**

Filed on behalf of the Australian Securities and Investments Commission Form 47, Version 2 Uniform Civil Procedure Rules 1999 Rule 435 Australian Securities and Investments
Commission
Level 20, 240 Queen Street
BRISBANE, QLD, 4000
Phone No: (07) 3867 4700
Fax No: (07) 3867 4790

Ref: 13-40003

HDC-5	Documents published on: www.lminvestmentadministration.com	25-30
HDC-6	Letter from ASIC to Russells dated 8 May 2013	31-33
HDC-7	Letter from Norton Rose to ASIC dated 10 May 2013	34-43
HDC-8	Letter from ASIC to Norton Rose dated 17 May 2013	44-46
HDC-9	Email from Norton Rose to ASIC dated 22 May 2013	47-54
HDC-10	Email from ASIC to Norton Rose dated 23 May 2013	55-56
HDC-11	Email from ASIC to Norton Rose dated 27 May 2013	57-58
HDC-12	Email from Norton Rose to ASIC dated 27 May 2013	59-80
HDC-13	Letter from ASIC to Norton Rose dated 28 May 2013	81-84
HDC-14	Email from Norton Rose to ASIC dated 30 May 2013	85
HDC-15	Email from ASIC to Norton Rose dated 30 May 2013	86-87
HDC-16	Email from Norton Rose to ASIC dated 30 May 2013	88-89
HDC-17	Email from ASIC to Norton Rose dated 30 May 2013	90-92
HDC-18	Email from Norton Rose to ASIC dated 4 June 2013	93-100
HDC-19	Email from ASIC to Norton Rose dated 6 June 2013	101-103
HDC-20	Email from Norton Rose to ASIC dated 9 June 2013	104-107
HDC-21	Correspondence between ASIC and The Trust Company	108-161

Deponent

Witness



26 April 2013

Dear Investor,

Re: Proposal to appoint Trilogy Funds Management Ltd ("Trilogy") as the responsible entity of the LM First Mortgage Income Fund ("Fund") in place of LM Investment Management Ltd (Administrators Appointed) ("LM")

A Meeting is being called for the Fund by LM, the current Manager. LM decided to call the Meeting because a unitholder has made an application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM.

LM does not believe that the power of the Court to appoint a temporary or replacement manager can or should be exercised in the circumstances relied upon by Trilogy in its Court application. However, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. This is considered preferable to a court determined outcome where over 99% of investors, by value, will have no say in the outcome.

Please refer to the \*attached Notice of Meeting which includes Explanatory Information for general background and additional details as to why LM has convened the meeting of Members.

LM has encouraged Trilogy to provide Members with information to assist them make a decision as to whether to vote for the resolutions to see Trilogy replace LM as Manager of your Fund.

Members who will not attend the meeting to consider the resolutions and wish to have their views counted, should complete and lodge the attached proxy form. However, it is recommended that investors defer lodging a proxy form until they have had an opportunity to consider the information expected to be circulated by Trilogy.

LM expects that if it remains as manager investors will recover capital distributions faster and in a greater amount. LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund.

LM recommends investors vote against the resolutions which would see Trilogy appointed for the reasons as outlined in the Notice of Meeting.

Yours faithfully FTI Consulting

Ginette Muller Voluntary Administrator

\*Attach.

John Park

Voluntary Administrator

FTI Consulting (Australia) Pty Limited ABN 49 160 397 811 | ACN 160 397 811

22 Market Street | Brisbane QLD 4000 | Australia Postal Address | GPO Box 3127 | Brisbane QLD 4001 | Australia +61.(0)7.3225.4900 main | +61.(0)7.3225.4999 fax | fticonsulting-asia.com



# LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

# NOTICE OF MEETING & EXPLANATORY INFORMATION

With respect to a Proposal to appoint Trilogy Funds Management Limited as the responsible entity of the Fund in place of LM Investment Management Limited (Administrators Appointed)

# This notice is issued to Members of the LM First Mortgage Income Fund ARSN 089 343 288

#### **Important**

This Booklet contains important information and requires your immediate attention.

It contains information about a Proposal to change the responsible entity for the LM First Mortgage Income Fund (the Fund)

It should be read in its entirety. If you do not understand the documents in this Booklet or are in doubt as to what you should do, it is recommended you consult your financial adviser immediately.

**Your vote is important**. The Meeting of Members is to be held at 11.00 am (AEST) on Thursday, 30<sup>th</sup> May 2013 at the Institute of Chartered Accountants, Level 32, Central Plaza One, 345 Queen Street, Brisbane, Queensland, 4000. If you cannot attend in person, please complete and return the enclosed proxy form to Computershare at the address stated on the proxy form as soon as possible and by the latest 11.00am (AEST) on Tuesday, 28<sup>th</sup> May 2013.

#### **CONTENTS**

#### THIS BOOKLET CONTAINS THE FOLLOWING:

SECTION 1	Notice of Meeting for the LM First Mortgage Income Fund	Page 3
SECTION 2	Explanatory Information	Page 4
SECTION 3	Glossary	Page 9
SECTION 4	Voting procedure and eligibility	Page 10

# A PROXY FORM IS ENCLOSED WITH THIS BOOKLET. UNLESS YOU WILL ATTEND THE MEETING TO HAVE YOUR SAY AND TO MAKE YOUR VOTE COUNT YOU NEED TO COMPLETE AND RETURN THE PROXY FORM.

This Booklet and the Notice of Meeting it contains are dated 26<sup>th</sup> April 2013.

The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.

LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. LM also wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application. For example, it is doubtful that the Court has, or will exercise the power to appoint a temporary manager. Appeals are possible. This Meeting is considered preferable to a court determined outcome where there is no meeting, no vote and where, at present, over 99% of Members, by value, will have no say in the outcome unless they wish to participate in legal proceedings.

Please refer to the following Explanatory Memorandum for general background and additional details as to why LM has convened the meeting of Members.

#### SECTION 1 - NOTICE OF MEETING FOR LM FIRST MORTGAGE INCOME FUND

**TAKE NOTICE** that a meeting (the **Meeting**) of Members of LM First Mortgage Income Fund ARSN 089 343 288 will be held at the time, date and place detailed below, or such later time and date as notified to Members, to consider and vote on the Resolutions in this Notice of Meeting:

Time:	11.00 am (AEST)		
Date:	Thursday, 30 May 2013		
Place:	Institute of Chartered Accountants		
	Level 32, Central Plaza One		
	345 Queen Street, Brisbane, Queensland, 4000		

LM Investment Management Limited (Administrators Appointed) (LM) in accordance with Section 252S(1) of the Corporations Act (Cth) intends to appoint the Chair of the Meeting.

The Chair intends to vote any undirected proxies appointing the Chair as proxy against the Resolutions.

#### **BUSINESS OF MEETING**

#### Resolution 1 - Extraordinary Resolution to remove current responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

#### Resolution 2 – Extraordinary Resolution to appoint new responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

#### **PROXIES**

Each Member of LM First Mortgage Income Fund has a right to appoint a proxy. The proxy does not need to be a Member. If a Member appoints two proxies, the Member may specify the proportion or number of votes the proxy is appointed to exercise.

#### RECOMMENDATION

LM strongly believes that the Resolutions are not in Members' best interests and recommends Members vote **AGAINST** the Resolutions which would see Trilogy appointed as Manager of the Fund for the reasons as outlined in the Notice of Meeting.

Dated 26 April 2013

Ginette Muller

Voluntary Administrator

John Park

Voluntary Administrator

LM Investment Management Limited (Administrators Appointed)

#### **SECTION 2 – EXPLANATORY INFORMATION**

#### 2.1 GENERAL BACKGROUND TO THE RESOLUTIONS

The purpose of the Meeting is for Members to consider a Proposal whereby Trilogy will replace LM as the Manager of the Fund.

Each of the Resolutions is considered below.

#### 2.2 BACKGROUND TO RESOLUTIONS 1 AND 2 (REPLACEMENT OF MANAGER)

Resolution 1 seeks to remove LM as the Manager of the Fund.

Resolution 2 seeks to appoint Trilogy as the replacement Manager of the Fund.

Resolutions 1 and 2 are interlinked. Unless both resolutions are approved, neither resolution can be approved. This means that even if the resolution to remove LM is passed, the resolution falls away if Trilogy is not appointed as the replacement Manager.

LM has included some publicly available information on Trilogy in section 2.7 below. LM will provide a copy of the register of Members to Trilogy so that Trilogy can, if they wish, provide further information on the Proposal to Members.

The date of the scheduled Members' Meeting is longer than the period required for such meetings by the Corporations Act. LM has undertaken this action so that Trilogy has ample time, if it wishes, to provide information to Members and for Members to consider and make a considered decision on how to vote.

Resolutions 1 and 2 are extraordinary resolutions which require at least 50% of the total votes that may be cast by eligible Members in the Fund (including Members not present in person or by proxy) to vote in favour in order for each resolution to be passed. If you are entitled to vote but do not attend the Meeting and do not appoint a proxy to vote on your behalf, then you will effectively be counted as having voted against Resolutions 1 and 2.

To vote on the Resolutions, you may either attend the meeting or simply sign and return the enclosed proxy form.

The proxy form must be sent to Computershare at the address shown on the form.

#### 2.3 WHY HAS LM ISSUED THE NOTICE OF MEETING?

An application has been made (albeit by only two Members) to the Supreme Court of Queensland with a request that the Court appoint Trilogy as temporary Responsible Entity of your Fund. The application to appoint Trilogy was made without any prior consultation or notice by those two Members, or Trilogy or their lawyers with LM or the Administrators; without any resort to the Complaints Procedure in the Constitution; and without any attempt to call a meeting of Members.

While the Court has power to appoint a temporary Responsible Entity, it is not clear that this power can or should be exercised in the circumstances relied upon by Trilogy in its Court application, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy.

Even if Trilogy were to succeed in its application to be appointed temporary Responsible Entity, under the Corporations Act (Cth) a meeting of Members must within 3 months be called to choose a new Manager. If a new Manager is not chosen then, the Fund is required to be wound up by Trilogy as the temporary responsible entity. Thus, in the situation of a court appointment, investors may have no effective choice as to whether Trilogy should manage the winding up of the Fund (which is already effectively underway).

Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met

from the assets of the underlying Fund (even though the lawyers had promised they would not charge their clients).

Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity, LM is also cognisant that such a move is likely to save significant legal costs for the Fund.

#### 2.4 WHY LM?

The Fund continues to be managed by LM at the direction of John Park and Ginette Muller as voluntary administrators.

The LM Group infrastructure and staff, who have extensive knowledge of the Fund and Fund assets, are engaged by LM and have and will continue to provide ongoing service in relation to investor communication and asset management.

Among its diverse business segments, FTI is one of the world's leading corporate finance and restructuring firms with specific expertise in real estate restructuring and advisory. FTI is regularly engaged to provide services that minimise holding costs and realise distressed real estate assets for the benefit of stakeholders. Additional information can be accessed from its web page (<a href="www.fticonsulting-asia.com">www.fticonsulting-asia.com</a>).

#### 2.5 DOES LM HAVE THE LICENCE TO MANAGE THE FUND?

Yes. LM holds Australian Financial Services Licence (AFSL) No 220281 which entitles it to continue to manage the Fund for specific purposes.

As you may be aware, on 9 April 2013, the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so as to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding up, LM's registered managed investment schemes.

ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.

LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund"

#### 2.6 WILL LM FIRE SALE THE ASSETS?

No. Trilogy has mischievously and wrongly suggested that because LM is under the control of FTI, this will lead to a fire sale of the assets of the Fund and destroy value.

This is not the case. The assets of the Fund are primarily loans. It is not the intention of the LM to sell the loans but rather to endeavour to recover the amounts outstanding under the loans. The sale of the assets provided as security for the loans made by the Fund will either be undertaken by the borrowers, or by LM as mortgagee.

If Trilogy is appointed as Manager, it will be in the same position. The difference is that as LM is now under the control of FTI, Members have the benefit of FTI's extensive experience managing distressed assets, as detailed above.

Accordingly, the fact that LM is under administration will have no adverse impact on the value of the sale of the assets.

#### 2.7 TRILOGY – THE PROPOSED NEW MANAGER

Trilogy Funds Management Limited (ACN 080 383 679) is a funds management company and holds Australian Financial Services Licence No. 261425. It is the responsible entity for a number of mortgage investment trusts and property trusts with total assets under management of approximately \$300m (as reported in October 2012).

LM has taken legal advice on the adequacy of Trilogy's AFSL. LM is confident that Trilogy's AFSL does not authorise it to operate the Fund.

LM has previously noted that Trilogy's Licence does not cover management of foreign currencies. Managing foreign currencies is necessary for the management of your Fund. Trilogy stated on 25 October 2012 that it had lodged an application to vary the authorisations on its licence to cover foreign currencies. As at 24 April 2013, no variation of Trilogy's Australian Financial Services Licence has yet been shown on the ASIC register of licences.

For further information on Trilogy, Members are encouraged to refer to the Trilogy web page <a href="http://www.trilogyfunds.com.au">http://www.trilogyfunds.com.au</a>.

At the time of dispatch of this Notice of Meeting, LM has provided Trilogy with a copy of the Notice of Meeting and all related documents. An up to date electronic copy of the unitholder register for your Fund was also provided.

LM has encouraged Trilogy to provide Members with information to assist them in making a decision as to whether to vote for the resolutions to see Trilogy replace LM as Manager of your Fund.

To ensure that Trilogy does not feel that Members have insufficient time to consider its appointment as Manager, LM has scheduled the Members' meeting longer than the period required for such meetings by the Corporations Act.

#### 2.8 OTHER CONSEQUENCES OF REPLACING LM WITH TRILOGY AS MANAGER

#### No change to existing Arrangements between the LM First Mortgage Income Fund and third parties

If Resolutions 1 and 2 as set out in the Notice of Meeting are approved and Trilogy is registered as the responsible entity of LM First Mortgage Income Fund, under the Corporations Act:

- i. Trilogy will assume those rights, obligations and liabilities of LM which were incurred in its role as responsible entity of the Fund; and
- ii. There will be a statutory novation of agreements and other documents to which LM is a party as responsible entity of the Fund.

Such arrangements between the Fund and third parties will therefore not be affected by the change of responsible entity.

#### **Financing Consequences**

Deutsche Bank has provided the Fund with a secured loan facility since 2010. LM's obligations under the Deutsche Bank facility are secured in favour of Deutsche Bank under an ASIC registered charge over all of the assets and undertaking of the Fund. The facility has been progressively reduced by approximately \$0.5m per month and now has a loan balance of approximately \$26.5m.

If the resolutions are approved in this Notice of Meeting, that will be an Event of Default under the facility agreement with Deutsche Bank, entitling it, for example, to appoint receivers to the Fund. The consequences upon the existing financial arrangements with Deutsche Bank are unknown at this stage.

FTI has the ongoing operational support of Deutsche Bank following the appointment as Voluntary Administrators (even though the appointment of administrators was an Event of Default).

#### Clawback Provisions under the Corporations Act

There are only three possible outcomes of the administration of LM – a Deed of Company Arrangement, a creditors' voluntary winding-up, or (unlikely) LM is returned to the control of the directors. If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members.

#### 2.9 LM or TRILOGY?

Set out in the table below is a simple comparison of Trilogy and LM.

Voting Intentions	Voting <b>In Favour</b> means you support Trilogy as the new responsible entity	Voting <b>Against</b> means you support LM/FTI remaining as responsible entity
Appropriate AFSL	Trilogy does not have the requisite AFSL, although they indicated at the last meeting of investors that they would be obtaining the required AFSL authorisations. Whether it has made any such application is unknown.	LM has the appropriate AFSL to operate the Fund in the manner proposed.
Changeover costs	There will be legal and other costs associated with appointing Trilogy as the new Manager.	If LM remains the Manager, there will be no changeover costs
Time to complete wind up of Fund and return surplus monies to Members	Trilogy is not familiar with the assets of the Fund and would need to spend considerable time and cost becoming familiar with the assets. This will delay the realisation of the assets of the Fund and the return of the surplus monies to Members.	LM staff know the assets well. FTI have since their appointment on 19 March become increasingly familiar with the assets.  Through the overall management of the voluntary administrators and the existing retained management of LM, the voluntary administrators will continue the existing strategy of LM to actively realise all remaining assets of the Fund and endeavour to recover loan monies. All surplus monies will be promptly returned to investors.  Changing Managers will slow the process as inevitably Trilogy will need time to review the assets and realisation strategies.
Impact on Borrowers from the Fund of a change of Manager	As the assets of the Fund include loans made to third parties it is possible (indeed likely) that the borrowers will seek to take advantage of the more limited (historical) knowledge of a new Manager such as Trilogy. A change in management of a lender very often works to the advantage of defaulters.	FTI, in conjunction with the existing LM staff, are very familiar with the loans and will be readily able to deal with any unmeritorious claims by borrowers.

Voting Intentions	Voting <b>In Favour</b> means you support Trilogy as the new responsible entity	Voting <b>Against</b> means you support LM/FTI remaining as responsible entity
Financing Consequences	Appointment of Trilogy is an Event of Default under the Deutsche Bank Facility	Not applicable – despite the appointment of the administrators, LM and FTI have enjoyed a cooperative relationship with Deutsche Bank.
Access to the Claw-Back Provisions under the Corporations Act?	No chance	Possible

Members are encouraged to complete and lodge the attached proxy forms once they have received further information from Trilogy and have had time to fully consider all information available.

#### 2.10 ONGOING INFORMATION

By visiting the LM web page at <a href="http://www.lminvestmentadministration.com">http://www.lminvestmentadministration.com</a>, this and all subsequent communications to both investors and financial advisers (both as groups) can be found. In addition, subject to LM receiving copies of the correspondence, all communications which Trilogy may send to all investors will also be lodged on that web page.

If you are unable to access that web page, please contact LM who will forward hard copies of all documents lodged on the web page to you.

#### **SECTION 3 – GLOSSARY**

The following terms are used in this Booklet:

Booklet	This Booklet, including the Notice of Meeting, dated 26 April 2013
Constitution	The LM First Mortgage Income Fund constitution, as amended from time to time
Fund	LM First Mortgage Income Fund ARSN 089 343 288
LM	LM Investment Management Limited (Administrators Appointed) ACN 077 208 461
Manager	A person who acts as responsible entity of a registered managed investment scheme under Chapter 5C of the Corporations Act 2001 (Cth). A Manager manages and administers the scheme on behalf of its Unitholders
Meeting	The Meeting of the Members of the Fund that is called by the Notice of Meeting contained in this Booklet
Notice of Meeting	The Notice of Meeting contained on page 3 of this Booklet, together with the additional information in this Booklet
Proposal	The proposal whereby Trilogy will replace LM as the Manager of the Fund. The proposal is described in more detail in sections 2.1 to 2.9 of the Booklet
Resolutions	Resolutions 1 and 2 as set out in the Notice of Meeting and as described in section 2.2 above
Trilogy	Trilogy Funds Management Limited ABN 59 080 383 679
Unit	A unit, as defined in the Constitution, in the Fund
Unitholder or Member	A registered holder of Units in the Fund
Voluntary Administrators	John Park and Ginette Muller of FTI Consulting

#### **SECTION 4 – VOTING PROCEDURE AND ELIGIBILITY**

These notes form part of the Notice of Meeting.

#### Changing the time and date of the Meeting

LM reserves the right to postpone or adjourn the Meeting to a later time or date. If such a determination is made, all Members will be notified by an announcement on LM's website <a href="http://www.lminvestmentadministration.com">http://www.lminvestmentadministration.com</a>. LM will endeavour to notify Members of any such postponement prior to the original date and time of the Meeting, however, the postponement of the Meeting will not be invalidated by the failure to do so.

#### Quorum

The quorum necessary for the Meeting is two Members present in person or by proxy.

#### Chairperson

LM will appoint an individual to chair the Meeting.

#### Voting

On a show of hands, each Member has one vote on each resolution.

The number of votes each Member has on a poll will be calculated in accordance with the Constitution and the Corporations Act 2001 (Cth) on the business day before the Meeting as being 1 vote for each dollar value of the total Units they hold in the Fund.

#### Approvals required

Resolutions 1 and 2 are extraordinary resolutions. An extraordinary resolution is passed if it is approved by at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy).

As required by the Corporations Act 2001 (Cth) Resolutions 1 and 2, being extraordinary resolutions, will be decided on a poll.

#### **Entitlement to vote**

All Members appearing on the register at 11am (AEST) on Thursday 30 May 2013 are entitled to attend and vote at the Meeting. Accordingly, Unit transfers registered after this time will be disregarded in determining entitlements to vote at the Meeting.

Under section 253E of the Corporations Act 2001 (Cth), LM (being the Manager of the Fund) and its associates are not entitled to vote their interest on a resolution at the Meeting if they have an interest in the resolution or the matter other than as a Member.

We note that three of the Fund's members are LM Wholesale First Mortgage Income Fund, LM Currency Protected Australian Income Fund and LM Institutional Currency Protected Australian Income Fund, each of whose fund constitution contains See Through Voting provisions, allowing members of the fund to direct the responsible entity of that fund to vote their proportionate interests in the Fund in accordance with their voting direction.

#### Corporations

A Member that is a corporation may appoint an individual to act as its representative at the Meeting in accordance with section 253B of the Corporations Act 2001 (Cth).

The corporate representative must bring to the Meeting evidence of his or her appointment, including any authority under which the appointment is signed.

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#### Jointly held units

If a Unit in the Fund is held jointly, and more than one Member votes in respect of that Unit, only the vote of the Member whose name appears first in the register of Members counts.

#### Appointment of proxy

A Member may vote in person at the Meeting or appoint a proxy to attend and vote for them.

Each Member has a right to appoint one or two proxies. A proxy need not be a Member. If a Member appoints two proxies, the Member may specify the proportion or number of votes that each proxy is appointed to exercise. If a Member appoints two proxies and the appointment does not specify the proportion or number of the Member's votes each proxy may exercise, each proxy may exercise half of the votes.

#### Voting directions to your proxy

You can direct your proxy how to vote. If you do not direct your proxy how to vote, your proxy will vote as he or she chooses. If you mark more than one box relating to the Resolution any vote by your proxy on that item may be invalid.

#### Signing instructions

In the case of Members who are individuals, the Proxy Form must be signed:

- (a) if the units are held by one individual, by that Member or that Member's attorney; and
- (b) if the units are held in joint names, by any one of them.

In the case of Members who are companies, the Proxy Form must be signed:

- (a) if it has a sole director who is also sole company secretary, by that director (and stating that fact next to, or under, the signature on the Proxy Form); and
- (b) in the case of any other company, by either 2 directors or a director and company secretary.

The use of the common seal of the company, in addition to those required signatures, is optional.

Please note that in order for your Proxy Form to be effective, your original Proxy Form (and the original or a certified copy of the power of attorney or authority, if any, under which it is signed) must be completed and returned to Computershare Investor Services Pty Ltd no later than 48 hours before the Meeting (that is on or before 11am (AEST) on Tuesday 28th May 2013). Proxy Forms received after that time will not be valid for the Meeting.

#### Postal address for return of proxies:

Computershare Investor Services Pty Limited GPO Box 2062 MELBOURNE VIC 8060 Australia

#### Hand delivery address:

Computershare Investor Services Pty Ltd 452 Johnston Street ABBOTSFORD VIC 3067 Australia

Alternatively, the documents may be faxed to:

Computershare Investor Services Pty Ltd on 03 9473 2145 (within Australia) or +61 3 9473 2145 (outside Australia)

Alternatively, the documents may be **scanned and emailed** to: <a href="mailed-quorum@computershare.com.au">quorum@computershare.com.au</a>

#### Enquiries:

Australia Toll Free – 1800 062 919 New Zealand Toll Free – 0800 142 919 International +61 7 5584 4500

If the Meeting is adjourned, proxies received by 48 hours prior to the resumption of the Meeting are effective for the resumed part of the Meeting.



## **Questions & Answers**

Date

27 May 2013

Re:

LM Investment Management Limited (Administrators Appointed) as Responsible

Entity of the LM First Mortgage Income Fund

Meeting of Members

These Question & Answers have been prepared by FTI Consulting as administrators of LM Investment Management Ltd (Administrators Appointed) ("LM") to assist members by providing them with additional information on some of the key matters relevant for the meeting of members of the LM First Mortgage Income Fund ("FMIF") scheduled to take place on 30 May 2013. This document supplements and is intended to be read together with the Notice of Meeting and the Explanatory Memorandum dated 26 April 2013.

To allow members time to consider the additional information included in this document LM will arrange for the Chairman of the meeting to adjourn the meeting till 11am (AEST) on Thursday 13 June 2013 at the same location (the Institute of Chartered Accountants, Level 32, Central Plaza One, 345 Queen Street, Brisbane, Queensland, 4000). As the meeting on 30 May 2013 will be adjourned (and the resolutions not put) there is no need to attend the meeting on 30 May 2013.

#### 1. Will the meeting dispose of the various Court applications which have been made?

When the notice of meeting was sent out to investors (on 26 April 2013) the only Court application on foot at that time was Trilogy Funds Management Ltd ("Trilogy") attempting to replace LM as the responsible entity of FMIF.

LM had hoped that by calling a meeting to allow members to vote on the issue of who should manage FMIF that the Court would adjourn the proceedings to allow the meeting to take place. If the meeting chose to appoint Trilogy then clearly the application would have been withdrawn. If the members did not support the appointment of Trilogy then it was expected that the results of the meeting would be helpful to the Court in deciding what to do. Thus LM reasonably expected that by calling the meeting it would minimise legal costs associated with the application to appoint Trilogy. LM still believes that holding the meeting continues to be in the best interests of the members of FMIF. In any event, even if Trilogy is not voted in as responsible entity at the meeting, the voting results will help inform the Court as to how members of the FMIF want their fund to be managed.

Since the original application was made two other parties (being another unitholder and ASIC) have made separate and different applications.

While all three of the Court proceedings have been adjourned until 15 July 2013 (after the date of the meeting), in light of the further applications it is at this stage unclear whether or not the meeting will dispose of all the Court proceedings.

#### 2. Has Trilogy consented to being appointed as responsible entity of FMIF?

As the notice of meeting was sent out after the application made to Court to have Trilogy appointed as temporary responsible entity of FMIF, LM assumed that Trilogy would (if members voted to appoint them) consent to be appointed as responsible entity of FMIF.

On 23 May 2013 (some 4 weeks after the notice of meeting was posted out) Trilogy has advised LM that it does not consent to being appointed as responsible entity by members at the meeting scheduled for 30 May 2013.

The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court. Trilogy states that each member of FMIF is entitled to turn up to Court to make their views known to the Court and that this makes the Court the appropriate forum to determine who should manage their fund.

It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July 2013 in part to allow the meeting to run its course.

#### 3. I am only a small unitholder do I still need to vote?

Yes – it is very important that you vote so that your views are known. As noted in the answer to the previous question, LM intends to provide to the Court all details of the voting so that the Court is accurately informed as to the current wishes of unitholders.

# 4. What are the resolutions which will be considered at the meeting on 30 May (now to be adjourned to 13 June)?

There are 2 resolutions specified in the notice of meeting which are to be considered at the meeting.

Resolution 1 seeks to remove LM as the Responsible Entity of FMIF.

Resolution 2 seeks to appoint Trilogy as the replacement Responsible Entity of FMIF.

Resolutions 1 and 2 are interlinked. Unless both resolutions are approved, neither resolution can be approved. This means that even if the resolution to remove LM is passed, the resolution falls away if Trilogy is not appointed as the replacement Responsible Entity.

Resolutions 1 and 2 are extraordinary resolutions which require at least 50% of the total votes that may be cast by eligible members in the Fund (including members not present in person or by proxy) to vote in favour in order for each resolution to be passed. These votes must be conducted by a poll and each member has 1 vote for each dollar value of the total Units they hold in FMIF.

It is possible that there may be other procedural resolutions which are put forward at the meeting. If there are, then these will be decided on a show of hands and each member has one vote on each resolution determined by a show of hands. However, importantly under the FMIF constitution a proxy appointed by member is not entitled to vote on a show of hands.

5. Are unitholders in the two LM managed feeder funds (being the LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF) able to direct LM (their responsible entity) how they wish LM to vote at the FMIF meeting?

The constitutions of the two feeder funds each have "See Through Voting" provisions. These were introduced to allow members of CPAIF and ICPAIF to give voting directions (based on their proportionate see through voting percentage) to their responsible entity (LM) as to how to vote at the FMIF meeting. This was seen as a direct benefit to members of the feeder funds by giving them (rather than LM as responsible entity) the right to make decisions on important matters put to an FMIF meeting.

As the FMIF meeting is to be adjourned to 13 June 2013 the Feeder fund voting directions need to be received by Friday 7 June 2013 at 4pm.

LM considers that these provisions are valid and effective to enfranchise members of the two feeder funds. However, in case there are parties with alternative views, LM will ensure that when the votes are counted they are recorded to separately show the feeder fund votes.

