

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
**NUMBER: 3383 of 2013**

**Applicants: 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**

**GINETTE DAWN MULLER**, Chartered Accountant and Official Liquidator, care of FTI Consulting (Australia) Pty Ltd, 22 Market Street, Brisbane in the State of Queensland, states on oath:

1. I am a Chartered Accountant and Official Liquidator. I am a senior Managing Director of FTI Consulting (Australia) Pty Ltd. John Richard Park and I were appointed administrators of the First Respondent ("LMIM") on 19 March, 2013. LMIM is the Responsible Entity of the LM First Mortgage Income Fund ARSN 089 343 288 ("the FMI Fund").

**PAGE 1**

  
Signed

  
Solicitor/Barrister/Justice of the Peace

**AFFIDAVIT OF GINETTE DAWN MULLER**

Filed on behalf of the First Respondent

Form 46 Rule 431

**RUSSELLS**  
Level 21  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

2. I make this Affidavit also on behalf of Mr Park.

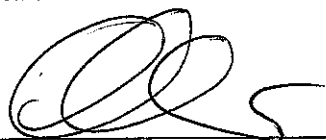
3. Now produced and shown to me and marked "GDM1" – "GDM14" is an indexed and paginated bundle of documents referred to in more detail in this Affidavit.

4. The Applicants, Mr and Mrs Bruce, are the registered holders of 144,514 units, which they acquired on 17 November, 2004. There are approximately 5,172 unit holders (with husbands and wives and other joint holders counted as one holder). There are a total of 488,000,231 units on issue. Mr and Mrs Bruce therefore hold 0.029% of the units on issue.

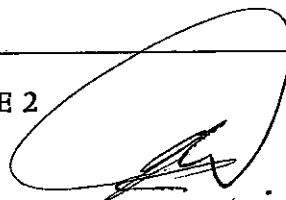
5. The Applicant Mr Shotton is recorded as holding 270,741 units, representing 0.055% of the units on issue.

6. Moreover, there are three unit holders in the FMI Fund, which are known as feeder funds, the sole assets of which are units in the FMI Fund. The Applicants' proposed temporary Responsible Entity is Trilogy Funds Management Limited ("Trilogy"). It is the holder of approximately 20% of the units in the FMI Fund, in its capacity as Responsible Entity of the LM Wholesale First Mortgage Income Fund ("the Wholesale Fund"). There are approximately 232 members of the Wholesale Fund.

7. The other two feeder funds are the LM Institutional Currency Protected Australian Income Fund, of which there are approximately 40 unit holders. Finally, there is the LM Currency Protected Australian Income Fund, in which there are approximately 2,656 investors, mostly resident overseas. LMIM is Responsible Entity of both of those feeder funds.



PAGE 2



Signed

Solicitor/Barrister/Justice of the Peace

---

## Application for Adjournment

8. I understand that the Applicants intend to serve a further Affidavit (by Ms Banton). At the time of swearing this Affidavit, I have not seen any further material from the Applicants, apart from the Affidavit of Mr Bruce. This Affidavit will, therefore, need to be supplemented, once I and Mr Park have had an opportunity to read, consider and respond to the Applicants' evidence.

9. Piper Alderman did not serve on LMIM the proceedings they instituted in the Federal Court of Australia on 12 April, 2013. I am not aware of the reason why these proceedings were commenced and discontinued and not served.

10. Piper Alderman filed the present proceedings on 15 April, 2013 but did not serve the Originating Application and the Affidavit of Mr Bruce until Friday afternoon, 19 April, 2013. I am not aware of any reason why these proceedings were not served promptly.

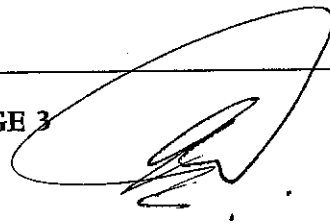
11. I understand that the Constitution of the FMI Fund and the *Corporations Act* make provision for meetings of members when any members wish to change the Responsible Entity of the FMI Fund.

12. Given the serious consequences of the proceedings, I and our solicitors immediately consulted officers of Australian Securities and Investments Commission in the week of 22 April, 2013. Mr Park and I are anxious not only to protect the interest of members in relation to the current proceedings (as to the possible replacement of LMIM as Responsible Entity), but also to ensure that our conduct and that of LMIM was, to the extent possible, satisfactory to ASIC. A meeting was convened and took place on Tuesday afternoon, 23 April, 2013, attended by me and Ms Dunn from my office, our solicitors and senior officers of ASIC including Ms Gubbins and Ms Hayden.

PAGE 3



Signed



Solicitor/Barrister/Justice of the Peace

13. Mr Park and I then immediately discussed the matter. We also sought legal and other business advice.

14. On 25 April, 2013, Mr Park and I resolved on behalf of LMIM to convene a meeting of members of the FMI Fund to permit them to consider and, if thought fit, replace LMIM as Responsible Entity with Trilogy Fund Management Limited. At least one of the advantages of such a proposal will be that Trilogy (which is a member of the FMI Fund, in its capacity as Responsible Entity for the LM Wholesale First Mortgage Income Fund) which holds 19.98% of the units in the FMI Fund, will be able to attend and address the meeting, answer questions, and vote.

15. I understand that Trilogy could itself have convened a meeting of members (since it holds more than 5% of the units in the FMI Fund). I do not know why it chose not to do so.


16. Further, Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any (*bona fide*) concerns of members in relation to the conduct of this Fund.

17. The Notice of Meeting and accompanying documents are marked "GDMI" and are at pages 1 to 12 of my exhibits.

18. As appears from the Notice of Meeting we have convened the meeting of members to take place on Thursday, 30 May, 2013. I and Mr Park were conscious that although the meeting could have been convened a little more quickly, on only 21 days notice, we wished to afford Trilogy sufficient time for it to secure a copy of the Register of Members and to post to the members whatever materials it wishes, to advocate its case for it becoming the Responsible Entity of the FMI Fund.

PAGE 4

  
Signed

  
Solicitor/Barrister/Justice of the Peace




19. I refer also to the order of de Jersey CJ made on 12 April, 2013, whereby His Honour extended the time for the administrators to convene the second meeting of creditors of LMIM until 25 July, 2013. As appears from the material supporting that Application, these matters are complex. Mr Park and I simply needed more time to make proper investigations into the affairs of LMIM, this Fund, and the other managed investment schemes of which it is Responsible Entity. The written submissions of Mr Sullivan SC and Ms Muir relied upon on that occasion is marked "GDM2", are at pages 13 to 21 of my exhibits. The Application for the order extending the convening period is marked "GDM3", are at pages 22 to 25 of my exhibits.

20. I believe His Honour the Chief Justice accepted these propositions and submissions when he extended the time for the convening period.

21. Mr Park and I are engaged on a detailed investigation of the affairs of LMIM and of the FMI Fund; and indeed of the other Funds of which it is Responsible Entity. Although it is difficult to be precise about these things, my present expectation is that we will not require the whole of the three months period the subject of the Chief Justice's extension order, and that we may be able to conclude our investigations and convene meetings of creditors within two months – by the end of June or perhaps into early July. This assumes we are not distracted by further litigation.

#### **Assets not in Jeopardy**

22. I am not aware of any substantial transactions or decisions that must be taken in respect of any of the assets of the FMI Fund between now and early to mid-June, 2013. The principal assets of the FMI Fund are loans to companies and other entities, secured, for the most part, by first registered mortgage. The assets so mortgaged in favour of the FMI Fund comprise:-

  
Signed  
Solicitor/Barrister/Justice of the Peace

- 
- (a) Vacant land the subject of development proposals;
  - (b) Completed or partially completed residential developments;
  - (c) Commercial properties;
  - (d) Operating Retirement Villages;
  - (e) Completed and partially completed industrial and retail developments.

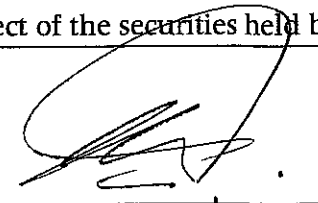
23. A schedule summarising the nature of those assets and briefly recording their current position, entitled "Briefing: FMIF Summary" is marked "GDM4" are at pages 26 to 34 of my exhibits.

24. There are no current offers from any person interested in acquiring any of the *en globo* assets. I am not aware of any circumstances which would cause me to think that any of the larger and more valuable properties might be the subject of an offer for purchase in the next several weeks. There are residential units and blocks of vacant land that are for the sale in the ordinary course but that process has been underway for years, in the ordinary course of the business of the FMI Fund and are listed with real estate agents very familiar with that stock and the market.

25. I have also made inquiries of all relevant FTI staff and the staff of LM Administration. I am not aware of any time limits which might expire in relation to conditions of Development Approvals or the like; nor of any circumstances of which time-limits might expire in the next several weeks, for taking action in respect of any of the trust properties.

26. There are no securities held by LMIM as RE of the FMI Fund, in respect of which I intend to make any insolvency appointment, to enforce such securities in the next several weeks. The great majority of loans are in default and action has already been taken – well prior to the appointment of us as Administrators – to take control of and, where appropriate, to sell the properties the subject of the securities held by the

  
Signed

  
Solicitor/Barrister/Justice of the Peace

FMI Fund. On our appointment, Mr Park and I reviewed those arrangements and they are substantially satisfactory to us.

**Trilogy's Australian Financial Services Licence ("AFSL")**

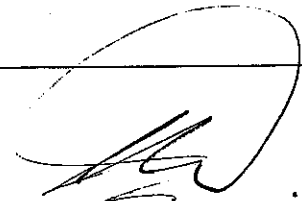
27. LMIM holds AFSL number 220281. It is marked "GDM5", are at pages 35 to 60 of my exhibits.

28. Upon our appointment as Administrators of LMIM, Mr Park and I consulted ASIC and on 9 April, 2013, ASIC decided to suspend LMIM's AFSL but also to take action under section 915H of the Act, to provide that the AFSL continued in effect as though the suspension had not happened, for certain specified purposes. ASIC's Notice, dated 9 April, 2013, setting out the conditions of the continued subsistence of the AFSL for LMIM is marked "GDM6", are at pages 61 to 69 of my exhibits.

29. My solicitors have obtained from the records of ASIC and the AFSL held by Trilogy, which is AFSL number 261425. It is marked "GDM7", are at pages 70 to 93 of my exhibits. In the course of its business, the FMI Fund, and its feeder funds, including the CPAI Fund, have engaged in foreign currency transactions and hedge transactions. Hedges are in place for a defined period (eg 3 months, 6 months, a defined date), but generally less than one year. They are hedging the spot rate that the investor swapped their domestic currency into AUD at the time of investment.

30. Because the investment may not be returned for quite a period (eg 3/4/5 years) these hedges must be rolled periodically as the contracts expire to maintain the original hedge position. As an example:-

- (a) Investor A invests EUR70,000 at an exchange rate of 0.7000EUR = 1.0000AUD.

  
Signed  
Solicitor/Barrister/Justice of the Peace

- (b) The FMI Fund hence receives AUD 100,000 from this investor (say, in June, 2012);
- (c) LM then takes out an EUR70,000 hedge contract at AUD1,000 =EUR.07000 expiring 31 Dec 2012 and subsequently rolls this contract to 30th June, 2013 (still at EUR0.7000).
- (d) If the fund is paying AUD5,000 in capital back to the Investor A at end June, 2013, this would be partially delivered against the hedge and EUR3,500 paid to the investor (ie AUD5,000 converted at 0.7000 = EUR3,500).
- (e) The balance of the hedge (EUR66,500) is then rolled for a further period (ideally to match the next capital distribution if known, or otherwise to a selected date).

31. This process of rolling and drawing down on the hedge is ongoing over a period until all of the capital has been repatriated to the investor. With the downward changes in unit value in FMIF, we also have to adjust the hedges as they are rolled to reflect the new unit value - so if the unit value declines by 40%, the value of the hedges outstanding in the above example would similarly be reduced by 40%.

32. I have prepared a table in respect of the active hedge transactions in relation to the FMI Fund. Therefore, the table below shows the active hedges with AFEX (AIF) & HIFX (AIF & FMI Fund).

Fund	Count of Active Hedges as @ 01/05/13
CPAIF	371
MIF	20
Grand Total	391

33. The 20 active hedge contracts held by the FMI Fund are subject to an agreement between LMIM and AFEX and HIFX, extracts of which is marked "GDM8" are at pages 94 to 100 of my exhibits. LMIM obtained an AFSL from ASIC to authorise it to engage in foreign exchange trading and derivatives trading. I understand that Trilogy's AFSL contains no such authority.

#### Assertions of Conflict

34. I understand that the applicants intended to submit that some conflict of duty and interest, or a conflict of some other kind subsists in relation to the company LMIM, and the FMI Fund. No one has articulated any such conflict and it is, therefore, impossible for me and Mr Park to respond.

35. I am, however, aware of assertions by Piper Alderman and Trilogy to the effect that I and or other members of staff of FTI have some relationship with the former directors of LMIM. I regret to say that those statements are utterly untrue.

36. The first occasion on which anyone from FTI had any dealings with anyone from LMIM was on 8 March, 2013, when we received a phone call from Ms Mulder inquiring about the possibility of us taking some kind of appointment. FTI have never previously acted for or given any professional advice to LMIM or any of its directors or other associates, concerning the affairs of LMIM or any of the LM Funds.

37. In October, 2012, KMQ Insolvency Pty Ltd sold its business to FTI Consulting Australia Pty Ltd. Up to that time, I and my colleagues had carried on practice under the name "KordaMentha (Qld)" pursuant to an Affiliation Agreement with KordaMentha Pty Ltd. Whilst carrying on practice under that name, the same position applies – none of us who now work for FTI, had any professional or other business dealings with anyone from LMIM, its directors or any associated companies.

38. Ironically, Piper Alderman's other client, KordaMentha Pty Ltd, did have prior dealings with LMIM and the Managed Performance Funds on behalf of a bank; but I do not apprehend that to be relevant to the present application.

39. Statements are made on the Piper Alderman website asserting apprehension that Mr Park and I will be on "both sides of the fence" when we come to adjudicate on Proofs of Debt in LMIM. With great respect to Ms Banton, I do not understand this contention.

40. I refer in this regard to paragraphs 18 to 21 of the Affidavit of Mr Bruce.

41. I do not believe that, in making the statements that Mr Bruce attributes to me, I said or conveyed that Mr Park and I have finally decided that none of the members of the FMI Fund can prove in the insolvent administration of LMIM. Mr Park and I do not hold and have never held that view.

42. In the external administration of companies and other bodies, shareholders and other equity holders - such as the members of the FMI Fund - often seek to prove, in those external administrations, and to vote at meetings of creditors for those purposes. This is a familiar issue. In relation to companies, the status of such claims is now dealt with by section 563A of the *Corporations Act 2001* - commonly referred to as the *Sons of Gwalia* amendments.

43. Those provisions are, as I understand the position, confined to Proofs of Debts by shareholders in companies and do not extend to Proofs of Debt by members of a Managed investment Scheme in the external administration of Corporate Responsible Entities of such Schemes.

44. Mr Park and I conceive that our role in dealing with every Proof of Debt – whether lodged by a member of the FMI Fund or not – is to consider the Proof of Debt on its merits and to make a just estimate on the claims made in the Proof of Debt. If such claims are either not quantified in the Proof of Debt or do not contain information from which a just estimate can be made, my practice, and I believe a wide spread practice in the profession, is to admit such persons to vote, but to assign \$1.00 value to their proofs of debt for the purposes of attending, speaking at and voting at meetings of creditors. That was the position on 2 April, 2013; since no member had lodged a proof of debt articulating any particular claim of this nature. We admitted all of them to vote, but only for \$1.00, since none had articulated any claim for any greater sum.

45. Before the creditors of LMIM meet, Mr Park and I will take legal advice on any Proofs of Debt which are out of the ordinary. This is standard practice. If Ms Banton's clients lodge Proofs of Debt seeking to vote and participate in the meeting of creditors of LMIM, I expect that we will take legal advice on the amounts such persons might be admitted to vote. All proofs of debt will be looked at on their merits.

46. I refer to paragraph 20 of Mr Bruce's affidavit. I may have said to Ms Palmer of Piper Alderman that the administrators had determined that financial advisors seeking payments of commission were creditors of LMIM. I did not intend to convey – and do not believe that I did convey – that Mr Park and I had made a final decision on that matter. However, it does appear to me that advisors who have claims for unpaid commission are creditors of LMIM who would be admitted to vote at meetings of its creditors. The fact that LMIM incurred such obligations in its own right, or in carrying out its duties as responsible entity of the FMI Fund, is irrelevant – the debtor is LMIM. It may or may not have a right of indemnity against Scheme assets.



Signed



Solicitor/Barrister/Justice of the Peace

**LM Administration Pty Ltd ("LM Administration")**

47. My investigations to date, including the various financial statement exhibited to the affidavit of Mr Bruce, have led me to believe that LM Administration:-

- (a) Is and has only ever been a service company;
- (b) Does not hold and has never held property assets;
- (c) Is not and has never been a developer;
- (d) Has never had any creditors, apart from its employees, and the ATO for PAYG remittances, and the various superannuation funds for those employees, for superannuation guarantee payments.

48. I and my staff have prepared a statement of position in respect of LM Administration as at 19 March, 2013, which is marked "GDM9" are at pages 101 to 103 of my exhibits and 30 April, 2013 which is marked "GDM10" are at pages 104 to 106 of my exhibits. I believe they are reasonably accurate summaries of the financial position of LM Administration of the date of appointment of Administrators. The position has not substantially changed since 19 March, 2013.

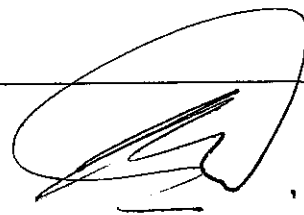
49. Thus, it appears to me that LM Administration has no creditors, aside from the staff I have mentioned, and that wages and other payments due to other employees are up to date.

50. The exception I mentioned is that the Statement of Position contains entries for substantial advances to entities associated with Mr Drake, a former director of LMIM.

51. I have not yet established the basis on which those funds were advanced to Mr Drake and those entities; that is a matter that is currently under investigation.



Signed



Solicitor/Barrister/Justice of the Peace



52. Neither Mr Park nor I, nor anyone else at FTI has any connection to Mr Drake. There is no impediment in pursuing him or those entities in respect of those payments. We have made demands for repayment.

53. I refer to paragraph 16 and in particular to subparagraph 16.10 of Mr Bruce's Affidavit. I do not understand the reference to the LM Administration owing the FMI Fund "approximately \$5.7 million in prepaid management fees". I believe that Mr Bruce (or whoever prepared his affidavit) has subtracted the sum of \$2,470,000 from \$8,209,841 at page 181 of his exhibits. However, the small sum was recorded as owing to LM Administration and the larger as owing by another entity altogether, Australian International Investments.

54. However, I do not believe that any such transactions between the two companies would give rise to a conflict of duty and interest, at least in the circumstances presently known to us if only because the state of the account is not controversial – if management fees had been "pre-paid", then provided LM Administration continues to render its services to 30 June, 2013, I would tentatively be of the view that the pre-payment as at 30 June, 2012 would cease to have any significance.

55. In any event, LM Administration has never held any property assets and, if it acquired cash in advance which ought to be refunded to FMI Fund, then we as administrators would be in a position to pursue other assets of LM Administration – predominantly the sums that appear to be due from Mr Drake and his entities – with which we have never had any connection and in pursuing which we have had no difficulty.

56. LM Administration has minimal cash assets and indeed LMIM has been funding its operations for quite some time. In any event, any such pre-payment has

now reduced to nil – as at 30 April, 2013, the balance of cash on hand in LM Administration had been reduced to approximately \$50,000.

57. It very frequently occurs in practice that the same external administrators are in office in respect of companies in a group (either a formal or an informal group), and there have been loan or other transactions between them. I do not regard the fact that an entity in the LM Funds Group has advanced monies to another entity in the LM Funds Group, as necessarily giving rise to such an acute conflict of duty and duty, or of duty and interest that the administrators must not continue in office as the administrators of each entity.

58. I acknowledge of course that circumstances may develop so that there is a controversy so acute that the potential for such conflict would then require us to either seek the appointment of other administrators or to approach the court for directions. No such circumstances presently exist.

59. I emphasise that this is a tentative view, because I have not received material from the applicants (Ms Banton's affidavit) in which the facts allegedly giving rise to these asserted conflicts are set out.

#### **LM Managed Performance Fund**

60. LMIM is no longer the trustee of the LM Managed Performance Fund and I therefore understand that any potential for conflict in respect of that Fund's relationship with the FMI Fund has ceased.

#### **Deed of Company Arrangement (DOCA)?**

61. None of the directors of LMIM or of LM Administration have had any discussions with me or Mr Park concerning any proposal for a DOCA. No other person has made any such proposal.

62. As presently advised, I do not expect that any person will make a proposal for a DOCA. This is principally because most of the assets in the group of entities under our administration are held in registered managed investment schemes; and LMIM itself holds few assets and has few, if any, external creditors. I understand that LMIM holds those assets for the principal purpose of satisfying the net tangible asset requirements of its AFSL.

#### **Complexity and Volume of Material**

63. I refer to Mr Park's affidavit filed in the proceeding BS2859 of 2013, in support of our application for an extension of the convening period.