#### 6. Will the FMIF be wound-up?

The AFSL given to the Administrators by ASIC on 9 April 2013 authorises the Administrators to remain as the responsible entity of the FMIF to investigate and preserve the assets and affairs of the FMIF and to:

- 1. Wind-up the scheme; or
- 2. Transfer the functions of the responsible entity to an entity not externally-administered.

Whilst we have now reached our view that it is in the best interests of members to formally wind up the FMIF, we have given an undertaking (and the Court may order) that we not take any steps pending the hearing on 15 July 2013, to formalize the winding up.

#### 7. Is FMIF currently being wound up?

Technically a wind up of FMIF has not actually commenced.

It took many weeks to investigate the assets and form a view on whether it was in the best interests of members for FMIF to be wound up and, more importantly, how best to achieve that

The only assets of FMIF are loans which are secured by mortgages. Most of the loans are in default. The function of LM is to realize those loans – it does this by taking the appropriate action to enforce its rights under those loans or sell those loans. As a result of the global financial crisis LM has been unable to make new loans on acceptable terms. Accordingly, in accordance with the "go forward" strategy which was announced by LM on 20 December 2012, when loan moneys are recovered they are used to pay FMIF liabilities with the surplus being distributed to members. Thus while a technical wind up of FMIF has not commenced, the action in relation to FMIF loan assets and moneys recovered which is being taken by LM would be no different if a technical wind up had commenced

# 8. If the Court did appoint Trilogy as temporary responsible entity would Trilogy need to subsequently call a meeting of members?

Yes. If the Court appointed Trilogy as temporary responsible entity then, under the Corporations Act, Trilogy would need to call a meeting of members of FMIF within 90 days of its appointment to choose a new permanent responsible entity. It is likely that Trilogy would propose themselves as the new permanent responsible entity and, if so, would put a resolution to members which was essentially the same as the second resolution to be considered at the meeting called by LM for 30 May 2013.

If Trilogy did not have the support of members to be appointed as the permanent responsible entity at this meeting, then under the Corporations Act this would trigger a requirement that Trilogy apply to the Court for an order directing it to wind up the FMIF and Trilogy would remain as the responsible entity and be required to wind up FMIF if so ordered. In that case, Trilogy would have to conduct its own review and formulate its own strategy and approach. As mentioned, this might call into question the ability to make interim capital distributions.

It would thus be possible, and indeed highly likely, that if Trilogy was appointed by the Court as temporary responsible entity they could remain as responsible entity for the rest of the term of FMIF even if they did not enjoy the necessary support of members of FMIF to be chosen as the permanent responsible entity.

#### 9. Was the Notice of Meeting reviewed or approved by ASIC?

LM was solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting.

Prior approval of such Notices by ASIC is not required.

# 10. If LM remains as responsible entity but is put into liquidation, will the clawback provisions of the Corporations Act provide advantages to members?

As advised in the Notice of Meeting, the Corporations Act has a number provisions that allow a Liquidator of a Company to "Clawback" money from Directors, related parties and creditors ("Clawback provisions"). The Clawback provisions will only apply if LM goes into Liquidation.

As previously stated, the application of these Clawback provisions to FMIF's property is untested, and not free from doubt. But, LM remains of the view that the application of those provisions is at least arguable.

If LM is removed as responsible entity:

- 1. the new responsible entity will not be able to rely upon the Clawback provisions.
- the Clawback provisions cannot be used by the new responsible entity to increase the recovery from FMIF property. It is not known at this stage whether any transaction involving fund property could be the subject of action under these Clawback provisions, but investigations are continuing.

3. the Clawback provisions will still allow for the Liquidators to recover funds for the benefit of unsecured creditors of LM (as opposed to members of the FMIF). If that occurs, members may still benefit if the funds recovered reduce the amount that LM is entitled to be paid from the FMIF Property for expenses incurred on behalf of FMIF.

#### 11. How should the Proxy Form be completed?

The proxy form needs to be signed and the various boxes completed. However, a signed proxy form (with no boxes completed) is still a valid proxy and constitutes an AGAINST vote on all resolutions. If no proxy is lodged or vote cast at the meeting, this is effectively support of LM's continued management. This is because to replace LM as Responsible Entity, over 50% of units eligible to vote must vote in favour of the change.

#### 12. When must I vote & how do I Vote?

As the Chairman will adjourn the meeting on 30 May 2013 to 13 June 2013 there is no need to attend the meeting on 30 May 2013.

Unless you intend to vote at the adjourned meeting in Brisbane on Thursday 13 June 2013, you will need to lodge a Signed Proxy Form with Computershare no later than 11.00 am on Tuesday 11 June 2013.

You can post, email or fax your Proxy Form to Computershare – details are set out below.

By Post:	Computershare Investor Services Pty Ltd GPO Box 2062 MELBOURNE VIC 8060 Australia
Hand Deliver:	Computershare Investor Services Pty Ltd 452 Johnston Street ABBOTSFORD VIC 3067 Australia
Facsimile:	03 9473 2145 (within Australia) or +61 3 9473 2145 (outside Australia)
Email:	quorum@computershare.com.au

#### 13. What happens if I have lost my Proxy Form?

Please contact LM on one of the below numbers to receive pre-printed replacement forms.

Australia Toll Free – 1800 062 919 New Zealand Toll Free – 0800 142 919 International +61 7 5584 4500

Or alternatively, you can send an email to mail@LMaustralia.com.

#### 14. If I have any questions who should I call?

Please contact your Financial Adviser or if you do not have a Financial Adviser please contact LM on one of the numbers listed in the previous answer.

FMIF and Feeder Funds Page 1 of 2

# LM Investment Management Limited

#### **Administrators Appointed**

Home Creditor and Investor General Correspondence MPF AIF FMIF and Feeder Funds Litigation FAQ Contact

## LM First Mortgage Income Fund (FMIF) and Feeder Funds

## May 2013 Distribution Update

We would like to advise that there will be a minor delay in the May 2013 distribution referred to in the 25 April 2013 - Circular to Investors of the FMIF correspondence.

This delay is due to the requirement of the Administrators to establish a new payment gateway facility to enable the effective processing of payments to investors, Data files for payments are now being tested by us and the facility providers with a view to distributing funds in the week commencing 3 June 2013.

We apologise for the delay in the distribution and any convenience this may have caused.

If you have updated your account details, please ensure you complete the relevant section of the Change of Investor Details Form as soon as possible to ensure you receive your distribution payment.

Once completed, please scan and email the form to  $\underline{investmentservices@LMaustralia.com}.$ 

# FMIF Investor Meeting - 30 May 2013 Adjourned to 13 June 2013

At the meeting of investors called by LM Investment Management Limited (Administrators Appointed) as Responsible Entity of the FMIF held on Thursday, 30 May 2013, investors resolved to adjourned the meeting to 13 June 2013, at 11:00am AEST.

The meeting has been adjourned to allow members time to consider the additional information included in the Question and Answer Document.

The reconvened meeting will be held on this date at the Institute of Chartered Accountants Australia, Level 32, Central Plaza One, 345 Queen Street, Brisbane, Queensland.

Further details in respect of the adjournment are available in the circular below.

31 May 2013 - Circular to Investors

# **Notice of Meeting**

Below are the notice of meeting and explanatory information documents for FMIF and its feeder funds the Currency Protected Australian Income Fund ("CPAIF") and the Institutional Currency Protected Australian Income Fund ("ICPAIF").

26 April 2013 - Notice of Meeting FMIF Investors

1 May 2013 - Notice of Meeting CPAIF Investors

1 May 2013 - Notice of Meeting ICPAIF Investors

Investors will have received the above documents together with individualised proxy forms directly from Computershare.

As an investor in one of these funds, you are provided the opportunity on these forms to vote to either leave LM Investment Management Ltd (Administrators Appointed) as the responsible entity, or alternatively, appoint Trilogy Funds Management Ltd.

## Notice of Meeting - Wholesale FMIF Investors

Please find below a circular issued 17 May 2013 to those invested in the Wholesale FMIF. As an investor in this fund, you are provided the opportunity to either leave LM Investment Management Ltd (Administrators Appointed) as the responsible entity, or alternatively, appoint Trilogy Funds Management Ltd.

17 May 2013 - Circular to Investors in the Wholesale EMIE

# Proxy and Voting Direction Forths

If you have not received your proxy form(s) from Computershare please contact enquiries@lminvestmentadministration.com and provide the name of all investments held so that these forms can be forwarded to you.

4/06/2013

Alternatively, linked below are blank proxies for each fund. You will be required to insert the name of your investment and address on these forms prior to sending them to Computershare.

Please note that only the constitution of the FMIF allows for an investor to appoint a proxy to vote on their behalf. Accordingly no proxy nominated is provided in the forms for CPAIF, ICPAIF and WFMIF investors.

Blank Proxy - FMIF

Voting Direction Form - Currency Protected Australian Income Fund ("CPAIF")

Voting Direction Form - Institutional Currency Protected Australian Income Fund ("ICPAIF")

Voting Direction Form - Wholesale FMIF

### Further Meeting Information

The below circular provides further explanatory information on the meeting of investors to be held on 30 May 2013.

17 May 2013 - Circular to Advisers and Investors of the FMIF

Throughout the week commencing 13 May 2013 teleconferences were held with advisers to provide further details on the upcoming meeting, investor distributions and fund assets. The recording of this teleconference is provided in three parts below.

Teleconference Part 1 - Introduction

Teleconference Part 2 - Fund Update

Teleconference Part 3 Meeting Procedures

### Litigation

A unitholder has made an application to the Supreme Court of Queensland for Trilogy Funds Management ("Trilogy") to be appointed as the Responsible Entity ("RE") of the FMIF.

LM Investment Management (Administrators Appointed) ("LM") as the current RE does not believe that the power of the Court to appoint a temporary or replacement manager can, or should be exercised in the circumstances relied upon by Trilogy in its' Court application. LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy as RE. This is considered preferable to a Court determined outcome where over 99% of investors, by value, will have no say in the outcome.

The application to replace the RE of FMIF was due to be heard before the Court on Monday, 29 April 2013, however due to the matter being unable to be heard on that date, the Application was heard on Thursday, 2 May 2013. This hearing reconvened on Monday, 13 May 2013 and on that date was adjourned to 15 July 2013.

\* Further information in regards to these proceedings, including copies of court material issued by all parties involved is available on the Litigation page of this website.

## **General Updates on the FMIF**

25 April 2013 - Circular to Investors of the FMIF

26 April 2013 - Response to Trilogy Correspondence dated 17 April 2013

Home Creditor and Investor General Correspondence MPF AIF FMIF and Feeder Funds Litigation FAQ Contact

#### **Contact Us**

GPO Box 3127

Brisbane, Qld, 4001

Email:enquiries@lminvestmentadministration.com



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Litigation Page 1 of 3

# LM Investment Management Li

# **Administrators Appointed**

Home Creditor and Investor General Correspondence MPF FMIF and Feeder Funds Litigation FAQ

# First Mortgage Income Fund

As you are aware, on 2 May 2013, the Court heard an application brought by Raymond and Vi-Limited as responsible entity of the LM First Mortgage Income Fund ("FMIF"). At this hearing, RIFMIF be wound up and that David Whyte of BDO take responsibility for ensuring that the FMIF is

This hearing has been adjourned and is scheduled to reconvene on Monday, 13 May 2013.

On 3 May 2013, The Australian Securities and Investments Commission ("ASIC") filed an interloup and that Derrick Vickers, Darryl Kirk and Gregory Hall of PWC be appointed to be respons accordance with its constitution as well as being appointed joint and several receivers of the property.

The court material issued by all parties involved in these proceedings is posted below according t

## **Applicants - Raythond Bruce and Vicki Bruce**

Originating Application

Affidavit of Raymond Edward Bruce, sworn 14 April 2013

Affidavit of Paul Alexander Russell, sworn 3 May 2013

Affidavit of Nadine Bucher, sworn 3 May 2013

Affidavit of Michael James Baltins, sworn 3 May 2013

Exhibits to the Affidavit of Michael James Baltins, sworn 3 May 2013 - Part 1

Exhibits to the Affidavit of Michael James Baltins, sworn 3 May 2013 - Part 2

Exhibits to the Affidavit of Michael James Baltins, sworn 3 May 2013 - Part 3

Affidavit of Paul Wood, sworn 6 May 2013

Exhibits to the Affidavit of Paul Wood, sworn 6 May 2013 - Part 1

Exhibits to the Affidavit of Paul Wood, sworn 6 May 2013 - Part 2

# First Respondents - LM Investment Management Ltd (Administrators Appointed) in its' ca

Application for Adjournment dated 1 May 2013

Affidavit of Stephen Russell, sworn 1 May 2013

Second Affidavit of Stephen Russell, sworn 1 May 2013

Affidavit of Ilenna Copley, sworn 1 May 2013

Affidavit of Bradley Hellen, sworn 1 May 2013

Affidavit of Ginette Muller, sworn 2 May 2013

Third Affidavit of Stephen Russell, sworn 6 May 2013

Fourth Affidavit of Stephen Russell, sworn 7 May 2013

Fifth Affidavit of Stephen Russell, sworn 7 May 2013

# **Second Respondents:**

# **Roger Shotton**

**Application** 

Affidavit of Roger Shotton, sworn 30 April 2013

Affidavit of David Tucker, sworn 29 April 2013

Affidavit of David Whyte, sworn 29 April 2013

Notice of Address for Service

## Other Members

Affidavit of Shane Roberts, sworn 7 May 2013

## **ASIC**

Notice of Intervention

**Interlocutory Application** 

Affidavit of Anne Gubbins, sworn 3 May 2013

Home Creditor and Investor General Correspondence MPF FMIF and Feeder Fur

## **Contact Us**

GPO Box 3127

Brisbane, Qld, 4001

Email:enquiries@lminvestmentadministration.com



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17 May 2013 Our Ref: RCL\_8974r13.docx

#### CIRCULAR TO ADVISERS IN THE LM FIRST MORTGAGE INCOME FUND ("FUND")

Dear Sir/Madam

RE: LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 the Responsible Entity of the LM First Mortgage Income Fund Notice of Meeting and Legal Proceedings update

I refer to previous correspondence in relation to this matter.

#### **Background to the Notice of Meeting**

Investors should have by now received a Notice of Meeting, and many have already returned completed proxy forms.

As you may be aware, Trilogy Funds Management Ltd ("Trilogy") applied to the Supreme Court in Queensland to be appointed temporary Manager of the LM First Mortgage Income Fund (MIF) in replacement of LM. Further litigation has resulted from these proceedings and is discussed later in this circular – in short however, these matters have been adjourned to 15 July 2013.

It is our strong view that the Court process being pursued by Trilogy fails to provide investors with the democratic right, as enshrined in the Corporations Act, to choose which entity should manage your Fund. This is the reason we have called for a meeting of investors on 30 May 2013.

#### Invitation to Trilogy to Provide Information to Investors

At the time of dispatch of the Notice of Meeting, we encouraged Trilogy to provide information to investors to assist them to make a decision on how to vote. To assist, an upto-date electronic copy of the investor register was provided to Trilogy so that they could provide relevant information on a timely basis. Trilogy has advised us that it considers the meeting has not been validly called and will not provide investors with any information.

We disagree and have advised that we will support an adjournment of the Meeting from 30 May 2013 by a further 3 weeks if Trilogy wishes to reconsider its position and write to investors.

#### Recommendation of FTI Consulting

We had advised investors to delay completing lodgement of their proxy forms until they had received the expected Trilogy generated information. As this is now unlikely to be received, investors are encouraged to determine their actions based upon the already circulated Notice of Meeting.

FTI Consulting (Australia) Pty Limited
ABN 49 160 397 811 | ACN 160 397 811
22 Market Street | Brisbane QLD 4000 | Australia
Postal Address | GPO Box 3127 | Brisbane QLD 4001 | Australia
+61.(0)7.3225.4900 main | +61.(0)7.3225.4999 fix | fticonsulting-asia.com

Should Trilogy subsequently provide additional information to investors and the investor decides to change their vote, then it should be noted that a subsequently lodged proxy form will over-ride an earlier lodged proxy.

We recommend investors vote "Against" the resolutions which would see Trilogy appointed for the reasons as outlined in the Notice of Meeting.

#### **Legal Action**

As mentioned in the Circular to Advisers dated 15 May 2013, the hearing brought by Mr & Mrs Bruce and funded by Trilogy, has been adjourned to 15 July 2013. By virtue of this adjournment, investors can now vote on whether they wish Trilogy to become the Responsible Entity of the Fund at the meeting on 30 May 2013.

I intend to provide the result of the meeting and the votes showing whether Trilogy has support or not, to the Court. I therefore strongly recommend that investors cast their proxies to show whether they are in favour or against Trilogy being appointed as manager of the Fund.

Details in relation to the legal action can be found on the website <a href="http://www.lminvestmentadministration.com/litigation">http://www.lminvestmentadministration.com/litigation</a> and Annexure A summarises the current situation.

#### **Proxy Forms**

If an investor would like a replacement proxy form, please forward the name of their investment(s) to <a href="mailto:enquiries@lminvestmentadministration.com">enquiries@lminvestmentadministration.com</a> to obtain a replacement proxy(ies).

Alternatively, a replacement proxy form will be made available by telephoning LM on:

Australia Toll Free - 1800 062 919 New Zealand Toll Free - 0800 142 919 International + 61 7 5584 4500 ).

Proxy forms can be returned by one of the following four methods:

By Email – <u>quorum@computershare.com.au</u>

- By Fax (within Australia) 03 9473 2145 and (outside Australia) +61 3 9473 2145
- By Post Computershare, GPO Box 2062, Melbourne VIC 8060
- In Person Computershare, 452 Johnston St, Abbotsford, Melbourne.

Yours faithfully FTI Consulting

**Ginette Muller** 

**Voluntary Administrator** 

## **ANNEXURE A**

The following table sets out each party involved in the litigation and what they seek.

Applicant	Seeks	Reasons why this will be detrimental to Investors or unnecessary.
(1) Bruce	(i) Trilogy to be the temporary RE; Or	A meeting to consider this matter has been called for 30 May 2013. All investors should have a say in this matter, which is why we have issued the Notice of Meeting.
(2) Shotton	(i) That the Court should wind up the fund; and	The Fund has been effectively in wind-down mode for some time. Investors were advised by a circular in December 2012 of the steps LM was undertaking to sell down the Fund assets. We have continued that process since our appointment.  LM intended to exercise the rights under the Constitution to wind up the Fund, however the Court proceedings have prevented this occurring.
	(ii) That BDO should supervise the winding up.	This involves an unnecessary layer of cost  — FTI has the local and global expertise required.
	(iii) Mr Shotton's submissions to the Court also includes, that he supports the appointment of a Receiver to the fund and that capital distributions should be deferred until the secured creditor is paid in full.	<ul> <li>Secured creditor has authorised capital distributions to members;</li> <li>If Receivers were appointed this situation may change; and if Mr Shotton's submissions were adopted, capital distributions would cease for a significant time, most likely up to 18 months.</li> <li>There is no interest expense saving if the bank debt is paid instead of capital to investors.</li> <li>If the Court appoints a Receiver it is possible that the Secured creditor may appoint their own Receiver, resulting in several Receivers from different firms being appointed – who will all be paid from member funds.</li> </ul>
(3) ASIC	(i) A Receiver be appointed to wind up the fund.	Reasons provided above in Shotton application.

Page 4 of 4



31 May 2013 Our Ref: RCL 8974r19 (FMIF) Meeting Adjournment.docx

# CIRCULAR TO INVESTORS IN THE LM FIRST MORTGAGE INCOME FUND ("FMIF") AND FEEDER FUNDS

Dear Sir/Madam

# RE: LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 ("LMIM")

**Adjournment of FMIF Meeting of Investors** 

I refer to the appointment of John Park and I as joint and several Administrators of LMIM on 19 March 2013 pursuant to resolution of LMIM board of directors.

#### **Meeting Adjournment**

At the meeting of investors held on 30 May 2013, it was resolved by investors that the meeting be adjourned until 13 June 2013, at 11:00am.

The reconvened meeting will again be held at:

Institute of Chartered Accountants Level 32, Central Plaza One 345 Queen Street, Brisbane, Queensland.

#### Validity of Proxy and Voting Direction Forms Already Lodged

If you are a member of FMIF or one of the two LM managed feeder funds (being the LM Currency Protected Australian Income Fund or the LM Institutional Currency Protected Australian Income Fund) and have already submitted your Proxy and Voting Direction Form to Computershare, and do not wish to change your vote, there is no need to submit another form.

Existing Proxy and Voting Direction Forms lodged with Computershare are valid at any adjournment or postponement of the meeting.

If you wish to change your vote, a new form should be lodged with Computershare. This form will override the previously lodged form.

#### New Deadlines to Submit Proxy and Voting Direction Forms

If you have not already lodged your Proxy or Voting Direction Form or wish to change your vote, you are now able to lodge the form at any time prior to the due dates noted overleaf.

FTI Consulting (Australia) Pty Limited

ABN 49 160 397 811 | ACN 160 397 811

22 Market Street | Brisbane QLD 4000 | Australia

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Liability limited by a scheme approved under Professional Standards Legislation

Fund	Due Date and Time for Voting Direction Form
LM First Mortgage Income Fund	11:00am (AEST) on 11 June 2013
LM Currency Protected Australian Income Fund	4:00pm (AEST) on 7 June 2013
LM Institutional Currency Protected Australian Income Fund	4:00pm (AEST) on 7 June 2013

#### **Obtaining a Proxy and Voting Direction Form**

Proxy and Voting Direction Forms for each fund are available on the <a href="https://www.lminvestmentadministration.com">www.lminvestmentadministration.com</a> website in the "FMIF and Feeder Funds" tab.

When completing the form, please ensure to provide both the registered name of your investment and your contact details on the form so Computershare is able to register your vote.

If you are unable to download the required form for any reason, please contact FTI Consulting using the below details, and a replacement form will be forwarded.

#### **Contact Details**

Investors are able to obtain further information as follows:

1. Regular updates will be provided on the LMIM voluntary administration website

(www.lminvestmentadministration.com); or

2. You can send an email to mail@lmaustralia.com or call on one of the below numbers:

Australia Toll Free - 1800 062 919

New Zealand Toll Free - 0800 142 919

International +61 7 5584 4500

Yours faithfully FTI Consulting

Ginette Muller Voluntary Administrator

F T I





#### ASIC

Australian Securities & Investments Commission

Commonwealth Bank Building 240 Queen Street, Brisbane GPO Box 9827 Brisbane QLD 4001 DX 322 Brisbane

Telephone: (07) 3867 4700 Facsimile: (07) 3867 4725

Our Reference:

13-40003

8 May 2013

Russells Level 21, 300 Queen Street Brisbane QLD 4000

Attention: Stephen Russell

Email: SRussell@RussellsLaw.com.au

Dear Mr Russell

## LM Investment Management Limited (Administrators Appointed)

I refer to the Notice of Meeting and Explanatory Information issued in relation to the LM First Mortgage Income Fund (FMIF) by your client dated 26 April 2013 (the Notice).

ASIC has concerns regarding the content of the Notice. In particular, ASIC is concerned that there are a number of statements made in the Notice which have the potential to confuse or unintentionally mislead investors. There are also a number of statements in the Notice for which ASIC is unsure of your clients' bases for so stating.

So that ASIC may better understand your clients' position, I would greatly appreciate if your clients would provide us with some explanation for making the following statements (please note that this is not intended to be an exhaustive list, merely the issues which are immediately apparent to us):

1. The Notice states (at page 2): "LM wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result Trilogy's Court application".

That statement implies that such consequences can be avoided by the meeting. ASIC is concerned about the possibility that such an implication might be likely to mislead unit holders. In particular, we note that the Notice does not dispose of the originating application, so costs associated with those proceedings are likely to be incurred in any event.

- 2. By the use of the phrase "and immediate consultations with ASIC" (at page 2) the Notice seemingly suggests that ASIC has endorsed your clients' action in calling such a meeting which is incorrect. ASIC is concerned that such a suggestion may influence how unit holders intend to vote.
- 3. The Notice states (at pages 2 and 4): "LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy".

This statement implies that unit holders will not have an opportunity to determine whether or not they wish to appoint Trilogy Funds Management Limited (**Trilogy**) if orders are made as sought in the originating application.

ASIC is concerned about the possibility that such an implication might be likely to mislead unit holders because it is not qualified by an explanation that Trilogy would, in any event, be required under section 601FQ of the *Corporations Act 2001* (Cth) (the Act) to call a unit holders' meeting for the purpose of the unit holders, by resolution, choosing a company to be the new responsible entity.

4. The Notice states (at page 4): "Thus, in the situation of a court appointment, investors may have no effective choice as to whether Trilogy should manage the winding up of the Fund (which is already effectively underway)."

Please explain why your clients say that the winding up of the FMIF is "effectively underway"?

ASIC is also concerned that this statement makes no reference to section 601NF of the Act, under which a member may apply to the court to appoint a person to take responsibility for ensuring that the fund is wound up in accordance with its constitution.

5. The Notice suggests (at page 5) that the calling of the meeting is "likely to save significant legal costs for the Fund".

Could you please explain on what bases your clients assert that significant legal costs are likely to be saved by that action given that the proceeding is not resolved?

6. The Notice states (at page 6): "If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members... While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

Despite its caveats, that statement implies that the potential of a liquidator of LM Investment Management Limited (Administrators Appointed) (LMIM) to utilise Part 5.7B of the Act, is a genuine point of differentiation between the

LMIM and Trilogy that unit holders should consider. ASIC is concerned about the possibility that this statement might be likely to mislead unit holders. In particular:

- a. What is your clients' basis for speculating that there are transactions which might be attacked by a liquidator under Part 5.7B of the Act? Or that the existence of such transactions might be material to the unit holders' consideration of the resolutions?
- b. What is your clients' basis for suggesting that money recovered by a liquidator would be available to the unit holders of the FMIF? The availability of recovered money to the unit holders, other than as potential creditors, is not immediately apparent.
- 7. The Notice (at page 10) states that "On a show of hands, each Member has one vote on each resolution".

Please explain how this statement accords with clause 28.2(d) of FMIF's constitution which states that "A proxy is not entitled to vote on a show of hands".

8. The Notice (at page 10) states that the unit holders of the LM Currency Protected Australian Income Fund and LM Institutional Currency Protected Australian Income Fund are able to direct LMIM, as the responsible entity of those funds, to vote in the LMIF.

Please explain how this statement accords with section 253E of the Act which states that a responsible entity cannot vote their interest on a resolution at a meeting if they have an interest in the resolution.

We look forward to receiving your clients' response to the above matters.

Yours sincerely,

Anne Gubbins Senior Lawyer



Norton Rose Australia ABN 32 720 868 049 Level 18, Grosvenor Place 225 George Street

SYDNEY NSW 2000 AUSTRALIA

Tel +61 2 9330 8000

Fax +61 2 9330 8111

10 May 2013

Email: anne.gubbins@asic.gov.au

Private & Confidential Attention: Anne Gubbins

Australian Securities & Investments Commission 240 Queen Street GPO Box 9827 Brisbane QLD 4001

Your reference: 13-40003

Direct line +61 2 9330 8166

DX 368 Sydney

nortonrose.com

Our reference: 2796586 Email

john.moutsopoulos@nortonrose.com

GPO Box 3872, Sydney NSW 2001

Dear Ms Gubbins

#### LM Investment Management (Administrators Appointed)

We act for LM Investment Management Limited (Administrators Appointed) (LM) in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF) in respect of a meeting of members of the FMIF to be held on 30 May 2013 (Meeting). As you are aware, the Meeting has been called by way of a Notice of Meeting dated 26 April 2013 (Notice).

We refer to your letter dated 8 May 2013 to Russells outlining various concerns ASIC holds in regards to the content of the Notice (**Letter**). We note that ASIC is concerned that statements made in the Notice may have the potential to cause confusion or unintentionally mislead investors.

We respond on behalf of our client to each of the concerns raised in the Letter below. Russells have already explained to ASIC in their letter to you on 1 May 2013 that there are a number of reasons why our client decided to convene a meeting of the FMIF. It was for all those reasons that our client decided that it was in the best interests of members of the FMIF to have an opportunity to consider whether they wish to have Trilogy Funds Management Limited (**Trilogy**) appointed as a permanent responsible entity.

At the outset we should state that LM is keen to ensure that members in FMIF are provided with all information which ASIC believes is necessary to allow them to make an informed decision. However, against this LM is also conscious of not unnecessarily overloading members with information as unfortunately if there is too much information there can be a tendency to ignore it all. Clearly, as the appointment of a replacement responsible entity requires an extraordinary resolution which is an extremely high hurdle, LM wants to encourage the maximum number of investors to express their views having considered all relevant information. We believe that there is a fine balancing act between providing full information and too much information. We would appreciate it if you could read our responses in this light.

#### 1 ASIC Concern #1

1.1 **ASIC Concern:** The Notice states (at page 2): "LM wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application".

That statement implies that such consequences can be avoided by the meeting. ASIC is concerned about the possibility that such an implication might be likely to mislead unit holders. In particular, we note that the Notice does not dispose of the originating application, so costs associated with those proceedings are likely to be incurred in any event.

APAC-#18612565-v1

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Norton Rose Australia together with Norton Rose LLP, Norton Rose Canada LLP, Norton Rose South Africa (incorporated as Deneys Reitz Inc) and their respective affiliates constitute Norton Rose Group, an international legal practice with offices worldwide, details of which, with certain regulatory information, are at nortonrose.com

1.2 **LM's Response:** LM notes that at the time of publishing the Notice (being 26 April 2013), the only court application on foot was that of Trilogy attempting to replace LM as responsible entity/trustee of the FMIF (**Original Proceedings**). That is, the Notice was published prior to the Shotton application (dated 29 April 2013) and ASIC's intervention (dated 26 April 2013).

It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy..

We note that as it turns out, all proceedings have been adjourned until 15 July 2013.

#### 2 ASIC Concern #2

2.1 **ASIC Concern:** By the use of the phrase "and immediate consultations with ASIC" (at page 2) the Notice seemingly suggests that ASIC has endorsed your clients' action in calling such a meeting which is incorrect. ASIC is concerned that such a suggestion may influence how unit holders intend to vote.

**LM Response:** The use of the phrase "and immediate consultation with ASIC" reflected what actually happened and was not intended to give (and we believe does not give) the suggestion that ASIC has endorsed our client's actions. Literally, the phrase goes on to provide that "LM wished to consult Members in the proper forum, with adequate notice." We appreciate that ASIC is concerned about any such suggestion, but we feel that the disclosure in the Notice to which you refer is adequate for those reasons.

#### 3 ASIC Concern #3

3.1 ASIC Concern: The Notice states (at pages 2 and 4): "LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy".

This statement implies that unit holders will not have an opportunity to determine whether or not they wish to appoint Trilogy Funds Management Limited (Trilogy) if orders are made as sought in the originating application.

ASIC is concerned about the possibility that such an implication might be likely to mislead unit holders because it is not qualified by an explanation that Trilogy would, in any event, be required under section 601FQ of the Corporations Act 2001 (Cth) (the Act) to call a unit holders' meeting for the purpose of the unit holders, by resolution, choosing a company to be the new responsible entity.

**LM Response:** We draw ASIC's attention to paragraph 2.3 in which there is in fact an explanation to which you refer.

The court application was for Trilogy to be appointed as either temporary responsible entity or permanent responsible entity. As previously mentioned, it was our client's decision that it was in the best interests of members for the FMIF to have an opportunity to consider that proposal which is why our client has convened the Meeting with the benefit of the existing and well understood regime for retirement and removal of responsible entities under the Act in which members of the FMIF could control who was to be their responsible entity.

#### 4 ASIC Concern #4

4.1 **ASIC Concern:** The Notice states (at page 4): "Thus, in the situation of a court appointment, investors may have no effective choice as to whether Trilogy should manage the winding up of the Fund (which is already effectively underway)."

Please explain why your clients say that the winding up of the FMIF is "effectively underway"?

ASIC is also concerned that this statement makes no reference to section 601NF of the Act, under which a member may apply to the court to appoint a person to take responsibility for ensuring that the fund is wound up in accordance with its constitution.

4.2 **LM Response:** Our client has stated that the wind up of the FMIF is "effectively underway" as prior to the appointment of voluntary administrators, LM had announced by way of letter to investors dated 20 December 2012 (attached to this letter for your reference) that its "go forward" strategy for the FMIF is effectively a decision for the winding up of the FMIF.

It is not considered material information for disclosure that a reference be made to s601NF in these circumstances. The primary focus of the Notice was to use the established regime of replacing a responsible entity under the Act through the vote of members of the FMIF.

#### 5 ASIC Concern #5

5.1 **ASIC Concern**: The Notice suggests (at page 5) that the calling of the meeting is "likely to save significant legal costs for the Fund"

Could you please explain on what bases your client assets that significant legal costs are likely to be save by that action given that the proceeding is not resolved?

5.2 LM's Response: LM refers ASIC to LM's response to ASIC Concern #1.

#### 6 ASIC Concern #6

ASIC Concern: The Notice states (at page 6): "If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable directed-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members... While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

Despite its caveats, this statement implies that the potential of a liquidator of LM Investment Management Limited (Administrators Appointed) (LMIM) to utilise Part 5.7B of the Act, is a genuine point of differentiation between the LMIM and Trilogy that unit holders should consider. ASIC is concerned about the possibility that this statement might be likely to mislead unit holders. In particular:

- a. What is your clients' basis for speculating that there are transactions which might be attached by a liquidator under Part 5.7B of the Act? Or that the exercise of such transactions might be material to the unit holders' consideration of the resolutions?
- b. What is your clients' basis for suggesting that money recovered by a liquidator would be available to the unit holders of the FMIF? The availability for recovered money to unit holders, other than as potential creditors, is not immediately apparent.
- 6.2 **LM's Response:** The simple point here is that unlike the Administrators appointed to LM, Trilogy is unable to take proceedings and utilise Part 5.7B of the Act. This means that unlike Trilogy, the Administrators have the potential for more recoveries.

#### 7 ASIC Concern #7

7.1 **ASIC Concern**: The Notice (at page 10) states that "On a show of hands, each Member has one vote on each resolution".

Please explain how this statement accords with clause 28.2(d) of the FMIF's constitution which states that "A proxy is not entitled to vote on a show of hands".

- 7.2 **LM's Response:** This is a correct statement because it is in reference to the two resolutions provided for in the Notice. As each of those two resolutions are extraordinary resolutions, they must each be determined by a poll. We accept that if there is a procedural motion at the Meeting that that motion must be determined on a show of hands. If ASIC feels that this should be clarified with members, we could consider supplementary disclosure as long as ASIC does not feel that this will cause confusion amongst members.
- 8 ASIC Concern #8
- 8.1 **ASIC Concern**: The Notice (at page 10) states that the unit holders of the LM Currency Protected Australian Income Fund and LM Institutional Currency Protected Australian Income Fund are able to direct LMIM, as the responsible entity of those funds, to vote in the LMIF.

Please explain how this statement accords with section 253E of the Act which states that a responsible entity cannot vote their interest on a resolution at a meeting if they have an interest in the resolution.

8.2 LM's Response: We note that LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF, together with CPAIF the Feeder Funds) each have "See Through Voting" provisions contained within their respective constitution. These See Through Voting provisions have been introduced so that members in the CPAIF and ICPAIF may give voting directions (based upon their proportionate unit holding as a percentage of the relevant fund's holding in the FMIF) to their respective responsible entity as to how to vote at any meeting of members of the FMIF. The only assets of the two Feeder Funds are units held in LMIF. In these circumstances LM considered it important that members of the Feeder Funds (rather than LM as responsible entity) should be able to make decisions on important resolutions put at an LMIF meeting.

It is our view that s253E of the Act should not exclude any entitlement of LM in its capacity as responsible entity of the Feeder Funds from voting Feeder Fund units on any proposed resolution to the extent that LM as the responsible entity of each of the Feeder Funds votes in accordance with the "See Through Voting" provisions. This is because any conflict of interest that s253E of the Act seeks to address is removed by virtue of the Feeder Fund's responsible entity being required under the relevant Feeder Fund constitution to vote the Feeder Fund units on any proposed resolution as directed by the Feeder Fund members.

In addition, we refer to the note appearing at the foot of s253E of the Act (read with s532EA(2)) which states that a responsible entity and its associates may vote as proxies if their appointments specify the way they are to vote and they vote that way. We submit that this note in the legislation evidences a legislative recognition that if the responsible entity holds a directed proxy, the responsible entity is not at any relevant time [voting] their interest in a resolution. Although the "See Through Voting" Provisions do not appoint the responsible entity of the Feeder Fund as a Feeder Fund member's proxy, the "See Through Voting" Provisions are similar to a directed proxy in that they oblige the responsible entity of each Feeder Fund to vote in accordance with the voting directions of the Feeder Fund members. Accordingly, the effect of the "See Through Voting" Provisions is a direct benefit to members of each of the Feeder Funds because it enfranchises those members and enables them to vote at Underlying Fund level (ie at the FMIF Meeting) which may not have been possible without the "See Through Voting" Provisions.

Please let us know if you would like to discuss.

John Moutsopoulos

Partner

Norton Rose Australia



The global pathway to Australian investment solutions

20 December 2012

Dear Sir / Madam,

We wrote to investors 16 November with details of our "go forward" strategy for the LM First Mortgage Income Fund (Fund). We are pleased to set out below further details of this strategy.

#### LM's Strategy for the Fund: Orderly Asset Sell Down

LM has conducted a detailed review of all aspects of the LM First Mortgage Income Fund and its operations, and has listened to the wishes of investors. After consideration of all factors, we have determined that it is in the best interests of investors to continue the sales program, with an orderly sale of all remaining Fund assets.

As previously advised, the liquidity mechanism proposed in May 2012 will not proceed. The Fund will not be split, and there will no longer be the options for investors to "sell" or "hold" their investment in the Fund. Instead, all remaining assets will be sold, and all investors will share pro-rata in the liquidity provided through this sales program. This strategy is for an orderly, commercial sale and not a fire sale of assets.

We have been actively selling assets of the Fund since before its closure to new investors and are continuing with this to see investors' investment capital returned as quickly as commercially possible.

We estimate that this program could take up to three years to complete. During this period, available liquidity will be returned to all investors from any asset sales by way of periodic pro-rata capital distributions, as described below.

#### **Periodic Capital Distributions for Investors**

#### March 2013 First pro-rata capital distribution to all investors.

We expect that by March 2013, the initial distribution of capital should be paid to all investors, pro-rata to their respective holdings in the Fund.

We intend repaying capital to all investors on a periodic basis, which is likely to be each quarter. Repayments will occur as and when liquidity is available from the sales program, after paying or making such provision that we reasonably determine for liabilities of the Fund.

#### **Unit Price**

The current unit price for the Fund is 59 cents, as reflected in the latest audited financial statements for the year ending 30 June 2012.

There will be no change to the number of units that you hold in the Fund as at the date of this letter. Every investor will automatically receive their pro-rata share of any capital distribution made from the Fund, without having to lodge a withdrawal request.

#### **Investor Income Catch Up**

The income catch up applies only to those investors who have not reinvested income in the LM First Mortgage Income Fund. Across the LM Currency Protected Australian Income Fund and the LM Institutional Currency Protected Australian Income Fund, income has been reinvested to the investor account.

With respect to the LM Wholesale First Mortgage Income Fund, LM is no longer the responsible entity of that fund and all decisions regarding distributions to be made to investors in that fund are a matter for the new responsible entity of that fund.

January 2013 Monthly distribution catch up for period to 30 December 2010 commences with two months of payments (for those investors who did not reinvest their income).

#### **Background to the Current Unit Price**

In the financial crisis across the industry generally, many funds were forced to close to protect assets. On the closure of this Fund, many of the assets were forced into default positions, when due to the credit crunch and its constraints, the majority of the Fund's borrowers were unable to meet the Fund's request for repayment of the loan at maturity. LM, utilising the strong legal position afforded by the Fund's first mortgage security over the assets, has successfully taken control of the majority of assets on behalf Fund investors as required.

Upon default, it was necessary to capitalise interest due to the Fund from many loans. In addition to accruing this interest to the original loan amount, the legal and recovery costs also had to be added to the loan. As a result, the originally approved terms of the loan with respect to the loan to valuation ratio requirements has been exceeded. This, in addition to some softening in property prices across all assets, resulted in the current unit price of 59 cents.

#### **Proper Determination of the Unit Price**

The assets of the Fund are valued twice a year, in full accordance with LM's statutory and general law duties. The valuation methodology utilised is consistent with the Fund's constitution, compliance plan and applicable accounting standards. Ernst & Young independently reviews the values of each asset at a minimum of every six months, as part of the Fund's regular audit program. The unit price reflects market values which are substantiated throughout this process.

#### Deutsche Bank Facility

We are pleased to announce that we have successfully renegotiated the facility with Deutsche Bank to 30 June 2014, with an option to further extend to 30 June 2015, if required. The facility, which is currently drawn to approximately A\$29 million will not be redrawn, and from May next year it will be capped at A\$25 million.

The revised facility provides certainty to the Fund and its investors for the maintenance of cash flows. Once the facility reaches A\$25 million, there will be no ongoing required payment/reduction to Deutsche Bank out of the sales price on the sale of each asset.

The Deutsche Bank facility is an important component of the Fund's orderly sales program, as it will allow the Fund to extend the required capital to those assets identified for additional development or enhancement, to potentially achieve a more favourable sales price. The renegotiation of the facility means that the Fund can immediately begin the catch up of investor income and program in capital distributions, which otherwise would have gone to the repayment of the Deutsche Bank facility.

The periodic capital distributions will be pro-rata to all investors in the LM First Mortgage Income Fund, the LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund and the LM Wholesale First Mortgage Income Fund.

#### Independent Report on Fund Assets: BIS Shrapnel Report

As promised, we are providing a copy of the BIS Shrapnel report to investors in the Fund. We are waiting on one further outstanding component of the report and expect to distribute it by early in the New Year.

#### **RG45 Report**

We are currently finalising the RG45 Report and will be providing a copy of this report to all investors by January 2013. This will also be accessible from the LM website. The full details of the renegotiated Deutsche Bank facility will be included in this document. This report is for the purposes of ASIC's Regulatory Guide 45 Mortgage Schemes, improving disclosure for retail investors.

#### **Ensure We Hold Your Current Bank Account Details**

As advised above, periodic capital distributions and catch up income distributions will commence shortly. Please ensure that you have provided us with your most recent bank account details for payment. We will make the payments to the bank account nominated in your application form or most recently provided by you.

#### **Further Technical Information**

#### (i) Suspension of Redemptions and Fund Liquidity

Redemption requests have been suspended since mid-2009. We have now determined that the Fund is not "liquid" for the purposes of the withdrawal provisions under the Corporations Act 2001. As a consequence, we can no longer process redemption requests in accordance with the redemption provisions in the Fund's Constitution. The only way we can process redemption requests is to make a "withdrawal" offer to all investors pursuant to the Corporations Act 2001, and we currently do not intend to make such an offer. Instead, we intend to return capital to investors by making periodic pro-rata capital distributions, as outlined above.

We will still consider any redemption requests that are lodged with us on hardship grounds in accordance with ASIC hardship relief.

#### (ii) Distribution Reinvestment Program is Closed

We have closed the Fund's distribution reinvestment program, and will no longer be offering investors the option to reinvest their monthly income distributions (as the Fund is not declaring any).

#### **Investors Should Obtain Professional Advice**

Your financial adviser or intermediary will be able to assist you with any information required regarding your investment in the Fund. We are happy also to provide any information on the Fund, and can be contacted at mail@LMaustralia.com or +61 7 5584 4500.

Please find attached for your information the LM First Mortgage Income Fund Asset Progress Report dated December 2012, providing an update on the orderly sell down of assets within the Fund.

We look forward to commencing the investor distributions next year, and will report further on the closed fund strategy in the New Year.

Yours Faithfully,

The Directors
LM INVESTMENT MANAGEMENT LTD

The LM products are solely for distribution via financial advisers and intermediaries. LM requests investors consult a financial adviser before making any decisions on their investment. This communication is general information on the LM funds issued by LM Investment Management Ltd.

# LM Investment Management Ltd

The global pathway to Australian investment solutions

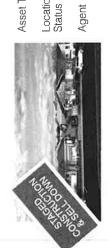
Brisbane/Surrounds QLD

NSW ACT VIC TAS

Central/North QLD South East QLD

-ocation

# LM First Mortgage Income Fund Asset Progress Report December 2012



Asset Type \_ocation Status

Land Subdivision, Grouped Staged Construction and Albany Property Brokers South Western Australia Housing, Aged Care Sell Down

Tenders to be sought from Central/North Queensland Beachfront Residential Agents for Sale

Asset Type

ocation

Status



Northern New South Wales

Retail Shop

Final Sell Down:

2 Remaining PRD

Sydney, New South Wales Preparing Asset for Sale

Industrial Complex

Asset Type

Location Status

Sold Since November 2012 Report

Asset Type ocation Status Agent

Residential Land Asset Type Location Status

Progressive Sell Down of Current Stage: 111 Sold, 21 Remaining North East Queensland Yeppoon Real Estate Supported Retirement Living

Asset Type

Agent

Location Status

Agent

Brisbane/Surrounds Queensland Progressive Sell Down of 21 Sold, 43 Remaining Specialist Aged Care Operator, Current Stage: Tall Trees

Brisbane/Surrounds Queensland Residential and Commercial Progressive Sell Down of Mixed Use Retirement,

19 Sold, 20 Remaining Specialist Aged Care Operator, Current Stage:

Asset Type Location Status Agent

Tasmania Asset Type ocation

Status

Agent

Independent Retirement Living Marketed for Sale in One Line Harrison Humphreys

Preselling Stage One Release Australian Capital Territory 34 Presold, 66 Remaining LJ Hooker Residential Apartments

Asset Type

Location

Status

Agent

Selling Down: 55 Sold, 27 Remaining Specialist Aged Care Operator, Tall Trees Supported Retirement Living Northern New South Wales



Asset Type

Location Status

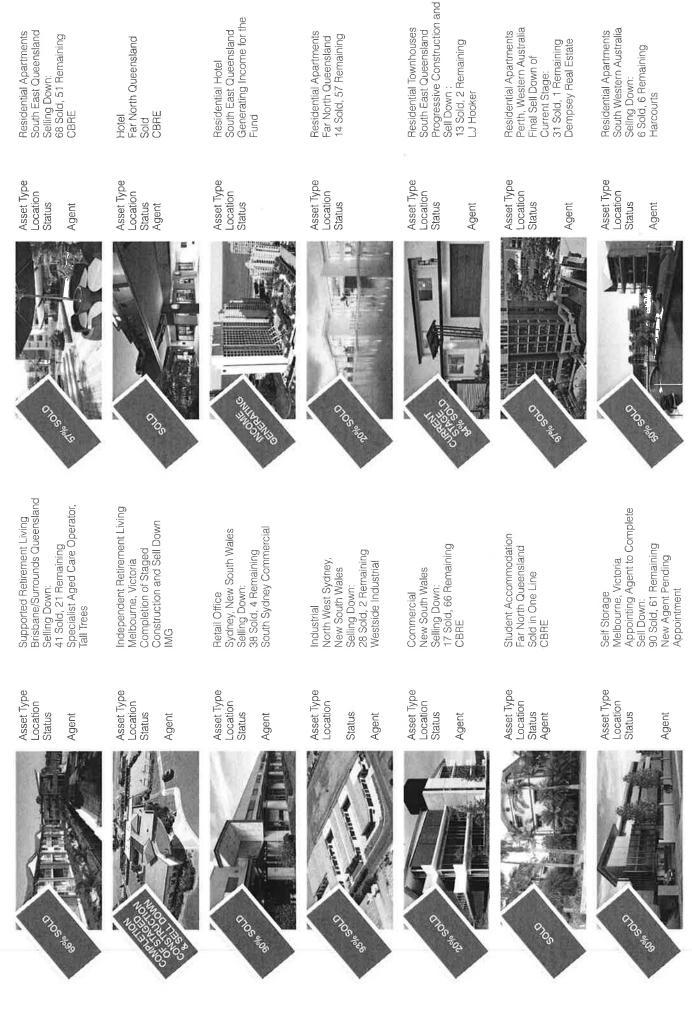
Agent

ABN 68 077 208 461 Responsible Entity & AFSL No. 220281

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42







#### ASIC

Australian Securities & Investments Commission

Commonwealth Bank Building 240 Queen Street, Brisbane GPO Box 9827 Brisbane QLD 4001 DX 322 Brisbane

Telephone: (07) 3867 4700 Facsimile: (07) 3867 4725

Our Reference:
Your Reference:

13-40003 2796586

17 May 2013

Norton Rose GPO Box 3872 Sydney NSW 2001

**Attention: John Moutsopoulos** 

Email: john.moutsopoulos@nortonrose.com

Dear Mr Moutsopoulos

#### LM Investment Management Limited (Administrators Appointed)

Thank you for your letter dated 10 May 2013. Our comments on your responses regarding the Notice of Meeting and Explanatory Information issued in relation to the LM First Mortgage Income Fund (FMIF) by your client dated 26 April 2013 (the Notice) are below:

#### ASIC Concern #1

We are concerned that your clients would make such an unqualified statement in the circumstances. ASIC considers that, at the time your clients sent the Notice, the assumption that it would impel the court to adjourn the Originating Application or that the applicants might discontinue their proceedings in response to the Notice did not provide a reasonable basis for the statement. This is particularly so in circumstances where such a statement has proved to be incorrect.

#### **ASIC Concern #2**

ASIC remains seriously concerned about the implied suggestion that ASIC has endorsed your clients' action in issuing the Notice.

Underscoring our concern is the fact that during the recent court appearances your clients continued to make statements, both directly and indirectly, that ASIC supported LM Investment Management Limited (LMIM) remaining as responsible

entity of the FMIF and supported your clients as administrators when such statements were simply untrue. By way of example, we refer you to references in the submissions made on behalf of your clients at the hearing on 2 May 2013.

#### ASIC Concern #3

ASIC remains concerned about the potentially misleading implication. We consider that paragraph 2.3 of the Notice does not provide an open and balanced explanation of the procedure upon the appointment of a temporary responsible entity. It tends to convey the wrong impression that a meeting under section 601FQ of the *Corporations Act 2001* (Cth) would not give unit holders an opportunity to choose a company to be the new responsible entity. It also conflates the selection of a responsible entity with the procedure for winding up in a way with might confuse unit holders.

#### ASIC Concern #4

We note your response in regard to the winding up of the FMIF being "effectively underway" however we do not agree that this statement is accurate and consider it misleading. That this was so at the time of the Notice has since been confirmed with orders preventing your clients from taking any steps to wind-up the FMIF.

#### **ASIC Concern #5**

Again, your clients' basis for making this statement was an unsubstantiated assumption about the applicants' response to the Notice. We do not consider this to be a valid basis for making such an unqualified assertion, particularly in circumstances where time has proven it to be incorrect.

#### ASIC Concern #6

We note that you have not responded to our request for an explanation of why your clients suggest that money recovered by a liquidator would be available to the unit holders of the FMIF, as opposed to its creditors. And, further, why such recoveries are limited only to liquidators.

As you would appreciate, this is a particularly important topic to unit holders and, as such, we consider it of great importance that any assertions relating to recoveries are accurate. Without further explanation, we consider the statement to be misleading.

#### ASIC Concern #7

We appreciate that the two resolutions specified in the Notice require extraordinary resolutions. However this matter is extremely fluid, evidenced by the fact that your clients have already considered (although we understand not sent) a further notice to unit holders advising of additional matters to be discussed at the meeting.

We request that you ensure any additional notices sent by your clients make it clear that, if the resolutions may be passed on a show of hands, unit holders will not be able to vote by way of proxy.

#### **ASIC Concern #8**

I note your reference to the see through voting provisions in the constitutions of the LM Currency Protected Australian Income Fund (CPAIF) and LM Institutional Currency Protected Australian Income Fund (ICPAIF).

CPAIF and ICPAIF do not yet have relief from ASIC to utilise these see through voting provisions. Consequently your assertion that these provisions enable CPAIF and ICPAIF to direct LMIM to vote on their behalf at the meeting is inaccurate and misleading.

Until such time as CPAIF and ICPAIF are granted relief for these provisions, it is ASIC's position that LMIM is unable to vote on behalf of these funds at the meeting by operation of section 253E of the *Corporations Act 2001* (Cth).

#### Conclusion

In light of the inaccuracies identified above, ASIC has serious concerns regarding the integrity of your clients' Notice. In particular we refer to:

- 1. the apparent claims of endorsement by ASIC;
- 2. the allegations regarding the ability of a liquidator to recover funds for unit holders over and above another entity; and
- 3. the implied assertion that the see through voting provisions in CPAIF and ICPAIF's constitutions are operational.

We also now question the utility of holding a general meeting for the replacement of the responsible entity out of context of the winding up of FMIF and the various assertions of conflicts of interests regarding that winding up. In the interests of efficiency and in the interests of unit holders as a whole, we consider it would be more appropriate that all of these matters be resolved together.

In light of the above, we suggest your client revisit its Notice and consider issuing an amended notice. If you are unable to satisfy us with regard to our concerns above, we will have to take those steps we deem necessary in order to ensure compliance with the obligations of a responsible entity under the *Corporations Act 2001* (Cth). While undesirable, this may include proceedings.

Yours sincerely,

Anne Gubbins Senior Lawyer



### LM Investment Management Limited (Administrators Appointed) - Questions & Answers

Gubbins, Anne

Moutsopoulos, John to: (anne.gubbins@asic.gov.au), Hugh.Copley@asic.gov.au

ns@asic.gov.au), 22/05/2013 04:52 PM

Cc: "Kelly, Jack"

This email message has been processed by MIMEsweeper

Dear Anne and Hugh

As discussed in our teleconference earlier this week, please see **attached** LM's draft Questions & Answers it proposes to place on its website as a form of supplementary disclosure to investors. The purpose of these Questions & Answers is allay ASIC's concerns regarding statements made within the Notice of Meeting and Explanatory Memorandum dated 26 April 2013.

Further, there has been some criticism as to the legal basis on which the meeting has been called by LM as responsible entity. In accordance with s601FJ(2), the legal basis on which the responsible entity is relying is found in both s601FL and in s601FM. Specifically, in relation to s601FL, the actual resolutions the subject of the notice of meeting are consistent with the requirements of s601FL. This section does not require the responsible entity to explain its reasons for wanting to retire in the meeting materials. In addition, in relation to s601FM, a unitholder requested the meeting to consider and vote on the resolutions the subject of the notice of meeting, pursuant to s252B.

We would appreciate any comments that ASIC may have on our client's draft Questions & Answers.

Kind regards

John

John Moutsopoulos | Partner

#### **Norton Rose Australia**

Level 18, Grosvenor Place, 225 George Street, Sydney, Australia Tel +61 2 9330 8166 | Mob +61 438 055 928 | Fax +61 2 9330 8111 john.moutsopoulos@nortonrose.com

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information, are at nortonrose.com Draft Q&A for LM web page(18756754\_1).pdf

#### **Questions & Answers**

These Question & Answers have been prepared by LM to assist members by providing them with additional information on some of the key matters relevant for the meeting of members of the FMIF scheduled to take place on 30 May 2013. This document supplements and is intended to be read together with the Notice of Meeting and the Explanatory Memorandum dated 26 April 2013.

# 1. Will the meeting dispose of the various Court applications which have been made?

When the notice of meeting was sent out to investors (on 26 April 2013) the only Court application on foot at that time was Trilogy attempting to replace LM as the responsible entity of FMIF.

LM had hoped that by calling a meeting to allow members to vote on the issue of who should manage FMIF that the Court would adjourn the proceedings to allow the meeting to take place. If the meeting chose to appoint Trilogy then clearly the application would have been withdrawn. If the members did not support the appointment of Trilogy then it was expected that the results of the meeting would be helpful to the Court in deciding what to do. Thus LM reasonably expected that by calling the meeting it would minimise legal costs associated with the application to appoint Trilogy. LM still believes that holding the meeting continues to be in the best interests of the members of FMIF. In any event, even if Trilogy is not voted in as responsible entity at the meeting, the voting results will help inform the Court as to how members of the FMIF want their fund to be managed.

Since the original application was made two other parties (being another unitholder and ASIC) have made separate and different applications.

While all three of the Court proceedings have been adjourned until 15 July 2013 (after the date of the meeting), in light of the further applications it is at this stage unclear whether or not the meeting will dispose of all the Court proceedings.

#### 2. I am only a small unitholder do I still need to vote?

Yes — it is very important that you vote so that your views are known. As noted in the answer to the previous question, LM intends to provide to the Court all details of the voting so that the Court is accurately informed as to the current wishes of unitholders.

#### 3. What are the resolutions which will be considered at the meeting on 30 May?

There are 2 resolutions specified in the notice of meeting which are to be considered at the meeting.

Resolution 1 seeks to remove LM as the Manager of FMIF.

Resolution 2 seeks to appoint Trilogy as the replacement Manager of FMIF.

Resolutions 1 and 2 are interlinked. Unless both resolutions are approved, neither resolution can be approved. This means that even if the resolution to remove LM is passed, the resolution falls away if Trilogy is not appointed as the replacement Manager.

Resolutions 1 and 2 are extraordinary resolutions which require at least 50% of the total votes that may be cast by eligible members in the Fund (including members not present in person or by proxy) to vote in favour in order for each resolution to be passed. These votes must be conducted by a poll and each member has 1 vote for each dollar value of the total Units they hold in FMIF.

It is possible that there may be other procedural resolutions which are put forward at the meeting. If there are, then these will be decided on a show of hands and each member has one vote on each resolution determined by a show of hands. However, importantly under the FMIF constitution a proxy appointed by member is not entitled to vote on a show of hands.