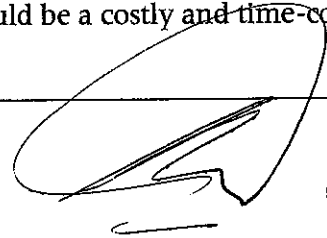
64. I do not propose to repeat what is said there. I add, however:-

- (a) There are over 2,400 archived boxes of records in storage;
- (b) LM Administration has provided all of the managerial, administrative and secretarial services to the various Schemes;
- (c) LM Administration currently has approximately 42 employees (and will be looking to make retrenchments where appropriate;
- (d) There is not an easily identifiable grouping of staff, or documents, whereby the documents and information in relation to the individual funds can easily be separated;
- (e) On the contrary, there is very considerable overlap amongst staff and documentation, and the filing system within LM Administration, which would make it practically exceedingly difficult for a hand-over to a new Responsible Entity, should that occur.

65. I am not contending that it would be impossible to hand-over all documents and information; rather, that that would be a costly and time-consuming exercise.



Signed



Solicitor/Barrister/Justice of the Peace

66. Even if LMIM ceases to be Responsible Entity of the FMI Fund, in my view, Mr Park and I may still need to investigate the affairs of the FMI Fund for the purposes of our report to the creditors of LMIM. I am conscious of the provisions of section 601FS of the Act, whereby, for the most part, the liabilities of an outgoing responsibility are transferred to an incoming Responsible Entity. However, liabilities of an outgoing Responsible Entity that are not the subject of indemnity from Scheme Property are not transferred to the new Responsible Entity. At this stage, it is not known whether there are or would be any such liabilities. I note, however, that Piper Alderman are investigating some kind of class action into the "demise of the Fund", but that is the extent of any information that has been given to me and Mr Park in relation to such claims.

**Material Published by Trilogy and Piper Alderman**

67. A bundle of emails and other material circulated by Piper Alderman and by Trilogy appear at pages is marked "GDM11" are at pages 107 to 121 of my exhibits.


68. LMIM wishes to contend that numerous statements in that material are either false or misleading.

**Financial Condition of Trilogy**

69. I have obtained from my solicitors various documents that they have obtained by searching the registry of this Honourable Court and ASIC.

70. It appears that Trilogy was sued in a trial recently concluded before Applegarth J. It has made provision in its financial statements as at 30 June, 2012, for a contingent liability of \$81 million in the event that it fails in that litigation.


---



Signed

PAGE 16

---



Solicitor/Barrister/Justice of the Peace

71. More recently, the Scheme of which Trilogy is the Responsible Entity, Pacific Mortgage Fund, has made identical provision in its six monthly financial statements to 31 December, 2012.

72. The documents from the Supreme Court proceedings is marked "GDM12" are at pages 122 to 240 of my exhibits. The documents from ASIC is marked "GDM13" are at pages 241 to 302 of my exhibits.

73. Immediately that litigation and contingent liability came to our notice, Mr Park and I retained Mr Hellen of Pilot Partners, an official liquidator experienced in these matters, to provide an opinion based on the material presently available as to the financial condition of Trilogy and in particular whether, if it suffers a judgment in that litigation, it will be able to continue as a going concern.

74. Having reviewed the documents provided to Mr Hellen (including the audited financial statements of Trilogy itself), and Mr Hellen's report, I believe that if Trilogy suffers a judgment in that litigation, it will be unable to pay that debt (it being presumably immediately due and payable) and indeed will have very considerable difficulty paying the debt in full, even if given a protracted period of time to pay such a debt.

75. I also refer to Ms Copley's affidavit in this regard, which shows that Trilogy is party to numerous facility agreements and securities. I apprehend that if it suffers a judgment to the extent of \$81 million, there is a real prospect that those secured creditors will move against Trilogy.

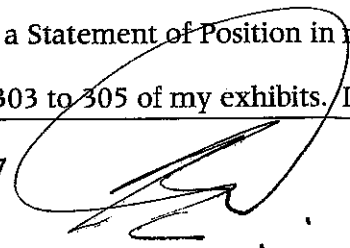
#### LMIM Itself

76. I have by a similar process, prepared a Statement of Position in respect of LMIM which is marked "GDM14" are at pages 303 to 305 of my exhibits. I am not

PAGE 17



Signed



Solicitor/Barrister/Justice of the Peace

conscious of any circumstances that gives rise to any conflict in relation to the company.

### **Summary of Present Position**

77. Mr Park and I have taken legal advice on these proceedings. I apprehend that based on the present state of Applicants' evidence, and our searches and enquiries to date, the matters of fact that will need to be resolved in the present proceedings include the following:-

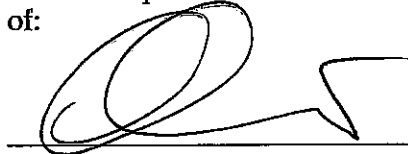
- (a) Whether the Application is brought for a collateral purpose;
- (b) The financial stability of the proposed temporary Responsible Entity, Trilogy;
- (c) Whether the conduct of Piper Alderman and/or Trilogy, in their communications with members of the FMI Fund and the financial press, has involved false or misleading statements, such that, in the exercise of the Court's discretion, it would withhold any relief which it might otherwise be minded to grant on the Application;
- (d) Whether the proposed nominee holds an Australian Financial Services Licence that would permit it to act as temporary Responsible Entity;
- (e) That a substantial body of members is in favour of the First Respondent remaining as Responsible Entity;
- (f) That a substantial body of members is opposed to Trilogy becoming a temporary or permanent Responsible Entity;
- (g) That if Trilogy is appointed a temporary or permanent Responsible Entity, there will be a substantial duplication and wastage of costs;
- (h) That there are no currently subsisting conflicts of interest issues which the Applicants, I understand from Ms Banton, wish to agitate, based on claims in correspondence and in the media, albeit not yet in evidence, which would justify immediate removal of LMIM as Responsible Entity, before the meeting;

(i) Whether the same solicitors – Piper Alderman – intend to represent all of the following parties at the same time:-

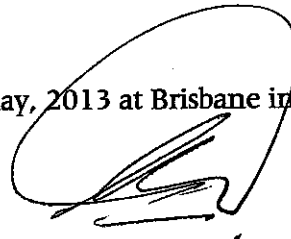
- A. Members of the FMI Fund, in litigation contemplated against LMIM, its auditors, its advisors and others associated with what is said to be “the demise of the FMI Fund”;
- B. The new Responsible Entity, Trilogy in similar litigation;
- C. The current trustees of the LM Managed Performance Fund; despite the submissions made to de Jersey CJ on 12 April, 2013;
- D. Members of the LM Managed Performance Fund in similar litigation.

78. All the facts and circumstances deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

**SWORN** by **GINETTE DAWN MULLER** on 2 May, 2013 at Brisbane in the presence of:



Deponent



Solicitor/~~Barrister~~/Justice of the Peace

"GDM1"

# **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:**

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

**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:

<b>Time:</b>	11.00 am (AEST)
<b>Date:</b>	Thursday, 30 May, 2013
<b>Place:</b>	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  
LM Investment Management Limited (Administrators Appointed)



John Park  
Voluntary Administrator

## **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 ([www.fticonsulting-asia.com](http://www.fticonsulting-asia.com)).

## **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 <http://www.trilogyfunds.com.au>.

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 In Favour means you support Trilogy as the new responsible entity	Voting Against means you support LM/FTI remaining as responsible entity
<b>Appropriate AFSL</b>	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.
<b>Changeover costs</b>	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.
<b>Time to complete wind up of Fund and return surplus monies to Members</b>	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.	<p>LM staff know the assets well. FTI have since their appointment on 19 March become increasingly familiar with the assets.</p> <p>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.</p> <p>Changing Managers will slow the process as inevitably Trilogy will need time to review the assets and realisation strategies.</p>
<b>Impact on Borrowers from the Fund of a change of Manager</b>	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.

<b>Voting Intentions</b>	<b>Voting In Favour</b> means you support Trilogy as the new responsible entity	<b>Voting Against</b> means you support LM/FTI remaining as responsible entity
<b>Financing Consequences</b>	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.
<b>Access to the Claw-Back Provisions under the Corporations Act?</b>	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 <http://www.lminvestmentadministration.com>, 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:

<b>Booklet</b>	This Booklet, including the Notice of Meeting, dated 26 April, 2013
<b>Constitution</b>	The LM First Mortgage Income Fund constitution, as amended from time to time
<b>Fund</b>	LM First Mortgage Income Fund ARSN 089 343 288
<b>LM</b>	LM Investment Management Limited (Administrators Appointed) ACN 077 208 461
<b>Manager</b>	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
<b>Meeting</b>	The Meeting of the Members of the Fund that is called by the Notice of Meeting contained in this Booklet
<b>Notice of Meeting</b>	The Notice of Meeting contained on page 3 of this Booklet, together with the additional information in this Booklet
<b>Proposal</b>	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
<b>Resolutions</b>	Resolutions 1 and 2 as set out in the Notice of Meeting and as described in section 2.2 above
<b>Trilogy</b>	Trilogy Funds Management Limited ABN 59 080 383 679
<b>Unit</b>	A unit, as defined in the Constitution, in the Fund
<b>Unitholder or Member</b>	A registered holder of Units in the Fund
<b>Voluntary Administrators</b>	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 <http://www.lminvestmentadministration.com>. 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.

### **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 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](mailto:quorum@computershare.com.au)

**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.

Registry: BRISBANE  
Number: BS 2859/13

**IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED  
(ADMINISTRATORS APPOINTED) ABN 68 077 208 461 AND  
LM ADMINISTRATION PTY LTD (ADMINISTRATORS APPOINTED)  
ACN 055 691 426**

**Applicants**

**JOHN RICHARD PARK AND GINETTE MULLER IN  
THEIR CAPACITY AS JOINT AND SEVERAL  
ADMINISTRATORS OF LM INVESTMENT  
MANAGEMENT LIMITED (ADMINISTRATORS  
APPOINTED) AND LM ADMINISTRATION PTY LTD  
(ADMINISTRATORS APPOINTED)**

**SUBMISSIONS ON BEHALF OF THE APPLICANTS**

**Relief Sought**

1. Relief is sought by John Richard Park and Ginette Muller, the administrators of each of LM Investment Management Limited (administrators appointed) ("LMIM") and LM Administration Pty Ltd (administrators appointed) ("LMA") (collectively, the "LM Companies") for orders<sup>1</sup> that:
  - (a) pursuant to section 439A(6) of the *Corporations Act* 2001 (Cth) ("the Act"), that the period within which the Administrators must convene the second meeting of creditors of each of LMA and LMIM be extended up to and including 25 July 2013; and
  - (b) pursuant to section 477A(1) of the Act, the second meeting of creditors of each of LMA and LMIM required by section 439A of the Act may be held together or separately and at any time during, or within five business days after the end of, the convening period as extended by the Court notwithstanding the provisions of section 439A(2) of the Act.

---

<sup>1</sup> Originating Application (Doc 1).

**APPLICANTS' SUBMISSIONS**

King & Wood Mallesons  
Level 33, Waterfront Place, 1 Eagle Street  
Brisbane Qld 4000  
T +61 7 3244 8000  
F +61 7 3244 8999  
DX 311 Brisbane  
King & Wood Mallesons' reference  
ESC/CAM:0455064221

2. Orders relating to ancillary administrative matters and costs are also sought.

### **Notice**

3. On 2 April 2013, the first meeting of creditors was held at which the administrators advised that this application seeking an extension to the second meeting had been listed to which no person in attendance raised an objection<sup>2</sup>.
4. On 5 April 2013, the Applicants provided a notice and a copy of the Application ("the Notice") to creditors of LMIM and LMA for whom the Applicants had a current postal address or email address ("Creditors"). The Notice stated that the Application and supporting affidavit material were available for viewing on the website set up by the administrators' for the administrations being www.lminvestmentadministration.com ("Website")<sup>3</sup>.
5. On 5 April 2013, a copy of the Application and the supporting affidavit of John Richard Park was uploaded onto the Website<sup>4</sup>.
6. On 5 April 2013, the secured creditors were given notice of the Application<sup>5</sup>.
7. ASIC were notified of the Application and do not wish to be heard<sup>6</sup>.

### **Relevant Factual Background**

8. On 19 March 2013, the administrators were appointed voluntary administrators of LMIM and LMA by resolution of the board of directors of each of those companies.<sup>7</sup>
9. According to the summary of information about the LM Companies' operations and activities prepared by Mr Park, the operations and activities of the LM Companies involved the following (amongst other things):<sup>8</sup>
  - (a) LMIM is an Australian fund manager which operates nationally and internationally from offices on the Gold Coast, Sydney, Hong Kong, London, Dubai, Queenstown, Toronto, Bangkok and Johannesburg with the

<sup>2</sup> Affidavit of John Richard Park sworn 5 April 2013 (Park Extension Affidavit) at [22]

<sup>3</sup> First Federico Affidavit of Service filed by leave at [3] – [11]

<sup>4</sup> Affidavit of John Richard Park filed by leave (Park Third Affidavit) at [22]

<sup>5</sup> First Federico Affidavit of Service at para 11

<sup>6</sup> Affidavit of Philip Yong Pan filed by leave; exhibit PYP - 2

<sup>7</sup> Park Extension Affidavit at [4] and exhibit JRP-1 (1-49).

<sup>8</sup> Park Extension Affidavit at [7], [8], [18]-[19].

international offices operating through wholly owned subsidiaries with the exception of Bangkok);

- (b) LMIM is an unlisted public company which held an Australian Financial Services Licence ("AFSL") authorising it to operate managed investment schemes and to provide financial and life insurance products. That licence has been suspended by ASIC subject to certain exceptions including, inter alia, that the administrators are allowed to provide financial services such as transfer to a new responsible entity, investigating or preserving the assets or winding up the registered managed investment schemes operated by LM<sup>9</sup>;
- (c) LMIM's principal activity was the provision of specialised Australian income products and it also offered life risk insurance products for sale;
- (d) LMIM is the responsible entity for, and operated as at the date of the appointment of the administrators, a number of managed funds ("LM Funds") which are managed investment schemes registered and regulated under Chapter 5C of the Act ("Registered LM Funds");
- (e) LMIM also managed a fund known as LM Managed Performance Fund ("MPF") that was not registered under Chapter 5C as it appears to have been designed for investors outside of Australia, global platform and folio bond operators, and institutional/wholesale investor;<sup>10</sup>
- (f) Before being replaced on 16 November 2012, LMIM was the responsible entity of the a fund known as the LM Wholesale First Mortgage Income Fund; and
- (g) LMA is the service entity to LMIM and has previously provided administration and funds management services to LMIM in exchange for a management fee.<sup>11</sup>

<sup>9</sup> Park Third Affidavit ( in proceedings 2869/13) [check correct para once settled]  
<sup>10</sup> Park Extension Affidavit at [8](f)-(g).  
<sup>11</sup> Park Extension Affidavit at [10].

## The Law

10. Pursuant to s 439A(1) of the Act, the administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by sub-section (5) or extended under sub-section (6).
11. In the present circumstances, the convening period in relation to the second meeting of creditors ends on 14 April 2013.
12. Pursuant to s 439A (6) of the Act, the Court may extend the convening period on an application made during or after the period referred to in paragraph 5(a) or (b), as the case requires. This section gives no guidance to the Court as to the grounds upon which such an extension may be granted.
13. Recently, in *Owen, in the matter of Rivercity Motorway Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) v Madden* [2011] FCA 295, Justice Logan summarised the applicable principles and authorities as follows:

"[18] Over time a number of principles have been developed in relation to whether or not to extend a convening period. In *Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313 at [10], Barrett J observed that, even in the context of an application for an extension of time, the need is:

... to strike an appropriate balance between, on the one hand, the expectation that an administration will be a relatively speedy and summary matter and, on the other, the requirement that undue speed should not be allowed to prejudice sensible and constructive actions directed towards maximising the return for creditors and any return for shareholders.

To that observation one might add, in the context of this case, "maximising, if possible, the return to those who have interests in the stapled securities". So much, in terms of underlying philosophy is evident from the object of Pt 5.3A as set out in s 435A.

[19] Considerations which have proved relevant were summarised, in a non-exhaustive way, by Austin J in *Re Riviera Group Pty Ltd* (2009) 72 ACSR 352 at 355, [13]–[14]. At para 13, his Honour noted that the reasons given for an extension in cases can be grouped into the following broad categories (I omit reference to the supporting authority cited by his Honour):

- (a) the size and scope of the business;
- (b) substantial offshore activities;
- (c) large number of employees with complex entitlements;

- (d) complex corporate group structure and intercompany loans;
- (e) complex transactions entered into by the company (for example securities lending or derivatives transactions);
- (f) complex prospects of recovery proceedings;
- (g) lack of access to corporate financial records;
- (h) the time needed to execute an orderly process of disposal of assets;
- (i) the time needed for thorough assessment of a proposal for a deed of company arrangement;
- (j) where the extension will allow sale of the business as a going concern;
- (k) more generally, that additional time is likely to enhance the return for unsecured creditors.

[20] His Honour then added at [14]:

The cases show that where a substantial issue in any of these categories is established (and a fortiori, where the facts fit into more than one category), the court tends to grant an extension, and the extension tends to be for the time sought by the administrator provided that the evidentiary case has been properly prepared, there is no evidence of material prejudice to those affected by the moratorium imposed by an administration, and the court is satisfied that the administrator's estimate of time has a reasonable basis."

14. Whilst it is not necessarily productive to make such comparisons as each case must be approached according to its own circumstances<sup>12</sup>, it is submitted that the 3 month extension being sought in the present instance is most reasonable.
15. In *Rivercity*<sup>13</sup> the first extension granted was 9 months (the total extension after further applications was 33 months).<sup>14</sup> In *ABC Learning Centres Ltd, in the matter of ABC Learning Centres Ltd; application by Walker (No.5)*<sup>15</sup>, the first extension granted was for a period of 4 months. The total extension (when aggregated with earlier extensions) was 16 months.<sup>16</sup>

<sup>12</sup> See the comments of Barrett J in *Lombe Re Australian Discounts Retail Pty Ltd* (2009) NSWSC 110 at [23]; in this case a short adjournment of 3 weeks was given and then a subsequent extension of 6 months.

<sup>13</sup> Referred to in paragraph 9 above.

<sup>14</sup> *Re Owen, in the matter of Rivercity Motorway Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) v Madden* [2012] FCA 1491.

<sup>15</sup> (2008) FCA 1947.

<sup>16</sup> *RE ABC Learning Centres Ltd (administrators appointed) (receiver and managers appointed); application by Walker (no 8)* (2009) 73 ACSR 478.



16. Section 447A enables an order to be made altering times fixed by a provision of Part 5.3A.<sup>17</sup> It permits the making of orders which alter how ss.439A (2), (5) and (6) apply.<sup>18</sup> The inclusion of s.447A in Part 5.3A means that the remaining provisions are not intended to have a fixed and unchanging operation in relation to all companies.<sup>19</sup>
17. Mr Park<sup>20</sup> has stated that if the administrators are in a position to do so, they may wish (with notice) to convene the second meeting of creditors before the end of the extended period under s 439A(1). This it is submitted, would enable the administrators to maximise their flexibility to pursue the most expeditious course. If this is to occur, it is necessary for an order [as sought in paragraph 2 of the application]<sup>21</sup> under s 447A(1) to be made, so that the administrators can convene the meeting and hold it at any time during the extended convening period, and therefore earlier than s 439A(2) would permit. Such orders were made in *Re Daisytek (Australia) Pty Ltd.*<sup>22</sup> It has become common practice for a court to make an order under s 447A (1).<sup>23</sup>

#### **Basis of the Request for an Extension**

18. Since their appointment, the administrators have undertaken a variety of activities in progressing the administration.<sup>24</sup> Based on those activities and the relevant documentation, the administrator's investigations reveal that:<sup>25</sup>
- (a) the businesses and affairs of the LM Companies (and its numerous overseas subsidiaries and global network of financial advisors and intermediaries) and the various LM Funds that LMIM operates, are significant and complex;
  - (b) the affairs of the LM Companies and the LM Funds are intertwined. LMIM is the responsible entity of the LM Funds (except for MPF) and is otherwise

<sup>17</sup> *Australasian Memory Pty Ltd v Brien* [2000] 200 CLR 270 at pp.278-284.

<sup>18</sup> *Australasian Memory Pty Ltd v Brien* (supra).

<sup>19</sup> *Australasian Memory Pty Ltd v Brien* (supra).

<sup>20</sup> Park Extension Affidavit at [25].

<sup>21</sup> Doc 1.

<sup>22</sup> (2003) 45 ACSR 446

<sup>23</sup> *Riviera Group Pty Ltd (administrators appointed) (receiver and managers appointed)* (2009) 72 ACSR 352 at paragraph 20.

<sup>24</sup> Park Extension Affidavit at [20].

<sup>25</sup> Park Extension Affidavit at [21].

the trustee/manager of MPF, while LMA is engaged by LMIM to provide management services in relation to the LM Funds. Further, some of the individual LM Funds act as feeder funds to other LM Funds;

- (c) there are numerous inter-company loans and other transactions among the LM Companies and the LM Funds;
- (d) there are numerous related party loans and other transactions involving the LM Companies, the LM Funds, Peter Drake (a director of LMIM and a director and shareholder of LMA) and entities associated with Peter Drake. The administrators are currently considering how those loans and transactions affect the LM Companies;
- (e) the administrators are assisting ASIC with any concerns it has with the LM Companies and the LM Funds; and
- (f) the LM Companies and financial planners and intermediaries have received significant management fees, commissions and other payments in respect to the LM Funds.

19. In light of those matters, the administrators seek an extension of the convening period for a period of 3 months to allow the administrators to undertake the further activities set out in the Park Extension Affidavit at [23](a) to (k) so as to be in a better position to:

- (a) consider the consequential effect of those matters on the projected returns to creditors and investors; and
- (b) make informed and considered recommendations at the second meeting of creditors of each of the LM Companies.

20. There is no suggestion that the extension will cause any material prejudice to the secured creditors identified in the Park Extension Affidavit at [13] to [16] (Deutsche and Western Union) as neither have sought to enforce its security, and in the case of Western Union, the calculation of the final balance owing under its facilities is complex and yet to be finalised.

## **Conclusion**

21. In all of the circumstances, it is submitted that an order in terms of the attached draft ought to be made given:
- (a) the size and scope of the LM Companies;
  - (b) the time needed to execute an orderly process of disposal of assets (in particular, the need to secure local and foreign assets of the LM Companies and LM Funds);
  - (c) the regulatory and compliance issues involved being:
    - (i) time required to deal with ASIC concerning LMIM's obligations under its suspended AFSL and reporting obligations under Part 2M.3 of the Act in relation to the Registered LM Funds;
    - (ii) the time required for the administrators to ascertain the level of regulatory compliance in numerous foreign jurisdictions and deal with any foreign regulatory issues given the offshore activities undertaken by LMIM;
  - (d) the time required to conduct further investigations:
    - (i) to determine whether there has been insolvent trading;
    - (ii) to determine whether there have been any voidable, uncommercial or director-related transactions that may be set aside;
    - (iii) to determine whether there are any other causes of actions available to the LM Companies;
    - (iv) as to whether there have been any breaches, offences or voidable transactions in relation to the LM Funds;
    - (v) in relation to the claims of creditors and investors;
  - (e) the time required to consider any proposals for a deed of company arrangement (DOCA) or restructure of the LM Companies and LM Funds which may preserve their businesses or offer a better return to creditors and

investors than a winding up. At this point in time no proposal has been put forward.

22. It is submitted that a good reason for the extension has been shown.

Tom Sullivan SC and CM Muir  
Counsel for the Applicants  
12 April 2013

SUPREME COURT OF QUEENSLAND

Registry: Brisbane 2859/13

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED  
(ADMINISTRATORS APPOINTED) ABN 68 077 208 461 AND  
LM ADMINISTRATION PTY LTD (ADMINISTRATORS APPOINTED)  
ACN 055 691 426

Applicants

JOHN RICHARD PARK AND GINETTE MULLER IN THEIR  
CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF  
LM INVESTMENT MANAGEMENT LIMITED  
(ADMINISTRATORS APPOINTED) AND LM ADMINISTRATION  
PTY LTD (ADMINISTRATORS APPOINTED)

ORIGINATING APPLICATION

To the Respondents, the creditors of LM Investment Management Limited (Administrators Appointed) ("LMIM") and LM Administration Pty Ltd (Administrator Appointed) ("LMA")

TAKE NOTICE that the Applicants are applying to the Court for the following orders:

Extension of Convening Period

- 1 Pursuant to section 439A(6) of the *Corporations Act 2001* ("the Act"), an order that the period within which the Applicants must convene the second meeting of creditors of each of LMI and LMA be extended up to and including 25 July 2013.
- 2 Pursuant to section 447A(1) of the Act, an order that the second meeting of creditors of each of LMI and LMA required by section 439A of the Act may be held together or separately and at any time during, or within five business days after the end of, the convening period as extended by the Court notwithstanding the provisions of section 439A(2) of the Act.

ORIGINATING APPLICATION

Filed on behalf of the Applicants

Form 5 - R.26



King & Wood Mallesons  
Level 33, Waterfront Place, 1 Eagle Street,  
Brisbane Qld 4000  
T +61 7 3244 8000  
F +61 7 3244 8999  
DX 311 Brisbane  
King & Wood Mallesons' reference  
ESC/CAM:0455064221

### Administrative Matters

- 3 The Applicants inform those creditors (including persons claiming to be creditors) of LMI and LMA for whom the Applicants have a current postal address (in Australia), facsimile number or email address ("Creditors") and the Australian Securities and Investments Commission ("ASIC") of the orders made pursuant to this application and any further application (for a further extension of the convening period) of LMI and LMA, by means of a circular forwarded by post, facsimile or email (as the case may be) within seven days after the filing of the application or sealed copies of the orders being made available by the Court.
- 4 With respect to all creditors of LMI and LMA for whom the Applicants do not have a current postal address (in Australia), facsimile number or email address, the Applicants inform those creditors of the orders made pursuant to this application and any further application (for a further extension of the convening period) of LMI and LMA, by making the applications (and any supporting affidavit material) or orders available on [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com) within seven days after the filing of the application or sealed copies of the orders being made available by the Court.
- 5 An order that the following persons have liberty to apply on giving all other interested parties not less than three business days' notice:
  - (a) any person who can demonstrate a sufficient interest to modify or discharge any orders made; and
  - (b) the Applicants for any purpose connected with the administrations of LMI or LMA.
- 6 An order that the costs of and incidental to this application be costs and expenses in the administrations of and be paid out of the assets of, LMI and LMA.
- 7 Such further or other orders as the Court considers appropriate.

This application will be heard by the Court at Brisbane.

on: 12  
10 April 2013 at 10.00 a.m

Filed in the Brisbane Registry on 26 March 2013

Registrar:

nll

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you may before the day for hearing file a Notice of Address for Service in this Registry. The Notice should be in Form 8 to the Uniform Civil Procedure Rules. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

On the hearing of the application the Applicants intends to rely on the following affidavits:

1 Affidavit of John Richard Park to be sworn.

If you intend on the hearing to rely on any affidavits they must be filed and served at the Applicant's address for service prior to the hearing date.

If you object that these proceedings have not been commenced in the correct district of the Court, you must apply to the Court for dismissal of the proceedings.

**THE APPLICANTS ESTIMATE THE HEARING SHOULD BE ALLOCATED 2 hour**

#### **PARTICULARS OF THE APPLICANTS**

<b>Applicant name:</b>	<b>John Richard Park and Ginette Muller</b>
<b>Applicant's residential or business address:</b>	<b>22 Market Street, Brisbane</b>
<b>Applicant's solicitor's name</b>	<b>King &amp; Wood Malleons</b>
<b>and firm name:</b>	<b>King &amp; Wood Malleons</b>
<b>Solicitor's business address:</b>	<b>Level 33, Waterfront Place, 1 Eagle Street, Brisbane Qld 4000</b>
<b>Address for service:</b>	<b>Level 33, Waterfront Place, 1 Eagle Street, Brisbane Qld 4000</b>
<b>DX:</b>	<b>311 Brisbane</b>
<b>Telephone:</b>	<b>+ 61 7 3244 8000</b>
<b>Fax:</b>	<b>+ 61 7 3244 8999</b>

Signed:

*King & Wood Malleons*

Description: Solicitor for the Applicants

Dated: 26 March 2013

Creditors of LMA and LMIM

And

**Australian Securities and Investment Commission**

**Attention: Tim Walker**

**GPO Box 9827**

**Sydney NSW 2001**

11387683\_2



BRIEFING: FMIF SUMMARY

Borrower	Security ranking	Loan type class/activity	Description / Comments	Location of asset	Loan balance 31/12/12	Provision	Impaired Loan Balance	Is LMIF in Possession, Controller or Acting as POA
Northshore Bayview St Pty Ltd	1st Mortgage	Originally development/residential, now residential in sell down.	"Harmony Apartments". Progressive sell down of a completed 119 unit development. As FMIF was unable to complete the construction, agreement was reached with CBA to fund the cost to complete the project up to a maximum debt of \$18.1M. Following completion, presales were able to settle, thereby discharging CBA and allowing FMIF to recover proceeds from sales going forward. LM as Controller manages the sales/marketing.	20 Bayview Street, Runaway Bay 4218	\$44,802,404	\$23,383,391	\$21,409,012.56	Yes
Beilpac Pty Ltd	Charge over entities and PGs		Operating coal mine and future development lands. Litigation finalised in 2011 against mine operator Gujarat (which had failed to perform on previous sale) for failure to remediate land, surrender mining leases and vacate the property in 2007. Recovery of outstanding debt being pursued against guarantors and bonds with full recovery anticipated following legal proceedings funded by second mortgages	Princess Highway, Russell Vale NSW (original security)	\$4,679,749		\$4,679,749.00	No assets only litigation. Need open PI cover at least

Borrower	Security ranking	Loan type class/activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LHM in Possession, Controller or Acting as POA
Redland Bay Leisure Life	1st Mortgage	development/retirement	Partially completed retirement village & residual land. Infill mixed residential development with DA for 480 dwellings. Currently constructed 39 apartments along with residual land for balance 123 further supported living aged care units, 8 courtyard homes, substantially completed civil works for 110 small lot (<500 sqm) development and residual land for balance site. The overall DA for the site provides for the development of residential dwellings for over 686. The overall zoning of the land is for residential purposes and the recovery strategy being undertaken has seen the opening of Tall trees Supported Living Aged Care neighbourhood with first 39 units which will deliver approximately 162 Supported Living retirement units. Planning approvals submitted to council regarding the development and realisation of balance of site for residential purposes and also negotiations advancing with council regarding delivery of community aquatic and healthcare facility.	City Government, Melbourn, Wertheim & Salisbury Streets, Redland Bay Qld 4165	\$86,303,102	\$15,368,382	\$48,934,720.06	Yes
Redland Bay Leisure Life Development Manager Pty Ltd		as above	as above	as above	refer above			Yes

Borrower	Security ranking	Loan type class/activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LMM in Possession, Controller or Acting as POA
St Crispin's Property Pty Ltd	1st Mortgage	development/residential, now completed residential	Remaining 57 residential apartments of a completed 72 unit resort complex. Experienced operators appointed to manage the resort to maximise return to owners. Agreed strategy is that the St Crispins property will not be placed on the current market and will be held until the property is five years old and sold under the going concern provisions thus eliminating liability for GST.	19-37 St Crispin's Avenue, Port Douglas QLD	\$39,289,771	\$14,759,366	\$24,530,405.00	Yes
Eden Apartments Pty Ltd	1st Mortgage	Development/residential now residential in sell down	Last remaining luxury residential strata units of a 32 unit development. LMIPITAL is Controller acting.	73 Mill Point Road, South Perth, WA	\$12,800,562.55	\$10,724,563	\$1,376,000.00	No last unit sold in March
Young Land Corporation Pty Ltd	1st Mortgage	Development/residential	A residential land subdivision at Yeppoon wherein approximately 130 lots have been sold and approximately 450 lots remain to be developed (subject to staged approvals). There are approximately 20 completed lots and 80 lots having operational works approval to be constructed. Remainder of site is anglobo residual land.	Koppel Bay Estate, Tanby Rd, Taroomballi, Yeppoon QLD	\$30,988,466	\$10,485,354	\$26,481,114.00	Yes. Controllership includes build out operations

Borrower	Security ranking	Loan type class/activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LMIM in Possession, Controller or Acting as POA
Brambleton Pty Ltd	1st Mortgage	Commercial	90 strata titled hotel rooms operating under the brand of the Holiday Inn. Management Rights are undertaken by Outrigger Resorts. There are approximately 400 rooms in the whole hotel. Rooms are in the rental pool generating income. LMPTAL is Controller acting. Strategy is that the property will not be marketed for sale in the current market. Monthly room rental income is being distributed to the Controller.	22 View Avenue, Surfers Paradise Qld 4217	\$27,474,008	\$10,974,008	\$16,500,000.00	Yes.
Lot 111 Pty Ltd	1st Mortgage	development/ completed commercial actively being marketed for sale or lease	Approximately 60 remaining units of 83 completed commercial units. The borrower is targeting lease up of lots and sale as a going concern.	23 Narabang Way, Belrose, NSW	\$21,104,891	\$5,371,562	\$15,733,129.25	Not in possession.
OYST P/L	1st Mortgage	development/retirement now completed commercial	Completed operating retirement village (supported living) of 83 units at Banora Point, NSW under sale down of Stage 2 units. LMPTAL is controller of this asset and has appointed an expert operator (Tail Trees) to manage the day to day running of the village.	Ocean View Banora Point, 2-4 Terranora Road, Banora Point, NSW	\$26,246,289	\$4,259,240	\$21,987,049.27	Yes.

H:\8974\Legal\Russells Info for briefing\8974MIF Summary FTI 20 3 12

Borrower	Security/ Ranking	Loan type class/activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LMM in Possession, Controller or Acting as POA
Graystones Projects Pty Ltd	1st Mortgage	Development/ Industrial	A partly completed industrial and retail strata titled precinct with additional child care centre. Site being prepared for upcoming sales campaign	Cnr Reconciliation & Florite Roads, Graystones, NSW 2145	\$27,013,092	\$21,013,093	\$5,999,999.08	Yes
Glendenning Developments P/L	1st Mortgage	Development/ Industrial now completed in sell down	Final remaining units of 31 mixed bulky storage/ industrial units at Glendenning NSW. LM overseeing borrower's management of sales and marketing.	Cnr Owen and Power Streets, Glendenning, NSW	\$4,937,972	\$4,137,972	\$800,000.00	Yes
Carrington Management P/L (Caboolture South)	1st Mortgage	development/ retirement now completed (and stage 2 residual land)	Operating supported living retirement village currently comprising 64 units and associated community facilities operating under Tall Trees model and brand. Construction of stage 2 being prepared	15 Adelaide Drive, Morayfield QLD 4508	\$28,775,799	\$298,984	\$28,476,815.75	Yes

Borrower	Security Ranking	Loan type class/ activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LMM in Possession, Controller or Acting as POA
Bridgewater Lake Estate Ltd	1st Mortgage	development	An operating Independent Living Retirement village with a number of completed and occupied dwellings and all infrastructures completed to allow development of remaining dwellings. Strategy for realisation of security is by development and sale over approx. 4.5 year period. Construction of 6 display units in 2012 and commencement of marketing campaign. LMP/TAL as controller has appointed a professional retirement village operator to manage the day to day running of the village.	Patillos Lane, Roxburgh Park Vic. 3084	\$29,628,116	\$2,017,811	\$27,611,305.00	Yes. Contollership also includes some development works
Townsville Commercial Pty Ltd (OR		Commercial	An operating hotel in Townsville with 100 rooms. The hotel is currently operating under a management agreement with the Townsville City Council. The hotel is currently operating under a management agreement with the Townsville City Council. The hotel is currently operating under a management agreement with the Townsville City Council.				Paid out Q3 2012	

Borrower	Security ranking	Loan type class/ activity	Description / Comments	Location of asset	Loan balance 31.12.12	Provision	Impaired Loan Balance	Is LMM in Possession, Controller or Acting as POA
Green Square Property Developments Pty Ltd	1st Mortgage	Development /showroom/office now completed and in sell down	Remaining 4-5 residual of 42 units in completed office/showroom building. LM oversees borrower's management of sales and marketing. Borrower focuses on lease up and then sale to investors. Sale contracts are on leased units with no GST payable by the vendor.	112-122 McEvoy St, Alexandria, NSW	\$2,607,838	\$615,313	\$1,892,525.04	Not in possession
Source Student Lodge Pty Ltd		Commercial/ student accommodation	Operating student accommodation facility, 76 individual beds, each accommodation units typically with each accommodation 3 students. On site managers coordinate daily to day living of the facility and such managers report to LM/PTAL. LM/PTAL is Controller of the facility. Property will be sold to LM/PTAL in early 2013. Property now operating at 100% occupancy during summer.	112-122 McEvoy St, Alexandria, NSW			Paid out 03/2012	
Source Developments No 1 (Coomera)	1st Mortgage	Development/residential at	Partially completed residential townhouse development. 14 dwellings now complete with 12 sold and settled. Construction of remaining 27 townhouses commenced January, 2012. LM/PTAL is Controller acting.	Brygon Creek Road & Gumtree Crescent, Coomera Qld 4210	\$14,188,325	\$10,283,825	\$3,904,500.00	Yes. Developments being completed in controllership
Coulter Developments P/L & Rocola P/L	1st Mortgage	Development/ residential now completed and in sell down	12 Completed luxury residential units in progressive sell down. 7 sold and settled, 1 under contract, 5 on market	Trevino Mews, Mandurah WA	\$8,051,016	\$5,395,028	\$3,655,988.56	Yes

<u>Borrower</u>	<u>Security Ranking</u>	<u>Loan type class/ activity</u>	<u>Description/ Comments</u>	<u>Location of asset</u>	<u>Loan balance 31.12.12</u>	<u>Provision</u>	<u>Impaired Loan Balance</u>	<u>Is LMM in Possession, Controller or Acting as POA</u>
Tall Trees Tanah Merah	2nd Mortgage Priority subsequent to CBA with current debt c.\$10M and asset valuations December 2012 \$42.3M	development/ retirement	Staged supported living development together with all community and administration facilities. As FMIF was unable to meet funding commitments on more recent stages, agreement was reached with CBA for it to complete funding on a cost to complete basis. CBA holds first mortgage and FMIF cedes priority. Additional collateral security held for Rochdale village (aggregate valuation \$42.3M Dec 2012)	3745-3749 Pacific Highway, Slacks Creek, Qld 4127	\$14,528,162		\$14,528,161.96	Yes
Australian International Investment Services Pty Ltd (AIIS)	1st Mortgage	Development/ residential	Residential development site with DA approval for 278 residential units with a 67 place child care centre. Off the plan marketing well under way with a steady sales rate being achieved. Loan expected to be refinanced by borrower prior to construction	7 Irving Street, Phillip ACT 2606	\$8,317,511		\$8,317,511.24	Yes
Kingopen P/L	1st Mortgage	Development/ retirement/ residential	3 residual development lots - Parcel 1. DA for 80 residential homes in place Parcel 2. Approval for 86 residential homes Parcel 3. DA being sought for 132 retirement/supported living dwellings.	Cnr Chester Pass, Merrier & Catalina Roads, Albany WA 6330	\$11,480,740	\$542,801	\$10,917,939.00	Yes



<u>Borrower</u>	<u>Security ranking</u>	<u>Loan type class/activity</u>	<u>Description / Comments</u>	<u>Location of asset</u>	<u>Loan balance 31.12.12</u>	<u>Provision</u>	<u>Impaired Loan Balance</u>	<u>is LMM in Possession, Controller or Acting as POA</u>
Cameo Estates Lifestyle	1st Mortgage	development/retirement now completed	Partly completed retirement Village in Launceston, Tasmania. Existing Community Centre with 21 ILU's completed. A further 22 ILU's are to be developed to maximise the Estate. An external manager with retirement expertise has been appointed to look after the day to day operations of the village and the village has just undergone sale campaign.	30 Janefield St, Mowbray, Launceston, TAS	\$6,028,537	\$1,402,537	\$4,626,000.00	Yes
Madrers Properties (Resort Corp)	1st Mortgage	existing residential/commercial	2 remaining retail units	32-34 Marine Parade, Kingscliff, NSW	\$3,028,283	\$2,172,017	\$854,266.16	Yes
U-Own Storage (Southbank) Pty Ltd	1st Mortgage	development/ storage facility now completed	Storage facility -strata titled - Port Melbourne Vic.	310-314 Lorimer St, South Melbourne Vic	\$4,199,985.98	\$2,971,386	\$1,227,600.00	Yes
LMM aff LM Managed Performance Fund	1st Mortgage	land/ future development	Residential future development site with DA for 15 dwellings.	Lots 2 and 20 Livistoria Close, Buehland Beach, Qld 4318	\$1,169,108.81		\$1,169,108.81	To take possession will need insurance

H:\8974\legal\russells info for briefing\8974FMIF Summary FTI 20 3 12

# Australian Financial Services Licence

**LM INVESTMENT MANAGEMENT LIMITED**

**ABN: 68 077 208 461**

**Licence No: 220281**

was licensed as an Australian Financial Services Licensee pursuant to section 913B of the Corporations Act 2001. The conditions of the licence are hereby varied from the date hereunder. The licensee shall continue to be licensed as an Australian Financial Services Licensee subject to the conditions and restrictions which are prescribed, and to the conditions contained in this licence and attached schedules.

**Issued 12 December 2012**

## Authorisation

1. This licence authorises the licensee to carry on a financial services business to:
  - (a) provide financial product advice for the following classes of financial products:
    - (i) life products limited to:
      - (A) life risk insurance products as well as any products issued by a Registered Life Insurance Company that are backed by one or more of its statutory funds; and
    - (ii) superannuation;
  - (b) deal in a financial product by:
    - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
      - (A) interests in managed investment schemes limited to:
        - (1) own managed investment scheme only; and
      - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
        - (A) deposit and payment products including:
          - (1) basic deposit products;
          - (2) deposit products other than basic deposit products; and
          - (3) non-cash payment products;
        - (B) derivatives;
        - (C) foreign exchange contracts;
        - (D) life products limited to:
          - (1) life risk insurance products as well as any products issued by
    - (c) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity:
      - (i) "Lm Australian Structured Products Fund" scheme (ARSN: 149 875 669),
        - (A) a scheme which only holds the following types of property:
          - (1) derivatives; and
          - (2) financial assets; and
        - (ii) schemes which only hold the following types of property:
          - (A) direct real property;
          - (B) financial assets; and
          - (C) mortgages; and
      - (d) provide the following custodial or depository services:
        - (i) operate custodial or depository services other than investor directed portfolio services;

a Registered Life Insurance Company that are backed by one or more of its statutory funds;

(E) interests in managed investment schemes including:

(1) investor directed portfolio services;

(F) securities; and

(G) superannuation;

to retail and wholesale clients.