4. Are unitholders in the two LM managed feeder funds (being the LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF) able to direct LM (their responsible entity) how they wish LM to vote at the FMIF meeting?

The constitutions of the two feeder funds each have "See Through Voting" provisions. These were introduced to allow members of CPAIF and ICPAIF to give voting directions (based on their proportionate see through voting percentage) to their responsible entity (LM) as to how to vote at the FMIF meeting. This was seen as a direct benefit to members of the feeder funds by giving them (rather than LM as responsible entity) the right to make decisions on important matters put to an FMIF meeting.

Feeder fund voting directions need to be received by Friday 24 May 2013 at 4pm.

LM considers that these provisions are valid and effective to enfranchise members of the two feeder funds. However, in case there are parties with alternative views, LM will ensure that when the votes are counted they are recorded to separately show the feeder fund votes.

#### 5. Will the FMIF be wound-up?

The AFSL given to the Administrators by ASIC on 9 April 2013, authorises the Administrators to remain as the manager of the FMIF to investigate and preserve the assets and affairs of the FMIF and to:

- (I) Wind-up the scheme; or
- (II) transfer the functions of the responsible entity to an entity not externallyadministered.

Whilst we have now reached our view that it is in the best interests of members to formally wind up the FMIF, we have given an undertaking (and the Court may order) that we not take any steps pending the hearing on 15 July, to formalize the winding up.

#### 6. Is FMIF currently being wound up?

Technically a wind up of FMIF has not actually commenced. One of the reasons why LM did not trigger a technical wind up of FMIF is that they had legal advice that it may not be possible to make interim capital distributions during the formal wind up phase.

Moreover, it took many weeks to investigate the assets and form a view on whether it was in the best interests of members for FMIF to be wound up and, more importantly, how best to achieve that.

The only assets of FMIF are loans which are secured by mortgages. All the loans are in default. The function of LM is to realize those loans – it does this by taking the appropriate action to enforce its rights under those loans or sell those loans. As a result of the global financial crisis LM has been unable to make new loans on acceptable terms. Accordingly, in accordance with the "go forward" strategy which was announced by LM on 20 December 2012, when loan moneys are recovered they are used to pay FMIF liabilities with the surplus being distributed to members. Thus while a technical wind up of FMIF has not commenced, the action in relation to FMIF loan assets and moneys recovered which is being taken by LM would be no different if a technical wind up had commenced but with the added advantage that there is no uncertainty over the legal ability to make interim capital distributions to members.

# 7. If the Court did appoint Trilogy as temporary responsible entity would Trilogy need to subsequently call a meeting of members?

Yes. If the Court appointed Trilogy as temporary responsible entity then, under the Corporations Act, Trilogy would need to call a meeting of members of FMIF within 90 days of its appointment to choose a new permanent responsible entity. It is likely that

Trilogy would propose themselves as the new permanent responsible entity and, if so, would put a resolution to members which was essentially the same as the second resolution to be considered at the meeting called by LM for 30 May.

If Trilogy did not have the support of members to be appointed as the permanent responsible entity at this meeting, then under the Corporations Act this would trigger a requirement that Trilogy apply to the Court for an order directing it to wind up the FMIF and Trilogy would remain as the responsible entity and be required to wind up FMIF if so ordered. In that case, Trilogy would have to conduct its own review and formulate its own strategy and approach. As mentioned, this might call into question the ability to make interim capital distributions.

It would thus be possible, and indeed highly likely, that if Trilogy was appointed by the Court as temporary responsible entity they could remain as responsible entity for the rest of the term of FMIF even if they did not enjoy the necessary support of members of FMIF to be chosen as the permanent responsible entity.

#### 8. Was the Notice of Meeting reviewed or approved by ASIC?

LM was solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting.

Prior approval of such Notices by ASIC is not required.

# 9. IF LM remains as responsible entity but is put into liquidation, will the clawback provisions of the Corporations Act provide advantages to members?

As advised in the Notice of Meeting, the Corporations Act has a number provisions that allow a Liquidator of a Company to "Clawback" money from Directors, related parties and creditors ("Clawback provisions"). The Clawback provisions will only apply if LM goes into Liquidation.

As previously stated, the application of these Clawback provisions to FMIF's property is untested, and not free from doubt. But, LM remains of the view, following receipt of legal advice, that the application of those provisions is at least arguable.

If LM is removed as responsible entity:

- 1. the new responsible entity will not be able to rely upon the Clawback provisions.
- 2. the Clawback provisions cannot be used by the new responsible entity to increase the recovery from FMIF property. It is not known at this stage whether

- any transaction involving fund property could be the subject of action under these Clawback provisions, but investigations are continuing.
- 3. the Clawback provisions will still allow for the Liquidators to recover funds for the benefit of unsecured creditors of LM (as opposed to members of the FMIF). If that occurs, members may still benefit if the funds recovered reduce the amount that LM is entitled to be paid from the FMIF Property for expenses incurred on behalf of FMIF.

#### 10. How should the Proxy Form be completed?

The proxy form needs to be signed and the various boxes completed. However, a signed proxy form (with no boxes completed) is still a valid proxy and constitutes an AGAINST vote on all resolutions. If no proxy is lodged or vote cast at the meeting, this is effectively support of LM's continued management. This is because to replace LM as Responsible Entity, over 50% of units eligible to vote must vote in favour of the change.

#### 11. When must I vote & how do I Vote?

Unless you intend to vote at the meeting in Brisbane on Thursday 30 May, you will need to lodge a Signed Proxy Form with Computershare no later than 11.00 am on Tuesday 28 May.

You can post, email or fax your Proxy Form to Computershare – details are set out below.

<u>Postal address for return of proxies:</u> Computershare Investor Services Pty Ltd GPO Box 2062 MFL BOURNE VIC 8060 Australia

#### Hand delivery address:

Computershare Investor Services Pty Ltd 452 Johnston Street ABBOTSFORD VIC 3067 Australia

#### Alternatively, the documents may be faxed to:

Computershare Investor Services Pty Ltd on 03 9473 2145 (within Australia) or +61 3 9473 2145 (outside Australia)

Alternatively, the documents may be scanned and emailed to: quorum@computershare.com.au

#### 12. What happens if I have lost my Proxy Form?

Please contact LM on one of the below numbers to receive pre-printed replacement forms.

Australia Toll Free – 1800 062 919 New Zealand Toll Free – 0800 142 919 International +61 7 5584 4500

#### 13. If I have any questions who should I call?

Please contact your Financial Adviser or if you do not have a Financial Adviser please contact LM on one of the numbers listed in the previous answer.

# Re: LM Investment Management Limited (Administrators Appointed) - Questions & Answers [SEC=UNCLASSIFIED]

Hugh Copley to: Moutsopoulos, John

23/05/2013 11:44 AM

"Gubbins, Anne (anne.gubbins@asic.gov.au)",

"Hugh.Copley@asic.gov.au", "Kelly, Jack"

Bcc: Georgina Hayden, Marc Robinson, sforrest, Roger Derrington

#### Dear John,

Before considering the material attached to your email (below), ASIC asks that you please confirm your clients' position in respect of the matters raised by ASIC at the teleconference between ASIC (Mr Copley and Ms Gubbins) and Norton Rose (Messrs Moutsopoulos, Schmidt and Kelly) on 21 May 2013, namely:

- 1. Whether your clients will cancel or adjourn the Meeting (until after 15 July or at all) on the question of utility, given that the outcome of the vote at the Meeting (either way) will not impact the majority of the competing claims for relief sought in proceeding BS3383/13, given that your clients' stated reason for convening the Meeting is to avoid the costs, delay and uncertainty associated with a court related outcome? If they will not, please provide a written explanation of what your clients consider the meeting will achieve for unitholders, against the competing claims for relief pending adjudication in proceeding BS3383/13?
- 2. Why your clients published (and proposed) material, concerning the Meeting, includes no explanation of their reasons for wanting to retire as RE of the FMIF which appears to be a requirement of s601FL? Indeed, the material, if anything, supports a conclusion strongly to the contrary.
- 3. Will your clients please confirm the name, address and unitholding of the member who has requested the Meeting in accordance with s252B, together with a copy of that member's request (-ASIC assumes it will have been made, in writing, prior to the issue of the Notice of Meeting on 26 April)?

I look forward to hearing from you,

Sincerely,

"Moutsopoulos, John" ---22/05/2013 04:52:07 PM---\*\*\* This email message has been processed by...

From:

"Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>

To:

"Gubbins, Anne (anne.gubbins@asic.gov.au)" <anne.gubbins@asic.gov.au>,

"Hugh.Copley@asic.gov.au" < Hugh.Copley@asic.gov.au>

Cc:

"Kelly, Jack" <jack.kelly@nortonrose.com>

Date:

22/05/2013 04:52 PM

Subject:

LM Investment Management Limited (Administrators Appointed) - Questions & Answers

......

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Dear Anne and Hugh

As discussed in our teleconference earlier this week, please see **attached** LM's draft Questions & Answers it proposes to place on its website as a form of supplementary disclosure to investors. The purpose of these Questions & Answers is allay ASIC's concerns regarding statements made within the Notice of Meeting and Explanatory Memorandum dated 26 April 2013.

Further, there has been some criticism as to the legal basis on which the meeting has been called by LM as responsible entity. In accordance with s601FJ(2), the legal basis on which the responsible entity is relying is found in both s601FL and in s601FM. Specifically, in relation to s601FL, the actual resolutions the subject of the notice of meeting are consistent with the requirements of s601FL. This section does not require the responsible entity to explain its reasons for wanting to retire in the meeting materials. In addition, in relation to s601FM, a unitholder requested the meeting to consider and vote on the resolutions the subject of the notice of meeting, pursuant to s252B.

We would appreciate any comments that ASIC may have on our client's draft Questions & Answers.

Kind regards

John

#### John Moutsopoulos | Partner

#### **Norton Rose Australia**

Level 18, Grosvenor Place, 225 George Street, Sydney, Australia Tel +61 2 9330 8166 | Mob +61 438 055 928 | Fax +61 2 9330 8111 john.moutsopoulos@nortonrose.com

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## Re: LM Investment Management Limited (Administrators Appointed) - Questions & Answers [SEC=UNCLASSIFIED]

Hugh Copley to: Moutsopoulos, John

27/05/2013 09:45 AM

Cc: "Gubbins, Anne (anne.gubbins@asic.gov.au)", "Kelly, Jack"

#### Dear John.

I refer to my email below and to your voice-mail message left for me at 5.12 pm last Friday (24 May).

My instructors are becoming anxious about the silence from your clients, concerning the Unitholders Meeting, given the proximity of the meeting, the fact that proxy voting closes at 11.00 am tomorrow and the reality that unitholders not voting by proxy will (or may) be making travel plans to attend the Unitholder Meeting in person. Moreover, your clients have been on notice as to the matters raised in my email (below) since midday on 21 May. It is surprising that your clients should require so long to respond to what are, in effect, relatively simple and obvious issues.

I ask that you respond to me by 12 pm today concerning the matters set out in my email below.

#### Sincerely,

Hugh Copley---23/05/2013 11:44:21 AM---Dear John, Before considering the material attached to yo...

From:

Hugh Copley/Brisbane/QLD/ASIC

To:

"Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>

Cc:

"Gubbins, Anne (anne.gubbins@asic.gov.au)" <anne.gubbins@asic.gov.au>, "Hugh.Copley@asic.gov.au" <Hugh.Copley@asic.gov.au>, "Kelly, Jack"

<iack.kelly@nortonrose.com>

Date:

23/05/2013 11:44 AM

Subject:

Re: LM Investment Management Limited (Administrators Appointed) - Questions & Answers

[SEC=UNCLASSIFIED]

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Before considering the material attached to your email (below), ASIC asks that you please confirm your clients' position in respect of the matters raised by ASIC at the teleconference between ASIC (Mr Copley and Ms Gubbins) and Norton Rose (Messrs Moutsopoulos, Schmidt and Kelly) on 21 May 2013, namely:

- 1. Whether your clients will cancel or adjourn the Meeting (until after 15 July or at all) on the question of utility, given that the outcome of the vote at the Meeting (either way) will not impact the majority of the competing claims for relief sought in proceeding BS3383/13, given that your clients' stated reason for convening the Meeting is to avoid the costs, delay and uncertainty associated with a court related outcome? If they will not, please provide a written explanation of what your clients consider the meeting will achieve for unitholders, against the competing claims for relief pending adjudication in proceeding BS3383/13?
- 2. Why your clients published (and proposed) material, concerning the Meeting, includes no explanation of their reasons for wanting to retire as RE of the FMIF which appears to be a requirement of s601FL? Indeed, the material, if anything, supports a conclusion strongly to the contrary.
- 3. Will your clients please confirm the name, address and unitholding of the member who has requested the Meeting in accordance with s252B, together with a copy of that member's request (-ASIC assumes it will have been made, in writing, prior to the issue of the Notice of Meeting on 26 April)?

I look forward to hearing from you,

Sincerely,

**Hugh Copley** | Litigation Counsel, QLD | Chief Legal Office| **ASIC** | Level 20, 240 Queen Street, Brisbane QLD 4000 | m +61 7 3867 4892 | B +61 7 3867 4790 | m hugh.copley@asic.gov.au

"Moutsopoulos, John" ---22/05/2013 04:52:07 PM---\*\*\* This email message has been processed by...



# RE: [2796586:170] LM Investment Management Limited (Administrators Appointed) - Questions & Answers [SEC=UNCLASSIFIED]

Moutsopoulos, John to: Hugh.Copley@asic.gov.au Sent by: "Klein, Tracy" <tracy.klein@nortonrose.com> 27/05/2013 11:56 AM

Cc:

"Gubbins, Anne (anne.gubbins@asic.gov.au)", "Kelly,

\*\*\*

This email message has been processed by MIMEsweeper

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Dear Hugh

Thank you for your email.

LM Investment Management Limited (Administrators Appointed) (**LM**) remains firmly of the view that holding the meeting of members currently scheduled for 30 May 2013 (**Meeting**) continues to be in the best interests of members of the LM First Mortgage Income Fund (**FMIF**). The Meeting will provide an opportunity for members to democratically vote on the direction and future of their fund.

There is no logical reason why that opportunity should be taken away from members. Members only other chance to let their views be known to the Court is to appear at the Court hearing which would be a significant financial burden on members, as well as being totally impractical considering the number of members holding units in the FMIF.

It is apparent from reading the transcript of the hearing on 7 May, that in considering whether to adjourn the Court proceedings to 15 July 2013, the Court was well aware, and submissions were made on, the fact that this meeting was taking place.

We are instructed to respond to ASIC's three specific queries as follows:

1. LM will not be cancelling the Meeting. Our client proposes to adjourn the Meeting until 14 June 2013 to allow members sufficient time to consider the further disclosure and information that is contained in the Questions & Answers (a draft of which was attached for ASIC's consideration by way of email below). This adjournment will also allow Trilogy, if it wishes, to provide information to members for their consideration.

We note that ASIC is concerned with the cost of the Meeting. While meeting costs are of course a consideration, as stated above, our client believes it continues to be in the best interests of the FMIF that the Meeting be held. Nonetheless, our client is prepared to agree not to charge as a fund expense any additional (to those already incurred) out of pocket expenses currently anticipated in relation to the Meeting, including the cost of the venue, and the engagement of Computershare.

Our client's objective in calling the Meeting has been to allow investors to democratically determine who they wish to manage their fund. Our client is committed to this. Our client believes that the Meeting will either:

- a. if the resolutions are passed by the requisite majority confirm Trilogy's appointment as responsible entity of the FMIF, thereby effectively removing the need for Trilogy to continue their litigious attack on the FMIF. If the resolutions do pass (and Trilogy consents to becoming the new responsible entity), LM will honour the vote and lodge with ASIC Form 5107 on the date of the Meeting; or
- b. if the resolutions do not pass by the requisite majority allow LM to remain as responsible entity of the FMIF, until the adjourned Court date, at which time LM will provide the Court with the voting results (as collected by Computershare). We consider that the evidence of the outcome of the vote at the Meeting will be great assistance to the Court.

- 2. Section 601FL of the *Corporations Act 2001* (Cth) (the **Act**) does not require the responsible entity to publish in the meeting materials an explanation of their reasons for wanting to retire. In any event, it is self-evident from the meeting material that our clients wished, and continue to wish, to afford the members the opportunity to consider Trilogy's proposal to take over the management of the FMIF in a meeting; and that, at the same time, our clients consider that the appointment of Trilogy as responsible entity is not in their interests. In short, in our opinion the actual resolutions the subject of the notice of meeting are consistent with the broad scope of s601FL.
- 3. We reiterate that our client is relying on both s601FL and s601FM of the Act. We **attach** a copy of the member's request. The member's details are as follows:

Name: The Trust Company (PTAL) Limited ACF LM Currency Protected Australian Income Fund

Address: c/- The Trust Company (PTAL) Limited, GPO Box 4270 Sydney NSW 2001 Unitholding: 120,702,629 (approximately 24.38%)

We now **attach** a further draft of the Questions & Answers for ASIC's consideration. You will see from our compare document (also attached) that the amendments do not relate to concerns ASIC have raised. Please will you let us have ASIC's comments (if any) on this draft Questions & Answers. Our client looks to posting this document on their website as soon as possible so as to allow members with an opportunity to consider.

Kind regards

John

John Moutsopoulos | Partner

#### Norton Rose Australia

Level 18, Grosvenor Place, 225 George Street, Sydney, Australia Tel +61 2 9330 8166 | Mob +61 438 055 928 | Fax +61 2 9330 8111 john.moutsopoulos@nortonrose.com

From: Hugh Copley [mailto:Hugh.Copley@asic.gov.au]

**Sent:** Monday, 27 May 2013 9:45 AM

**To:** Moutsopoulos, John

Cc: Gubbins, Anne (anne.qubbins@asic.gov.au); Kelly, Jack

Subject: RE: [2796586:170] LM Investment Management Limited (Administrators Appointed) -

Questions & Answers [SEC=UNCLASSIFIED]

Importance: High

Dear John,

I refer to my email below and to your voice-mail message left for me at 5.12 pm last Friday (24 May).

My instructors are becoming anxious about the silence from your clients, concerning the Unitholders Meeting, given the proximity of the meeting, the fact that proxy voting closes at 11.00 am tomorrow and the reality that unitholders not voting by proxy will (or may) be making travel plans to attend the Unitholder Meeting in person. Moreover, your clients have been on notice as to the matters raised in my email (below) since midday on 21 May. It is surprising that your clients should require so long to respond to what are, in effect, relatively simple and obvious issues.

I ask that you respond to me by 12 pm today concerning the matters set out in my email below.

#### Sincerely,

From: Hugh Copley/Brisbane/QLD/ASIC

To: "Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>

Cc: "Gubbins, Anne (<u>anne.gubbins@asic.gov.au</u>)" <<u>anne.gubbins@asic.gov.au</u>>, "<u>Hugh.Copley@asic.gov.au</u>" < <u>Hugh.Copley@asic.gov.au</u>>, "Kelly, Jack" <<u>jack.kelly@nortonrose.com</u>>

Date: 23/05/2013 11:44 AM

Subje Re: LM Investment Management Limited (Administrators Appointed) - Questions & Answers [SEC=UNCLASSIFIED] ct:

Dear John,

Before considering the material attached to your email (below), ASIC asks that you please confirm your clients' position in respect of the matters raised by ASIC at the teleconference between ASIC (Mr Copley and Ms Gubbins) and Norton Rose (Messrs Moutsopoulos, Schmidt and Kelly) on 21 May 2013, namely:

- 1. Whether your clients will cancel or adjourn the Meeting (until after 15 July or at all) on the question of utility, given that the outcome of the vote at the Meeting (either way) will not impact the majority of the competing claims for relief sought in proceeding BS3383/13, given that your clients' stated reason for convening the Meeting is to avoid the costs, delay and uncertainty associated with a court related outcome? If they will not, please provide a written explanation of what your clients consider the meeting will achieve for unitholders, against the competing claims for relief pending adjudication in proceeding BS3383/13?
- 2. Why your clients published (and proposed) material, concerning the Meeting, includes no explanation of their reasons for wanting to retire as RE of the FMIF which appears to be a requirement of s601FL? Indeed, the material, if anything, supports a conclusion strongly to the contrary.
- 3. Will your clients please confirm the name, address and unitholding of the member who has requested the Meeting in accordance with s252B, together with a copy of that member's request (-ASIC assumes it will have been made, in writing, prior to the issue of the Notice of Meeting on 26 April)?

I look forward to hearing from you,

Sincerely,

From: "Moutsopoulos, John" < iohn.moutsopoulos@nortonrose.com>

To: "Gubbins, Anne (anne.gubbins@asic.gov.au)" <anne.gubbins@asic.gov.au>, "Hugh.Copley@asic.gov.au" <

Hugh.Copley@asic.gov.au>

Cc: "Kelly, Jack" < jack.kelly@nortonrose.com>

Date: 22/05/2013 04:52 PM

Subject LM Investment Management Limited (Administrators Appointed) - Questions & Answers

This email message has been processed by MIMEsweeper

Dear Anne and Hugh

As discussed in our teleconference earlier this week, please see **attached** LM's draft Questions & Answers it proposes to place on its website as a form of supplementary disclosure to investors. The purpose of these Questions & Answers is allay ASIC's concerns regarding statements made within the Notice of Meeting and Explanatory Memorandum dated 26 April 2013.

Further, there has been some criticism as to the legal basis on which the meeting has been called by LM as responsible entity. In accordance with s601FJ(2), the legal basis on which the responsible entity is relying is found in both s601FL and in s601FM. Specifically, in relation to s601FL, the actual resolutions the subject of the notice of meeting are consistent with the requirements of s601FL. This section does not require the responsible entity to explain its reasons for wanting to retire in the meeting materials. In addition, in relation to s601FM, a unitholder requested the meeting to consider and vote on the resolutions the subject of the notice of meeting, pursuant to s252B.

We would appreciate any comments that ASIC may have on our client's draft Questions & Answers.

Kind regards

John

#### John Moutsopoulos | Partner

#### Norton Rose Australia

Level 18, Grosvenor Place, 225 George Street, Sydney, Australia Tel +61 2 9330 8166 | Mob +61 438 055 928 | Fax +61 2 9330 8111 john.moutsopoulos@nortonrose.com

Norton Rose will join forces with Fulbright & Jaworski L.L.P. on June 1, 2013, creating Norton Rose Fulbright, a global legal practice with significant depth of expertise across the USA, Europe, Asia, Australia, Canada, Africa, the Middle East, Latin America and Central Asia. For more information, visit nortonrose.com

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Please consider the environment before printing this document

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Amended Draft Q&A for LM web page(18813729\_1) (2) pdf Compare - v2 as against v1(18814829\_1) pdf Meeting Request pdf

#### **Questions & Answers**

These Question & Answers have been prepared by LM to assist members by providing them with additional information on some of the key matters relevant for the meeting of members of the FMIF scheduled to take place on 30 May 2013. This document supplements and is intended to be read together with the Notice of Meeting and the Explanatory Memorandum dated 26 April 2013.

To allow member time to consider the additional information included in this document LM will arrange for the Chairman of the meeting to adjourn the meeting till 11am (AEST) on Friday 14 June 203 at the same location (the Institute of Chartered Accountants, Level 32, Central Plaza One, 345 Queen Street, Brisbane, Queensland, 4000). As the meeting on 30 May will be adjourned (and the resolutions not put) there is no need to attend the meeting on 30 May.

# 1. Will the meeting dispose of the various Court applications which have been made?

When the notice of meeting was sent out to investors (on 26 April 2013) the only Court application on foot at that time was Trilogy attempting to replace LM as the responsible entity of FMIF.

LM had hoped that by calling a meeting to allow members to vote on the issue of who should manage FMIF that the Court would adjourn the proceedings to allow the meeting to take place. If the meeting chose to appoint Trilogy then clearly the application would have been withdrawn. If the members did not support the appointment of Trilogy then it was expected that the results of the meeting would be helpful to the Court in deciding what to do. Thus LM reasonably expected that by calling the meeting it would minimise legal costs associated with the application to appoint Trilogy. LM still believes that holding the meeting continues to be in the best interests of the members of FMIF. In any event, even if Trilogy is not voted in as responsible entity at the meeting, the voting results will help inform the Court as to how members of the FMIF want their fund to be managed.

Since the original application was made two other parties (being another unitholder and ASIC) have made separate and different applications.

While all three of the Court proceedings have been adjourned until 15 July 2013 (after the date of the meeting), in light of the further applications it is at this stage unclear whether or not the meeting will dispose of all the Court proceedings.

#### 2. Has Trilogy consented to being appointed as responsible entity of FMIF?

As the notice of meeting was sent out after the application made to Court to have Trilogy appointed as temporary responsible entity of FMIF, LM assumed that Trilogy would (if members voted to appoint them) consent to be appointed as responsible entity of FMIF.

On 23 May (some 4 weeks after the notice of meeting was posted out) Trilogy has advised LM that it does not consent to being appointed as responsible entity by members at the meeting scheduled for 30 May.

The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court. Trilogy states that each member of FMIF is entitled to turn up to Court to make their views known to the Court and that this makes the Court the appropriate forum to determine who should manage their fund.

It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July in part to allow the meeting to run its course.

#### 3. 2. I am only a small unitholder do I still need to vote?

Yes – it is very important that you vote so that your views are known. As noted in the answer to the previous question, LM intends to provide to the Court all details of the voting so that the Court is accurately informed as to the current wishes of unitholders.

# 4. 3. What are the resolutions which will be considered at the meeting on 30 May (now to be adjourned to 14 June)?

There are 2 resolutions specified in the notice of meeting which are to be considered at the meeting.

Resolution 1 seeks to remove LM as the ManagerResponsible Entity of FMIF.

Resolution 2 seeks to appoint Trilogy as the replacement Manager Responsible Entity of FMIF.

Resolutions 1 and 2 are interlinked. Unless both resolutions are approved, neither resolution can be approved. This means that even if the resolution to remove LM is passed, the resolution falls away if Trilogy is not appointed as the replacement <u>ManagerResponsible Entity</u>.

Resolutions 1 and 2 are extraordinary resolutions which require at least 50% of the total votes that may be cast by eligible members in the Fund (including members not present in person or by proxy) to vote in favour in order for each resolution to be passed. These votes must be conducted by a poll and each member has 1 vote for each dollar value of the total Units they hold in FMIF.

It is possible that there may be other procedural resolutions which are put forward at the meeting. If there are, then these will be decided on a show of hands and each member has one vote on each resolution determined by a show of hands. However, importantly under the FMIF constitution a proxy appointed by member is not entitled to vote on a show of hands.

5. 4. Are unitholders in the two LM managed feeder funds (being the LM Currency Protected Australian Income Fund (ICPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF) able to direct LM (their responsible entity) how they wish LM to vote at the FMIF meeting?

The constitutions of the two feeder funds each have "See Through Voting" provisions. These were introduced to allow members of CPAIF and ICPAIF to give voting directions (based on their proportionate see through voting percentage) to their responsible entity (LM) as to how to vote at the FMIF meeting. This was seen as a direct benefit to members of the feeder funds by giving them (rather than LM as responsible entity) the right to make decisions on important matters put to an FMIF meeting.

As the FMIF meeting is to be adjourned to 14 June the Feeder fund voting directions need to be received by Friday 24 MayMonday 10 June 2013 at 4pm.

LM considers that these provisions are valid and effective to enfranchise members of the two feeder funds. However, in case there are parties with alternative views, LM will ensure that when the votes are counted they are recorded to separately show the feeder fund votes.

#### 6. 5. Will the FMIF be wound-up?

The AFSL given to the Administrators by ASIC on 9 April 2013, authorises the Administrators to remain as the manager responsible entity of the FMIF to investigate and preserve the assets and affairs of the FMIF and to:

- (I) Wind-up the scheme; or
- (II) transfer the functions of the responsible entity to an entity not externally-administered.

Whilst we have now reached our view that it is in the best interests of members to formally wind up the FMIF, we have given an undertaking (and the Court may order) that we not take any steps pending the hearing on 15 July, to formalize the winding up.

#### 7. 6. Is FMIF currently being wound up?

Technically a wind up of FMIF has not actually commenced. One of the reasons why LM did not trigger a technical wind up of FMIF is that they had legal advice that it may not be possible to make interim capital distributions during the formal wind up phase.

Moreover, it took many weeks to investigate the assets and form a view on whether it was in the best interests of members for FMIF to be wound up and, more importantly, how best to achieve that.

The only assets of FMIF are loans which are secured by mortgages. AllMost of the loans are in default. The function of LM is to realize those loans – it does this by taking the appropriate action to enforce its rights under those loans or sell those loans. As a result of the global financial crisis LM has been unable to make new loans on acceptable terms. Accordingly, in accordance with the "go forward" strategy which was announced by LM on 20 December 2012, when loan moneys are recovered they are used to pay FMIF liabilities with the surplus being distributed to members. Thus while a technical wind up of FMIF has not commenced, the action in relation to FMIF loan assets and moneys recovered which is being taken by LM would be no different if a technical wind up had commenced but with the added advantage that there is no uncertainty over the legal ability to make interim capital distributions to members.