**ASIC**  
Australian Securities & Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

### Key Person Requirements

2. If any of the following officer(s) or key person(s) cease to be officers of the licensee or to perform duties on behalf of the licensee with respect to its financial services business:
- (a) Peter Charles DRAKE;
  - (b) Eghard VAN DER HOVEN;
  - (c) Simon Jeremy TICKNER;
  - (d) Michael William SKEGGS; and
  - (e) Wendy Gaye LIST;
- the licensee must notify ASIC in writing within 5 business days of the following matters:
- (f) the date the officer or key person ceased to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business; and
  - (g) the name, address, date of commencement, educational qualifications and experience of any replacement officer or key person the licensee has appointed to perform duties on behalf of the licensee with respect to its financial services business; and
  - (h) if the licensee does not have a replacement officer or key person, detailed reasons as to why the licensee has not nominated a replacement; and
  - (i) a detailed description of how the licensee will continue to comply with the Act and the conditions of this licence following the officer or key person(s) identified above, or any replacement of such person, ceasing to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business.

### Compliance Measures to Ensure Compliance with Law and Licence

3. The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.

### Training Requirements for Representatives

4. The licensee must for any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
- (a) identify the tasks and functions that person performs on behalf of the licensee; and
  - (b) determine the appropriate knowledge and skills requirements required to competently perform those tasks and functions; and
  - (c) implement procedures for continuing training.
5. The licensee must ensure that any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
- (a) has completed training courses at an appropriate level that are or have been approved by ASIC in writing that are relevant to those functions and tasks; or



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2010

## Conditions of Conditions

- (b) has been individually assessed as competent by an assessor that is or has been approved by ASIC in writing; or
- (c) in respect of financial product advice on basic deposit products and facilities for making non-cash payments that are related to a basic deposit product, has completed training courses that are or have been assessed by the licensee as meeting the appropriate level that are relevant to those functions and tasks.

### 6. Condition 5 does not apply in relation to:

- (a) a natural person who is a customer service representative and who provides financial product advice:
  - (i) derived from a script approved by a natural person who complies with paragraphs 5(a), (b) and (c) ("qualified person"); or
  - (ii) under the direct supervision of a qualified person present at the same location; or
- (b) a natural person who is a para-planner or trainee adviser and who provides financial product advice under the direct supervision of a qualified person who is, in addition to the licensee, responsible for:
  - (i) ensuring that any financial product advice that is provided by the para-planner or trainee adviser for which a Statement of Advice must be given is reflected in a Statement of Advice that has been reviewed by the qualified person before the Statement of Advice is given, to ensure that the Statement of Advice would comply with all of the requirements of the Act; and
  - (ii) managing and leading any verbal explanation of the financial product advice to the client,

where the licensee has established procedures to ensure that the natural person does not provide financial product advice to retail clients on behalf of the licensee other than in the manner specified in this paragraph, and the licensee monitors whether or not those procedures are effective.

### 7. Condition 5 does not apply in relation to financial product advice:

- (a) given to retail clients in advertising to which section 1018A of the Act applies, provided that:
  - (i) this licence authorises the provision of financial product advice; and
  - (ii) a responsible officer of the licensee approves such advertising before its publication or dissemination to retail clients; or
- (b) for which there is an exemption under the Act from the obligation to hold a licence; or
- (c) given to retail clients in respect of a margin lending facility before 1 July 2011.

### Notification to Current or Former Representative's Clients

#### 8. Where, under Division 8 of Part 7.6 of the Act:

- (a) ASIC makes a banning order against a current or former representative of the licensee; or
- (b) the Court makes an order disqualifying a current or former representative of the licensee;

the licensee must, if directed in writing by ASIC, take all reasonable steps to provide the following information in writing to each retail client to whom the representative had provided personal advice within the 3 years prior to the date of the banning order or disqualification order:

- (c) the name of the representative; and



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

- (d) any authorised representative number allocated to the representative by ASIC; and
- (e) the terms of the banning or disqualification order; and
- (f) contact details of the licensee for dealing with enquiries and complaints regarding the banning or disqualification or the conduct of the representative as a representative of the licensee.

### Financial Requirements for Market Participants and Clearing Participants

9. Where the licensee is a market participant in a licensed market, or a clearing participant in a licensed CS facility, conditions 10 to 20 (inclusive) do not apply to the licensee.

### Base Level Financial Requirements

10. The licensee must:

- (a) be able to pay all its debts as and when they become due and payable; and
- (b) either:
  - (i) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or
  - (ii) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and
- (c) meet the cash needs requirement by complying with one of the following five options:
  - (i) Option 1 (reasonable estimate projection plus cash buffer)—refer to definition of "Option 1" under this licence; or
  - (ii) Option 2 (contingency based projection)—refer to definition of "Option 2" under this licence; or
  - (iii) Option 3 (financial commitment by an Australian ADI or comparable foreign institution)—a requirement that an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider gives the licensee an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of the demand to the licensee's creditors or a trustee for the licensee's creditors, that the licensee reasonably expects will apply for at least three months, taking into account all commercial contingencies for which the licensee should reasonably plan; or
  - (iv) Option 4 (expectation of support from an Australian ADI or comparable foreign institution)—a requirement that the licensee:
    - (A) is a subsidiary of an Australian ADI or a corporation approved by ASIC in writing for the purpose of this condition; and
    - (B) reasonably expects that (based on access to cash from its related bodies corporate) it will have adequate resources (when needed) to meet its liabilities for at least the next three months (including any additional liabilities that the licensee might incur during that period), taking into account all adverse commercial contingencies for which the licensee should reasonably plan; and



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

- (C) ensures that a responsible officer of the licensee has documented that the officer has the reasonable expectation for at least the following three month period together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or
- (v) Option 5 (parent entity prepares cash flow projections on a consolidated basis)—a requirement that the licensee ensures that:
- (A) the cash flows of the licensee and each of its related bodies corporate, other than any body regulated by APRA ("licensee group"), are managed on a consolidated basis; and
  - (B) there is a body corporate within the licensee group of which all members of the licensee group are subsidiaries that is not a body regulated by APRA ("parent entity"); and
  - (C) the parent entity complies with Option 1 or Option 2 as if it were the licensee, cash flows of any member of the licensee group were cash flows of the licensee and any cash held by a member of the licensee group, other than as trustee or as trustee of a relevant trust, were so held by the licensee; and
  - (D) a report by the parent entity, and if that is a registered company auditor is given to ASIC with the licensee's annual report, under condition 21 of this licence, in relation to each financial year of the licensee and for any other period that ASIC requests, by a date that ASIC requests, with respect to compliance by the parent entity with Option 1 or Option 2 as they would apply in accordance with subparagraph (C), including the report that would be required from the auditor of a licensee for that period purporting to comply with Option 1 or Option 2; and
  - (E) either of the following applies:
    - Alternative A—the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities which the licensee reasonably expects will apply for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan; or
    - Alternative B—the licensee reasonably expects that (based on access to cash from members of the licensee group) it will have adequate resources to meet its liabilities (including any additional liabilities that the licensee might incur while the commitment applies) for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan and a responsible officer of the licensee has documented that the officer has the reasonable expectation in respect of at least the following three months together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; and
  - (F) the licensee has no reason to believe that the parent entity has not complied with the requirement at subparagraph (C) or has failed to comply in a material respect with its obligations under Chapter 2M of the Act or, if the parent entity is not a company, under any other laws (whether law in Australia or not) relating to financial reporting that apply to it.



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

For 5 years after the end of the last financial year that includes a part of the period to which any document prepared for subparagraph (c)(iv)(C) or Alternative B in subparagraph (c)(v)(E) relates, the licensee must keep the document and give it to ASIC if ASIC requests.

### Financial Requirements for Managed Investments, Custody Services and Margin Lending Facilities

11. The licensee must hold at least \$5 million net tangible assets ("NTA"), unless for each registered scheme operated by the licensee at least one of the following is satisfied:

- (a) all the scheme property and other assets of the scheme(s) not held by members are held by a custodian appointed by the licensee, that has \$5 million NTA or is an eligible custodian; or
- (b) all the scheme property and other assets of the scheme(s) not held by members are special custody assets or the Tier \$500,000 class assets held by the licensee or a custodian appointed by the licensee (or a sub-custodian appointed by that custodian), where the person holding the scheme property or other assets is:
  - (i) the licensee and the licensee has \$500,000 NTA; or
  - (ii) the custodian or sub-custodian and the custodian has \$500,000 NTA or is an eligible custodian; or
- (c) the only scheme property and other assets of the scheme(s) that are not held under paragraph (a) or (b) of this condition are special custody assets, each of which is held by:
  - (i) the licensee; or
  - (ii) an eligible custodian; or
  - (iii) a custodian that has the same level of NTA as the licensee is required to have under the remainder of this condition; or
  - (iv) the members of the scheme;

Where paragraph (a), (b) or (c) of this condition is satisfied, the licensee must hold NTA of 0.5% of the value of:

- (d) assets (including mortgages held by members of a mortgage scheme and managed as part of the scheme); plus
- (e) any other scheme property not counted in calculating the value of assets, of the registered scheme(s) operated by the licensee with a minimum NTA requirement of \$50,000 and a maximum NTA requirement of \$5 million.

12. The custodian need not have the required NTA under paragraph 11(c)(iii) of this licence if the only assets it holds for the scheme are those contained in paragraphs (a), (c) or (g) of the definition of "special custody assets" under this licence, or if the audited trust account is a regulated trust account, described in paragraph (d) of the definition of "special custody assets" under this licence.

13. The licensee must have at least \$5 million NTA where the licensee provides a custodial or depository service that:

- (a) has custody of client assets other than incidentally to another financial service provided by the licensee or a related body corporate; or
- (b) holds IDPS property or other assets of an IDPS.



ASIC  
Australian Securities &  
Investment Commission



# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

licence No: 220281

Effective 7 September 2012

Immediate Conditions

## Financial Requirements for Foreign Exchange Dealers

### 14. Where:

- (a) the licensee carries on a business of entering, as principal, into foreign exchange contracts that are financial products in Australia; and
- (b) a counterparty to a foreign exchange contract that the licensee enters into as principal in Australia covered by this licence is a person who is not:
  - (i) an authorised deposit-taking institution within the meaning of the Banking Act 1959; or
  - (ii) a person that is required under their AFS licence to have \$10 million of tier one capital,

the licensee must either:

- (c) have \$10 million of tier one capital, as defined in the Australian Prudential Regulation Authority's ("APRA") Prudential Standards and Guidance Notes for Authorised Deposit-Taking Institutions as in force at the date of this licence; or
- (d) have adjusted surplus liquid funds ("ASLF") of the sum of:
  - (i) \$50,000; plus
  - (ii) 5% of adjusted liabilities between \$1 million and \$100 million; plus
  - (iii) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding \$100 million,

up to a maximum ASLF of \$100 million.

## Financial Requirements for Holding Client Money or Property

### 15. If at any time the licensee:

- (a) is required to hold money in a separate account under Division 2 of Part 7.8 of the Act; or
- (b) holds money or other property on trust for a client or is required to do so under Regulation 7.8.07(2) of the Corporations Regulations or otherwise; or
- (c) has the power to dispose of a client's property under power of attorney or otherwise;

the licensee must ensure that the licensee has at least \$50,000 in surplus liquid funds ("SLF") unless the total value of the money and property for all clients is less than \$100,000 excluding:

- (d) money that has satisfied a client's liability on an insurance contract where the licensee is acting under a binder or section 985B of the Act applies, or property acquired by investment of that money; or
- (e) the value of property where the licensee merely holds a document of title, and the client has legal title to the property.

## Financial Requirements for Licensee Transacting with Clients

16. If the licensee incurs actual or contingent liabilities of the relevant kind by entering into a transaction with a client(s) in the course of providing a financial service to the client(s), the licensee must have adjusted surplus liquid funds ("ASLF") of the sum of:

- (a) \$50,000; plus



ASIC  
Australian Securities &  
Investments Commission



# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No. 220281

Effective 7 September 2010

## Schedule of Conditions

- (b) 5% of adjusted liabilities between \$1 million and \$100 million; plus
- (c) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding \$100 million, up to a maximum ASLF of \$100 million.

This condition does not apply to the licensee if:

- (d) the total of:
  - (i) the current liabilities that would be included in the calculation of the licensee's adjusted liabilities; and
  - (ii) the contingent liabilities that if crystallised would be a current liability and be included in the calculation of the licensee's adjusted liabilities,is less than \$100,000; or
- (e) the licensee has no:
  - (i) liabilities to clients that would be included in calculating its adjusted liabilities; or
  - (ii) contingent liabilities to clients which if crystallised would be included in calculating its adjusted liabilities,other than under debentures the licensee issued under Chapter 2L of the Act.

For the purpose of paragraphs (d) and (e), the licensee may disregard a liability or a contingent liability that:

- (f) is a contingent liability that is neither a derivative nor a liability from underwriting securities or managed investment products; or
- (g) the licensee reasonably estimates has a probability of less than 5% of becoming an actual liability; or
- (h) is covered by money or property that the licensee holds in a separate account under Part 7.8 of the Act or on trust for clients; or
- (i) is adequately secured as defined in paragraph (a) or (b) of the definition of "adequately secured" under this licence; or
- (j) is a liability incurred by entering into a transaction on a licensed market that is to be settled using a clearing and settlement facility, the operation of which is authorised by an Australian CS facility licence; or
- (k) is under a foreign exchange contract and the licensee is required to have \$10 million of tier one capital under another condition of this licence because the licensee has entered a foreign exchange contract as principal; or
- (l) is under a derivative where:
  - (i) the licensee does not make a market in derivatives; and
  - (ii) the licensee entered into the dealing for the purposes of managing a financial risk; and
  - (iii) either the licensee's dealings in derivatives are not a significant part of its business or of the business of it and its related bodies corporate taken together; and
  - (iv) the licensee did not enter into the dealing on the instructions of another person; or
- (m) is under a foreign exchange contract where the licensee:
  - (i) does not make a market in foreign exchange contracts; and
  - (ii) entered into the contract for the purposes of enabling a payment in one of the currencies under the foreign exchange contract; and
  - (iii) did not enter into the foreign exchange contract on the instruction of another person; or



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

licence No: 220281

effective 7 September 2012

## Annexure of Conditions

(n) occurs in circumstances where a licensee agrees to provide credit to another person under a margin lending facility and the credit remains undrawn or a portion of the credit remains undrawn.

In this condition, a reference to a client includes a person who acquires or disposes of financial products in a transaction that the licensee entered into at a price the licensee stated in the course of making a market.

## Reporting Triggers and Requirements for Financial Requirement Conditions of this Licence

17. The licensee must ensure the reporting requirements under conditions 18 and 19 of this licence are met where either paragraph (a) or paragraph (b) applies:
- (a) the trigger points described in paragraphs (i) and (ii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$1 million and less than or equal to \$100 million; and
    - (ii) the licensee has an ASLF of less than 5.5% of adjusted liabilities; or
  - (b) the trigger points described in paragraphs (i), (ii) and (iii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$100 million; and
    - (ii) the licensee does not have \$100 million ASLF; and
    - (iii) the licensee has an ASLF that is less than \$100,000 above the minimum ASLF required under condition 16 of this licence.
18. Where the licensee's ASLF is below the trigger points, the licensee must not enter into any transactions with clients that could give rise to further liabilities, contingent liabilities or other financial obligations until the licensee's board or other governing body has certified in writing that having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A of the Act.
19. Where the licensee's board or other governing body has made the certification required under condition 18, the licensee must ensure that the licensee's board or other governing body certifies in writing at least monthly that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A of the Act until the licensee's ASLF continuously exceeds the trigger point for a period exceeding one month.
20. The licensee must keep each certification issued by the licensee's board or other governing body under conditions 18 and 19 of this licence for at least 5 years from the date of such certification. The licensee must provide ASIC with a copy of each certification within 3 business days of the date of each certification.

## Audit Opinion on Financial Requirements

21. The licensee must lodge with ASIC an opinion by a registered company auditor ("the audit opinion") addressed to the licensee and ASIC for the following periods:
- (a) for each financial year, at the same time the licensee is required to lodge a balance sheet under Part 7.8 of the Act; and
  - (b) for any period of time that ASIC requests, by the date ASIC requests the audit opinion to be lodged;



ASIC  
Australian Securities &  
Investments Commission

## Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

### Formula of Conditions

that states whether during:

- (c) any part of the period for which the licensee:
  - (i) relied on being a market participant or a clearing participant, on a positive assurance basis, the licensee was a participant in the market conducted by:
    - (A) ASX; or
    - (B) SFE, that restricted its financial services business to participating in the market and incidental business supervised by SFE; and
  - (ii) relied on being a body regulated by APRA, on a positive assurance basis, the licensee was a body regulated by APRA; and
- (d) any remaining part of the period:
  - (i) in the auditor's opinion, the licensee:
    - (A) complied with all the financial requirements under conditions 10 to 20 (inclusive) of this licence other than paragraph 10(c) of this licence, except for paragraph (e) of the definition of "Option 1" under this licence, the licensee purports to comply with "Option 1"; and
    - (B) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v) had at all times a projection covering at least the following 3 months) that purports to, and appears on its face to comply with paragraph (a) of the definition of "Option 1" or paragraph (a) of the definition of "Option 2" under this licence (depending on which option the licensee purports to be complying with); and
    - (C) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v) correctly calculated the projections on the basis of the assumptions the licensee adopted for the projections described in subparagraph (B) of this condition; and
    - (D) for any period when the licensee relied on subparagraph 10(c)(iii) of this licence, has obtained from an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of demand to the licensee's creditors or a trustee for the licensee's creditors; and
    - (E) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the licensee complied with subparagraph 10(c)(iv)(A) and subparagraph 10(c)(iv)(C) for the period to which the report relates; and
    - (F) for any period when the licensee relied on subparagraph 10(c)(v), the licensee complied with subparagraph 10(c)(v)(A) and (B); and
    - (G) for any period when the licensee relied on Alternative A in subparagraph 10(c)(v)(E), the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities.
  - (ii) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), following an examination of the documents the licensee relies on in complying with "Option 1" or "Option 2" as defined under this licence, the auditor has no reason to believe that:



ASIC  
Australian Securities &  
Investment Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

- (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions of this licence; or
- (B) the licensee failed to comply with the cash needs requirement using either "Option 1" or "Option 2" as defined under this licence (as applicable) except for:
  - (1) paragraphs (a), (c) and (e) of the definition of "Option 1" as defined under this licence; or
  - (2) paragraphs (a) and (c) of the definition of "Option 2" as defined under this licence; or
- (C) if the licensee relied on "Option 1" as defined under this licence, the assumptions the licensee adopted for its projection were unreasonable; or
- (D) if the licensee relied on "Option 2" as defined under this licence, the basis for the selection of assumptions to meet the requirements for its projection adopted was unreasonable; and
- (iii) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions in this licence; and
  - (B) the basis for the selection of the assumptions adopted was unreasonable; and
- (iv) for any period when the licensee relied on subparagraph 10(c)(v) under Alternative B, following an examination of the documents prepared for Alternative B, the auditor has no reason to believe that:
  - (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions in this licence; or
  - (B) the basis for the selection of the assumptions adopted was unreasonable.

## Professional Indemnity Compensation Requirements

22. The licensee must maintain an insurance policy covering professional indemnity and fraud by officers that:
- (a) is adequate having regard to the nature of the activities carried out by the licensee under the licence; and
  - (b) covers claims amounting in aggregate to whichever is the lesser of:
    - (i) \$5 million; or
    - (ii) the sum of the value of all IDPS property of all IDPS for which it is the operator and all scheme property of all registered schemes for which it is the responsible entity.