# **8.** 7. If the Court did appoint Trilogy as temporary responsible entity would Trilogy need to subsequently call a meeting of members?

Yes. If the Court appointed Trilogy as temporary responsible entity then, under the Corporations Act, Trilogy would need to call a meeting of members of FMIF within 90 days of its appointment to choose a new permanent responsible entity. It is likely that Trilogy would propose themselves as the new permanent responsible entity and, if so, would put a resolution to members which was essentially the same as the second resolution to be considered at the meeting called by LM for 30 May.

If Trilogy did not have the support of members to be appointed as the permanent responsible entity at this meeting, then under the Corporations Act this would trigger a requirement that Trilogy apply to the Court for an order directing it to wind up the FMIF and Trilogy would remain as the responsible entity and be required to wind up FMIF if so ordered. In that case, Trilogy would have to conduct its own review and formulate its own strategy and approach. As mentioned, this might call into question the ability to make interim capital distributions.

It would thus be possible, and indeed highly likely, that if Trilogy was appointed by the Court as temporary responsible entity they could remain as responsible entity for the rest of the term of FMIF even if they did not enjoy the necessary support of members of FMIF to be chosen as the permanent responsible entity.

### 9. 8. Was the Notice of Meeting reviewed or approved by ASIC?

LM was solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting.

Prior approval of such Notices by ASIC is not required.

## 10.9. IF LM remains as responsible entity but is put into liquidation, will the clawback provisions of the Corporations Act provide advantages to members?

As advised in the Notice of Meeting, the Corporations Act has a number provisions that allow a Liquidator of a Company to "Clawback" money from Directors, related parties and creditors ("Clawback provisions"). The Clawback provisions will only apply if LM goes into Liquidation.

As previously stated, the application of these Clawback provisions to FMIF's property is untested, and not free from doubt. But, LM remains of the view, following receipt of legal advice, that the application of those provisions is at least arguable.

If LM is removed as responsible entity.

- 1. the new responsible entity will not be able to rely upon the Clawback provisions.
- 2. the Clawback provisions cannot be used by the new responsible entity to increase the recovery from FMIF property. It is not known at this stage whether any transaction involving fund property could be the subject of action under these Clawback provisions, but investigations are continuing.
- 3. the Clawback provisions will still allow for the Liquidators to recover funds for the benefit of unsecured creditors of LM (as opposed to members of the FMIF). If that occurs, members may still benefit if the funds recovered reduce the amount that LM is entitled to be paid from the FMIF Property for expenses incurred on behalf of FMIF.

#### 11.10. How should the Proxy Form be completed?

The proxy form needs to be signed and the various boxes completed. However, a signed proxy form (with no boxes completed) is still a valid proxy and constitutes an

AGAINST vote on all resolutions. If no proxy is lodged or vote cast at the meeting, this is effectively support of LM's continued management. This is because to replace LM as Responsible Entity, over 50% of units eligible to vote must vote in favour of the change.

#### 12,11. When must I vote & how do I Vote?

As the Chairman will adjourn the meeting on 30 May to 14 June there is no need to attend the meeting on 30 May.

Unless you intend to vote at the <u>adjourned</u> meeting in Brisbane on <del>Thursday 30</del> May<u>Friday 14 June</u>, you will need to lodge a Signed Proxy Form with Computershare no later than 11.00 am on <del>Tuesday 28 MayWednesday 12 June</del>.

You can post, email or fax your Proxy Form to Computershare – details are set out below.

#### Postal address for return of proxies:

Computershare Investor Services Pty Ltd GPO Box 2062 MELBOURNE VIC 8060 Australia

#### Hand delivery address:

Computershare Investor Services Pty Ltd 452 Johnston Street ABBOTSFORD VIC 3067 Australia

#### Alternatively, the documents may be faxed to:

Computershare Investor Services Pty Ltd on 03 9473 2145 (within Australia) or +61 3 9473 2145 (outside Australia)

Alternatively, the documents may be scanned and emailed to: quorum@computershare.com.au

#### 13.12. What happens if I have lost my Proxy Form?

Please contact LM on one of the below numbers to receive pre-printed replacement forms.

Australia Toll Free – 1800 062 919 New Zealand Toll Free – 0800 142 919 International +61 7 5584 4500

Or alternatively, you can send an email to mail@LMaustralia.com

## 14.13. If I have any questions who should I call?

Please contact your Financial Adviser or if you do not have a Financial Adviser please contact LM on one of the numbers listed in the previous answer.

# Document comparison by Workshare Compare on Monday, 27 May 2013 11:13:45 AM

Input:		
Document 1 ID	interwovenSite://Documents/APAC/18756754/1	
Description	#18756754v1 <apac> - DRAFT 1 to ASIC - Draft Q&amp;A for LM web page</apac>	
Document 2 ID	interwovenSite://Documents/APAC/18813729/1	
Description #18813729v1 <apac> - DRAFT 2 to ASIC - Draft Q LM web page</apac>		
Rendering set	Standard	

Legend:		
Insertion		
Deletion		
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Style change		
Format change		
Moved deletion		
Inserted cell		
Deleted cell		
Moved cell		
Split/Merged cell		
Padding cell		

Statistics:		
	Count	
Insertions	23	
Deletions	24	
Moved from	0	
Moved to	0	
Style change	0	
Format changed	0	
Total changes	47	

### **Questions & Answers**

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## 8. If the Court did appoint Trilogy as temporary responsible entity would Trilogy need to subsequently call a meeting of members?

Yes. If the Court appointed Trilogy as temporary responsible entity then, under the Corporations Act, Trilogy would need to call a meeting of members of FMIF within 90 days of its appointment to choose a new permanent responsible entity. It is likely that Trilogy would propose themselves as the new permanent responsible entity and, if so, would put a resolution to members which was essentially the same as the second resolution to be considered at the meeting called by LM for 30 May.

If Trilogy did not have the support of members to be appointed as the permanent responsible entity at this meeting, then under the Corporations Act this would trigger a requirement that Trilogy apply to the Court for an order directing it to wind up the FMIF and Trilogy would remain as the responsible entity and be required to wind up FMIF if so ordered. In that case, Trilogy would have to conduct its own review and formulate its own strategy and approach. As mentioned, this might call into question the ability to make interim capital distributions.

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rest of the term of FMIF even if they did not enjoy the necessary support of members of FMIF to be chosen as the permanent responsible entity.

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- the Clawback provisions cannot be used by the new responsible entity to increase the recovery from FMIF property. It is not known at this stage whether any transaction involving fund property could be the subject of action under these Clawback provisions, but investigations are continuing.
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#### 11. How should the Proxy Form be completed?

The proxy form needs to be signed and the various boxes completed. However, a signed proxy form (with no boxes completed) is still a valid proxy and constitutes an AGAINST vote on all resolutions. If no proxy is lodged or vote cast at the meeting, this is effectively support of LM's continued management. This is because to replace LM

as Responsible Entity, over 50% of units eligible to vote must vote in favour of the change.

#### 12. When must I vote & how do I Vote?

As the Chairman will adjourn the meeting on 30 May to 14 June there is no need to attend the meeting on 30 May.

Unless you intend to vote at the adjourned meeting in Brisbane on Friday 14 June, you will need to lodge a Signed Proxy Form with Computershare no later than 11.00 am on Wednesday 12 June.

You can post, email or fax your Proxy Form to Computershare – details are set out below.

#### Postal address for return of proxies:

Computershare Investor Services Pty Ltd GPO Box 2062 MELBOURNE VIC 8060 Australia

#### Hand delivery address:

Computershare Investor Services Pty Ltd 452 Johnston Street ABBOTSFORD VIC 3067 Australia

#### Alternatively, the documents may be faxed to:

Computershare Investor Services Pty Ltd on 03 9473 2145 (within Australia) or +61 3 9473 2145 (outside Australia)

Alternatively, the documents may be scanned and emailed to: quorum@computershare.com.au

#### 13. What happens if I have lost my Proxy Form?

Please contact LM on one of the below numbers to receive pre-printed replacement forms.

Australia Toll Free – 1800 062 919 New Zealand Toll Free – 0800 142 919 International +61 7 5584 4500

Or alternatively, you can send an email to mail@LMaustralia.com

## 14.If I have any questions who should I call?

Please contact your Financial Adviser or if you do not have a Financial Adviser please contact LM on one of the numbers listed in the previous answer.



The Directors
LM Investment Management Limited (Administrators Appointment) ACN 077 208 461
as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

Dear Sirs

#### **Meeting Request**

We hold approximately 24.38% of the issued units in the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

Pursuant to section 252B of the Corporations Act 2001 (Cth), we request that you call a meeting of the members of FMIF to consider and vote on the following extraordinary resolutions:

#### 1. Resolution 1 - Extraordinary Resolution to remove current responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

#### 2. Resolution 2 - Extraordinary Resolution to appoint new responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

For and on behalf of

The Trust Company (PTAL) Limited as custodian for LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875

John Newby

Head of Property & Infrastructure Custody

Attorney





ASIC

Australian Securities & Investments Commission

Our Ref:

13-40003

Your Ref:

2796586

28 May 2013

John Moutsopoulos Norton Rose Australia Level 18, Grosvenor Place 225 George Street Sydney NSW 2000

By email:

john.moutsopoulos@nortonrose.com

Dear Mr Moutsopoulos

Re: Meeting of the Members of the LM First Mortgage Income Fund ("FMIF")

I refer to previous correspondence (and discussions) concerning the proposed meeting of unit holders of the FMIF scheduled for 11.00 am on 30 May 2013 ("the proposed meeting"). I refer also to your email, received at 11.56 am on 27 May 2013 ("your email").

Your email confirms that your clients propose to adjourn the proposed meeting until 14 June 2013 and that they firmly consider that the proposed meeting should be convened (and not cancelled altogether) prior to the proceeding BS3383/13 returning to Court on 15 July 2013. Further, I note that the "Question and Answer Document" posted on your clients' website, earlier this afternoon ("the Q&A Document"), now indicates the proposed meeting has been adjourned until 11.00 am on 13 June 2013. In short, your clients consider that the proposed meeting provides the best mechanism for unit holders to express their views on who should manage the FMIF. If the resolutions are carried, your clients are of the view that the relief sought by Trilogy, in the proceeding, will fall away. If the resolutions are not carried, your clients intend to provide the Court with evidence of the voting outcome which they consider "will be great assistance to the Court" in determining the merits of Trilogy's claim for relief in the proceeding.

On 21 May 2013, you confirmed that the overwhelming majority of proxies received, to that point, were against the resolutions the subject of the proposed meeting. If unit holder intentions – as indicated by the votes cast thus far – remain consistent, it is most unlikely that your clients will be removed as RE of the FMIF, meaning that all claims for relief (the subject of the proceeding) will remain on foot. In any event (as indicated in my email on 24 May), the outcome of the vote at the proposed meeting – either way – will have no bearing on the competing claims for relief made by any of ASIC, Mr Shotton and the unit holders represented by Holman Webb. In these circumstances ASIC has reached the prima facie

conclusion that the proposed meeting (if it is to be convened at any time prior to the resolution of the proceeding) will be a waste of unit holder time and unit holder money.

Put simply, ASIC presently does not consider that the proposed meeting is in the interests of unit holders if the proposed meeting is to be held at any time prior to the conclusion of the proceeding BS3383/13. Moreover, in light of the issues previously raised by ASIC (concerning the proposed meeting and your clients' disclosure in respect of same), ASIC considers that the best course for your clients is to cancel the proposed meeting.

Whilst ASIC is prepared to consider all responses received from you in relation to this matter, it reserves its rights accordingly, including as to the form and content of your clients' disclosure concerning the proposed meeting.

While ASIC accepts that the Court was aware of the fact of the proposed meeting when adjourning the proceeding to 15 July, that date was selected as a consequence of timetabling difficulties faced by the Court, noti for unit holders to 'have their say'.

In order that ASIC might further consider its position, in respect of the proposed meeting, I ask that you kindly obtain instructions in respect of the following additional queries:

A. By letter dated 23 May 2012, Piper Alderman (for Trilogy) confirmed that "[Trilogy] did not and does not consent to its appointment as responsible entity via the resolutions proposed to be considered and voted on at the [proposed meeting]" ("the Trilogy withdrawal of consent"). The Trilogy withdrawal of consent has now been disclosed at Item 2 of the Q&A Document which, practically, will likely result in the receipt of more votes against the proposed resolutions. It is clearly your clients' intention to convene the proposed meeting, notwithstanding the Trilogy withdrawal of consent. In this regard, your clients have made the following statements in the Q&A Document:

"If the members did not support the appointment of Trilogy then it was expected that the results of the meeting would be helpful to the Court in deciding what to do". I

"...even if Trilogy is not voted in as responsible entity at the meeting, the voting results will help inform the Court as to how members of the FMIF want their fund to be managed."

"LM intends to provide to the Court all details of the voting so that the Court is accurately informed as to the current wishes of unitholders".<sup>3</sup>

Given the Trilogy withdrawal of consent, there would seem to be no merit whatsoever in holding the proposed meeting. Can you please confirm your clients' view as to whether – in light of the Trilogy withdrawal of consent – the purpose for which the proposed meeting was convened cannot now be achieved? Moreover, bearing in mind your clients' obligations under Chapter 5C of the Act (in particular, under s601FC), can your clients please explain how they consider that the holding of the proposed meeting remains in the interests of unit holders, beyond an evidence gathering exercise to assist your clients in defending the claims for relief brought by Mr and Mrs Bruce in the proceeding?

<sup>1</sup> At Item 1

<sup>&</sup>lt;sup>2</sup> At Item 1

<sup>&</sup>lt;sup>3</sup> At Item 3

- B. Can you please confirm what power, whether under the FMIF constitution, the Act, or otherwise, your clients consider they can adjourn the proposed meeting?
- C. The initial disclosure for the proposed meeting required, for those unit holders not attending the proposed meeting in person, that their Proxy Forms were required to be received by 11.00 am tomorrow (28 May). Item 12 of the Q&A Document now confirms that Proxy Forms can be delivered up until 11.00 am on 11 June. Given that the majority of Proxy Forms for the proposed meeting will have by now been sent and/or received, how do your clients propose to deal with those unit holders who, by virtue of matters contained in the Q&A Document, may now wish to change their vote? The Q&A Document is silent as to this issue.
- D. Can you please confirm when and how the Meeting Request, dated 26 May 2013, signed by Mr Newby as attorney for The Trust Company ("the Meeting Request"), was received by or on behalf of your client? If it was sent by email, can you please provide a copy of that email (and any attachment(s)), in its native format? Can you also please provide ASIC copies with all correspondence (in their native format) passing between your clients and the Trust Company (and/or their respective agents) concerning the Meeting Request? We note that in the recorded Notifications given to members on the LM Investment Management Ltd website, the administrators advise the members that the "see-through" voting provisions has the effect that the individual investors give a voting direction to the RE who will then vote as an "image of the underlying investors". Would you please confirm whether or not the Meeting Request was made at the direction of the underlying investors (as they are referred to). If so, would you please provide evidence of the same? If there has been no direction in relation to the Meeting Request by the underlying investors or at least underlying investors who have more than 5% of the voting rights, would you please identify how it is that you assert that the Trustee is entitled to exercise the rights of the members in this manner?
- Your clients assert that the Meeting Request complies with s252B of the Act, Ε. requiring your clients to convene the proposed meeting in accordance with s601FM of the Act. Section 252B requires an RE to convene a meeting on the request of "members with at least 5% of the votes that may be cast" [my emphasis]. As ASIC understand it, The Trust Company (apart from its status as custodian of the assets in the FMIF) is merely the custodian of the assets in the LM Currency Protected Australian Income Fund ("the Currency Feeder Fund"). As indicated in your letter to ASIC, dated 10 May 2013, the only assets in the Currency Feeder Fund are units in the FMIF. As also indicated in that letter, it is your clients' intention, as RE of the Currency Feeder Fund, to vote the Currency Feeder Fund Units at the proposed meeting "in accordance with the voting directions of the Feeder Fund Members". Is ASIC correct in assuming that any such voting directions will be given by The Trust Company, being the holder of 24.38% of the units in the FMIF? Leaving aside the issue of your clients' entitlement to do so (given the restriction in s253E of the Act) can you please confirm what direction, if any, your client holds from The Trust Company in respect of The Trust Company's 24.38% holding in the FMIF?
- F. Following on from the matters raised in E. (above), ASIC is concerned to learn more about the circumstances giving rise to your clients' receipt of the Meeting Request and as to The Trust Company's status in respect of the proposed meeting. In particular, ASIC is anxious know more about the relationship between your clients and The Trust Company, given the effect of the matters variously set out in sections 12, 13, 15, 16 and 253 of the Act, which may well operate to preclude The Trust Company (or from any person acting at its direction) from voting its interests at the proposed meeting.

Can you please provide copies of all current agreements executed by The Trust Company in respect of the FMIF and each of the Feeder Funds?

I ask that you kindly respond to me, in respect of the above matters, by 4.00 pm on 29 May 2013.

Yours sincerely,

**Hugh Copley** 

Litigation Counsel, Qld

[2796586:193] LM Schmidt, Peter

to:

hugh.copley@asic.gov.au 30/05/2013 12:09 PM

Cc:

"Moutsopoulos, John", "Kelly, Jack" **Show Details** 

History: This message has been replied to.

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Hugh,

As I presume you know, the meeting was adjourned this morning until the 13th.

If possible, we would like to have a discussion with you about your last letter before we formally respond.

Are you free this afternoon? Maybe 1.30 or 2pm?

#### Peter Schmidt | Partner

#### Norton Rose Australia

Level 21, ONE ONE ONE, 111 Eagle Street, Brisbane, Australia Tel +61 7 3414 2930 | Mob +61 417 740 738 | Fax +61 7 3414 2999 peter.schmidt@nortonrose.com

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Re: [2796586:193] LM [SEC=UNCLASSIFIED]

Hugh Copley to: Schmidt, Peter Cc: "Moutsopoulos, John", "Kelly, Jack"

Bcc: "Anne Gubbins", "David McGuinness", "Georgina Hayden"

From:

Hugh Copley/Brisbane/QLD/ASIC

To:

"Schmidt, Peter" <peter.schmidt@nortonrose.com>

Cc:

"Moutsopoulos, John" <john.moutsopoulos@nortonrose.com>, "Kelly, Jack"

<jack.kelly@nortonrose.com>

Bcc:

"Anne Gubbins" <Anne.Gubbins@asic.gov.au>, "David McGuinness"

<David.McGuinness@asic.gov.au>, "Georgina Hayden" <Georgina.Hayden@asic.gov.au>

30/05/2013 12:21 PM

Classification: Unclassified/Public Domain

Peter,

In all the circumstances, I would prefer to receive your clients' formal response to my last letter before entertaining any further discussions.

Hugh

From: "Schmidt, Peter" [peter.schmidt@nortonrose.com]

Sent: 30/05/2013 02:09 AM GMT

To: Hugh Copley

Cc: "Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>; "Kelly, Jack"

<jack.kelly@nortonrose.com>
Subject: [2796586:193] LM

\*\*\*

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#### Peter Schmidt | Partner

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RE: [2796586:193] LM [SEC=UNCLASSIFIED]

Schmidt, Peter

to:

**Hugh Copley** 

30/05/2013 02:53 PM

Cc:

"Moutsopoulos, John", "Kelly, Jack"

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Thanks Hugh.

We will send through the response as soon as we can.

#### Peter Schmidt | Partner

#### Norton Rose Australia

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From: Hugh Copley [mailto:Hugh.Copley@asic.gov.au]

Sent: Thursday, 30 May 2013 12:22 PM

To: Schmidt, Peter

Cc: Moutsopoulos, John; Kelly, Jack

Subject: Re: [2796586:193] LM [SEC=UNCLASSIFIED]

Classification: Unclassified/Public Domain

Peter.

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Hugh

From: "Schmidt, Peter" [peter.schmidt@nortonrose.com]

Sent: 30/05/2013 02:09 AM GMT

To: Hugh Copley

Cc: "Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>; "Kelly, Jack" < jack.kelly@nortonrose.com>

**Subject:** [2796586:193] LM

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Hugh,

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#### Peter Schmidt | Partner

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Re: [2796586:193] LM [SEC=UNCLASSIFIED]

Hugh Copley to: Schmidt, Peter

Cc: "Moutsopoulos, John", "Kelly, Jack" ...

Bcc: Anne Gubbins

From:

Hugh Copley/Brisbane/QLD/ASIC

To:

"Schmidt, Peter" <peter.schmidt@nortonrose.com>

Cc:

"Moutsopoulos, John" <john.moutsopoulos@nortonrose.com>, "Kelly, Jack"

30/05/2013 07:46 PM

<jack.kelly@nortonrose.com>

Bcc:

Anne Gubbins/Brisbane/QLD/ASIC

Classification: Unclassified/Public Domain

Peter,

This matter has been brought to the attention of the Commission who are anxious to learn of your clients' response to my most recent correspondence. The matters raised in that correspondence should not have taken your clients by surprise.

Last evening you indicated a response was imminent. However, nothing has been received.

Can you please indicate when a fulsome written response will be received to the matters ASIC has raised?

Sincerely,

**Hugh Copley** 

From: "Schmidt, Peter" [peter.schmidt@nortonrose.com]

**Sent:** 30/05/2013 04:53 AM GMT

To: Hugh Copley

Cc: "Moutsopoulos, John" < john.moutsopoulos@nortonrose.com>; "Kelly, Jack"

<jack.kelly@nortonrose.com>

Subject: RE: [2796586:193] LM [SEC=UNCLASSIFIED]

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Thanks Hugh.

We will send through the response as soon as we can.

Peter Schmidt | Partner

#### **Norton Rose Australia**

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From: Hugh Copley [mailto:Hugh.Copley@asic.gov.au]

**Sent:** Thursday, 30 May 2013 12:22 PM

To: Schmidt, Peter

Cc: Moutsopoulos, John; Kelly, Jack

Subject: Re: [2796586:193] LM [SEC=UNCLASSIFIED]

Classification: Unclassified/Public Domain

Peter,

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Hugh

From: "Schmidt, Peter" [peter.schmidt@nortonrose.com]

Sent: 30/05/2013 02:09 AM GMT

To: Hugh Copley

Cc: "Moutsopoulos, John" < <u>john.moutsopoulos@nortonrose.com</u>>; "Kelly, Jack" < <u>jack.kelly@nortonrose.com</u>

Subject: [2796586:193] LM

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Hugh,

As I presume you know, the meeting was adjourned this morning until the 13<sup>th</sup>.

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Are you free this afternoon? Maybe 1.30 or 2pm?

Peter Schmidt | Partner

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4 June 2013

Email: hugh.copley@asic.gov.au

Private & Confidential Attention: Hugh Copley

Australian Securities & Investments Commission 240 Queen Street GPO Box 9827 Brisbane QLD 4001

## NORTON ROSE FULBRIGHT

Norton Rose Fulbright Australia ABN 32 720 868 049 Level 18, Grosvenor Place 225 George Street SYDNEY NSW 2000 AUSTRALIA

Tel +61 2 9330 8000
Fax +61 2 9330 8111
GPO Box 3872, Sydney NSW 2001
DX 368 Sydney
nortonrosefulbright.com

Direct line +61 2 9330 8166

Email

john.moutsopoulos@nortonrosefulbright.com

Your reference:

Our reference:

13-40003

2796586

Dear Mr Copley

#### Meeting of the Members of the LM First Mortgage Income Fund ("FMIF")

We refer to your letter to us dated 28 May 2013 (Letter) and subsequent discussions and emails.

We respond to your Letter on behalf of our client, LM Investment Management Limited (Administrators Appointed) (LM) in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

As you would now be aware, the meeting of members of the FMIF scheduled for 30 May 3013 (**Original Meeting**) has now taken place, with the members present voting to adjourn the meeting until 11:00am on 13 June 2013 (**Adjourned Meeting**).

At the outset we emphasise that our client is committed to working with ASIC in a cooperative manner to ensure it addresses the concerns of ASIC and continues to act in the best interests of members of FMIF. To that end, we had hoped to discuss our responses with you prior to formally responding so that we could have taken your views into account in our formal response. However, as this was not possible we hope we can arrange to speak with you in person or on a teleconference once you have had an opportunity to consider this response, with a view to addressing any further queries held by ASIC.

As a prelude to ASIC's six queries in your Letter (paragraphs A-F), you make various comments and note ASIC's views. We respond to those comments at paragraphs 1 to 3 below, and respond to each of ASIC's six specific queries at paragraphs 4 to 9 below.

#### 1 Bearing on proceedings

- 1.1 Our client maintains its position that the outcome of the members' vote on the resolutions is highly relevant to the court's consideration of the issues that are the subject of Mr and Mrs Bruce's originating application and the applications brought by ASIC and Mr Shotton.
- 1.2 The meeting was called when the originating application was the only application before the court and followed a meeting between the Administrators, Russells and representatives from ASIC on 24 April 2013.

APAC-#18933295-v1

- 1.3 Although the limited court availability was a factor in considering whether to adjourn the trial of the proceeding, as the transcript reveals, the importance of obtaining the views of members was a primary consideration in the submissions of the parties.
- 1.4 The members are entitled to appear before the court at the hearing of the trial. However, the logistics of them doing so and the associated legal costs make such a proposition unreasonable and practically difficult. This would result in a significantly larger cost burden (and inconvenience) to members than attending the members' meeting. The members' meeting and the opportunity for members to vote on the resolutions that have been put, is a sensible and entirely appropriate process to obtain members' views. Members do not need legal representation and can vote by proxy if they do not want to attend in person.
- 1.5 The outcome of the meeting will provide evidence for the court on whether members prefer:
  - (1) LM (under FTI's control) to remain as the responsible entity of the FMIF; or
  - (2) Trilogy Funds Management Limited (Trilogy) to become the responsible entity of the FMIF.
- 1.6 Our client does not share ASIC's "prima facie conclusion that the proposed meeting (if it is to be convened at any time prior to the resolution of the proceeding) will be a waste of unit holder time and unit holder money".
- 1.7 Throughout this process and the court proceeding, our client has held the best interests of the members as the primary consideration. It has done so in circumstances where there are legitimate concerns about the motives behind the application brought by Mr and Mrs Bruce, given:
  - (1) Trilogy has (belatedly) admitted it has agreed to indemnify Mr and Mrs Bruce for their costs of the proceeding (see affidavit of Paul Wood, sworn 6 May 2013, at paragraph 9);
  - (2) the solicitors for Mr and Mrs Bruce and Trilogy are advertising about bringing a "class action" in relation to LM; and
  - our client has been contacted by numerous members and advisors expressing their opposition to Trilogy and the prospect of Trilogy becoming the responsible entity of the Fund.
- 1.8 In our email to you dated 27 May 2013, we noted that "our client is prepared to agree not to charge as a fund expense any additional (to those already incurred) out of pocket expenses currently anticipated in relation to the Meeting, including the cost of the venue, and the engagement of Computershare". As you will appreciate, FTI's fees as Administrators of LM are not payable by the FMIF, but are recovered from the assets of LM itself. Therefore, FTI's fees of attending the meeting are not an additional cost to the members.

#### 2 Cancel the proposed meeting

- 2.1 You note that "ASIC considers that the best course for your clients is to cancel the proposed meeting".
- As a technical issue, as you have identified (implicitly) at paragraph B of your Letter, neither the FMIF constitution nor the *Corporations Act 2001* (Cth) (the **Act**) expressly confers a power on LM as responsible entity of the FMIF or the chair in its own right to adjourn a meeting. That is why the Original Meeting had to take place and why it was adjourned by a resolution of members (and not by the chair).
- 2.3 Similarly, there is no express power for a responsible entity, the chair or indeed the members to "cancel" a meeting once called and we are not aware, at general law, of circumstances in which a responsible entity has the ability simply to cancel a meeting unilaterally. Conversely, it is apparent that at general law, the meeting must take place and the resolutions be put.
- 2.4 For the reasons set out in this letter, our client maintains the view that the meeting of members should proceed, albeit on an adjourned date.

2.5 In any event, the meeting cannot simply be cancelled. Our client has represented to members that the meeting would occur and that they would be given an opportunity to vote on the resolutions.

#### 3 Date of court adjournment

- 3.1 The court adjourned the hearing to dates that were available in the court calendar, but that was by no means the sole determining factor. The fact of the meeting on 30 May, prior to any hearing, was the subject of submissions by each of the parties, including ASIC. Submissions were clearly made regarding the benefit of the meeting occurring before the trial. His Honour did not reject those submissions. Ultimately, His Honour was not required to rule on whether there would be a benefit of having the meeting before the hearing. Indeed, he gave no reasons.
- 3.2 Our client is entitled to put into evidence the results of members' voting at the meeting. It is for the court, to determine the weight to be given to such evidence. Our client will submit the evidence is relevant to the court's determination.

#### 4 ASIC Query A - Trilogy consent

- 4.1 You note that Trilogy (through their solicitors Piper Alderman) have advised LM that they "did not and does not consent to its appointment as responsible entity via the resolutions proposed to be considered and voted on" at the meeting and that as a result the purpose for the proposed meeting cannot now be achieved.
- 4.2 Plainly, until Trilogy's recent announcement, it consented to appointment as responsible entity at all material times after Mr and Mrs Bruce filed the proceedings, for which Trilogy is paying. Trilogy's express consent dated 10 April 2013 was exhibited to Mr Bruce's affidavit sworn 14 April 2013.
- 4.3 There is no requirement under s601FM or s601FL that our client seek Trilogy's prior consent. Trilogy's consent is only required once Trilogy has been voted in by members to replace LM as responsible entity.
- 4.4 Section 601FL(3) clearly envisages that a vote on a replacement of a responsible entity can take place before the replacement responsible entity has given their consent.
- 4.5 If the resolutions to remove LM and appoint Trilogy are passed, Trilogy may very well change their mind, based on the fact that the whole objective of Mr and Mrs Bruce's application is to install Trilogy as responsible entity of the FMIF with the Court's assistance. Trilogy would not require the Court's assistance if the resolutions were passed.
- 4.6 It is not surprising that Trilogy has adopted the position it now has in withholding its consent to be appointed as the responsible entity, if that is the result of voting, given Trilogy wishes to be in a position to criticise the meeting if the voting result is not in its favour.
- 4.7 It is our client's view that the meeting should be held, the results of the voting should be made known and the wishes of the members will then be clear.
- 4.8 It is entirely proper and in the interests of justice and fairness, to identify the views of the members on the very issue about which two individual unit holders, holding such a minimal financial interest in the FMIF, amongst approximately 4,500 other unit holders, have brought proceedings in the Supreme Court of Queensland, funded by the entity that is seeking to be installed as the new responsible entity.

#### 5 ASIC Query B - Adjournment of meeting

5.1 As discussed in the telephone conversation between you, Peter Schmidt and myself, and as referred to above, we confirm that the FMIF constitution does not contain a power for the chair to adjourn a meeting. During that conversation, we also noted the general law principles of meetings do provide limited circumstances where a chair can adjourn a meeting. It was our view that those limited circumstances may not have applied to the Original Meeting, and as such, it was necessary for the

- chair to formally open the meeting and for the meeting itself to put forward a motion and vote on an adjournment.
- As you would be aware, members at the Original Meeting did in fact put forward and vote (unanimously) on a motion to adjourn the Original Meeting.

#### 6 ASIC Query C - Delivery of Proxy Forms

- Now that the Original Meeting has officially been adjourned, LM has provided an update to investors, dated 31 May, 2013, informing them of the adjournment and how they can submit a supplementary Proxy Form if they wish to change their vote.
- 6.2 Further, our client's investor and advisor communication dated 17 May 2013 already outlined the fact that should an investor decide to change his or her vote, then a subsequently lodged Proxy Form will over-ride any earlier lodged form.

#### 7 ASIC Query D - Meeting Request

- 7.1 The Meeting Request dated 26 April 2013 signed by Mr Newby (Meeting Request) was received by email by Ginette Muller on 26 April 2013 at 10:44am. The original document was collected by Jack Kelly of Norton Rose Australia from The Trust Company's Sydney office soon after.
- 7.2 As requested, attached to the email under cover of which this letter was sent to you are the following emails (in their native format):
  - (1) email from Ginette Muller to John Newby (copying others), dated 26 April 2013 at 9:44am, requesting execution of the Meeting Request; and
  - (2) email from John Newby to Ginette Muller (copying others), dated 26 April 2013 at 10:44am, attaching the executed Meeting Request.
- 7.3 The Notice of Meeting was not dispatched from Computershare until approximately 9:00pm on 26 April 2013.
- 7.4 We confirm that the Meeting Request was not made at the direction of an underlying investor. We do not consider that this is necessary. This is because we believe that The Trust Company is entitled to vote its full holding at the FMIF meeting albeit that to do so it needs to follow a procedure as set out in the LM Currency Protected Australian Income Fund (CPAIF) constitution (and it is likely that part of the holding will be voted on an abstain basis see paragraph 8.1 below). The procedure set out in the CPAIF constitution only applies to voting (and as a result ensures the entitlement to vote) and not to exercising a right to call a meeting.
- 7.5 To avoid any doubt, we observe that the See Through Voting mechanics contained in the CPAIF constitution are a mechanism facilitating underlying investors in the CPAIF to give directions to the CPAIF responsible entity, who will, in turn, instruct the custodian (as the registered unitholder in the FMIF) to vote in accordance with the underlying investor's instructions.

### 8 ASIC Query E - s253B and the Meeting Request

- 8.1 We confirm that once Computershare has collated the Voting Direction Forms submitted by members of the CPAIF, LM as reasonable entity of the CPAIF (in accordance with the CPAIF constitution) will instruct The Trust Company to lodge a proxy in relation to the two proposed resolutions which will split the votes in accordance with the directions (that is by showing the aggregate or percentage "For" directed votes, the aggregate or percentage "Against" directed votes and the balance will be shown as abstaining). We understand that proxies completed in this manner are commonly used by companies which hold units on behalf of a number of entities and are required to vote in accordance with the directions of those underlying entities.
- 8.2 We refer you to our clarification of the See Through Voting mechanics at paragraph 7.5 above.

- 8.3 The question about the applicability of s253E to the voting of The Trust Company's 24.38% holding in the FMIF is a separate issue and at this stage is academic, given the vote has not yet occurred. In respect of the Adjourned Meeting, our client has already stated (in the Questions & Answers document) that our client considers the provisions to be valid and effective, however, "in case there are parties with alternative views, LM will ensure that when the votes are counted they are recorded to separately show the feeder fund votes."
- 9 ASIC Query F LM's relationship with The Trust Company
- 9.1 We refer you to our clarification of the See Through Voting mechanics at paragraph 7.5 above.
- 9.2 As a final matter, in relation to the relationship between The Trust Company and our client, it is quite simply a typical custodian relationship under which a responsible entity has appointed a professional custodian to be the legal holder of assets of a scheme of which it is the responsible entity.

Please let us know if you would like to discuss.

1 1 1/1/1

Yours faithfull

John Moutsopoulos

Partner

Norton Rose Fulbright Australia

The Directors

LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

Dear Sirs

#### Meeting Request

We hold approximately 24.38% of the issued units in the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

Pursuant to section 252B of the Corporations Act 2001 (Cth), we request that you call a meeting of the members of FMIF to consider and vote on the following extraordinary resolutions:

#### 1. Resolution 1 – Extraordinary Resolution to remove current responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

#### 2. Resolution 2 - Extraordinary Resolution to appoint new responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

For and on behalf of

The Trust Company (PTAL) Limited as custodian for LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875

The Directors

LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

**Dear Sirs** 

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For and on behalf of

LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875



The Directors
LM Investment Management Limited (Administrators Appointment) ACN 077 208 461
as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

Dear Sirs

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For and on behalf of

The Trust Company (PTAL) Limited as custodian for LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875

John Newby

Head of Property & Infrastructure Custody

Attorney





#### ASIC

Australian Securities & Investments Commission

Our Ref:

13-4003

Your Ref:

2796586

6 June 2013

John Moutsopoulos Norton Rose Fulbright Level 18, Grosvenor Place 225 George Street Sydney NSW 2000

By email:

john.moutsopoulos@nortonrose.com

Dear Mr Moutsopoulos

Re: Meeting of the Members of the LM First Mortgage Fund ("FMIF")

I refer to your letter of 4 June 2013 (received by email at 6.48 pm) ("your 4 June letter"). Your 4 June letter was written in response to the matters raised in ASIC's letter of 28 May 2013 ("ASIC's 28 May letter"), to which ASIC requested a response by the close of business on 29 May. ASIC requested a response to its 28 May letter within a short time-frame, given the proximity of the proposed meeting on 30 May and given that the matters in respect of which a response was sought would have been readily at hand (either for you or your clients). It is indeed unfortunate that your client took over 7 days to instruct you to respond.

Against this background, ASIC views the matters set out in the 4<sup>th</sup> paragraph of your 4 June letter with a deal of scepticism. I am instructed that future dealings between ASIC and your clients, at least insofar as the proposed meeting is concerned, are to proceed in writing.

#### The Meeting Request

Paragraph 7.4 of your letter dated 4 June 2013 contained the following statement about the Meeting Request:

"We confirm that the Meeting Request was not made at the direction of an underlying investor. We do not consider that this is necessary. This is because we believe that The Trust Company is entitled to vote its full holding at the FMIF meeting albeit that to do so it needs to follow a procedure as set out in the LM Currency Protected Australian Income Fund (CPAIF) constitution..... The procedure set out in the CPAIF constitution only applies to voting (and as a result ensures the entitlement to vote) and not to exercising a right to call a meeting." (Emphasis added).

It is now evident that, not only was the Meeting Request "not made at the direction of an underlying investor", it was made at the direction of your clients, Ms Muller and Mr Park, purportedly in their capacity as administrators of the responsible entity of the Currency Fund.<sup>1</sup>

This is a matter of grave concern to ASIC. The following matters bear scrutiny:

- Your clients clearly have an interest in the calling of the proposed meeting. As set out
  in paragraph 1 of your 4 June letter, your clients' claim that the outcome of the
  meeting "is highly relevant" to the Court's consideration of an application for relief
  that would effectively see Ms Muller and Mr Park, in their capacity as administrators
  of LM Investment Management Ltd, lose the opportunity of acting in the winding up
  of the FMIF a process likely to generate significant professional fees for the persons
  or entity so involved.
- 2. LM Investment Management Ltd clearly also has an interest in the calling of the meeting as the responsible entity of the FMIF. This much is borne out on a review of the Notice of Meeting.
- 3. The assertion that "The Trust Company is entitled to vote its full holding at the FMIF meeting" was, as at the date of your 4 June letter incorrect, unless valid "Voting Directions" (within the meaning of the relevant constitution) in respect of the full holdings of each of the feeder funds had been received by LM Investment Management Ltd at the time of transmission of your 4 June letter. It is erroneous to suggest that "The Trust Company is entitled to vote its full holding" so long as it follows "a procedure" set out in the relevant constitution. That would tend to defeat the stated purpose of the "See Through Voting" provisions, which are to "make available to the Members... certain of the RE's rights as a member of the Underlying Fund" (emphasis added). Those provisions are not available to your clients to vote on the proposed resolution(s), as a means of avoiding the restrictions set out in \$253E of the Act.
- 4. Section 252B of the Act refers to "members with at least 5% of *the votes that may be cast* on the resolution" (emphasis added). By operation of s 253E, the votes of The Trust Company do not satisfy that description. It follows that the notice of meeting is void.
- 5. Aside from the technical arguments you have put forward, erroneously in ASIC's view, as to your clients' entitlement to orchestrate the requisition of the proposed meeting, ASIC is most concerned that your clients would seek to do so in circumstances in which there is no evidence that even a single underlying feeder fund investor was consulted.

The unavoidable inference that must be drawn is that Ms Muller and Mr Park coordinated the calling of the proposed meeting in order to achieve a forensic advantage in the Supreme Court proceeding and without any reference to underlying feeder fund investors.

It is ASIC's position that the notice of meeting is void, having been issued purportedly pursuant to s 252B of the Act in circumstances in which that provision was not invoked.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> ASIC notes that clause 4.1 of the Custody agreement between LM Investment Management Ltd and The Trust Company obliges The Trust Company to act on LM Investment Management Ltd's instructions.

<sup>&</sup>lt;sup>2</sup> For the reasons set out in previous correspondence, the calling of the proposed meeting also does not accord with the requirements of s601FL of the Act. It is immaterial that the proposed resolution(s) might accord with a meeting convened in accordance with that provision. What is clear is that the responsible entity of the FMIF

Contrary to the recent assertion, in your 4 June letter, that there is no power for your clients to cancel the meeting, the correct position is that there is no power to hold the meeting. This lack of power is not an irregularity capable of correction, after the event, in accordance with s1322 of the Act.

For the avoidance of any doubt, ASIC reserves all its rights in the event that your clients proceed to convene the proposed meeting and put the proposed resolutions to a vote of the unit holders of the FMIF.

Yours sincerely,

**Hugh Copley** 

Litigation Counsel, Qld

9 June 2013

Email: hugh.copley@asic.gov.au

#### **Private & Confidential**

Hugh Copley Litigation Counsel, QLD Australian Securities & Investments Commission 240 Queen Street GPO Box 9827 Brisbane QLD 4001

# NORTON ROSE FULBRIGHT

Norton Rose Fulbright Australia ABN 32 720 868 049 Level 18, Grosvenor Place 225 George Street SYDNEY NSW 2000 AUSTRALIA

Tel +61 2 9330 8000 Fax +61 2 9330 8111 GPO Box 3872, Sydney NSW 2001 DX 368 Sydney nortonrosefulbright.com

#### **Direct line**

+61 2 9330 8166

#### Email

john.moutsopoulos@nortonrosefulbright.com

Your reference:

Our reference:

13-40003

2796586

Dear Mr Copley

## Meeting of the Members of the LM First Mortgage Income Fund ("FMIF")

We refer to your letter to us dated 6 June 2013 (Letter).

We respond to your Letter on behalf of our client, LM Investment Management Limited (Administrators Appointed) (LM) in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

#### 1 Your allegations about the conduct of the Administrators

- 1.1 Your Letter makes a number of serious allegations about the conduct of the Ms Muller and Mr Park as Administrators.
- 1.2 We do not consider that such allegations are in any way justified, or are appropriate, particularly in the context that our clients and ASIC are currently opposing parties in ongoing litigation.
- 1.3 Needless to say, our clients, and this firm, do not agree with your assertions.
- 1.4 Given that your assertions of impropriety are without foundation, we are instructed to ask you to withdraw them.

## 2 Delay in response

- 2.1 Your Letter suggests that the delay in providing our client's response to your letter dated 28 May 2013 was a result of our client and this firm not acting in a cooperative manner as our letter to you dated 4 June 2013 had stated.
- 2.2 In light of the fact that all communications, or attempts to communicate with you in respect to the meeting have been through this firm, we find your comments very disappointing, particularly your comment that future dealings with ASIC and our client, insofar as the proposed meeting is concerned, need to be in writing.
- 2.3 At all times, our client, and this firm, have been as open and transparent with ASIC as possible given the ongoing situation and ASIC's regulatory involvement.

APAC-#18991643-v1

Norton Rose Fulbright Australia is a law firm as defined in the Legal Profession Acts of the Australian states and territory in which it practises.

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Fulbright & Jaworski LLP, each of which is a separate legal entity, are members of Norton Rose Fulbright Verein, a Swiss Verein. Details of each entity, with certain regulatory
information, are at nortonrosefulbright com. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

#### 2.4 To this end we note that:

- Your Letter to us dated 28 May 2013 was received at 3.50pm and sought a response by 4:00pm the following day.
- (2) That Letter sought a response on a number of issues, some involving complex legal issues upon which our client was entitled to receive legal advice, and therefore were not just about matters that would have been "readily at hand" as noted in your Letter.
- (3) My partner, Peter Schmidt, and myself, called you around 4:00pm on 29 May 2013 (being the time to respond as requested in your Letter) and apologised, advising that we were not in a position to respond by the 4:00pm deadline, and then discussed with you a number of issues in respect to the meeting that was to be held the following day. After that discussion, we felt that we had allayed any of ASIC's immediate concerns about what might transpire at the meeting, given the very clear message we gave you in the call that our client's intention and expectation was that the meeting would be adjourned.
- (4) Shortly after the meeting on 30 May, 2013 had concluded, Peter Schmidt sent you an email at 12.08pm asking whether you had time to discuss your letter dated 28 May 2013 before we formalised a response with our client. As explained in our letter to you dated 4 June 2013, the purpose of that discussion was to try and better understand ASIC's concerns so that our client could address them. We strongly believed that an open two way conversation was more likely to achieve that result than a more formal written exchange of views.
- (5) You responded at 12.22pm saying that "In all the circumstances, I would prefer to receive your clients formal response to my last letter before entertaining any further discussions".
- (6) Our client's formal response to your letter, being of some 5 pages and covering a number of factual and legal issues was in the end not sent to you until 4 July 2013. We can assure you that all reasonable efforts were made by our client and this firm to respond to your letter as soon as possible
- 2.5 With respect, we do not see how ASIC could reasonably form the view that the above conduct by our client, and this firm, justifies "a deal of scepticism" about the assertion that our client is committed to working with ASIC in a cooperative manner.

## 3 Meeting Request

3.1 In regards to the Meeting Request received by our client, you state:

"It is now evident that, not only was the Meeting Request "not made at the direction of an underlying investor", it was made at the direction of your clients, Ms Muller and Mr Park, purportedly in their capacity as administrators of the responsible entity of the Currency Fund. [footnote 1]"

Footnote 1 being: "ASIC notes that clause 4.1 of the Custody agreement between LM Investment Management Ltd and The Trust Company obliges the Trust Company to act on LM Investment Management Ltd's instructions".

3.2 While the premise to your assertion is correct, that is, Ms Muller and Mr Park (as administrators of the responsible entity of the LM Currency Protected Australian Income Fund (**CPAIF**)) did in fact provide an instruction to The Trust Company, and that The Trust Company did in fact act upon that instruction, your implicit assertion that this was erroneous or for an improper purpose is strongly denied.

#### 3.3 We note that:

(1) Ms Muller and Mr Park, as administrators for the responsible entity of CPAIF, were entitled to instruct The Trust Company to request a meeting, and in light of s437C of the *Corporations Act 2001* (Cth) (the **Act**), are the only persons who can currently do so on behalf of LM as responsible entity of the CPAIF; and

- The Trust Company, as noted in your Footnote 1, is under an obligation (as is any professional custodian in such circumstances) to act as instructed and in accordance with the Custody Agreement This custody relationship is consistent with the widespread industry practice where a responsible entity appoints a professional licensed custodian on the terms of a custody agreement like the Custody Agreement entered into by LM as responsible entity of CPAIF and The Trust Company.
- 3.4 If Ms Muller and Mr Park, as administrators for the responsible entity of CPAIF, were not entitled to request such a meeting to take place, it would leave the CPAIF unable to exercise its rights as a unitholder the FMIF.
- 3.5 In any event, even in the absence of the Meeting Request having been received by our client as responsible entity of FMIF, our client's position is that the meeting has been properly convened as stated in our previous correspondence to you
- 3.6 Section 601FL of Act does not require the responsible entity to publish in the meeting materials an explanation of their reasons for wanting to retire. In any event, it is self-evident from the meeting material that our clients wished, and continues to wish, to afford the members the opportunity to consider Trilogy's proposal to take over the management of the FMIF in a meeting; and that, at the same time, our clients consider that the appointment of Trilogy as responsible entity is not in their interests. In short, the actual resolutions the subject of the notice of meeting are consistent with the broad scope and evident purpose of s601FL.
- 3.7 At footnote 2 of your Letter, you assert that the calling of the meeting does not accord with the requirements of s601FL of the Act. We do not agree with your unnecessarily narrow interpretation of s601FL, particularly in light of s601FJ(2) which requires a change of responsible entity to be in accordance with either s601FL or s601FM.
- 3.8 The fundamental point is that, as noted in our previous correspondence to you, our client at all times believed, and continues to believe, the calling of the meeting to be in the best interests of members of the FMIF. That is, and continues to be, the purpose of our client exercising its discretion in calling the meeting.
- 3.9 Further, as CPAIF is a member of the FMIF, our client, in their capacity as administrators of the responsible entity of CPAIF considered that it was in the best interest of members of the CPAIF that the meeting request be provided.

### 4 Your paragraphs 1 and 2

- 4.1 We refer to our comments above in respect to your assertions in respect to the conduct of the Administrators.
- 4.2 Further, our clients restate their position that convening the meeting was, and continues to be in the best interests of members of the FMIF.
- 4.3 Our client maintains its position that the outcome of the member's vote on the resolution is highly relevant to the court's consideration of the issues that are the subject of the various applications.
- 4.4 Indeed if the resolutions are passed it would seemingly dispose of the Bruce application (which was the only application on foot at the time the meeting was called) and perhaps the other applications. If the resolutions do not pass the court may still have regard to the voting result. Presumably the Court will make its determination of what it considers to be the best interest of investors.
- 4.5 We confess to a degree of surprise that ASIC could or would object to a trustee consulting its beneficiaries by convening a meeting.

## 5 Your paragraph 3

5.1 The See Through Voting regime, as set out in the CPAIF constitution, only applies to voting on "See Through Voting Resolutions" as defined in the CPAIF constitution, and does not apply to a member

requesting the responsible entity of FMIF to call a meeting under s252B of the Act. That decision is a discretion of the responsible entity of the CPAIF to exercise.

Further, as noted in our letter to you dated 4 June 2013, our client as responsible entity of the CPAIF is required to instruct The Trust Company (as custodian) to lodge a proxy in relation to the two proposed resolutions at the meeting which will be split in accordance with the directions (ie "For", "Against" and "Abstain"). An "Abstain" vote is clearly a vote and thus it follows that all units held by CPAIF will be voted in any See Through Voting Resolution.

## 6 Your paragraph 4

6.1 Our position on s253E was stated in our letter to you dated 4 June 2013. That position has not changed.

#### 7 Your paragraph 5

- 7.1 LM as responsible entity of the CPAIF has an obligation to act in the best interests of all members of the CPAIF. Our client maintains that it has acted, and continues to act, in the best interests of all members of the CPAIF by requisitioning the meeting of the FMIF.
- 7.2 It is common in the Australian fund industry for fund managers to operate a feeder fund/underlying fund structure with a common responsible entity at both layers of the structure.
- 7.3 You assert that our client has "orchestrated the requisition of the proposed meeting". As explained above, in fact what occurred was that a responsible entity of a feeder fund (through administrators of the responsible entity of that feeder fund) have exercised a discretion to give a meeting request to the responsible entity at the underlying fund level, which happens to be the same entity acting in a different capacity. We see nothing unusual with that structure and request..
- 7.4 We note that it would be unusual for a responsible entity of a feeder fund in such circumstances to consult with feeder fund investors.

## 8 Alleged Forensic advantage

- 8.1 Your assertion that there is an "unavoidable inference that must be drawn that Ms Muller and Mr Park coordinated the calling of the proposed meeting in order to achieve a forensic advantage in the Supreme Court proceedings without any reference to underlying feeder fund investors" is denied and clearly wrong.
- 8.2 We respectfully suggest that consulting members about who should control their assets is right and proper.
- 9 Our client's response to your suggestion that there is no power to hold the meeting
- 9.1 For the reasons set out above, our client rejects your assertion there is no power to hold the meeting and maintains its position that the meeting has been properly called.

We remain open to having a meeting with you to discuss the above.

Yours faithfully

John Moutsopoulos

Partner

Norton Rose Fulbright Australia

Peter Schmidt

Partner

Norton Rose Fulbright Australia



Commonwealth Bank Building 240 Queen Street, Brisbane GPO Box 9827 Brisbane QLD 4001 DX 322 Brisbane

Telephone: (07) 3867 4700 Facsimile: (07) 3867 4725 ASIC website: www.asic.gov.au

29 May 2013

## By Email

The Trust Company (PTAL) Limited Level 15, 20 Bond Street Sydney NSW 2001

Attention: Mr John Newby

Dear Mr Newby,

Re: LM Investment Management Limited (Administrators Appointed)
ACN 077208461 ("LMIM") as Responsible Entity for the LM First
Mortgage Income Fund ARSN 089343288 ("FMIF")
Meeting Request dated 26 April 2013
Notice of Request for Assistance under s912E of the Corporations Act 2001

Trust Company (PTAL) Limited ("Trust Company") is the holder of Australian Financial Services Licence Number 235128 ("the Licence"). Pursuant to paragraph 1(a)(ii) of the Licence, Trust Company is authorised to deal in financial products by applying for, acquiring, varying or disposing of interests in managed investment schemes on behalf of another person, while pursuant to 1(b) of the Licence, Trust Company is authorised to provide custodial or depository services, namely to operate custodial or depository services, other than investor directed portfolio services to wholesale clients (together, "the Services"). Paragraph 15 of the Licence sets out Trust Company's obligations in respect of arrangements with third parties concerning the custodial or depository service aspect of the Services.

I note that Trust Company is both the custodian of the assets of the FMIF and the LM Currency Protected Australian Income Fund ARSN 110247875 ("the Currency Fund"). I further note that the assets of the Currency Fund are approximately 121,000,000 (or 24.38%) of the units issued in the FMIF.

I refer to the Meeting Request, dated 26 April 2013, signed by John Newby as Attorney for Trust Company, in its capacity as custodian for LMIM as Responsible Entity for the Currency Fund, in respect of the FMIF ("the FMIF Meeting Request"). A copy of the FMIF Meeting Request is attached.

I enclose a Notice of Request for Assistance ("the Notice") under s912E of the Corporations Act 2001 ("the Act").

You should read the Notice carefully. You will see that it requires Trust Company to give to the Australian Securities and Investments Commission (ASIC) a written statement containing certain information and to provide copies of certain documents by 12.00pm Friday, 31 May 2013. Details are set out in the Notice.

Trust Company may comply with the Notice by emailing the written statement and copies of the requested documents to hugh.copley@asic.gov.au or by posting it to GPO Box 9827, Brisbane QLD 4001. Please address the written statement to the attention of Hugh Copley.

Trust Company is entitled to consult with its legal adviser in relation to its obligations under the Notice.

I draw your attention to the note enclosed with the Notice which contains information relevant to the Notice, including some definitions of expressions which may be used - and some of the offence and penalty provisions relating to non-compliance with the Notice. It also deals with the application of legal professional privilege to the Notice.

The Notice should not be construed as an indication by ASIC that a contravention of the law has occurred, nor should it be considered a reflection upon any person or entity.

If you have any questions about the Notice, please contact me on (07) 3867 4892.

Yours sincerely

Litigation Counsel, Qld





Australian Securities & Investments Commission

# AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION SUBSECTION 912E OF THE CORPORATIONS ACT 2001 (CTH)

## NOTICE OF REQUEST FOR ASSISTANCE

To: The Trust Company (PTAL) Limited

ACN 008 412 913 Level 15, 20 Bond Street Sydney NSW 2001

AFSL 235128

You are notified under s912E of the Corporations Act 2001 (the Act) that you are directed to give:

to: Australian Securities & Investments Commission

at: Level 20 240 Queen Street Brisbane QLD 4001

by: 12.00 pm on: 31 May 2013

a written statement and the provision of documents relevant to whether Trust Company and its representatives are complying with the financial services laws, and in relation to the performance of ASIC's other functions, specified in the Schedule to this Notice.

Date:

29 May 2013

Signed:

**Hugh Copley** 

a delegate of the Australian Securities & Investments Commission.

#### **SCHEDULE**

- 1. Please provide a copy of any written agreement(s) in accordance with which Trust Company was purported to be acting when it issued the FMIF Meeting Request.
- 2. Please confirm on what date Mr Newby executed the FMIF Meeting Request, as attorney for Trust Company.
- 3. Please confirm when and how the FMIF Meeting Request was communicated to LMIM. If the FMIF Meeting Request was transmitted by facsimile, please provide a copy of the facsimile transmission report in respect of same. If the FMIF Meeting Request was transmitted by email please provide a copy of that email (and any attachment(s)), in native format.
- 4. At whose request/direction/instruction (hereinafter, "the instruction") instigated the making of the FMIF Meeting Request issued by Trust Company?
- 5. Please provide a copy of any written agreement(s) in accordance with which the instruction was purported to be made or, in accordance with which Trust Company (or its representatives) considered the instruction was being made?
- 6. When and in what form was the instruction received by Trust Company?
- 7. If the instruction was received in writing, please provide a copy of same. If the instruction was received via email, please provide a copy of that email and its attachment(s), in native format.
- 8. If the instruction was made orally, please confirm the date and time the instruction was received, as well as the identity of the person(s) issuing the instruction and who they purported to represent when issuing the instruction.
- 9. Does Trust Company hold instructions (via proxy or otherwise) to cast any votes in respect of one or more of the approximately 121,000,000 units it holds the FMIF, at the meeting of unit holders of the FMIF currently scheduled for 13 June 2013, at 11.00 am ("the proposed meeting")? Please provide a copy of each such instruction for the proposed meeting to the extent that such instruction(s) is(are) in written form.

# INFORMATION ABOUT THE NOTICE OF REQUEST FOR ASSISTANCE

## **Relevant Statutory Provisions**

[All section references are to the Corporations Act 2001 ("the Act") unless otherwise indicated]

Subsection 912E(1) allows ASIC to request assistance in relation to whether the Licensee and its representatives are complying with the financial services laws and in relation to the performance of ASIC's other functions.

Subsection 912E(2) allows ASIC to request the Licensee's books or for the Licensee to give ASIC other information.