## External Disputes Resolution Requirements

23. Where the licensee provides financial services to retail clients, the licensee must be a member of one or more External Disputes Resolution Scheme(s) ("EDRS") which covers, or together cover, complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.
24. Where the licensee ceases to be a member of any EDRS, the licensee must notify ASIC in writing within 3 business days:
- (a) the date the licensee ceases membership of the EDRS(s); and



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

effective 7 September 2012

## Articles of Conditions

- (b) the reasons the licensee's membership of the EDRS(s) has ceased (including circumstances where the EDRS is no longer operating, failure by the licensee to renew their membership of the EDRS or where the EDRS has terminated the licensee's membership of the EDRS); and
- (c) details of the new EDRS(s) the licensee intends to or has joined (including the date the membership commences and the name of the EDRS); and
- (d) details that provide confirmation that the licensee is covered by EDRS(s) covering complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

## Agreement with Holder of Financial Product on Trust

### 25. If the licensee:

- (a) operates a registered scheme in the capacity of a responsible entity; or
  - (b) operates an IDPS as an IDPS operator; or
  - (c) provides a custodial or depository service
- and in the course of operating that scheme or providing that service the licensee enters into an arrangement:
- (d) with another person ("holder") to hold scheme property, IDPS property or to hold financial products on trust for or on behalf of the licensee or another person; or
  - (e) between a responsible entity or IDPS operator in that capacity and another person ("master custodian") under which the master custodian is authorised to arrange for a third person ("subcustodian") directly or indirectly to hold scheme property or IDPS property; or
  - (f) with a subcustodian arranged by a master custodian;
- the licensee must ensure that at all times:
- (g) the arrangement is covered by a contract that is in writing; and
  - (h) the contract clearly specifies:
    - (i) the nature of the arrangement and the obligations of each party; and
    - (ii) the rights that the parties will have in relation to ongoing review and monitoring of the holder or any subcustodian or for an agreement made by the licensee with a master custodian ("master agreement"), the master custodian and the standards against which their performance will be assessed; and
    - (iii) how the holder, any subcustodian or for a master agreement, the master custodian will certify that it complies with, and will continue to comply with, the requirements of ASIC Regulatory Guide 133 (formerly referred to as Policy Statement 133) when read in conjunction with ASIC Regulatory Guides 148 and 167 (formerly referred to as Policy Statements 148 and 167) (as each of those Regulatory Guides is in force as at the date of this licence); and
    - (iv) how instructions will be given to the holder, subcustodian or for a master agreement, the master custodian; and
    - (v) how the client of the licensee will be compensated if the client suffers any loss due to a failure by the holder, any subcustodian, or for a master agreement, the master custodian, to comply with its duties or to take reasonable care based on the standards applying in the relevant markets for the assets held and



ASIC  
Australian Securities &  
Investment Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Terms of Conditions

- the extent to which the holder, any subcustodian, or for a master agreement, the master custodian, must maintain a minimum level of professional indemnity insurance; and
- (vi) that the holder, any subcustodian and for a master agreement, the master custodian is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is for expenses and outlays made within the terms of the contract (but not including any unpaid fees of the holder, master custodian or subcustodian) or in accordance with the licensee's instructions; and
  - (vii) in the case of a responsible entity or IDPS operator who has a master agreement, what should be in the written contract with any subcustodian used in accordance with these conditions including the liability of the subcustodian to the master custodian and the licensee when acts or omissions of the subcustodian are in breach of the subcustodian's obligations; and
  - (viii) how records of the assets held will be kept and maintained by the holder, any subcustodian or for a master agreement, the master custodian; and
  - (ix) requirements for reporting by the holder, any subcustodian or for a master agreement, the master custodian, including notifications of any dealing in or transfers of the assets; and
  - (x) requirements for the holder to provide all reasonable access and assistance to any registered company auditor engaged to conduct an audit in relation to the licensee.

The contract is not required to contain the matters specified in paragraph (iii), (v) or (vi) or to be in writing to the extent that the licensee establishes by documentary evidence that it is not practicable for the licensee to:

- (a) hold the relevant financial products (being property outside Australia) itself; or
- (b) engage a custodian that is willing to include such matters in the contract to hold that property on reasonable commercial terms.

and provided that the licensee has disclosed to the client that these terms will not be included.

## Property

26. The licensee must ensure that at all times:

- (a) in relation to a registered scheme for which the licensee is the responsible entity, the holder of any scheme property complies with the requirements of ASIC Regulatory Guide 133 (formerly referred to as Policy Statement 133) (as in force as at the date of this licence) relating to the holding of scheme property and maintains proper records identifying the scheme property; and
- (b) in relation to any custodial or depository service that the licensee provides other than as the operator of an IDPS, the holder of any property, complies with the requirements of ASIC Regulatory Guide 133 (formerly referred to as Policy Statement 133) except requirements expressed to apply to duties under s601FC(1)(i), when read with ASIC Regulatory Guides 148 and 167 (formerly referred to as Policy Statements 148 and 167) (as each of those Regulatory Guides is in force as at the date of this licence), and maintains proper records in relation to the financial products held.



ASIC  
Australian Securities & Investments Commission

# Australian Financial Services Licence

IM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2010

Schedule of Conditions

## Prohibition to Operate Managed Discretionary Account Service

27. The licensee must not provide an MDA service to a retail client except when operating a registered scheme.

## Retention of Financial Services Guides, Statements of Advice and Material Relating to Personal Advice

28. Where the licensee provides financial product advice to retail clients, the licensee must ensure that copies (whether in material, electronic or other form) of the following documents are retained for at least the period specified:

- (a) each Financial Services Guide ("FSG") (including any Supplementary FSG) given by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period commencing on the date of the FSG and continuing for at least 7 years from when the document was last provided to a person as a retail client; and
- (b) a record of the following matters relating to the provision of personal advice to a retail client (other than personal advice for which a Statement of Advice ("SOA") is not required or for which a record of the advice is kept in accordance with subsection 945A(2A)):
  - (i) the client's relevant personal circumstances within the meaning of subparagraph 945A(1)(a)(i); and
  - (ii) the inquiries made in relation to those personal circumstances within the meaning of subparagraph 945A(1)(a)(ii); and
  - (iii) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of paragraph 945A(1)(b); and
  - (iv) the advice including reasons why advice was considered to be "appropriate" within the meaning of paragraphs 945A(1)(c) to (e);for a period of at least 7 years from the date that the personal advice was provided;
- (c) any SOA provided by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period of at least 7 years from the date the document was provided to the client.

29. The licensee must establish and maintain measures that ensure, as far as is reasonably practicable, that it and its representatives comply with their obligation to give clients an FSG as and when required under the Act. The licensee must keep records about how these measures are implemented and monitored.

## Terms and Definitions

In this licence references to sections, Parts and Divisions are references to provisions of the Corporations Act 2001 ("the Act") unless otherwise specified. Headings contained in this licence are for ease of reference only and do not affect interpretation. Terms used in this licence have the same meaning as is given to them in the Act (including, if relevant, the meaning given in Chapter 7 of the Act) and the following terms have the following meanings:

actual or contingent liabilities of the relevant kind means:

- (a) an actual or contingent monetary liability; or



ASIC  
Australian Securities &  
Investment Commission



## Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

licence No: 220281

Effective 7 September 2010

### Schedule of Corporations

- (b) an actual or contingent liability under a non-standard margin lending facility, in the circumstances determined under the terms of the facility, to transfer marketable securities to the client.

#### adequately secured means:

- (a) secured by an enforceable charge over financial products (other than financial products issued by the licensee or its associate) if:
- (i) the financial products are:
- (A) regularly traded on:
- (1) a financial market (as defined in subsection 767A(1) of the Act and disregarding subsection 767A(2) of the Act) operated by a market licensee or a licensee other than the licensee or its associate that in the reasonable opinion of the licensee produces sufficiently reliable prices to assess the value of the security provided by the charge;
- (2) an ASIC-approved foreign market under ASIC Regulatory Guide 72 (formerly referred to as Policy Statement 72) as at the date of this licence; or
- (3) a foreign market approved in writing for this purpose by ASIC; or
- (B) interests in a registered scheme for which withdrawal prices are regularly quoted by the responsible entity and the licensee believes on reasonable grounds that withdrawal may be effected within 5 business days; and
- (ii) the market value of these financial products equals not less than 120% of the amount owing or not less than 109% of the amount owing if the financial products are debt instruments; or
- (b) secured by a registered first mortgage over real estate that has a fair market valuation at least equal to 120% of the amount owing; or
- (c) owing from an eligible provider; or
- (d) secured by an enforceable charge over amounts owing to another licensee which themselves are adequately secured.

**adjusted assets** means the value of total assets as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity:

- (a) minus the value of excluded assets that would be included in the calculation; and
- (b) minus the value of any receivable of the licensee that would be included in the calculation, up to the amount that the licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and
- (c) minus the value of any assets that would be included in the calculation that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and
- (d) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and



ASIC  
Australian Securities &  
Investments Commission



# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

## Schedule of Conditions

- (e) plus
  - (i) the amount of any eligible undertaking that is not an asset; or
  - (ii) if the eligible undertaking is for an unlimited amount, an unlimited amount;

provided that if the eligible undertaking is given by a person who is an eligible provider only because of paragraph (b) of the definition of "eligible provider" under this licence, the amount added may be no more than one quarter of the eligible provider's net assets (excluding intangible assets) as shown in the most recent audited financial statements lodged with ASIC; and
- (f) for calculating ASLF, plus the value of any current assets of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as assets of the licensee except to the extent the value exceeds the sum of:
  - (i) the current liabilities of the trust as if they would appear on the balance sheet as assets of the licensee; and
  - (ii) any adjustments to ASLF that are a result of current assets, liabilities and contingent liabilities of the trust for accounting purposes being included in calculating adjustments; and
- (g) for calculating ASLF, plus the value of the applicable percentage as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" and the value of the value of any current assets that would be acquired in return for paying a contingent liability as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence up to the value of the applicable percentage of the relevant contingent liability.

**adjusted liabilities** means the amount of total liabilities as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity:

- (a) minus the amount of any liability under any subordinated debt approved by ASIC; and
- (b) minus the amount of any liability that is the subject of an enforceable right of set-off if the corresponding receivable is excluded from adjusted assets; and
- (c) minus the amount of any liability under a credit facility that is made without recourse to the licensee; and
- (d) for calculating ASLF, plus the amount of the total current liabilities of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as liabilities of the trustee; and
- (e) plus the value of any assets that are encumbered as a security against another person's liability where the licensee is not also liable, but only up to the amount of that other person's liability secured or the value of the assets encumbered after deducting any adjustments under this licence, whichever is lower.

**adjusted surplus liquid funds or ASLF** means surplus liquid funds minus either:

- (a) the standard adjustments (refer to the definition of "standard adjustments" under this licence); or
- (b) such other adjustments as ASIC may from time to time consent to in writing.

**clearing participant** means a clearing participant in the licensed clearing and settlement facility ("CS Facility") as defined in the operating rules of Australian Clearing House Pty Limited ("ACH"), as at the date of this licence, that complies with those operating rules relating to financial requirements, taking into account any waiver by ACH.



ASIC  
Australian Securities & Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220283

Effective 7 September 2010

## Schedule of Conditions

**customer service representative** means call centre staff or front desk staff who deal with initial queries from customers.

**derivative** means "derivatives" as defined in section 761D of the Act (including regulation 7.1.04 of the Corporations Regulations) and:

- (a) includes "managed investment warrants" as defined in this licence; and
- (b) excludes "derivatives" that are "foreign exchange contracts" as defined in this licence.

**eligible custodian** means:

- (a) an Australian ADI; or
- (b) a market participant or a clearing participant; or
- (c) a subcustodian appointed by a person of the kind referred to in (a) or (b) of this definition.

**eligible provider** means:

- (a) an Australian ADI; or
- (b) an entity (other than a registered scheme of which the licensee or the licensee's associate is the responsible entity):
  - (i) whose ordinary shares are listed on a licensed market or an ASIC-approved foreign exchange under ASIC Regulatory Guide 72 (formerly referred to as Policy Statement 22) as at the date of this licence; and
  - (ii) that had net assets (excluding intangible assets) of more than \$50 million, as shown in the most recently audited financial statements of the provider lodged with ASIC; and
  - (iii) that the licensee has no reason to believe no longer has net assets of at least that amount; or
- (c) an Australian government (ie. the Commonwealth or a State or Territory government) or a government of a country that is a member of the Organisation for Economic Co-operation and Development ("OECD country government"), or an agency or instrumentality of an Australian or OECD country government; or
- (d) a foreign deposit-taking institution that is regulated by an ASIC-approved regulator; or
- (e) a foreign deposit-taking institution approved in writing by ASIC for this purpose; or
- (f) an Australian CS facility licensee; or
- (g) an entity approved by ASIC in writing for this purpose.

**eligible undertaking** means the amount of a financial commitment that is:

- (a) payable on written demand by the licensee (disregarding any part previously paid or any amount that would be repayable as a current liability or, for calculating NTA, as a liability by the licensee if money were paid), provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the licensee, and that:
  - (i) is an enforceable and unqualified obligation; and



ASIC  
Australian Securities &  
Investment Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 1 September 2012

## Schedule of Conditions

- (ii) remains operative (even if, for example, the licensee ceases to hold an AFS licence) until ASIC consents in writing to the cancellation of the undertaking; or
- (b) approved in writing by ASIC as an eligible undertaking.

### excluded assets means:

- (a) intangible assets (i.e. non-monetary assets without physical substance); and
- (b) except when allowed under paragraphs (e) or (f) of this definition, assets owing or receivables ("receivables") from or assets invested in, any person who:
- (i) is an associate of the licensee; or
  - (ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or
  - (iii) became liable to the licensee because of, or in connection with, the acquisition of interests in a managed investment scheme the licensee operates; and
- (c) except when allowed under paragraph (e) of this definition, assets:
- (i) held as a beneficial interest or an interest in a managed investment scheme; or
  - (ii) invested in any superannuation product in respect of which the licensee or its associate may exercise any form of power or control; and
- (d) except when allowed under paragraphs (e) or (f) of this definition, receivables from the trustee of any trust in respect of which the licensee or its associate may exercise any form of power or control; and
- (e) despite paragraphs (b) and (d) of this definition, a receivable is not excluded to the extent that:
- (i) it is adequately secured; or
  - (ii) the following apply:
    - (A) it is receivable as a result of a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and
    - (B) no part of the consideration in relation to the transaction is, in substance, directly or indirectly invested in the licensee; and
    - (C) the total value of such assets (before any discount is applied) is not more than 20% of the assets less liabilities of the licensee; and
    - (D) for the purposes of calculating ASLF, the amount is further discounted by 10% of the value after any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence; or
  - (iii) the following apply:
    - (A) it is receivable from an insurance company that is a body regulated by APRA and results from a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and
    - (B) there is no reason to believe that any amount invested in the licensee would not have been invested if the transactions that caused the receivable had not taken place or were not at the time of the investment expected to take place; and



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No. 220281

Effective 7 September 2010

## Schedule of Conditions

- (C) there is no reason to believe that the recoverability of the receivable will materially depend on the value of an investment by any person in the licensee; and
- (D) the total value of the receivables under this subparagraph (iii) before any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence is applied is not more than 60% of the adjusted liabilities of the licensee disregarding this subparagraph (iii); or
- (iv) ASIC consents in writing to the licensee treating the amount owing as not being an excluded asset; and
- (f) despite paragraphs (b) and (d) of this definition, the licensee can include a receivable amount to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of, a superannuation entity as defined in the Superannuation Industry (Supervision) Act 1993, an IDPS or a registered scheme ("scheme") to the extent that the receivable:
  - (i) exceeds amounts invested by the scheme in, or lent (other than by way of a deposit with an Australian ADI in the ordinary course of its banking business) directly or indirectly by the scheme to, the licensee, a body corporate the licensee controls, a body corporate that controls the licensee or a body corporate that the licensee's controller controls; and
  - (ii) if receivable by way of fees, represents no more fees than are owing for the last 3 months; and
  - (iii) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and
- (g) despite paragraph (c) of this definition, the licensee does not have to exclude a managed investment product unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.

**financial asset** means cash, cheques, orders for payment of money, bills of exchange, promissory notes, securities, deposit products and interests in managed investment schemes (including where the managed investment scheme invests in direct real property or mortgages) but does not include a derivative.

**foreign exchange contracts** means "foreign exchange contracts" as defined in section 761A of the Act (including regulation 7.1.04 of the Corporations Regulations) and includes "derivatives", as defined in section 761D of the Act, that are foreign exchange contracts.

**IDPS** means an investor directed portfolio service in relation to which the licensee has relief under Class Order 02/294 as at the date of this licence and as amended by any disallowable legislative instrument, or relief under any disallowable legislative instrument that replaces Class Order 02/294.

**IDPS property** means property acquired or held through an IDPS other than property held by a client.

**incidental property** means:

- (a) assets of any kind which are necessary for, or incidental to the effective operation of the scheme, the total value of which, and the total liability that may arise from the holding of which, does not exceed 10% of the value of the assets net of liabilities other than liabilities to members as members of the scheme; and



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 1 September 2012

## Schedule of Conditions

- (d) cash held for up to 3 months in an account with an Australian ADI styled as a trust account that is audited at least once every 6 months by a registered company auditor where the auditor's report states that in the auditor's opinion the account has been operated in accordance with the trust:
  - (i) pending payment to members; or
  - (ii) to meet expected expenses (not including investments) over a 3 month period; or
  - (iii) pending application in acquiring a mortgage and paying any fees and costs incidental to the acquisition; and
- (e) contractual, lease or licence rights that are not assignable except with the consent of the member or that it would not be reasonably practicable to assign (other than to a new responsible entity) and any documents evidencing those contractual, lease or licence rights; and
- (f) assets of trivial value; and
- (g) levies of a time sharing scheme which are held in an account with an Australian ADI styled as a trust account that is audited at least twice annually by a registered company auditor where the report from the auditor is provided to the responsible entity's board or compliance committee and states that in the auditor's opinion the account has been operated in accordance with the trust; and
- (h) mortgages or documents of title held under a mortgage where:
  - (i) particular members have a specific benefit or legal interest in the mortgage; and
  - (ii) the mortgage was acquired after disclosure in writing to the relevant members (at the time of the acquisition) of all information that would have been required to be in a Product Disclosure Statement (or in relation to mortgages acquired before Division 2 of Part 7.9 applies to interests in the registered scheme a disclosure document under Chapter 6D of the Act) if an offer of interests in the registered scheme conferring rights in connection with that mortgage had been made immediately prior to the mortgage; and
  - (iii) either of the following applies:
    - (A) the mortgage was acquired on the specific direction of the relevant members (at the time of acquisition of the interest); or
    - (B) members are able to withdraw from that mortgage for a period of 14 days commencing on the date of disclosure under sub-paragraph (h)(ii) of this definition; and
  - (iv) the scheme does not involve the mortgage being sold prior to its discharge; and
- (i) land or other real property relating to a time sharing scheme

## standard adjustments means:

- (a) discounts as follows:
  - (i) 8% for the values that reflect obligations to pay the licensee a certain sum maturing beyond 12 months unless the interest rate applicable is reset to reflect market interest rates at least annually; and
  - (ii) 16% for the values that reflect any assets other than:
    - (A) an obligation to pay the licensee a certain sum; or
    - (B) a derivative; or
    - (C) an interest in property held in trust by another licensee under Division 3 of Part 7.8 of the Act or the rights to money held by another licensee in an account under section 981B of the Act; and



ASIC  
Australian Securities & Investments Commission

## Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

Licence No: 220281

Effective 7 September 2012

### Schedule of Conditions

- (b) 8% of the values that reflect others' obligations to pay the licensee a certain sum except to the extent that the asset is adequately secured or is a right against another licensee in respect of money or property held by that other licensee in an account under section 981B or held in trust under Division 3 of Part 7.8 of the Act; and
- (c) the following amounts for contingent liabilities and contingent liabilities of any trust (other than a registered scheme) of which the licensee is trustee:
- (i) 5% of any contingent liabilities that can be quantified under an underwriting or sub-underwriting of financial products except:
    - (A) during the 5 business days after the commitment is assumed; and
    - (B) during any period it is unlawful to accept applications for the financial products to which the underwriting relates (such as under subsection 727(3) or section 1016B) and the period ending 5 business days after the first day on which it becomes lawful to accept applications; and
    - (C) to the extent that the underwriter holds funds from persons seeking to acquire the financial products subject to the underwriting; and
  - (ii) 5% of the potential liability of any contingent liabilities that can be quantified under a derivative other than to the extent there is an offsetting position in any of the following or a combination of the following:
    - (A) the "something else" for the purposes of paragraph 761D(1)(c) of the Act; and
    - (B) another derivative relating to that something else; and
    - (C) a thing that is so similar to the something else as to make the probability of net loss from the liability under the derivative exceeding any increase in the value of the thing less than 5% in the reasonable and documented opinion of the licenseeexcept to the extent that the licensee is of the reasonable opinion that the risk that they will become liabilities (or become liabilities to a greater extent than taken into account for the purposes of applying the adjustment) because of a change in the price or value of the something else is trivial; and
  - (iii) 20% of the potential liability of any contingent liabilities that can be quantified under a guarantee or indemnity;
- (d) the relevant percentage as set out in subparagraphs (c)(ii) and (c)(iii) of the amounts that in the licensee's reasonable opinion is the maximum amount that the licensee may be liable for in relation to a contingent liability referred to in paragraph (c) where the maximum liability cannot be quantified; and
- (e) where the licensee has agreed to sell an asset that it does not hold, the amount of the adjustment that would apply if it held that asset is to be applied against adjusted assets.

For the purposes of this definition, the risk that a contingent liability will become a liability may be treated as trivial if the probability that this will occur is reasonably estimated by the licensee as less than 5%.

For the purposes of paragraphs (a) and (b) of this definition, discounts apply against the value of current assets:

- (f) used in calculating "adjusted assets" in this licence; and
- (g) of any trust (other than a registered scheme) of which the licensee is a trustee (see subparagraph (f)(ii) of the definition of "adjusted assets" in this licence); and
- (h) that are deducted under paragraph (c) of the definition of "adjusted assets" in this licence as assets to which recourse may be had for a liability of the licensee where the licensee's liability is limited to those assets but the



ASIC  
Australian Securities &  
Investments Commission

# Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

ABN: 68 077 208 461

licence No: 220281

effective 7 September 2012

## Schedule of Conditions

total discounts applied to those assets shall not exceed any excess of the value of the licensee's assets to which recourse may be taken over the amount of the liability; and

- (i) that is the applicable percentage of the current assets that would be acquired in return for paying a contingent liability referred to in subparagraph (c)(i) or (iii) of this definition including rights against a sub-underwriter (see paragraph (g) of the definition of "adjusted assets" in this licence).

The licensee does not have to apply the discounts to the value of amounts payable from a client in the ordinary course of its financial services business for financial products that the client has agreed to buy, if the money is required to be—and in the reasonable estimation of the licensee probably will be—paid no more than 5 business days after the client became liable.