Failure to respond to the Notice, providing material that a person knows is false or misleading or obstructing or hindering ASIC or any other person in the performance or exercise of a function or a power, could give rise to an offence under the Act; see s.1311(1), s1308(2) and s1310 of the Act.

## Legal Professional Privilege

For the purposes of your obligations arising from the Notice, legal professional privilege is a reasonable excuse for not providing information pursuant to the Notice. Accordingly, you are not obliged to provide under the Notice information that is covered by a valid claim of legal professional privilege.

A person who claims legal professional privilege must establish that the privilege exists. If you claim that any information that you are required to provide is subject to legal professional privilege, you must provide ASIC with sufficient information to allow its officers to make an informed decision about whether the claim for privilege can be supported.

For that purpose, if the information over which you claim legal professional privilege was or is currently, comprised in the whole or part of a document, you should prepare a list, in writing, which specifies for each document or part thereof you claim is privileged:

- (a) the date, type, author, recipient and subject matter of that document or part thereof, and whether it is an original or copy;
- (b) if the original or a copy of the document or part thereof has been provided to any person who is not the privilege holder or a legal representative of the privilege holder, the identity of the persons to whom the original or a copy of the document or part thereof has been provided and the basis on which it was provided to those persons;
- (c) the grounds on which legal professional privilege is claimed;

(d) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the information was brought into existence.

You will be requested to specify whether an in-house legal counsel was involved in the preparation of that document or part thereof and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the preparation of that document or part thereof; and

(e) the identity of the person in whose name the claim of legal professional privilege is made.

If the information over which you claim legal professional privilege was the subject of an oral communication, you should prepare a list, in writing, which specifies for each oral communication you claim is privileged:

- (i) the grounds on which legal professional privilege is claimed;
- (ii) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the communication was made.

You will be requested to specify whether an in-house legal counsel was involved in the communication and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the communication;

- (iii) the identity of the person in whose name the claim of legal professional privilege is made;
- (iv) the date and time of, and parties to, the communication; and
- (v) the subject matter of, location at, and means by which, the communication took place.

Unless ASIC otherwise agrees, you should provide the list(s) relating to your privilege claims to ASIC on or before the due date of the Notice.

#### **Definitions**

"financial service" has the meaning given by Division 4 of Part 7.1: s761A. A person provides a financial service if they:

- (a) provide financial product advice (see section 766B); or
- (b) deal in a financial product (see section 766C); or
- (c) make a market for a financial product (see section 766D); or
- (d) operate a registered scheme; or
- (e) provide a custodial or depository service (see section 766E); or
- (f) engage in conduct of a kind prescribed by regulations made for the purpose of this paragraph.

## [s766A(1)]

"financial services business" means a business providing financial services: s761A.

Note: The meaning of "carry on a financial services business" is affected by \$761C of the Act.

"financial services Licensee" means a person who holds an Australian financial services licence: s761A.

"financial services law" means:

- (a) a provision of Chapter 7 or of Chapter 5C, 6, 6A, 6B, 6C or 6D of the Corporations Act; or
- (b) a provision of Chapter 9 of the Corporations Act as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 of the ASIC Act; or
- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services.

## [s761A]

## **Offences**

A person who, in a document required by or for the purposes of the Corporations Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence: s1308(2).

A person who, in a document required by or for the purposes of the Corporations Act or lodged:

- (a) makes or authorises the making of a statement that is false or misleading in a material particular; or
- (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence: s1308(4).

A person must not, without lawful excuse, obstruct or hinder ASIC, or any other person, in the performance or exercise of a function or power under the Corporations Act: s1310.

A person who does an act or thing that a person is forbidden to do by or under a provision of the Act, fails to do an act or thing that the person is required or directed to do by, or under a provision of, the Act, or otherwise contravenes a provision of the Act, is guilty of an offence: s1311.



30 May 2013

Hugh Copley Litigation Counsel Qld Australian Securities & Investments Commission Level 20, 240 Queen Street Brisbane QLD 4000

By email:

Hugh.Copley@asic.gov.au

Dear Mr Copley

LM Investment Management Limited (Administrators Appointed)
ACN 077208461 ("LMIM") as Responsible Entity for the LM First Mortgage
Income Fund ARSN 089343288 ("FMIF")
Meeting Request dated 26 April 2013
Your Ref: 13-40003

We refer to your Notice of Request for Assistance under section 912E of the Corporations Act 2001 dated 29 May 2013 and provide the following information:

- 1. Request received from the appointed Administrator for LMIM as Responsible Entity of the LM Currency Protected Australian Income Fund.
- 2. Request in writing dated 26 April 2013 signed by the Administrator of LMIM, Ginette Muller of FTI Consulting.
- 3. Request letter received as an attachment to email received 26 April 2013. Copies of email and attachment are enclosed.
- 4. Request in point 3 received following earlier phone call from Ginette Muller advising request would be sent through.
- LMIM appointed The Trust Company (PTAL) Limited as custodian of the LM Currency Protected Australian Income Fund pursuant to Deed dated 30 November 2011, copy attached, and the subsequent appointment of the Administrator of the Responsible Entity and its assumption of responsibility for that role.
- 6. Request executed by me on 26 April 2013.
- Copy of the Request was transmitted by email on 26 April 2013, recipients noted on the copy enclosed. Original request was collected by Norton Rose, Solicitors on 26 April 2013.
- 8. I am not aware of The Trust Company (PTAL) Limited having received any instructions to cast any vote in respect of units held in the FMIF at the proposed meeting. However, we received a request at 3.54pm on 29 May from the Administrator to execute appointments of a Corporate Representative, in



respect of the units held by LM Currency Protected Australian Income Fund & one other scheme, to a meeting of FMIF on 30 May. We were unable to execute the requests due to defects with both the request form and the appointment form. We subsequently received a replacement request after business hours which given time of receipt was not executed within the requested timeframe.

Yours faithfully

The Trust Company (PTAL) Limited

John Newby

Head of Property & Infrastructure Custody

## **John NEWBY**

From:

Muller, Ginette [Ginette.Muller@fticonsulting.com]

Sent:

Friday, 26 April 2013 9:44 AM

To:

John NEWBY

Cc:

Kelly, Jack (jack.kelly@nortonrose.com); Moutsopoulos, John

(john.moutsopoulos@nortonrose.com); Francene Mulder (fmulder@lmaustralia.com)

(fmulder@lmaustralia.com); Bender, Damian; Daniel KIM

Subject:

LM & CPAIF

Attachments:

Letter from Custodian - Section 252B Request(18433526\_1) (2).doc; Letter from LM (AA)

- Section 252B Request(18433379\_1) (2).doc

#### Dear John

As you are aware, John Park and myself have been appointed voluntary administrators of LM Investment Management Limited (Administrators Appointed) (LM), the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (CPAIF).

Please see **attached** a letter we request that The Trust Company (PTAL) Limited, execute as custodian of the CPAIF.

As this is a matter of urgency, we would appreciate if this letter can be executed by 1pm today and made available for collection at your Sydney office. Jack Kelly of Norton Rose Australia will attend to collecting the executed copy as soon as it is made available.

Please contact me directly or John Moutsopoulos (Partner - Norton Rose Australia) on 02 9330 8166 if you have any queries.

## Kind regards

#### **Ginette Muller**

Senior Managing Director Corporate Finance/Restructuring

#### F T I Consulting

22 Market Street Brisbane QLD 4000 Australia

+61.7.3225.4903 direct

+61.(0) 419 682 113

+61.7.3225.4999 fax

Ginette.Muller@fticonsulting.com

We've joined FTI Consulting - click here to learn more

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26 April 2013

Our ref: GDM:8974:L1 Trust Co

Mr John Newby
Head of Property and Infrastructure Custody Services
The Trust Company
Level 15, 20 Bond Street
SYDNEY NSW 2000

Re: LM and CPAIF

Dear John

As you are aware, John Park and myself have been appointed voluntary adminsitrators of LM Investment Management Limited (Administrators Appointed) (LM), THE RESPONSIBLE ENTITY OF THE Im Currency Protected Australian Income Fund ARSN 110 247 875 (CPAIF).

Please see attached a letter we request that the Trust Company (PTAL) Limited, execute as custodian of the CPAIF.

As this is a matter of urgency, we would appreciate if this letter can be executed by 1.00pm today, and made available for collection at your Sydney office. Jack Kelly of Norton Rose Australia will attend to collection of the executed copy as soon as it is made available.

Please contact me directly, or John Moutsopoulos (Partner – Norton Rose Australia on 02-9330 8166) if you have any queries.

Yours sincerely

**FTI Consulting** 

**Ginette Muller** 

Senior Managing Director

FTI Consulting (Australia) Pty Limited
ABN 49 160 397 811 | ACN 160 397 811
22 Market Street | Brisbane QLD 4000 | Australia
Postal Address | GPO Box 3127 | Brisbane QLD 4001 | Australia
+61.(0)7.3225.4900 main | +61.(0)7.3225.4999 fax | fticonsulting-asia.com

Liability limited by a scheme approved under Professional Standards Legislation

26 April 2013

The Directors

LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

Dear Sirs

## **Meeting Request**

We hold approximately 24.38% of the issued units in the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

Pursuant to section 252B of the Corporations Act 2001 (Cth), we request that you call a meeting of the members of FMIF to consider and vote on the following extraordinary resolutions:

## 1. Resolution 1 – Extraordinary Resolution to remove current responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

## 2. Resolution 2 - Extraordinary Resolution to appoint new responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

For and on behalf of LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875

26 April 2013

The Directors

LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income ARSN 089 343 288

Dear Sirs

## Meeting Request

We hold approximately 24.38% of the issued units in the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).

Pursuant to section 252B of the Corporations Act 2001 (Cth), we request that you call a meeting of the members of FMIF to consider and vote on the following extraordinary resolutions:

## 1. Resolution 1 - Extraordinary Resolution to remove current responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

## 2. Resolution 2 – Extraordinary Resolution to appoint new responsible entity

To consider and, if thought fit, pass the following resolution as an extraordinary resolution:

"That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

For and on behalf of

The Trust Company (PTAL) Limited as custodian for LM Investment Management Limited (Administrators Appointment) ACN 077 208 461 as responsible entity for the LM Currency Protected Australian Income Fund ARSN 110 247 875

## John NEWBY

From:

John NEWBY

Sent:

Friday, 26 April 2013 10:44 AM

To:

'Muller, Ginette'

Cc:

Kelly, Jack (jack.kelly@nortonrose.com); Moutsopoulos, John

(john.moutsopoulos@nortonrose.com); Francene Mulder (fmulder@lmaustralia.com)

(fmulder@Imaustralia.com); Bender, Damian; Daniel KIM

Subject:

RE: LM & CPAIF

Attachments:

hq1703@thetrustcompany.com.au\_20130426\_104132.pdf

#### **Hi Ginette**

Attached is a copy of the executed letter.

Jack can you please call me to arrange collection of the original.

#### Regards

#### **JOHN NEWBY**

Head of Property & Infrastructure Custody Services Corporate Services

#### THE TRUST COMPANY

Level 15, 20 Bond Street Sydney, NSW 2000, Australia

**P**: (02) 8295 8927 **F**: (02) 8295 8656 **M**: 0417 480 510

E: jnewby@thetrustcompany.com.au www.thetrustcompany.com.au





2011 AND 2012 FINALIST (LARGE SERVICES AWARD CATEGORY)

From: Muller, Ginette [mailto:Ginette.Muller@fticonsulting.com]

Sent: Friday, 26 April 2013 9:44 AM

To: John NEWBY

Cc: Kelly, Jack (jack.kelly@nortonrose.com); Moutsopoulos, John (john.moutsopoulos@nortonrose.com); Francene

Mulder (fmulder@lmaustralia.com) (fmulder@lmaustralia.com); Bender, Damian; Daniel KIM

Subject: LM & CPAIF

Dear John

As you are aware, John Park and myself have been appointed voluntary administrators of LM Investment Management Limited (Administrators Appointed) (**LM**), the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (**CPAIF**).

Please see attached a letter we request that The Trust Company (PTAL) Limited, execute as custodian of the CPAIF.

As this is a matter of urgency, we would appreciate if this letter can be executed by 1pm today and made available for collection at your Sydney office. Jack Kelly of Norton Rose Australia will attend to collecting the executed copy as soon as it is made available.

Please contact me directly or John Moutsopoulos (Partner – Norton Rose Australia) on 02 9330 8166 if you have any queries.

Kind regards

#### **Ginette Muller**

Senior Managing Director Corporate Finance/Restructuring

### F T I Consulting

22 Market Street Brisbane QLD 4000 Australia

+61.7.3225.4903 direct +61.(0) 419 682 113 +61.7.3225.4999 fax Ginette.Muller@fticonsulting.com

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## LM Investment Management Ltd ACN 077 208 461 ("the Company")

## INSTRUMENT OF APPOINTMENT OF ADMINISTRATORS

In accordance with the resolutions passed at a meeting of the directors of the Company held on Igsto Morth 2013, the Company hereby appoints John Richard Park and Ginette Dawn Muller of the firm FTI Consulting to be Administrators of the Company and to exercise all or any of the powers conferred by law upon them as Administrators.

**DATED** this  $19 \frac{4 \sqrt{4}}{2}$  day of March 2013

**EXECUTED AS A DEED** 

GOK\_8947instrument.doc

EXECUTED by LM Investment Managem ACN 077-208-461	ent Ltd )
Director	Meddler
Reder Brake Name of Director (print)	Francene, Mudder  Name of Director (print)
Director	KPTUGS )
Eghard Van Sy Hoven Name of Director (print)	Kertherine Phillips Name of Director (print)

## Amending Deed

Date:

30th day of November 2011

Parties:

THE TRUST COMPANY (PTAL) LIMITED (ACN 008 412 913) of 20 Bond Street, Sydney NSW ("Permanent") and,

LM INVESTMENT MANAGEMENT LTD (ACN 077 208 461) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland ("Client").

#### Recitals:

- A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").
- B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.
- C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002, 1 September 2004, 26 September 2006, 1September 2011 and 1 November 2011.
- D. The Client wishes to appoint Permanent as custodian for additional schemes not included in the Custody Agreement and to the removal of certain schemes or subsequent amendments and Permanent has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement
- E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

### Terms:

- 1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.
- 2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

- 3. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "B".
- 4. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.
- 5. Except as expressly stated in Clauses 2, 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

EXECUTED BY LM INVESTMENT MANAGEMENT LTD ACN 077 208 461 in accordance with section 127 (i) of the Corporation Act by the authority of its directors:

Signature of Secretary/Director

Signature of Director

## THE TRUST COMPANY (PTAL) LIMITED A.C.N. 008 412 913

by its Attorney GEOFFREY FUNNELL who states that he has no notice of revocation of the Power of Attorney dated 12 July 2010, whereby he executes this deed document or instrument.

William &

Signature.....

State Manager (Corporate & Legal Services) (Qld)

# Annexure "A"

## Schedule 2

## LIST OF SCHEMES SUBJECT TO THIS AGREEMENT

- 1. LM First Mortgage Income Fund (formerly LM Mortgage Income Fund)
- 2. LM Australian Income Fund Currency Protected
- 3. LM Managed Performance Fund
- 4. LM Cash Performance Fund
- 5. LM Wholesale First Mortgage Income Fund
- 6. LM Currency Protected Australian Income Fund
- 7. LM Institutional Currency Protected Australian Income Fund

## Annexure "B"

#### Schedule 5

FEES: (Clause 8.1)

## A Basic Custody for LM First Mortgage Income Fund;

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

## B Basic Custody for:

LM Australian Income Fund - Currency Protected LM Managed Performance Fund and LM Cash Performance Fund

For each fund the greater of either:

(a) 2 basis points

or

(b) \$15,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

## C Basic Custody for:

LM Wholesale First Mortgage Income Fund LM Institutional Currency Protected Australian Income Fund

For each fund:

\$10,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

The above funds are to be fully invested in the LM First Mortgage Income Fund. In the event that the funds are not fully invested in the LM First Mortgage Income Fund then the pricing for Paragraph B shall apply

## D Basic Custody for:

## LM Currency Protected Australian Income Fund

#### For this fund:

\$15,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

The above fund is to be fully invested in the LM First Mortgage Income Fund. In the event that the fund is not fully invested in the LM First Mortgage Income Fund then the pricing for Paragraph B shall apply

## **Definitions:**

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State, or Territory government agency; and

Year means twelve (12) months commencing on the Commencement date of each Scheme.

In addition to the above should extraordinary activity occur (outside those services set out in the Custody Agreement), we may charge additional fees of \$250 per hour for internal legal and or \$150 per hour for executive time (exclusive of GST).

# RE: Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

Hugh Copley to: John NEWBY

Cc: David GRBIN, Daniel KIM, Ian BURNETT, Peter BRYANT

Bcc: Anne Gubbins

Dear John.

Thank you for your email below.

Could you please provide me with a copy of the Custody Agreement between Trust Company and LM Investment management Ltd, dated 4 February 1999 (the Custody Agreement), which is otherwise the subject of the Amending Deed (dated 30 November 2011) attached to your email? I believe that the Custody Agreement would fall within the ambit of the request made in paragraph 5 of the schedule to the 912E Notice.

30/05/2013 10:04 AM

I look forward to hearing from you.

Sincerely,

John NEWBY ---30/05/2013 09:24:18 AM---\*\*\* This email message has been processed by MIMEsw....

From:

John NEWBY <JNewby@thetrustcompany.com.au>

To:

Hugh Copley < Hugh.Copley@asic.gov.au>, Daniel KIM < DKim@thetrustcompany.com.au>

Cc:

Peter BRYANT <PBryant@thetrustcompany.com.au>, Ian BURNETT <IBurnett@thetrustcompany.com.au>, David GRBIN <DGrbin@thetrustcompany.com.au>

Date:

30/05/2013 09:24 AM

Subject:

RE: Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

This email message has been processed by MIMEsweeper

. . .

Hugh

Please find attached our response to your Notice.

As discussed yesterday please do not hesitate to call me or email should you require any clarification.

#### Regards

## **JOHN NEWBY**

Head of Property & Infrastructure Custody Services Corporate Services

## THE TRUST COMPANY

Level 15, 20 Bond Street Sydney, NSW 2000, Australia

**P**: (02) 8295 8927 **F**: (02) 8295 8656 **M**: 0417 480 510

E: inewby@thetrustcompany.com.au www.thetrustcompany.com.au





2011 AND 2012 FINALIST (LARGE SERVICES AWARD CATEGORY)

**From:** Hugh Copley [mailto:Hugh.Copley@asic.gov.au]

Sent: Wednesday, 29 May 2013 12:03 PM

To: John NEWBY; Daniel KIM

**Subject:** Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

Importance: High

Please see the Notice and letter attached.

Please consider the environment before printing this document

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A Please consider the environment before printing this e-mail

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\*\*\*\*\*\*\*\*\*\*\*\*\*

[attachment "ASIC Response 30 May 2013 LMIM (Admistrators Appointed).pdf" deleted by Hugh Copley/Brisbane/QLD/ASIC]



# RE: Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

John NEWBY to: Hugh Copley

Cc: David GRBIN, Daniel KIM, Ian BURNETT, Peter BRYANT

30/05/2013 10:31 AM

History:

This message has been replied to and forwarded.

...

This email message has been processed by MIMEsweeper

\*\*\*

Dear Hugh

Apologies that this was not included in the documentation provided and is now attached.

### Regards

#### **JOHN NEWBY**

Head of Property & Infrastructure Custody Services Corporate Services

#### THE TRUST COMPANY

Level 15, 20 Bond Street Sydney, NSW 2000, Australia

P: (02) 8295 8927 F: (02) 8295 8656 M: 0417 480 510

E: jnewby@thetrustcompany.com.au www.thetrustcompany.com.au



PREMIER'S NSW
EXPORT AWARDS

2011 AND 2012 FINALIST (LARGE SERVICES AWARD CATEGORY)

From: Hugh Copley [mailto:Hugh.Copley@asic.gov.au]

Sent: Thursday, 30 May 2013 10:04 AM

To: John NEWBY

Cc: David GRBIN; Daniel KIM; Ian BURNETT; Peter BRYANT

Subject: RE: Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

Dear John,

Thank you for your email below.

Could you please provide me with a copy of the Custody Agreement between Trust Company and LM Investment management Ltd, dated 4 February 1999 (the Custody Agreement), which is otherwise the subject of the Amending Deed (dated 30 November 2011) attached to your email? I believe that the Custody Agreement would fall within the ambit of the request made in paragraph 5 of the schedule to the 912E Notice.

I look forward to hearing from you.

## Sincerely,

**Hugh Copley** | Litigation Counsel, QLD | Chief Legal Office | **ASIC** | Level 20, 240 Queen Street, Brisbane QLD 4000 | ★ +61 7 3867 4892 | ★ +61 7 3867 4790 | ★ hugh.copley@asic.gov.au

From: John NEWBY < JNewby@thetrustcompany.com.au>

To: Hugh Copley < Hugh.Copley@asic.gov.au >, Daniel KIM < DKim@thetrustcompany.com.au >

Cc: Peter BRYANT < PBryant@thetrustcompany.com.au >, Ian BURNETT < IBurnett@thetrustcompany.com.au >, David GRBIN <

DGrbin@thetrustcompany.com.au>

Date: 30/05/2013 09:24 AM

SubjecRE: Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

t:

This email message has been processed by MIMEsweeper

Hugh

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Please find attached our response to your Notice.

As discussed yesterday please do not hesitate to call me or email should you require any clarification.

## Regards

#### **JOHN NEWBY**

Head of Property & Infrastructure Custody Services Corporate Services

## THE TRUST COMPANY

Level 15, 20 Bond Street Sydney, NSW 2000, Australia

P: (02) 8295 8927 F: (02) 8295 8656 M: 0417 480 510

E: inewby@thetrustcompany.com.au

www.thetrustcompany.com.au



PREMIER'S NSW
EXPORT AWARDS
Froort Council of Australia

2011 AND 2012 FINALIST (LARGE SERVICES AWARD CATEGORY)

**From:** Hugh Copley [mailto:Hugh.Copley@asic.qov.au]

**Sent:** Wednesday, 29 May 2013 12:03 PM

To: John NEWBY; Daniel KIM

**Subject:** Notice pursuant to s912E of the Corporations Act [SEC=UNCLASSIFIED]

Importance: High
Please see the Notice and letter attached.
<b>Hugh Copley</b>   Litigation Counsel, QLD   Chief Legal Office  <b>ASIC</b>   Level 20, 240 Queen Street, Brisbane QLD 4000   <sup>®</sup> +61 7 3867 4892   <sup>≜</sup> +61 7 3867 4790   <sup>™</sup> hugh.copley@asic.gov.au
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\*\*\*\*\*\*\*\*\*\*\*\*\*\*

[attachment "ASIC Response 30 May 2013 LMIM (Admistrators Appointed).pdf" deleted by Hugh



Copley/Brisbane/QLD/ASIC] PTAL and LM Original Custody Deed 4 Feb 1999.pdf

## PERMANENT TRUSTEE AUSTRALIA LIMITED

and

LM INVESTMENT MANAGEMENT LTD

# **CUSTODY AGREEMENT**

## PERMANENT TRUSTEE AUSTRALIA LIMITED

23-25 O'Connell Street SYDNEY NSW 2000 DX 383 SYDNEY Tel: (02) 9321 1600

Fax: (02) 9321 1659 #140216/v2

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## **CUSTODY AGREEMENT**

THIS AGREEMENT is made the day of Tebruary 1999

BETWEEN: PERMANENT TRUSTEE AUSTRALIA LIMITED (ACN 008 412 913) a

company duly incorporated in New South Wales having its registered office at 23-25 O'Connell Street, Sydney, in the said State, and an office at Level 8, 410 Queen St,

Brisbane, Queensland ('Permanent')

AND: LM INVESTMENT MANAGEMENT LTD (ACN 077 208 461) a company duly

incorporated in Queensland having its registered office at Level 4, RSL Centre, 44A

Cavill Avenue Surfers Paradise in the State of Queensland (the 'Client')

## OPERATIVE PROVISIONS:

## 1. INTERPRETATION

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1.1 In this agreement, unless the context otherwise requires:

'Austraclear' means the system operated by Austraclear Limited performing the role of central depository for securities traded in the Australian financial market, and which provides a real-time system for clearing and settling corporate and semi-government debt securities and financial derivatives.

'ASIC' means the Australian Securities and Investments Commission or such other government authority that performs the role undertaken by ASIC in relation to managed investment schemes at the date of this agreement.

'Authorised Person' means the persons nominated by each of the Client and Permanent respectively who are authorised to make any written communication or take action on behalf of the Client or Permanent respectively in relation to the performance of the relevant party under this agreement. The Client may nominate as its Authorised Persons any officers or employees of a Manager employed by the Client. A party may impose restrictions on the authority of any Authorised Person by written notice to the other party. The Authorised Persons and any restrictions on authority as at the date of this agreement are specified in schedule 1 and may be varied upon written notice by the respective party to the other party.

'Business Day' means a day on which banks are open for business in Brisbane, but excludes Saturdays, Sundays, public holidays and bank holidays.

'CHESS' stands for 'Clearing House Electronic Subregister System' and means the clearing house established and operated by Securities Clearing House ('SCH') for the clearing, settlement, transfer and registration of securities approved by SCH.

'Custodially Held', in relation to an asset of a Scheme held by or on behalf of Permanent under this agreement means that Permanent or the person holding the asset on Permanent's behalf has one or more of the following:-

- (i) legal title to the asset;
- (ii) physical possession of the asset;
- (iii) direct control of the asset;

- (iv) is designated as mortgagee of the asset; or
- (v) physical possession or direct control of the essential elements of title of the asset,

where in all the circumstances this results in Permanent or the person holding the asset on Permanent's behalf having effective control of the asset for the purpose of its safekeeping (whether or not Permanent or the person holding the asset on Permanent's behalf, as the case may be, also performs other services in relation to the asset).

'Instructions' has the meaning set out in clause 5.

'Law' means the Corporations Law.

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'Manager' means a person appointed by the Client to provide management services in respect of all or part of the Portfolio.

'Portfolio' means property of a Scheme Custodially Held from time to time by Permanent or a Sub-custodian pursuant to this agreement.

'RITS' stands for 'Reserve Bank Information and Transfer System' and means the real time computerised settlement and information system established by the Reserve Bank of Australia for settlements, electronic trading and bidding, and cash transfers for parties with Reserve Bank accounts.

'SCO' means the Client's Senior Compliance Officer.

'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between Permanent and the Client.

'Sub-custodian' means any person engaged pursuant to clause 6.1 to Custodially Hold some part or all of the Portfolio on behalf of Permanent.

'SWIFT' stands for 'Society for Worldwide Interbank Financial Telecommunications' and means the international store and forward network system which processes a range of financial transactions relating to, inter alia, bank transfers, foreign exchange, loans, deposits and securities.

'Taxes' means all taxes of whatever nature lawfully imposed, including income tax, recoupment tax, land tax, sales tax, fringe benefits tax, group tax, capital gains tax, profit tax, interest tax, tax on the provision of goods or services, property tax, undistributed profits tax, withholding tax, municipal rates, financial institutions duty, bank account debit tax, stamp duties and other taxes, charges and liens assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, Territory or municipal taxation or excise governmental agency, including any interest or fee imposed in connection with any such tax, rates, duties, charges or liens.

"Title Documents" means the written evidence of title to or interest in any of the assets forming part of the Portfolio.

- 1.2 In this agreement, unless the context otherwise requires:
  - (a) words importing one gender include the other genders;
  - (b) the singular includes the plural and vice versa;
  - (c) a reference to a party is a reference also to that party's respective successors or assigns;
  - (d) a reference to a *person* includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality) and reference to a *company* includes a person;
  - (e) a reference to an agent does not include any pricing service or supplier of pricing information used by Permanent for valuation or pricing purposes;
  - (f) headings are for convenience only and shall not affect interpretation;
  - (g) mentioning anything after, *include*, *includes* or *including* does not limit what else may be included;
  - (h) references to sections, clauses and schedules are references to sections, clauses and schedules of this agreement;
  - (i) a reference to Permanent or the Client includes, where the context permits a reference to their respective officers, employees and agents or any of them;
  - (j) a reference to the *knowledge*, *belief or awareness* of any person in relation to a matter means the knowledge, belief or awareness that the person would have if they had made all reasonable enquiries of others who could reasonably be expected to have information relevant to the matter and, where those enquiries would have prompted a reasonable person to make further enquiries, made those further enquiries;
  - (k) a reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued relating to it;
  - (1) references to dollar and '\$' refer to amounts in Australian currency; and
  - (m) the schedules to this agreement form part of this agreement.

## 2. APPOINTMENT OF PERMANENT

- 2.1 The Client appoints Permanent to provide custodial services on the terms of this agreement.
- 2.2 Permanent accepts its appointment and agrees to provide custodial services to the Client on the terms of this agreement.
- 2.3 Permanent acknowledges that the Client will assess Permanent's performance on a regular basis in accordance with the methods and standards identified in schedule 3.

## 3. FUNCTION AND POWERS OF PERMANENT

- 3.1 Subject to the provisions of this agreement, Permanent agrees to custodially hold the Portfolio and Title Documents as agent for the Client in relation to each Scheme.
- 3.2 The Client authorises Permanent to:
  - (a) purchase, acquire, issue, release, sell or dispose of property to form or forming part or all of any Portfolio on receipt of Instructions from the Client and execute all transfers, releases, and assurances and other documents necessary for any such purpose;
  - (b) receive and hold or procure the receipt and holding of any property so purchased or acquired and any interest, dividend, rent or other income accruing in respect of it and any document of title to it in safe custody;
  - (c) procure safe custody of property of the Portfolio in bearer form;
  - (d) procure registration in the name of Permanent or of a Sub-custodian, as the case requires, of property of the Portfolio in a registrable form unless it is otherwise impractical or inconsistent with market practice or otherwise permitted with the consent of the Client; and
  - (e) provide the custody services and other administrative services as set out in this agreement or as agreed from time to time between Permanent and the Client. In such circumstances Permanent is entitled to receive additional fees as agreed between the parties.
- Permanent may establish an account in the name of the Client designating a Scheme or, if otherwise instructed by the Client, some other name, with any bank or company approved by the Client and operate on the account in accordance with Instructions from the Client.
  - 3.4 Permanent may refuse to purchase, acquire, issue, release, sell, accept the deposit or transfer of a security, document or other property, and the Client must accept a return of the document or transfer of the security or other property at the request of Permanent. In particular, Permanent has no obligation to accept into the Portfolio or acquire any partly paid investment unless the Client has made arrangements satisfactory to Permanent to set aside in the name of Permanent money or other property sufficient to provide for payment of the investment in full.
  - 3.5 The Client agrees that, in relation to property held on a pooled basis or in an omnibus account, the transfer or delivery of property in accordance with this agreement of the same type and number as the property so held will constitute a proper performance by Permanent of its obligations under this agreement.
  - 3.6 Permanent may execute or make on behalf of the Client any certificates, declarations or affidavits which are required to receive into or transfer out of its custody any property of or for any Portfolio.
  - 3.7 The Client agrees that Permanent or any Sub-custodian may hold any property included in a Portfolio on a pooled basis or in an omnibus account in accordance with any class order issued by ASIC or any specific relief from the requirements of section 601FC(1)(i) of the Law granted by ASIC in relation to the relevant Scheme.

- Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.
- 3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.
- 3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.
- 3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.
- 3.12 Permanent is authorised to comply with any obligations imposed on it by law.
- Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.
- 3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.

## 4. DUTIES OF PERMANENT

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- 4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.
- 4.2 Permanent must promptly forward to or notify the Client or the relevant Manager of all forms of proxy, notices of meetings and other material letters, notices or announcements received by Permanent relating to the assets of a Portfolio.
- 4.3 Permanent is not responsible for reviewing or advising the Client on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by the Client.
- Permanent disclaims any knowledge of the terms on which securities are issued or the constituent documents of the issuer and the Client undertakes to investigate and satisfy itself as to those matters and to ensure that any Instructions to Permanent are in conformity and reasonable having regard to them.

- 4.5 Permanent is not responsible for the accuracy or completeness of any information received from third parties and passed to or assessed by the Client or a Manager.
- 4.6 Permanent is not obliged to institute or defend legal proceedings unless requested by the Client and indemnified by the Client to its satisfaction.
- 4.7 The services of Permanent under this agreement are not exclusive. Permanent is free to provide similar services to others, and is not obliged to disclose to the Client anything which comes to its notice in the course of providing services to others or otherwise than in the performance of this agreement.
- Permanent is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.
- 4.9 To the extent required by section 60lFC(1)(i) of the Law as modified by any relief granted by ASIC, Permanent shall ensure that the assets of each Portfolio are:
  - (a) clearly identified as property of the respective Scheme; and

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- (b) held separately from Permanent's own assets, the assets of any other Scheme or any other assets held by Permanent in any other capacity whatsoever.
- 4.10 Permanent is not responsible for checking or ascertaining the value of any property or whether the price to be paid for any property is proper or reasonable or whether any transaction which it is instructed to effect accords with the constitution, compliance requirements, prospectus, investment policy or limit for the time being established for or in force in relation to the Scheme.
- 4.11 Permanent must notify the Client in writing immediately if Permanent becomes aware that it no longer satisfies the requirements of ASIC Policy Statement 131 or 133.
- 4.12 Permanent must provide to the Client at least annually at a time as agreed between the parties a certificate signed by two directors stating that Permanent has met the requirements of ASIC Policy Statements 131 and 133 during that financial year and must (if the Client reasonably requires such certificate) also provide annually at a time as agreed between the parties a certificate signed by Permanent's external auditor confirming that, in the auditor's opinion, Permanent continues to meet the financial requirements of ASIC Policy Statements 131 and 133.
- 4.13 Subject to clause 4.15, Permanent must not take a charge, mortgage, lien or other encumbrance over, or in relation to, the assets of a Scheme other than in respect of expenses and outlays made within the terms of this agreement.
- Permanent must not exercise any right in the nature of a charge, mortgage, lien, or other encumbrance over or in relation to assets of the Scheme in relation to unpaid custodian fees pursuant to clause 8.1, but otherwise Permanent is entitled to exercise any rights in relation to the assets of the Scheme available to it at law in the nature of a charge, mortgage, lien or other encumbrance and is additionally granted by this agreement rights of lien and set off as against the assets of a Portfolio in relation to any liability, loss, cost, claim or expense incurred or arising on account of the Scheme in the proper performance of Permanent's powers or duties under this agreement. In the exercise of rights pursuant to this clause Permanent may sell any

asset from the relevant Portfolio and enforce its rights under this agreement against the proceeds of such sale.

- 4.15 If Permanent receives Instructions to take a charge, mortgage, lien or other encumbrance over or in relation to any assets in a Portfolio, Permanent need only act on those Instructions if it is satisfied that its liability pursuant to such charge, mortgage, lien or encumbrance is limited to the assets available to it pursuant to this agreement.
- 4.16 If the Client instructs Permanent to Custodially Hold any real property pursuant to this agreement, Permanent need not agree to do so unless Permanent is satisfied that its liabilities in relation to the holding of such real property are limited to the assets available to it pursuant to this agreement. In this regard, Permanent may require the Client to effect and maintain insurances identified by Permanent in Permanent's name or to provide additional indemnities to Permanent.
- 4.17 In the event that Permanent has breached a term of this agreement which entitles the Client to exercise rights against Permanent, the existence of such rights does not entitle the Client to prevent Permanent from relying on the provisions of this agreement to seek indemnification or other rights in order to meet or satisfy any claim or demand made by a third party on Permanent.
- 4.18 Permanent agrees to compensate a Scheme by making a payment to that Scheme in the event of Permanent being required by law to make such payment if there is a loss to a Scheme as a result of Permanent failing in its obligations under this agreement.

#### 5. INSTRUCTIONS

- 5.1 Permanent is authorised to act, or to cause any other person to act, on any Instructions given to it in accordance with this clause 5.
- Permanent is authorised to act on Instructions in writing which bear or purport to bear the signature or a facsimile of the signature of any of the Client's Authorised Persons or Instructions provided by electronic means using security codes or procedures agreed between Permanent and the Client.
- 5.3 Permanent is not liable for acting on any Instructions which appear to it to have been properly and regularly signed or given and is under no duty to inquire whether any such Instructions have been so signed or given. However, Permanent may require written confirmation from the Client before acting on any Instructions.
- 5.4 Permanent is not liable for acting on any Instructions given in accordance with this clause 5 which contain any error or ambiguity.
- Nothing in this clause 5 obliges Permanent to obtain Instructions where the other provisions of this agreement do not impose any such obligation.
- Permanent may record electronically telephonic discussions relating to this agreement or any transaction effected under it with the prior consent of the Client for each discussion intended to be recorded.

#### 6. SUB-CUSTODIANS

- Permanent may, where it considers their appointment necessary or desirable for the purpose of exercising its powers or performing its duties under this agreement, appoint Sub-custodians (including any person related to or associated with Permanent) to perform any of its duties under this agreement with any or all of its powers under this agreement, including this power of delegation, and any delegate appointed by the exercise of such power shall be included in the term Sub-custodian. Any appointment of a Sub-custodian by Permanent is not an assignment of Permanents rights or obligations under this agreement.
- Permanent must supply to the Client on request a description of property included in the Portfolio which is held by or registered in the name of a Sub-custodian, together with the name and address of the Sub-custodian.
- Permanent shall be responsible for the actions and omissions of its Sub-custodian appointed by Permanent pursuant to clause 6.1.

## 7. BOOKS, RECORDS AND STATEMENTS

#### Permanent must:

- (a) properly maintain adequate books and records, accounts of all receipts, disbursements and other transactions relating to the Portfolio in accordance with generally accepted accounting principles to the extent such principles are relevant;
- (b) provide the Client with the reports and statements relating to the Portfolio described in schedule 4 at the intervals mentioned in schedule 4; and
- (c) provide any auditor of the Client with any reasonably available information in Permanent's possession about the Portfolio which the auditor requires to enable it to perform any audit or investigation involving the Portfolio.

#### 8. FEES AND EXPENSES

- 8.1 The Client agrees to pay to Permanent during the continuance of this agreement fees in the amounts described and at the time set out in schedule 5.
- 8.2 Permanent is entitled to recover from the Client the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs (including fees and other amounts payable to Sub-custodians) in connection with the performance of its duties and the exercise of its powers under this agreement including, without limitation, settlement, delivery, registration and transaction charges and foreign currency costs and charges including any reasonable expenses incurred as a result of the Client requesting a certificate pursuant to clause 4.1.
- 8.3 The Client agrees that Permanent may deduct from any part of a Portfolio any amount payable to Permanent under this clause 8 or any other provision of this agreement and with the consent of the Client, the amounts payable under clause 8.1. The Client authorises Permanent in the name of the Client or Permanent to do any thing (including, but not limited to, executing any document) that is required for that purpose. Permanent agrees to record any such deduction in the records maintained under clause 8.

8.4 All monies owing to Permanent including fees under this agreement accrues from day-to-day.

## 9. INDEMNITIES AND LIMITATIONS OF LIABILITY

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- 9.1 Without limiting any other indemnity or limitation of liability in this agreement, and without prejudice to any indemnity allowed by law, but subject to this agreement and to any law to the contrary, and to the maximum extent permitted by law, it is agreed and declared that:
  - (a) the Client indemnifies Permanent against any liability, demand, loss, costs, Taxes charges and expenses which may be incurred by Permanent in connection with:
    - (i) this agreement and the acts and omissions of Permanent in performing services pursuant to this agreement, except those attributable to the negligence or fraud of Permanent.
    - (ii) all actions, suits, claims and demands which may be brought or threatened against or suffer or sustained by Permanent by reason of Permanent complying with any Instruction by an Authorised Person; and
    - (iii) neglect or fraud on the part of the Client, any Manager or any of their employees, servants or agents.
  - (b) Permanent does not incur any liability in respect of any thing done or not done in reliance on any Instruction, notice, resolution, direction, consent, certificate, receipt, affidavit, statement, holding out, certificate for stock, shares or other security, plan or reorganisation, or other document or information which Permanent reasonably believed to be genuine or to have been passed, signed or endorsed by the proper parties, where liability but for this provision would attach because that document or matter was not in fact genuine or so passed, signed or endorsed.
  - (c) Permanent does not incur any liability in respect of any failure to do any thing which, because of any present or future law or of any order or judgement of any court, it is hindered, prevented or forbidden from doing.
  - (d) Permanent will not be responsible or have any liability for any obligations imposed on the Client, a Scheme or Permanent as custodian of the Portfolio or any transaction under this agreement by the tax law of Australia or any State or Territory of Australia. Permanent will be kept indemnified by and be without liability to the Client for any such obligations including Taxes (but excluding any income taxes assessable in respect of compensation paid to Permanent pursuant to this agreement), withholding, certification and reporting requirements, claims for exemption or refund, additions for late payment, interest, penalties and other expenses (including legal expenses) that may be assessed against the Client, a Scheme or Permanent as custodian of the Portfolio except those attributable to the negligence or fraud of Permanent.
  - (e) Permanent may act on the opinion or advice of, statements of or information obtained from barristers, solicitors, bankers, accountants, brokers or other persons believed by it in good faith and on reasonable grounds to be expert in relation to the matters on which they are consulted (whether they are instructed by the Client, Permanent or a third party), and Permanent is not liable for anything done or not done by it in good faith in reliance on that opinion, advice, statements or information.

- (f) where Permanent relies in good faith on any opinion, advice, statements or information from any barrister, solicitor or other expert it is not responsible for any misconduct, mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such barrister, solicitor or other expert;
- (g) in the event of the liquidation, dissolution or bankruptcy of any person, or if for any other reason it becomes impossible or impracticable to carry out the provisions of this agreement in respect of that person or otherwise, Permanent is not liable for anything done or not done by Permanent, where Permanent has acted in good faith;
- (h) Permanent is entitled to rely on statements or information from the Client or Manager as to the validity of any signature on any transfer, form of application, request or other document which Permanent reasonably believed to be genuine;
- (i) Permanent is not responsible for the loss of any property during transmission between the Client or a Manager and Permanent or Permanent and a third party or fraud on the Client by a third party, nor for the corruption or loss of any data that is transmitted electronically or to which access is given by Permanent to the Client or a Manager or vice versa;
- (j) Permanent is not liable for any act or omission that is believed by Permanent to be in accordance with local market practice;
- (k) Permanent is not liable for the failure of any person to carry out any agreement or obligation on that person's part;
- (l) Notwithstanding any other provision of this agreement, Permanent's liability is limited to the property for the time being comprised in the Portfolio except for a liability arising as a result of Permanent's own negligence or fraud; and
- (m) Permanent, is not liable for any loss, damage or expense suffered or incurred as a result of any delay in executing an Instruction where the delay has occurred as a result of Permanent waiting for the receipt of the written confirmation from the Client pursuant to clause 5.3.
- 9.2 Permanent is not responsible for insuring the Portfolio or any part of it.

## 10. WARRANTIES AND UNDERTAKINGS BY CLIENT

10.1 The Client represents and warrants to Permanent that:

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- (a) it has the power to enter into and perform this agreement and has obtained all necessary consents to enable it to do so;
- (b) the entry into and performance of this agreement by the Client does not constitute a breach of any obligation (including, but not limited to, any statutory, contractual or fiduciary obligation) or default under any agreement or undertaking by which the Client is bound;
- (c) property transferred or delivered by the Client to Permanent from time to time to form part of a Portfolio will be the property of a Scheme the subject of this agreement and,

- unless the consent of Permanent is obtained prior to the transfer, free from any mortgage, charge, lien, pledge, encumbrance or other security interest;
- (d) the Client will, at all times during the term of this agreement, hold any licences or approvals required to be held by it under any law governing its activities relating to this agreement and comply with all conditions of any such licence or approval;
- (e) it is the only responsible entity for each Scheme and no action has been taken or is proposed to remove it as responsible entity of any Scheme;
- (f) the copy of each Scheme constitution provided by the Client to Permanent discloses all the terms of each Scheme and it is not in default under the terms of any Scheme constitution or the Law in relation to any Scheme; and
- (g) it has a right to be fully indemnified out of the relevant Scheme's assets in respect of all obligations and liabilities which it incurs under this agreement.

#### 10.2 The Client undertakes:

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- (a) to notify Permanent promptly if the Client appoints or terminates the appointment of a Manager;
- (b) to provide Permanent on request with any documents, information or Instructions reasonably required by Permanent to enable it to perform obligations imposed on Permanent under this agreement or by law;
- (c) to perform its obligations pursuant to this agreement as soon as reasonably practicable and in accordance with the requirements of any relevant Scheme's constitution and the Law;
- (d) to give Permanent notice of any communication from any person including ASIC forthwith upon receipt which relates to the possibility or likelihood of the Client being suspended or removed in relation to a Scheme or that affects or might affect Permanent or any of its Sub-custodians in relation to the performance of their obligations or exercise of their powers under this agreement or otherwise;
- (e) to give Permanent prompt notice of any alteration to a Scheme's constitution.
- 10.3 The Client undertakes on request to provide and certify to Permanent any information in relation to the Client's status or assessibility for taxation purposes in any country which is relevant to the performance of this agreement.
- 10.4 The Client acknowledges that it enters into this agreement both in its individual capacity and in its capacity as responsible entity for each Scheme and all agreements, warranties and obligations of the Client in this agreement bind the Client in both capacities.
- 10.5 The Client agrees to inform Permanent promptly if:
  - (a) the terms of a Scheme are varied;
  - (b) there is any change of responsible entity of a Scheme;
  - (c) there is any change of status for taxation purposes of a Scheme; or

(d) when a Scheme is terminated.

## 11. TERMINATION OF AGREEMENT

- Subject to clauses 11.2, 11.3 and 11.4, this agreement shall continue for the minimum term specified in schedule 6 and after the expiry of the minimum term shall continue on the same terms unless terminated by either party upon giving to the other party notice for no less than the notice period specified in schedule 6.
- 11.2 A party may terminate this agreement by notice to the other party: -
  - (a) if a receiver or a receiver and manager of the undertaking (or any part) of the other party is appointed either in relation to the capacity in which it acts pursuant to this agreement or where such receiver or receiver and manager is reasonably likely to affect materially such other party's performance pursuant to this agreement, or
  - (b) if the other party:-
    - (i) goes into liquidation (other than for the purposes of a reconstruction or amalgamation on terms previously approved in writing by the other party) either in relation to the capacity in which it acts pursuant to this agreement or where such liquidation is reasonably likely to affect such other party's performance pursuant to this agreement;
    - (ii) is subject to a scheme of compromise or arrangement with its creditors or has an administrator appointed to its affairs either in relation to the capacity in which it acts pursuant to this agreement or where such scheme or administration is reasonably likely to affect such other party's performance pursuant to this agreement;
    - (iii) ceases to carry on business in relation to its activities as responsible entity in relation to a Scheme in the case of the Client (in which case Permanent may terminate this agreement in relation to a Scheme) or as a provider of custodial services in the case of Permanent;
    - breaches any provision of this agreement in a material respect or fails to observe or perform any representation, warranty, indemnity or undertaking pursuant to this agreement in a material respect **PROVIDED THAT** if the breach or failure is capable of remedy in the reasonable opinion of the party not in default, this agreement may not be terminated unless the party in default is given a period of no less than 14 days within which to remedy the breach or failure and if not remedied within such period the party not in default may terminate this agreement;
    - (v) sells or transfers or makes any agreement for the sale or transfer of its principal business and undertaking, or of a beneficial interest therein, other than to a related body corporate for the purposes of a corporate reconstruction upon at least 7 days' notice to the other party; or
  - (c) by Permanent if ASIC or a Court having jurisdiction makes a written order vesting any property of the Client in relation to any Scheme in ASIC or some other body other than the Client.

- 11.3 The termination of this agreement does not affect any claim which either party may have against the other.
- 11.4 If after two (2) years from the date of execution of this agreement, the Law and/or ASIC Policy Statements are such that the Client is no longer required to engage the services of a custodian for the Schemes, then the Client may terminate this agreement on not less than three (3) months notice in writing to Permanent.
- Subject to this agreement, on termination of this agreement Permanent must, at the expense of the Client, promptly transfer, or cause any Sub-custodian to transfer, the assets of the Portfolio, to or according to the Instructions of the Client (subject to any contrary direction given to Permanent which has the lawful effect of overriding this provision), and the Client agrees promptly to accept the transfer or give the necessary Instructions for the transfer of those assets. Permanent must also, at the expense of the Client, promptly deliver or cause any Subcustodian to deliver, any documents evidencing title to those assets which it is holding, to or according to the Instructions of the Client. Notwithstanding the provisions of this clause, Permanent may retain any assets which it is lawfully permitted to retain in the exercise of its rights under this agreement.
- Upon termination of this agreement pursuant to clause 11.2(c), Permanent shall act upon the instructions of ASIC or an entity properly appointed in relation to a Scheme to the exclusion of the rights of the Client and shall deal with the Portfolio and all books, records, or other material held by it in relation thereto in accordance with the instructions of ASIC or such other entity to the exclusion of any orders, requests or directions from the Client.
- 11.7 Notwithstanding any other provision of this agreement, if ASIC or a Court having jurisdiction has made a written order vesting the property of the Client in relation to a Scheme in another person, Permanent may, upon the receipt of notice of such vesting order, disregard any future Instructions of the Client in relation to a Scheme and any existing Instructions of the Client in relation to a Scheme which have not been fully performed and take instructions in relation to any matter affecting a Scheme from ASIC or such other person.

#### 12. COSTS AND STAMP DUTY

- 12.1 The Client shall pay Permanent's reasonable professional costs, including external legal expenses in connection with the preparation, execution and completion of this agreement and of other documentation related to this agreement.
- 12.2 The Client agrees to bear any stamp duty payable or assessed in connection with this agreement and the transfer of any property to Permanent to form part of the Portfolio. The Client must indemnify Permanent on demand against any liability for that stamp duty (including fines and penalties).

#### 13. NOTICES

Any notice under this agreement shall be in writing and:-

- (a) may be sent to the address, or facsimile number set out in schedule 7 or to any other address or facsimile number that either party may specify in writing to the other;
- (b) is taken to have been given or made:-

- (i) (in the case of delivery in person) when delivered to the address set out in schedule 7;
- (ii) (in the case of delivery by post) on the second Business Day after posting; or
- (iii) (in the case of delivery by facsimile) on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the correct number,

but if the notice is taken to have been given or made on a day which is not a Business Day or is later than 5.00pm (local time) it will be taken to have been duly given at the commencement of the next Business Day.

#### 14. EXERCISE OF RIGHTS

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

#### 15. NO WAIVER

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No failure to exercise or any delay in exercising any right, power or remedy under this agreement operates as a waiver. No single or partial exercise of any right, power or remedy precludes any other or further exercise of that right or any other right, power or remedy.

## 16. SURVIVAL OF INDEMNITIES

Each indemnity in this agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this agreement.

### 17. ENFORCEMENT OF INDEMNITIES

It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this agreement.

#### 18. ASSIGNMENT

A party may not assign any of its rights or obligations under this agreement without the prior written consent of the other party.

#### 19. CONFIDENTIALITY

- 19.1 All information exchanged between the parties under this agreement or during the negotiations preceding this agreement is confidential to the party supplying the information and may not be disclosed to any person except:-
  - (a) to employees, legal advisers, auditors and other consultants of either party or its related bodies corporate requiring the information for the purposes of this agreement;
  - (b) with the consent of the party who supplied the information;

- (c) if the information is, at the date this agreement is entered into, lawfully in the possession of the recipient of the information through sources other than the party who supplied the information;
- (d) if required for the purposes of implementing transaction, dealing or matter pursuant to this agreement or by law or a stock exchange;
- (e) if required in connection with legal proceedings relating to this agreement; or
- (f) if the information is generally and publicly available other than as a result of breach of confidence by the person receiving the information.
- 19.2 A party disclosing information under clause 19.1(a) or clause 19.1(b) must use all reasonable endeavours to ensure that persons receiving confidential information from it do not disclose the information except in the circumstances permitted in clause 19.1.

### 20. FURTHER ASSURANCES

Each party agrees on the request of the other party to do everything reasonably necessary to give effect to this agreement and the transactions contemplated by it (including the execution of documents) and to use all reasonable endeavours to cause relevant third parties to do likewise.

#### 21. FORCE MAJEURE

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Where a party is unable, wholly or in part, because of any thing which is not reasonably within its control other than lack of funds ('force majeure') to carry out any obligation under this agreement, and it:

- (a) gives the other party prompt notice of that force majeure with reasonably full particulars and, in so far as known, the probable extent to which it will be unable to perform or be delayed in performing that obligation; and
- (b) uses all reasonable endeavours to remove that force majeure as quickly as possible,

that obligation is suspended so far as it is affected by the continuance of that force majeure. Any obligation to pay money is not excused by force majeure, save for any obligation of Permanent to pay money where Permanent is entitled to an indemnity from the Client under this agreement in relation to the Portfolio and there is insufficient money in the relevant Portfolio to pay such money.

#### 22. ENTIRE AGREEMENT

This agreement contains the entire agreement between the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by them or prior agreement between them with respect to its subject matter.

#### 23. AMENDMENT

This agreement may be amended only by another document signed by both the parties.

## 24. DISPUTES OR CONFLICTING CLAIMS

- Where there is a dispute between Permanent and the Client in relation to any matter under this agreement, then any party may refer the matter for decision to an independent expert agreed to by the parties, and failing agreement, an independent expert nominated by the President of the Queensland Law Society. The costs incurred in the determination of the matter by the expert (including the costs of the appointment of the expert) shall be borne by the party or parties as determined by the expert. The decision of the expert shall be final and binding on the parties.
- 24.2 If any dispute or conflicting claim is made by any person or persons with respect of any asset Custodially Held, Permanent shall be entitled to refuse to act in respect of that asset until either:
  - (a) such dispute or conflicting claim has been finally determined by a court of competent jurisdiction or settled by agreement between conflicting parties, and Permanent has received written evidence satisfactory to it of such determination or agreement; or
  - (b) Permanent has received an indemnity, reasonably satisfactory to it, to hold it harmless from and against any and all loss, liability and expense which Permanent may incur as a result of its actions.

#### 25. SEVERABILITY

Each part of this agreement is severable from the balance of this agreement. If any part of this agreement is illegal, void, invalid or unenforceable, then that will not affect the legality, effectiveness, validity or enforceability of the balance of this agreement.

## 26. GOVERNING LAW AND JURISDICTION

This agreement is governed by the laws of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of Queensland and courts of appeal from them in relation to any matter or dispute concerning this agreement or the transactions contemplated by this agreement.

#### 27. COUNTERPARTS

This agreement may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

EXECUTED as an agreement.			
THE COMMON SEAL of PERMANENT TRUSTEE AUSTRALIA LIMITED ACN 008 412 913 is affixed in accordance with its articles of association in the presence of:	) ) )		
Director		A	Secretary/or appointed person
THE COMMON SEAL of LM INVESTMENT MANAGEMENT LTD ACN 077 208 461 is affixed in accordance with its constitution in the presence of:	) ) )		
Director		A	Secretary

## Authorised Persons (Clause 1.1)

#### Client

The Client's Authorised Persons are each of the group "A" signatories and the group "B" signatories appearing on the attached authorised signatories list dated 18 January 1999 and marked "AA" or such later corresponding lists as may be forwarded by the Client to Permanent from time to time.

The Client will clearly identify instructions to Permanent as either Level 1 or Level 2 instructions.

Level 1 - any "A" signatory together with any "B" signatory are authorised to give Level 1 instructions.

Level 2 - any "B" signatory together with any other "B" signatory are authorised to give Level 2 instructions.

#### Permanent

Permanent's Authorised Persons are each of the group "A" attorneys and the group "B" attorneys appearing on the attached specimen signature list dated 23 September 1998 and marked "BB" or such later corresponding lists as may be forwarded by Permanent to the Client from time to time.

## LIST OF SCHEMES SUBJECT TO THIS AGREEMENT (Clause 1.1)

- 1. LM Select Mortgage Income Fund
- 2. LM Mortgage Income Fund
- 3. LM Cash Performance Fund
- 4. LM Special Participation Fund

## METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE

#### (Clause 2.3)

- (a) The Client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).
- (b) Any or all of the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.
- (c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a quarterly basis. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.
- (d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.
- (e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.
- (f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the Law.
- (g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

# REPORTS AND STATEMENTS (Clause 7(b))

1.	(a)	Bank reconciliation as at each month end	10 days after month end
	(b)	List of any cheques cancelled in the month	10 days after month end
2.		Listing of all assets as at each month end	10 days after month end
3.		Bank reconciliation as at each Friday	The following Monday morning
4.		List of documents outstanding or intransit	10 days after month end
5.		List of insurance policies due to expire	10 days after month end

## FEES (Clause 8.1)

#### A Basic custody for mortgage Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

#### B Basic custody for property Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

#### C Basic custody for the LM Cash Performance Fund (LMCPF Scheme):

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for amounts over \$500 million; or
- (b) \$15,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

## D Basic custody for the LM Special Participation Fund:

(a) \$10,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

#### Where:

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

Year means twelve (12) months commencing on the Commencement Date of each Scheme.



# MINIMUM TERM AND NOTICE PERIOD (Clause 11.1)

The minimum term is the period five (5) years from the date of execution of this agreement.

After expiry of the minimum term, termination may occur on not less than three (3) months notice by either party.

# ADDRESS AND FACSIMILE DETAILS (Clause 14)

Permanent's Address:

Level 8, 410 Queen St, BRISBANE QLD 4000

Facsimile:

(07) 3842 7159

Client's Address:

LM INVESTMENT MANAGEMENT LTD

Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise QLD 4217

Facsimile:

(07) 55 922 505

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