**surplus liquid funds or SLF** means adjusted assets minus adjusted liabilities:

- (a) plus any non-current liabilities that were used in calculating adjusted liabilities and the value of any assets that are encumbered (where the licensee is not liable and the assets do not secure another person's current liability) that were deducted when calculating the licensee's adjusted liabilities; and
- (b) minus any non-current assets that were used in calculating adjusted assets; and
- (c) if the licensee is an eligible provider under paragraph (b) of the definition of "eligible provider" under this licence—plus one quarter of the value of the licensee's current assets minus any intangible assets and the amount of its non-current liabilities.

**Tier \$500,000 class assets** means:

- (a) real property (including mortgages or leases over or licences in relation to real property) that is intended to be kept for the whole duration of the scheme or the relevant mortgage; and
- (b) physical assets including currency which as a matter of reasonable practice can be held by a custodian (such as valuables or precious metals); and
- (c) funds received from members within the previous:
  - (i) 6 months if held for the purposes of the initial investment by the responsible entity as part of the scheme; or
  - (ii) 13 months if held pending payment of expenses of the scheme;held in a regulated trust account; and
- (d) special custody assets.

**trigger point** means either of the trigger points described in condition 17 of this licence.

**value of assets** means, for the purpose of condition 11 of this licence, the value of assets and other scheme property and/or IDPS property determined as follows:

- (a) in the case of assets that would be recognised in preparing a balance sheet for members under Chapter 2M of the Act - their value as if at that time such a balance sheet was being prepared; and



ASIC  
Australian Securities &  
Investments Commission



## Australian Financial Services Licence

LM INVESTMENT MANAGEMENT LIMITED

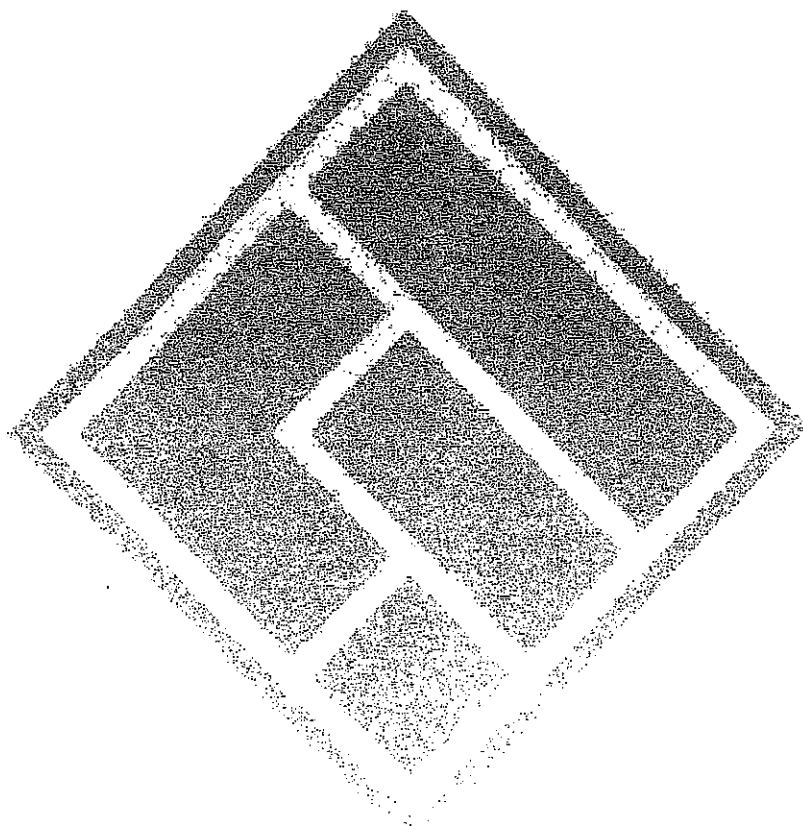
ABN: 68 077 208 461

Licence No. 220281

Effective 7 September 2012

### Interpretation of Definitions

- (b) in the case of any other scheme property and/or IDPS property - its market value. For the purpose of this calculation mortgages held by members of a registered scheme and managed as part of the scheme must be treated as assets of the scheme.



**ASIC**  
Australian Securities &  
Investment Commission





**ASIC**

Australian Securities & Investments Commission

9 April 2013

Mr Park and Ms Muller  
FTI Consulting  
Corporate Centre One  
Level 9  
2 Corporate Court  
Bundall QLD 4217

Level 2, 2 Allsup Street, Canberra  
GPO Box 9827 Canberra ACT 2601  
DX 5696 Canberra

Telephone: (02) 6250 3800  
Facsimile: (02) 6250 3811  
ASIC website: [www.asic.gov.au](http://www.asic.gov.au)

Dear Mr Park and Ms Muller

**LM Investment Management Limited ACN 077 208 461**  
**Suspension of Licence**

Having carefully considered all of the material before me I have decided that Australian financial service licence no. 220281 issued to LM Investment Management Limited ACN 077 208 461, that became effective on 15 July 2002, should be suspended under paragraph 915B(3)(b) of the Corporations Act 2001.

The suspension takes effect when the written notice of the suspension is given to you.

I enclose the written notice, my reasons for decision and an information sheet titled "ASIC Decisions; Your Rights".

Yours sincerely

Graeme D. Plath  
Delegate - Australian Securities and Investments Commission

**Australian Securities and Investments Commission  
Corporations Act 2001 section 915B**

**Notice of Suspension of Australian Financial Services Licence**

To: LM Investment Management Limited ACN 077 208 461  
FTI Consulting  
Corporate Centre One  
Level 9  
2 Corporate Court  
BUNDALL QLD 4217

TAKE NOTICE that under s915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ACN 077 208 461 (Licensee) until 9 April 2015.

Under s915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in Schedule B regarding the matters specified in Schedule A.

**Schedule A**

The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of:

1. LM Cash Performance Fund ARSN 087 304 032;
2. LM First Mortgage Income Fund ARSN 089 343 288;
3. LM Currency Protected Australian Income Fund ARSN 110 247 875;
4. LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868;
5. LM Australian Income Fund ARSN 133 497 917;
6. LM Australian Structured Products Fund ARSN 149 875 669;
7. The Australian Retirement Living Fund ARSN 162 406 162.

**Schedule B**

- (a) The provisions of Chapter 5C;
- (b) The provisions of Chapter 7, other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5.

Dated this 9<sup>th</sup> day of April 2013

Signed .....

Graeme Darcy Plath, a delegate of the Australian Securities and Investments Commission

## AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

In the matter of s915B of the  
Corporations Act 2001 and  
LM Investment Management  
Limited ACN 077 208 461

Date of decision: 9 April 2013

### Decision

That Australian financial services licence number 220281 held by LM Investment Management Limited ACN 077 208 461 be suspended under s915B(3)(b) of the *Corporations Act 2001* until 9 April 2015

### STATEMENT OF REASONS

#### Legislative frame-work

1. Under s915B(3)(b) of the *Corporations Act 2001* (Act), the Australian Securities and Investments Commission (ASIC) may suspend or cancel an Australian financial services licence (AFS licence) held by a body corporate, by giving written notice to the body, if the body becomes an externally-administered body corporate.
2. Under s9 of the Act an "externally-administered body corporate" includes a body corporate that is under administration.
3. Under s915H of the Act:

*"In the written notice of suspension or cancellation that ASIC gives to the licensee, ASIC may specify that the licence continues in effect as though the suspension or cancellation had not happened for the purposes of specified provisions of this Act, in relation to specified matters, a specified period or both."*

4. I am a delegate of ASIC for the purpose of making a decision under s915B of the Act.

#### Section 915B of the Act applies to LM Investment Management Limited

5. Under s913B of the Act, on 15 July 2002, ASIC licensed LM Investment Management Limited ACN 077 208 461 (LMIM) as an Australian financial services licensee. ASIC issued LMIM with AFS licence no. 220281. This AFS licence (Licence) was varied on several occasions and was last varied on 7 September 2012. The Licence authorises LMIM to carry on a financial services business to:

- (a) Provide financial product advice regarding certain classes of financial products;
- (b) Deal in a financial product by engaging in certain activities regarding certain classes of financial products;

- (c) Operate specified registered manage investment schemes;
  - (d) Provide specified custodial or depository services.
6. Document no. 7E5097309 lodged with ASIC shows that on 19 March 2013 Mr Park and Ms Muller (Administrators) were appointed by LMIM as joint and several administrators of LMIM.
  7. Accordingly, on 19 March 2013, LMIM became a body corporate to which s915B(3)(b) of the Act applied.

**Appropriate to exercise discretion under s915B of the Act**

8. Under s915B(3)(b) of the Act ASIC has a discretion as to whether to suspend or cancel the Licence.
9. In *Sovereign Capital Ltd v Australian Securities and Investments Commission*<sup>1</sup> the Administrative Appeals Tribunal stated that the power to suspend or cancel an Australian financial services licence "must be exercised having regard to the purposes of the regulatory regime". The Tribunal identified s760A of the Act<sup>2</sup> and s1(2) of the Australian Securities and Investments Commission Act 2001 (ASIC Act)<sup>3</sup> as relevant regulatory provisions. That decision dealt with ASIC's power under s915C of the Act to suspend or cancel an AFS licence. It is appropriate to apply a similar approach to a decision under s915B of the Act.
10. In considering the regulatory regime and the objects of the legislative scheme, it is noted that s915B of the Act provides for ASIC to suspend or cancel an AFS licence where the licensee is under administration. Parliament has decided that, as a matter of public policy, a licensee under administration is liable to have their AFS licence suspended or cancelled – nothing more is required. It is further noted that the power can be exercised without affording the licensee a hearing.
11. Although ASIC's Regulatory Guide 98 titled "Licensing: Administrative action against financial services providers" (RG 98) does not deal specifically with factors that ASIC will take into account in making a decision whether to suspend or cancel an AFS licence under s915B, section C sets out ASIC's general approach as to when it will take administrative action.

<sup>1</sup> [2008] AATA 901 at [81]

<sup>2</sup> Section 760A relevantly provides that Chapter 7 – "Financial Services and Markets", is intended to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; ...

<sup>3</sup> Subsection 1(2) relevantly provides that ASIC must seek to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system; ...

<sup>4</sup> See subs (1)(b), (2)(b), (3)(b), (4)(b)(i)

12. The appointment of the Administrators occurred under s436A of the Act which operates on a company resolving that:

*"(a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and  
(b) an administrator of the company should be appointed".*

13. It is not appropriate that an entity that is insolvent, or likely to become insolvent, be licensed, under s 913B of the Act, to carry on a financial services business given that the entity's:

- (a) Failure to efficiently manage its own affairs causes concern about its ability to provide financial services efficiently;
- (b) Financial situation causes concern about its ability to finance the provision of financial services so as they are provided efficiently.

14. The basis for the concern is supported by a letter dated 26 March 2013 from "King & Wood, Mallesons", addressed to ASIC, which advised that "King & Wood, Mallesons" acted for the Administrators and, relevantly, stated:

*"LMIM in its capacity as responsible entity of LM First Mortgage Income Fund ABN 13 089 343 288 ("MIF") has failed to lodge the MIF's half-yearly financial report for the half-year ended 31 December 2012 and due 15 March 2013".*

15. Under s320(1) of the Act LMIM was required to lodge this report by 15 March 2013.

16. In these circumstances it is appropriate that the discretion be exercised and that the Licence be either suspended or cancelled.

#### **Suspension rather than cancellation**

17. In *Sovereign Capital Ltd v Australian Securities and Investments Commission*<sup>5</sup> the Administrative Appeals Tribunal said a "licence should only be suspended or cancelled if it is necessary to do so in order to accomplish the objects of the legislative scheme. A suspension will ordinarily be preferable if there is a reasonable prospect that the licence-holder can remedy the defects which prompted the concern. If there is no reasonable prospect of the issues being resolved, cancellation may be the appropriate course. The power to suspend or cancel should not be used merely to punish the licence-holder for transgressions".

18. In *Story v National Companies and Securities Commission*<sup>6</sup> Young J said in a matter concerning a dealer's licence "On the matter as to whether revocation should follow an opinion of inefficiency, various matters have to be weighed. One of these is the public interest that people should be permitted to follow a trade or profession which they are qualified to follow. Another is that the public expect those who fall short of minimum standards to be removed from the profession, at least until such time as the regulatory body can be assured that they are able to

<sup>5</sup> [2008] AATA 901 at [84]

<sup>6</sup> (1988) 13 NSWLR 661 at 686

*perform their functions efficiently. A third consideration is that the step of revocation is purely for the public benefit and is not punitive".*

19. It is possible that LMIM may cease to be an externally-administered body corporate and operate as it did prior to the appointment of the Administrators. It may at that time be appropriate that LMIM hold the Licence. In these circumstances I will, under s915B(3)(b) of the Act, prepare a written notice suspending the Licence for a period of two years.

#### **Making a specification under s915H of the Act**

20. Under s1(2) of the ASIC Act ASIC must seek to *"promote the confident and informed participation of investors and consumers in the financial system"*. It is appropriate that ASIC facilitate any decision by the Administrators of LMIM to engage in conduct that involves the:

- (a) Preservation of a registered managed investment scheme operated by LMIM;
- (b) Transfer of the responsible entity functions concerning such a scheme to an entity that is not externally-administered; and
- (c) The winding up of such a scheme.

21. It is appropriate that the suspension of the Licence be subject to a specification under s915H of the Act that the Licence continues in effect as though the suspension had not happened regarding:

*"The provision by LMIM of financial services that are reasonably necessary for, or incidental to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or the winding up of, [the registered managed investment schemes operated by LMIM]."*

#### **Conclusion**

22. I will prepare a written notice under s915B of the Act suspending the Licence until 9 April 2015, subject to the specification described above.



Graeme Darcy Plath

Delegate of the Australian Securities and Investments Commission

**ASIC**

Australian Securities &amp; Investments Commission

**About ASIC > Dealing with ASIC > ASIC decisions - your rights**

## ASIC decisions - your rights

ASIC makes many decisions about corporations, securities and financial products and services that might affect you. If we have made a decision that directly affects you, you may have rights connected with the decision. This information sheet sets out an overview of your rights and how to exercise them. You may have other rights in addition to those discussed here.

**Note:** Under certain circumstances ASIC can waive late lodgement fees. If your inquiry is about withdrawing a late lodgement fee, you can find more details in the information sheet, **Fee waivers** (INFO 87).

### What can you find out from us?

#### Talk to us about the decision

**ASIC decision maker**—If you need to clarify anything relating to the decision, you may find it helpful to discuss it with the ASIC staff member who made the decision.

**Administrative Law Coordinator**—You can contact the Administrative Law Coordinator in the ASIC office you have been dealing with.

Senior Manager, Chief Legal Office  
Australian Securities & Investments Commission  
GPO Box 9827  
SYDNEY NSW 2001

The coordinator can explain how to exercise the rights set out in this information sheet. It would be best to do this promptly because there is a 28-day time limit on some applications.

#### Get our reasons in writing

If we have not told you why we made the decision when we notified you about it, you may be entitled to ask for a written statement of reasons.

#### How to apply

You must write to the person who made the decision within 28 days of being told about the decision.

#### Ask for access to other documents

You may seek access to documents about the decision under the *Freedom of Information Act 1982*.

#### How to apply

You must apply to ASIC in writing stating clearly which documents you want to obtain. Send your application by email to

**FOIrequest@asic.gov.au** or by mail to:

Senior Manager, Administrative Law Team  
Australian Securities & Investments Commission  
GPO Box 9827  
SYDNEY NSW 2001

Charges may be imposed for the time spent in searching for and retrieving relevant documents, decision-making time, photocopying and postage.

For more information contact the Administrative Law Team at  
[FOIrequest@asic.gov.au](mailto:FOIrequest@asic.gov.au).

### Can you get an independent review?

You may have a right to seek review of the decision by the Administrative Appeals Tribunal (AAT). The AAT is an independent body which can review some of ASIC's decisions. The AAT can, among other things:

- confirm our decision;
- vary our decision; or
- set our decision aside and replace it with its own decision.

### How to apply to the AAT

**In writing** You must apply to the AAT for review in writing. The AAT has a form for this purpose which you can use if you prefer.

**In time** You must apply for the review within 28 days of being told why the decision was made.

**Pay the fee** You must enclose the \$816.00 application fee with your application.

If you want to apply for the application fee to be reduced or waived you can obtain the application form from the AAT.

We have also published Regulatory Guide 57 *Notification of rights of review (RG 57)* which gives more detail about your rights of review. You can also contact the Administrative Law Team to obtain a copy.

If you have any questions about the AAT's procedures and requirements, see [www.aat.gov.au](http://www.aat.gov.au), call the AAT on 1300 366 700 or write to the AAT at GPO Box 9955 in your capital city.

### If you are unhappy with how we handled your matter

**Talk to us** If you have a complaint about the way we have handled a matter, you may wish to bring your concerns to the attention of a more senior ASIC staff member than the officer with whom you have been dealing.

**Take it further** You may also have the right to complain to the Commonwealth Ombudsman. However, the Ombudsman usually prefers that you discuss your complaint with ASIC first. There is an office of the Commonwealth Ombudsman in each capital city: see your local *White Pages*. For further information call 1300 362 072 or visit [www.ombudsman.gov.au](http://www.ombudsman.gov.au).

### Applying for compensation under the CDDA scheme

If you are not able to seek a remedy through administrative appeal, litigation or another legal mechanism, you may also wish to consider an application under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA scheme). The CDDA scheme is an administrative scheme that allows Australian Government agencies to provide compensation when there is a moral rather than a legal obligation to do so.



For guidance on how the CDDA scheme operates, the criteria to be applied and the calculation of payments, see the Department of Finance and Deregulation website and the Commonwealth Ombudsman.

### Where can I get more information?

- ASIC on 1300 300 630
- Administrative Appeals Tribunal website at [www.aat.gov.au](http://www.aat.gov.au)
- Commonwealth Ombudsman website at [www.ombudsman.gov.au](http://www.ombudsman.gov.au)
- Office of the Australian Information Commissioner website at [www.oaic.gov.au](http://www.oaic.gov.au)
- Department of Finance and Deregulation website at [www.finance.gov.au](http://www.finance.gov.au)

**This is Information Sheet 9 (INFO 9). Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.**

**ASIC Website: Printed 09/04/2013**

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No. 261425

was heretofore an Australian Financial Services licensee pursuant to section 913B of the Corporations Act 2001. The conditions of the licence are hereby varied from the date hereunder. The licensee shall continue to be licensed as an Australian Financial Services licensee subject to these conditions and variations which are prescribed, and to the conditions contained in this licence and attached schedules.

1. This licence authorises the licensee to carry on a financial services business to:
    - (a) provide financial product advice for the following classes of financial products:
      - (i) deposit and payment products limited to:
        - (A) basic deposit products; and
      - (ii) interests in managed investment schemes limited to:
        - (A) own managed investment schemes only;
    - (b) deal in a financial product by:
      - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
        - (A) interests in managed investment schemes limited to:
          - (i) own managed investment schemes only; and
      - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
        - (A) deposit and payment products limited to:
          - (i) basic deposit products; and
        - (B) general insurance products; and
    - (c) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity:
      - (i) schemes which only hold the following types of property:
        - (A) direct real property;
        - (B) financial assets; and
        - (C) mortgages;
- to retail and wholesale clients.



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261 425

Effective 13 Feb 2019

Issued by ASIC

### Key Person Requirements

2. If any of the following officer(s) or key person(s) cease to be officers of the licensee or to perform duties on behalf of the licensee with respect to its financial services business:

- (a) Rodger Ingle BACON;
- (b) David John HOGAN; and
- (c) Trevor John GIBSON;

the licensee must notify ASIC in writing within 5 business days of the following matters:

- (d) the date the officer or key person ceased to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business; and
- (e) the name, address, date of commencement, educational qualifications and experience of any replacement officer or key person the licensee has appointed to perform duties on behalf of the licensee with respect to its financial services business; and
- (f) if the licensee does not have a replacement officer or key person, detailed reasons as to why the licensee has not nominated a replacement; and
- (g) a detailed description of how the licensee will continue to comply with the Act and the conditions of this licence following the officer or key person(s) identified above, or any replacement of such person, ceasing to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business.

### Compliance Measures to Ensure Compliance with Law and Licence

3. The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.

### Training Requirements for Representatives

4. The licensee must for any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
- (a) identify the tasks and functions that person performs on behalf of the licensee; and
  - (b) determine the appropriate knowledge and skills requirements required to competently perform those tasks and functions; and
  - (c) implement procedures for continuing training.
5. The licensee must ensure that any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
- (a) has completed training courses at an appropriate level that are or have been approved by ASIC in writing that are relevant to those functions and tasks; or
  - (b) has been individually assessed as competent by an assessor that is or has been approved by ASIC in writing; or



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 18 March 2009

Appendix 1

- (c) in respect of financial product advice on basic deposit products and facilities for making non-cash payments that are related to a basic deposit product, has completed training courses that are or have been assessed by the licensee as meeting the appropriate level that are relevant to those functions and tasks.
6. Condition 5 does not apply in relation to:
- (a) a natural person who is a customer service representative and who provides financial product advice:
    - (i) derived from a script approved by a natural person who complies with paragraphs 5(a), (b) and (c) ("qualified person"); or
    - (ii) under the direct supervision of a qualified person present at the same location; or
  - (b) a natural person who is a para-planner or trainee adviser and who provides financial product advice under the direct supervision of a qualified person who is, in addition to the licensee, responsible for:
    - (i) ensuring that any financial product advice that is provided by the para-planner or trainee adviser for which a Statement of Advice must be given, is reflected in a Statement of Advice that has been reviewed by the qualified person before the Statement of Advice is given, to ensure that the Statement of Advice would comply with all of the requirements of the Act; and
    - (ii) managing and leading any person responsible for providing financial product advice to the client, where the licensee has established procedures to ensure that the natural person does not provide financial product advice to retail clients without the supervision of the licensee, and in the manner specified in this paragraph, and the licensee monitors whether or not those procedures are followed;
7. Condition 5 does not apply in relation to financial product advice:
- (a) given to retail clients in advertising to which section 911A of the Act applies, provided that:
    - (i) this licence authorises the provision of financial product advice; and
    - (ii) a responsible officer of the licensee approves such advertising before its publication or dissemination to retail clients; or
  - (b) for which there is an exemption under the Act from the obligation to hold a licence.

### Notification to Current or Former Representative's Clients

8. Where, under Division 8 of Part 7.6 of the Act:
- (a) ASIC makes a banning order against a current or former representative of the licensee; or
  - (b) the Court makes an order disqualifying a current or former representative of the licensee;
- the licensee must, if directed in writing by ASIC, take all reasonable steps to provide the following information in writing to each retail client to whom the representative had provided personal advice within the 3 years prior to the date of the banning order or disqualification order:
- (c) the name of the representative; and
  - (d) any authorised representative number allocated to the representative by ASIC; and
  - (e) the terms of the banning or disqualification order; and



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 14 March 2007

Conditions of Licence

- (f) contact details of the licensee for dealing with enquiries and complaints regarding the banning or disqualification or the conduct of the representative as a representative of the licensee.

### Financial Requirements for Market Participants and Clearing Participants

9. Where the licensee is a market participant in a licensed market, or a clearing participant in a licensed CS facility, conditions 10 to 18 (inclusive) do not apply to the licensee.

### Base Level Financial Requirements

#### 10. The licensee must:

- (a) be able to pay all its debts as and when they become due and payable; and
- (b) either:
  - (i) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or
  - (ii) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and
- (c) meet the cash needs requirement by complying with one of the following five options:
  - (i) Option 1 (reasonable estimate projection over each quarter) – refer to definition of "Option 1" under this licence; or
  - (ii) Option 2 (contingency based projection) – refer to definition of "Option 2" under this licence; or
  - (iii) Option 3 (financial commitment by an Australian ADI or comparable foreign institution) – a requirement that an Australian ADI or a foreign deposit taking institution approved in writing by ASIC as an eligible provider gives the licensee an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of the demand to the licensee's creditors or a trustee for the licensee's creditors, that the licensee reasonably expects will apply for at least three months, taking into account all commercial contingencies for which the licensee should reasonably plan; or
  - (iv) Option 4 (expectation of support from an Australian ADI or comparable foreign institution) – a requirement that the licensee:
    - (A) is a subsidiary of an Australian ADI or a corporation approved by ASIC in writing for the purpose of this condition; and
    - (B) reasonably expects that (based on access to cash from its related bodies corporate) it will have adequate resources (when needed) to meet its liabilities for at least the next three months (including any additional liabilities that the licensee might incur during that period), taking into account all adverse commercial contingencies for which the licensee should reasonably plan; and
    - (C) ensures that a responsible officer of the licensee has documented that the officer has the reasonable expectation for at least the following three month period together with the reasons for forming the



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No. 261475

Effective 10 April 2018

### Schedule of Conditions

- expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or
- (v) Option 5 (parent entity prepares cash flow projections on a consolidated basis)—a requirement that the licensee ensures that:
- (A) the cash flows of the licensee and each of its related bodies corporate, other than any body regulated by APRA ("licensee group"), are managed on a consolidated basis; and
  - (B) there is a body corporate within the licensee group of which all members of the licensee group are subsidiaries that is not a body regulated by APRA ("parent entity"); and
  - (C) the parent entity complies with Option 1 or Option 2 as if it were the licensee, cash flows of any member of the licensee group were cash flows of the licensee and any cash held by a member of the licensee group, other than as trustee or as trustee of a relevant trust, were so held by the licensee; and
  - (D) a report by the parent entity's auditor that is a registered company auditor is given to ASIC with the licensee's annual financial report under condition 19 of this licence, in relation to each financial year of the licensee and for any other period that ASIC requests, by a date that ASIC requests, with respect to compliance by the parent entity with Option 1 or Option 2 as they would apply in accordance with the provisions of Chapter 2M of the Act; and the report that would be required from the auditor of a licensee for that period pursuant to the provisions of Chapter 2M of the Act; and
  - (E) either of the following applies:
    - Alternative A—the parent entity has provided an explicit and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities, which the licensee's reasonable expert will apply for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan; or
    - Alternative B—the licensee reasonably expects that (based on access to cash from members of the licensee group) it will have adequate resources to meet its liabilities (including any additional liabilities that the licensee might incur while the commitment applies) for at least the next three months taking into account all adverse commercial contingencies for which the licensee should reasonably plan and a responsible officer of the licensee has documented that the officer has the reasonable expectation in respect of at least the following three months together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; and
  - (F) the licensee has no reason to believe that the parent entity has not complied with the requirement at subparagraph (C) or has failed to comply in a material respect with its obligations under Chapter 2M of the Act or, if the parent entity is not a company, under any other laws (whether law in Australia or not) relating to financial reporting that apply to it.

For 5 years after the end of the last financial year that includes a part of the period to which any document prepared for subparagraph (c)(iv)(C) or Alternative B in subparagraph (c)(v)(E) relates, the licensee must keep the document and give it to ASIC if ASIC requests.



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No. 261425

Effective 1 November 2008

Financial Services Licence

### Financial Requirements for Managed Investments and Custody Services

11. The licensee must hold at least \$5 million net tangible assets ("NTA"), unless for each registered scheme operated by the licensee at least one of the following is satisfied:

- (a) all the scheme property and other assets of the scheme(s) not held by members are held by a custodian appointed by the licensee that has \$5 million NTA or is an eligible custodian; or
- (b) all the scheme property and other assets of the scheme(s) not held by members are special custody assets or the Tier \$500,000 class assets held by the licensee or a custodian appointed by the licensee (or a sub-custodian appointed by that custodian), where the person holding the scheme property or other assets is:
  - (i) the licensee and the licensee has \$500,000 NTA; or
  - (ii) the custodian or sub-custodian and the custodian has \$500,000 NTA or is an eligible custodian; or
- (c) the only scheme property and other assets of the scheme(s) that are not held under paragraph (a) or (b) of this condition are special custody assets, each of which is held by:
  - (i) the licensee; or
  - (ii) an eligible custodian; or
  - (iii) a custodian that has the same level of NTA as the licensee is required to have under the remainder of this condition; or
  - (iv) the members of the scheme.

Where paragraph (a), (b) or (c) is satisfied, the licensee must hold NTA of 0.5% of the value of:

- (d) assets (including mortgages held by members of a mortgage scheme and managed as part of the scheme); plus
  - (e) any other scheme property not counted in calculating the value of assets;
- of the registered scheme(s) operated by the licensee with a minimum NTA requirement of \$50,000 and a maximum NTA requirement of \$5 million.

12. The custodian need not have the required NTA under paragraph 11(c)(iii) of this licence if the only assets it holds for the scheme are those contained in paragraphs (a), (b) or (c) of the definition of "special custody assets" under this licence, or if the audited trust account is a regulated trust account, described in paragraph (d) of the definition of "special custody assets" under this licence.

### Financial Requirements for Holding Client Money or Property

13. If at any time the licensee:
- (a) is required to hold money in a separate account under Division 2 of Part 7.8 of the Act; or
  - (b) holds money or other property on trust for a client or is required to do so under Regulation 7.8.07(2) of the Corporations Regulations or otherwise; or
  - (c) has the power to dispose of a client's property under power of attorney or otherwise;



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 3 March 2017

### Director's Declaration

the licensee must ensure that the licensee has at least \$50,000 in surplus liquid funds ("SLF") unless the total value of the money and property for all clients is less than \$100,000 excluding:

- (d) money that has satisfied a client's liability on an insurance contract where the licensee is acting under a binder or section 985B of the Act applies, or property acquired by investment of that money; or
- (e) the value of property where the licensee merely holds a document of title, and the client has legal title to the property.

### Financial Requirements for Licensee Transacting with Clients

14. If the licensee incurs actual or contingent monetary liabilities by entering into a transaction with a client(s) in the course of providing a financial service to the client(s), the licensee must have adjusted surplus liquid funds ("ASLF") of the sum of:

- (a) \$50,000; plus
- (b) 5% of adjusted liabilities between \$1 million and \$100 million; plus
- (c) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding \$100 million, up to a maximum ASLF of \$100 million.

This condition does not apply to the licensee if:

- (d) the total of:
  - (i) the current liabilities that would be included in the calculation of the licensee's adjusted liabilities; and
  - (ii) the contingent liabilities that if crystallised would be an actual liability and be included in the calculation of the licensee's adjusted liabilities,is less than \$100,000; or
- (e) the licensee has no:
  - (i) liabilities to clients that would be included in calculating its adjusted liabilities; or
  - (ii) contingent liabilities to clients which if crystallised would be included in calculating its adjusted liabilities,

other than under debentures the licensee issued under Chapter 2L of the Act.

For the purpose of paragraphs (d) and (e), the licensee may disregard a liability or a contingent liability that:

- (f) is a contingent liability that is neither a derivative nor a liability from underwriting securities or managed investment products; or
- (g) the licensee reasonably estimates has a probability of less than 5% of becoming an actual liability; or
- (h) is covered by money or property that the licensee holds in a separate account under Part 7.8 of the Act or on trust for clients; or
- (i) is adequately secured as defined in paragraph (a) or (b) of the definition of "adequately secured" under this licence; or
- (j) is a liability incurred by entering into a transaction on a licensed market that is to be settled using a clearing and settlement facility, the operation of which is authorised by an Australian CS facility licence; or





## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 13 May 2019

Covered by Financial

- (k) is under a foreign exchange contract and the licensee is required to have \$10 million of tier one capital under another condition of this licence because the licensee has entered a foreign exchange contract as principal; or
- (l) is under a derivative where:
  - (i) the licensee does not make a market in derivatives; and
  - (ii) the licensee entered into the dealing for the purposes of managing a financial risk; and
  - (iii) either the licensee's dealings in derivatives are not a significant part of its business or of the business of it and its related bodies corporate taken together; and
  - (iv) the licensee did not enter into the dealing on the instructions of another person; or
- (m) is under a foreign exchange contract where the licensee:
  - (i) does not make a market in foreign exchange contracts; and
  - (ii) entered into the contract for the purposes of enabling a payment in one of the currencies under the foreign exchange contract; and
  - (iii) did not enter into the foreign exchange contract on the instruction of another person.

In this condition, a reference to a client includes a person who acquires or disposes of financial products in a transaction that the licensee entered into or proposes to enter into in the course of making a market.

### Reporting Triggers and Requirements for Financial Services Licence Conditions of this Licence

15. The licensee must ensure the reporting requirements under conditions 15 and 17 of this licence are met where either paragraph (a) or paragraph (b) applies:
  - (a) the trigger points described in paragraphs (i) and (ii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$1 million and less than or equal to \$100 million; and
    - (ii) the licensee has an ASLF of less than 5.5% of adjusted liabilities; or
  - (b) the trigger points described in paragraphs (i), (ii) and (iii) below occur:
    - (i) the licensee has adjusted liabilities of more than \$100 million; and
    - (ii) the licensee does not have \$100 million ASLF; and
    - (iii) the licensee has an ASLF that is less than \$500,000 above the minimum ASLF required under condition 14 of this licence.
16. Where the licensee's ASLF is below the trigger points, the licensee must not enter into any transactions with clients that could give rise to further liabilities, contingent liabilities or other financial obligations until the licensee's board or other governing body has certified in writing that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A of the Act.
17. Where the licensee's board or other governing body has made the certification required under condition 16, the licensee must ensure that the licensee's board or other governing body certifies in writing at least monthly that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 680 383 679

Licence No: 261425

Effective 13 March 2009

Investment of Innovation

fail to comply with its obligations under section 912A of the Act until the licensee's ASLF continuously exceeds the trigger point for a period exceeding one month.

18. The licensee must keep each certification issued by the licensee's board or other governing body under conditions 16 and 17 of this licence for at least 5 years from the date of such certification. The licensee must provide ASIC with a copy of each certification within 3 business days of the date of each certification.

### Audit Opinion on Financial Requirements

19. The licensee must lodge with ASIC an opinion by a registered company auditor ("the audit opinion") addressed to the licensee and ASIC for the following periods:
- (a) for each financial year, at the same time the licensee is required to lodge a balance sheet under Part 7.8 of the Act; and
  - (b) for any period of time that ASIC requests, by the date ASIC requests the audit opinion to be lodged; that states whether during:
    - (c) any part of the period for which the licensee:
      - (i) relied on being a market participant or a clearing participant, on a positive assurance basis, the licensee was a participant in the market conducted by:
        - (A) ASX or
        - (B) SFF, that restricted its financial services business to participating in the market and incidental business supervised by SFF; and
      - (ii) relied on being a body regulated by APRA on a positive assurance basis, the licensee was a body regulated by APRA; and
    - (d) any remaining part of the period:
      - (i) in the auditor's opinion, the licensee:
        - (A) complied with all the financial requirements under conditions 10 to 18 (inclusive) of this licence other than paragraph 10(c) of this licence, except for paragraph (e) of the definition of "Option 1" under this licence if the licensee purports to comply with "Option 1"; and
        - (B) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), had at all times a projection (covering at least the following 3 months) that purports to, and appears on its face to comply with, paragraph (a) of the definition of "Option 1" or paragraph (a) of the definition of "Option 2" under this licence (depending on which option the licensee purports to be complying with); and
        - (C) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), correctly calculated the projections on the basis of the assumptions the licensee adopted for the projections described in subparagraph (d)(i)(B) of this condition; and
        - (D) for any period when the licensee relied on subparagraph 10(c)(iii) of this licence, has obtained from an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider an enforceable and unqualified commitment to pay on demand from time to time



ASIC  
Australian Securities &  
Investment Commission

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 680 383 679

Licence No: 261425

Effective 1 January 2008

Issued by ASIC

- an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of demand to the licensee's creditors or a trustee for the licensee's creditors; and
- (E) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the licensee complied with subparagraph 10(c)(iv)(A) and subparagraph 10(c)(iv)(C) for the period to which the report relates; and
  - (F) for any period when the licensee relied on subparagraph 10(c)(v), the licensee complied with subparagraph 10(c)(v)(A) and (B); and
  - (G) for any period when the licensee relied on Alternative A in subparagraph 10(c)(v)(E), the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities.
- (ii) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), following an examination of the documents the licensee relies on in complying with "Option 1" or "Option 2" as defined under this licence, the auditor has no reason to believe that:
- (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions of this licence; or
  - (B) the licensee failed to comply with the risk management requirement using either "Option 1" or "Option 2" as defined under this licence, except for:
    - (1) paragraphs (a), (c) and (e) of the definition of "Option 1" as defined under this licence; or
    - (2) paragraphs (a) and (c) of the definition of "Option 2" as defined under this licence; or
  - (C) in the licensee's reliance on "Option 1" as defined under this licence, the assumptions the licensee adopted for its projection were unreasonable; or
  - (D) in the licensee's reliance on "Option 2" as defined under this licence, the basis for the selection of assumptions to meet the requirements for its projection adopted was unreasonable; and
- (iii) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the auditor has no reason to believe that:
- (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions in this licence; and
  - (B) the basis for the selection of the assumptions adopted was unreasonable; and
- (iv) for any period when the licensee relied on subparagraph 10(c)(v) under Alternative B, following an examination of the documents prepared for Alternative B, the auditor has no reason to believe that:
- (A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) of the Act for managing the risk of having insufficient financial resources to comply with the conditions in this licence; or
  - (B) the basis for the selection of the assumptions adopted was unreasonable.

### Professional Indemnity Compensation Requirements

20. The licensee must maintain an insurance policy covering professional indemnity and fraud by officers that:
- (a) is adequate having regard to the nature of the activities carried out by the licensee under the licence; and



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

Effective 15 April 2005

**Schedule 1 - Conditions**

- (b) covers claims amounting in aggregate to whichever is the lesser of:
- (i) \$5 million; or
  - (ii) the sum of the value of all IDPS property of all IDPS for which it is the operator and all scheme property of all registered schemes for which it is the responsible entity.

### External Disputes Resolution Requirements

21. Where the licensee provides financial services to retail clients, the licensee must be a member of one or more External Disputes Resolution Scheme(s) ("EDRS") which covers, or together cover, complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.
22. Where the licensee ceases to be a member of any EDRS, the licensee must notify ASIC in writing within 3 business days:
- (a) the date the licensee ceases membership of the EDRS(s); and
  - (b) the reasons the licensee's membership of the EDRS(s) has ceased (including circumstances where the EDRS is no longer operating, failing by the licensee to renew their membership of the EDRS or where the EDRS has terminated the licensee's membership of the EDRS); and
  - (c) details of the new EDRS(s) the licensee intends to or has joined (including the date the membership commences and the name of the EDRS); and
  - (d) details that provide confirmation that the licensee is covered by EDRS(s) covering complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

### Agreement with Holder of Financial Product on Trust

23. If the licensee:
- (a) operates a registered scheme in the capacity of a responsible entity; or
  - (b) operates an IDPS as an IDPS operator; or
  - (c) provides a custodial or depository service;
- and in the course of operating that scheme or providing that service the licensee enters into an arrangement:
- (d) with another person ("holder") to hold scheme property, IDPS property or to hold financial products on trust for or on behalf of the licensee or another person; or
  - (e) between a responsible entity or IDPS operator in that capacity and another person ("master custodian") under which the master custodian is authorised to arrange for a third person ("subcustodian") directly or indirectly to hold scheme property or IDPS property; or
  - (f) with a subcustodian arranged by a master custodian;
- the licensee must ensure that at all times:
- (g) the arrangement is covered by a contract that is in writing; and
  - (h) the contract clearly specifies:



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 1 March 2007

Conditions of Licence

- (i) the nature of the arrangement and the obligations of each party; and
- (ii) the rights that the parties will have in relation to ongoing review and monitoring of the holder or any subcustodian or for an agreement made by the licensee with a master custodian ("master agreement"), the master custodian and the standards against which their performance will be assessed; and
- (iii) how the holder, any subcustodian or for a master agreement, the master custodian will certify that it complies with, and will continue to comply with, the requirements of ASIC Policy Statement 133 when read in conjunction with ASIC Policy Statements 148 and 167 (as each of those Policy Statements is in force as at the date of this licence); and
- (iv) how instructions will be given to the holder, subcustodian or for a master agreement, the master custodian; and
- (v) how the client of the licensee will be compensated if the client suffers any loss due to a failure by the holder, any subcustodian, or for a master agreement, the master custodian, to comply with its duties or to take reasonable care based on the standards applying in the relevant markets for the assets held and the extent to which the holder, any subcustodian, or for a master agreement, the master custodian, must maintain a minimum level of professional indemnity insurance; and
- (vi) that the holder, any subcustodian or for a master agreement, the master custodian is prohibited from taking a charge, mortgage, lien or other security over, or in relation to, the assets held under the arrangement unless it is for a purpose or purposes made within the terms of the contract (but not including any unpaid fees of the holder, subcustodian or for a master agreement, the master custodian) or in accordance with the licensee's instructions; and
- (vii) in the case of a responsible entity or DPF operator who has a master agreement, what should be in the written contract with any subcustodian used in accordance with these conditions including the liability of the subcustodian to the master custodian and the licensee when acts or omissions of the subcustodian are in breach of the subcustodian's obligations; and
- (viii) how records of the assets held will be kept and maintained by the holder, any subcustodian or for a master agreement, the master custodian; and
- (ix) requirements for reporting by the holder, any subcustodian or for a master agreement, the master custodian, including notifications of any dealing in or transfers of the assets; and
- (x) requirements for the holder to provide all reasonable access and assistance to any registered company auditor engaged to conduct an audit in relation to the licensee.

The contract is not required to contain the matters specified in paragraph (iii), (v) or (vi) or to be in writing to the extent that the licensee establishes by documentary evidence that it is not practicable for the licensee to:

- (a) hold the relevant financial products (being property outside Australia) itself; or
- (b) engage a custodian that is willing to include such matters in the contract to hold that property on reasonable commercial terms;

and provided that the licensee has disclosed to the client that these terms will not be included.



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

Effective 13 April 2009

Introduction of Conditions

### Property

24. The licensee must, in relation to a registered scheme for which the licensee is the responsible entity, ensure that at all times the holder of any scheme property:
- (a) complies with the requirements of ASIC Policy Statement 133 (as in force as at the date of this licence) relating to the holding of scheme property; and
  - (b) maintains proper records identifying the scheme property.

### Prohibition to Operate Managed Discretionary Account Service

25. The licensee must not provide an MDA service to a retail client except when operating a registered scheme.

### Retention of Financial Services Guides, Statements of Advice and Material Relating to Personal Advice

26. Where the licensee provides financial products advice to retail clients, the licensee must ensure that copies (whether in material, electronic or other form) of the following documents are retained for at least the period specified:
- (a) each Financial Services Guide ("FSG") and Supplementary FSG given by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period commencing on the date of the FSG and continuing for at least 7 years from when the document was last provided to a person as a retail client; and
  - (b) a record of the following matters relating to the provision of personal advice to a retail client (other than personal advice for which a Statement of Advice ("SOA") is not required or for which a record of the advice is kept in accordance with subsection 945A(1)(c)):
    - (i) the client's relevant personal circumstances within the meaning of subparagraph 945A(1)(a)(i); and
    - (ii) the inquiries made in relation to those personal circumstances within the meaning of subparagraph 945A(1)(a)(ii); and
    - (iii) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of paragraph 945A(1)(b); and
    - (iv) the advice, including reasons why advice was considered to be "appropriate" within the meaning of paragraphs 945A(1)(a) to (c),for a period of at least 7 years from the date that the personal advice was provided;
  - (c) any SOA provided by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period of at least 7 years from the date the document was provided to the client.
27. The licensee must establish and maintain measures that ensure, as far as is reasonably practicable, that it and its representatives comply with their obligation to give clients an FSG as and when required under the Act. The licensee must keep records about how these measures are implemented and monitored.



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261 425

Effective 1 July 2009

Schedule of Conditions

### Terms and Definitions

In this licence references to sections, Parts and Divisions are references to provisions of the Corporations Act 2001 ("the Act") unless otherwise specified. Headings contained in this licence are for ease of reference only and do not affect interpretation. Terms used in this licence have the same meaning as is given to them in the Act (including, if relevant, the meaning given in Chapter 7 of the Act) and the following terms have the following meanings:

**adequately secured means:**

- (a) secured by an enforceable charge over financial products (other than financial products issued by the licensee or its associate) if:
  - (i) the financial products are:
    - (A) regularly traded on:
      - (1) a financial market (as defined in subsection 767A(1) of the Act and disregarding subsection 767A(2) of the Act) operated by a market operator or a licensee other than the licensee or its associate that in the reasonable opinion of the licensee produces sufficiently reliable prices to assess the value of the security provided by the charge;
      - (2) an ASIC approved foreign market under ASIC Policy Statement 72 as at the date of this licence; or
      - (3) a foreign market approved in writing for the purpose by ASIC; or
    - (B) interests in a registered scheme for which unit prices are regularly quoted by the responsible entity and the licensee believes on reasonable grounds that withdrawal may be effected within 5 business days; and
  - (ii) the market value of these financial products equals not less than 120% of the amount owing or not less than 100% of the amount owing if the financial products are debt instruments; or
- (b) secured by a registered first mortgage over real estate that has a fair market valuation at least equal to 120% of the amount owing; or
- (c) owing from an eligible provider; or
- (d) secured by an enforceable charge over amounts owing to another licensee which themselves are adequately secured.

**adjusted assets means** the value of total assets as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity:

- (a) minus the value of excluded assets that would be included in the calculation; and
- (b) minus the value of any receivable of the licensee that would be included in the calculation, up to the amount that the licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and
- (c) minus the value of any assets that would be included in the calculation that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and





## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 13 March 2009

### Schedule of Definitions

- (d) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and
- (e) plus
  - (i) the amount of any eligible undertaking that is not an asset; or
  - (ii) if the eligible undertaking is for an unlimited amount, an unlimited amount;
 provided that if the eligible undertaking is given by a person who is an eligible provider only because of paragraph (b) of the definition of "eligible provider" under this licence, the amount added may be no more than one quarter of the eligible provider's net assets (excluding intangible assets) as shown in the most recent audited financial statements lodged with ASIC; and
- (f) for calculating ASLF, plus the value of any current assets of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as assets of the licensee except to the extent the value exceeds the sum of:
  - (i) the current liabilities of the trust as if they would appear on the balance sheet as assets of the licensee; and
  - (ii) any adjustments to ASLF that are made to current assets, liabilities and contingent liabilities of the trust for accounting purposes being included in calculation adjustments; and
- (g) for calculating ASLF, plus the value of the applicable percentage set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence of the value of any current assets that would be acquired in return for paying a contingent liability as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence up to the value of the applicable percentage of the relevant contingent liability.

**adjusted liabilities** means the amount of total liabilities as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M of the Act if the licensee were a reporting entity;

- (a) minus the amount of any liability under any subordinated debt approved by ASIC; and
- (b) minus the amount of any liability that is the subject of an enforceable right of set-off, if the corresponding receivable is excluded from adjusted assets; and
- (c) minus the amount of any liability under a credit facility that is made without recourse to the licensee; and
- (d) for calculating ASLF, plus the amount of the total current liabilities of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as liabilities of the trustee; and
- (e) plus the value of any assets that are encumbered as a security against another person's liability where the licensee is not also liable, but only up to the amount of that other person's liability secured or the value of the assets encumbered after deducting any adjustments under this licence, whichever is lower.

**adjusted surplus liquid funds or ASLF** means surplus liquid funds minus either:

- (a) the standard adjustments (refer to the definition of "standard adjustments" under this licence); or
- (b) such other adjustments as ASIC may from time to time consent to in writing.



ASIC  
Australian Securities & Investments Commission



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Expiry Date: 14/01/2014

Introduction of Conditions

**clearing participant** means a clearing participant in the licensed clearing and settlement facility ("CS Facility") as defined in the operating rules of Australian Clearing House Pty Limited ("ACH"), as at the date of this licence, that complies with those operating rules relating to financial requirements, taking into account any waiver by ACH.

**customer service representative** means call centre staff or front desk staff who deal with initial queries from customers.

**eligible custodian** means:

- (a) an Australian ADI; or
- (b) a market participant or a clearing participant; or
- (c) a subcustodian appointed by a person of the kind referred to in (a) or (b) of this definition.

**eligible provider** means:

- (a) an Australian ADI; or
- (b) an entity (other than a registered scheme of which the licensee or the licensee's associate is the responsible entity):
  - (i) whose ordinary shares are listed on a licensed market or an ASIC approved foreign exchange under ASIC Policy Statement 72 as at the date of this licence; and
  - (ii) that had net assets (excluding intangible assets) of more than \$50 million as shown in the most recently audited financial statements of the provider lodged with ASIC; and
  - (iii) that the licensee has no reason to believe no longer has net assets of at least that amount; or
- (c) an Australian government (i.e. the Commonwealth or a State or Territory government) or a government of a country that is a member of the Organisation for Economic Co-operation and Development ("OECD country government"), or an agency or instrumentality of an Australian or OECD country government; or
- (d) a foreign deposit-taking institution that is regulated by an ASIC approved regulator; or
- (e) a foreign deposit-taking institution approved in writing by ASIC for this purpose; or
- (f) an Australian CS facility licensee; or
- (g) an entity approved by ASIC in writing for this purpose.

**eligible undertaking** means the amount of a financial commitment that is:

- (a) payable on written demand by the licensee (disregarding any part previously paid or any amount that would be repayable as a current liability or, for calculating NTA, as a liability by the licensee if money were paid), provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the licensee, and that
  - (i) is an enforceable and unqualified obligation; and



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 1 March 2008

Interpretation of Conditions

- (ii) remains operative (even if, for example, the licensee ceases to hold an AFS licence) until ASIC consents in writing to the cancellation of the undertaking; or
- (b) approved in writing by ASIC as an eligible undertaking.

### excluded assets means:

- (a) intangible assets (i.e. non-monetary assets without physical substance); and
- (b) except when allowed under paragraphs (e) or (f) of this definition, assets owing or receivables ("receivables") from or assets invested in, any person who:
  - (i) is an associate of the licensee; or
  - (ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or
  - (iii) became liable to the licensee because of, or in connection with, the acquisition of interests in a managed investment scheme the licensee operates; and
- (c) except when allowed under paragraph (g) of this definition, assets:
  - (i) held as a beneficial interest or asset of a managed investment scheme; or
  - (ii) invested in any superannuation product, in respect of which the licensee or its associate may exercise any form of power or control; and
- (d) except when allowed under paragraphs (e) or (f) of this definition, receivables from the trustee of any trust in respect of which the licensee or its associate may exercise any form of power or control; and
- (e) despite paragraphs (b) and (d) of this definition, a receivable is not excluded to the extent that:
  - (i) it is adequately secured; or
  - (ii) the following apply:
    - (A) it is receivable as a result of a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and
    - (B) no part of the consideration in relation to the transaction is, in substance, directly or indirectly invested in the licensee; and
    - (C) the total value of such assets (before any discount is applied) is not more than 20% of the assets less liabilities of the licensee; and
    - (D) for the purposes of calculating ASLF, the amount is further discounted by 10% of the value after any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence; or
- (iii) the following apply:
  - (A) it is receivable from an insurance company that is a body regulated by APRA and results from a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and



ASIC  
Australian Securities &  
Investments Commission

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

Effective 1 March 2009

### Schedule 1 of Conditions

- (B) there is no reason to believe that any amount invested in the licensee would not have been invested if the transactions that caused the receivable had not taken place or were not at the time of the investment expected to take place; and
  - (C) there is no reason to believe that the recoverability of the receivable will materially depend on the value of an investment by any person in the licensee; and
  - (D) the total value of the receivables under this subparagraph (iii) before any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence is applied is not more than 60% of the adjusted liabilities of the licensee disregarding this subparagraph (iii); or
- (iv) ASIC consents in writing to the licensee treating the amount owing as not being an excluded asset; and
- (f) despite paragraphs (b) and (d) of this definition, the licensee can include a receivable amount to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of, a superannuation entity as defined in the Superannuation Industry (Supervision) Act 1993, an IDPS or a registered scheme ("scheme") to the extent that the receivable:
- (i) exceeds amounts invested by the scheme in, or lent (either than by way of a deposit with an Australian ADI in the ordinary course of its banking business) directly or indirectly by the scheme to, the licensee, a body corporate the licensee controls, a body corporate that controls the licensee or a body corporate that the licensee's controller controls; and
  - (ii) if receivable by way of fees, represents no more fees than are owing for the last 3 months; and
  - (iii) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and
- (g) despite paragraph (c) of this definition, the licensee does not have to exclude a managed investment product unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.

**financial asset** means cash, cheques, orders for payment of money, bills of exchange, promissory notes, securities, deposit products and interests in managed investment schemes (including where the managed investment scheme invests in direct real property or mortgages) but does not include a derivative.

**incidental property** means:

- (a) assets of any kind which are necessary for, or incidental to the effective operation of the scheme, the total value of which, and the total liability that may arise from the holding of which, does not exceed 10% of the value of the assets net of liabilities other than liabilities to members as members of the scheme; and
- (b) cash, deposits or current accounts with an Australian ADI or units in a cash management trust that are held for no more than 3 months pending investment in assets to which the scheme relates, or expenditure or distribution to members; and
- (c) derivatives, where:
  - (i) the value or amount of the derivative will ultimately be determined, derived or varied by reference to something else for the purposes of section 761D(1)(c) of the Act which is related to or may significantly and directly affect the receipts or costs of the fund; and



## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

effective 1 November 2002

### Schedule of Conditions

- (ii) the derivative is acquired or disposed of by the licensee as a hedge which has the primary purpose of avoiding or limiting the financial consequences of fluctuations in, or in the value of, receipts or costs of the fund.

### market participant means:

- (a) a participant as defined in the operating rules of ASX Limited ("ASX"), as at the date of this licence (other than a Principal Trader, unless the Principal Trader is registered as a Market Maker), who complies with the ASX's operating rules that relate to financial requirements, taking into account any waiver by ASX; or
- (b) a participant in the licensed market operated by Sydney Futures Exchange Limited ("SFE") that:
- (i) restricts its financial services business to participating in the licensed market and incidental business supervised by SFE; and
  - (ii) complies with the SFE's operating rules, as at the date of this licence, that relate to financial requirements, taking into account any waiver by SFE.

### MDA service means a service with the following features:

- (a) a person ("the client") makes client contributions; and
- (b) the client agrees with another person that the client's portfolio assets will:
- (i) be managed by that other person at their discretion subject to any limitation that may be agreed, for purposes that include investment; and
  - (ii) not be pooled with property that is not the client's portfolio assets to enable an investment to be made or made on more favourable terms; and
  - (iii) be held by the client unless a beneficial interest but not a legal interest in them will be held by the client; and
- (c) the client and the person intend that the person will use client contributions of the client to generate a financial return or other benefit from the person's investment expertise.

net tangible assets or NTA means adjusted assets minus adjusted liabilities.

old law securities options contracts means "options contracts" as defined under section 9 of the Act immediately prior to 11 March 2002 which were "securities" as defined under section 92(1) of the Act immediately prior to 11 March 2002.

Option 1 means the reasonable estimate projection plus cash buffer basis where the licensee is required to:

- (a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's reasonable estimate of what is likely to happen over this term; and
- (b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and



ASIC  
Australian Securities &  
Investment Commission

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

Effective 15 April 2009

### Summary of Conditions

- (c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and
- (d) demonstrate, based on the projection of the licensee's cash flows, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any additional liabilities the licensee projects will be incurred during that term; and
- (e) hold (other than as trustee) or be the trustee of a relevant trust that holds, in cash an amount equal to 20% of the greater of:
  - (i) the cash outflow for the projected period of at least 3 months (if the projection covers a period longer than 3 months, the cash outflow may be adjusted to produce a 3-month average); or
  - (ii) the licensee's actual cash outflow for the most recent financial year for which the licensee has prepared a profit and loss statement, adjusted to produce a 3-month average.

For the purposes of this definition references to the licensee's cash flow include the licensee's own cash flow and any cash flow of a relevant trust but do not include cash flows of any other trust.

For the purposes of paragraph (e) of this definition, "cash" means:

- (A) current assets valued at the amount of cash for which they can be expected to be exchanged within 5 business days; or
- (B) a commitment to provide cash from an eligible provider that can be drawn down within 5 business days and has a maturity of at least 1 month.

but does not include any cash in a relevant trust if the licensee has reason to believe that the cash will not be available to meet all of the projected cash flows of the licensee.

**Option 2** means the cash needs requirement on the contingency-based projection basis where the licensee is required to:

- (a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's estimate of what would happen if the licensee's ability to meet its liabilities over the projected term (including any liabilities the licensee might incur during the term of the projection) was adversely affected by commercial contingencies taking into account all contingencies that are sufficiently likely for a reasonable licensee to plan how they might manage them; and
- (b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and
- (c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and
- (d) demonstrate, based on the projection of the licensee's cash flow, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any



ASIC  
Australian Securities &  
Investment Commission

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 16 March 2008

### Schedule of Conditions

additional liabilities the licensee might incur during that term.

For the purposes of this definition references to the licensee's cash flow include any cash flow of a relevant trust.

#### regulated trust account means:

- (a) a trust account maintained by an authorised trustee corporation under the law of a State or Territory; or
- (b) a solicitor's trust account; or
- (c) a real estate agent's trust account; or
- (d) a trust account maintained by an entity other than the licensee and that provides protections similar to the accounts described in paragraphs (a) to (c) of this definition, and is approved by ASIC for the purpose in writing.

relevant trust means, for the purposes of the definitions of "Option 1" and "Option 2" of this licence, a trust:

- (a) where substantially all of the financial services business carried on by the licensee is carried on as trustee of a trust; and
- (b) that it is not a registered scheme or a superannuation entity as defined in subsection 10(1) of the Superannuation Industry (Supervision) Act 1993.

#### special custody assets means:

- (a) for serviced strata schemes, cash held in a regulated trust account for the purposes of:
  - (i) refurbishment or improvement of real property associated with the scheme; or
  - (ii) alleviating seasonal fluctuations in payments of income from the scheme in accordance with provisions in the constitution;provided that no more is held than the licensee reasonably considers necessary for the relevant purpose; and
- (b) currency and cheques (other than documents) that it would not be reasonably practicable for a person other than the responsible entity to hold; and
- (c) funds received from members of the scheme within the previous 6 months held in a regulated trust account; and
- (d) cash held for up to 3 months in an account with an Australian ADI styled as a trust account that is audited at least once every 6 months by a registered company auditor where the auditor's report states that in the auditor's opinion the account has been operated in accordance with the trust:
  - (i) pending payment to members; or
  - (ii) to meet expected expenses (not including investments) over a 3 month period; or
  - (iii) pending application in acquiring a mortgage and paying any fees and costs incidental to the acquisition; and
- (e) contractual, lease or licence rights that are not assignable except with the consent of the member or that it would not be reasonably practicable to assign (other than to a new responsible entity) and any documents evidencing those contractual, lease or licence rights; and



ASIC  
Australian Securities &  
Investment Commission

## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 13 March 2009

### Immediate Conditions

- (f) assets of trivial value; and
- (g) levies of a time sharing scheme which are held in an account with an Australian ADI styled as a trust account that is audited at least twice annually by a registered company auditor where the report from the auditor is provided to the responsible entity's board or compliance committee and states that in the auditor's opinion the account has been operated in accordance with the trust; and
- (h) mortgages or documents of title held under a mortgage where:
  - (i) particular members have a specific beneficial or legal interest in the mortgage; and
  - (ii) the mortgage was acquired after disclosure in writing to the relevant members (at the time of the acquisition) of all information that would have been required to be in a Product Disclosure Statement (or in relation to mortgages acquired before Division 2 of Part 7.9 applies to interests in the registered scheme a disclosure document under Chapter 6D of the Act) an offer of interests in the registered scheme conferring rights in connection with that mortgage had been made immediately prior to the mortgage; and
  - (iii) either of the following applies:
    - (A) the mortgage was acquired on the specific direction of the relevant members (at the time of acquisition of the interest); or
    - (B) members are able to withdraw from that mortgage in a period of 14 days commencing on the date of disclosure under subparagraph (ii) of the acquisition; and
  - (iv) the scheme does not involve the mortgage being sold prior to its discharge.

### standard adjustments means:

- (a) discounts as follows:
  - (i) 8% for the values that reflect obligations to pay the licensee a certain sum maturing beyond 12 months unless the interest rate applicable is reset to reflect market interest rates at least annually; and
  - (ii) 16% for the values that reflect any assets other than:
    - (A) an obligation to pay the licensee a certain sum; or
    - (B) a derivative; or
    - (C) an interest in property held in trust by another licensee under Division 3 of Part 7.8 of the Act or the rights to money held by another licensee in an account under section 981B of the Act; and
- (b) 8% of the values that reflect others' obligations to pay the licensee a certain sum except to the extent that the asset is adequately secured or is a right against another licensee in respect of money or property held by that other licensee in an account under section 981B or held in trust under Division 3 of Part 7.8 of the Act; and
- (c) the following amounts for contingent liabilities and contingent liabilities of any trust (other than a registered scheme) of which the licensee is trustee:
  - (i) 5% of any contingent liabilities that can be quantified under an underwriting or sub-underwriting of financial products except:
    - (A) during the 5 business days after the commitment is assumed; and





## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 18 March 2005

### Schedule of Conditions

- (B) during any period it is unlawful to accept applications for the financial products to which the underwriting relates (such as under subsection 727(3) or section 1016B) and the period ending 5 business days after the first day on which it becomes lawful to accept applications; and
  - (C) to the extent that the underwriter holds funds from persons seeking to acquire the financial products subject to the underwriting; and
  - (ii) 5% of the potential liability of any contingent liabilities that can be quantified under a derivative other than to the extent there is an offsetting position in any of the following or a combination of the following:
    - (A) the "something else" for the purposes of paragraph 761D(1)(c) of the Act; and
    - (B) another derivative relating to that something else; and
    - (C) a thing that is so similar to the something else as to make the probability of net loss from the liability under the derivative exceeding any increase in the value of the thing less than 5% in the reasonable and documented opinion of the licensee;except to the extent that the licensee is of the reasonable opinion that the risk that they will become liabilities (or become liabilities to a greater extent than taken into account for the purposes of applying the adjustment) because of a change in the price or value of the something else is trivial; and
  - (iii) 20% of the potential liability of any contingent liabilities that can be quantified under a guarantee or indemnity;
  - (d) the relevant percentage as set out in subparagraphs (i)(ii) and (i)(iii) of the amounts that in the licensee's reasonable opinion is the maximum amount that the licensee may be liable for in relation to a contingent liability referred to in paragraph (c) where the maximum liability cannot be quantified; and
  - (e) where the licensee has agreed to sell an asset that it does not hold, the amount of the adjustment that would apply if it held that asset is to be applied against adjusted assets.
- For the purposes of this definition, the risk that a contingent liability will become a liability may be treated as trivial if the probability that this will occur is reasonably estimated by the licensee as less than 5%.
- For the purposes of paragraphs (a) and (b) of this definition, discounts apply against the value of current assets:
- (f) used in calculating "adjusted assets" in this licence; and
  - (g) of any trust (other than a registered scheme) of which the licensee is a trustee (see subparagraph (f)(ii) of the definition of "adjusted assets" in this licence); and
  - (h) that are deducted under paragraph (c) of the definition of "adjusted assets" in this licence as assets to which recourse may be had for a liability of the licensee where the licensee's liability is limited to those assets but the total discounts applied to those assets shall not exceed any excess of the value of the licensee's assets to which recourse may be taken over the amount of the liability; and
  - (i) that is the applicable percentage of the current assets that would be acquired in return for paying a contingent liability referred to in subparagraph (c)(i) or (iii) of this definition including rights against a sub-underwriter (see paragraph (g) of the definition of "adjusted assets" in this licence).

The licensee does not have to apply the discounts to the value of amounts payable from a client in the ordinary course of its financial services business for financial products that the client has agreed to buy, if the money is required to





## Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

licence No: 261425

Effective 18 Nov 2009

Signature of Director

be—and in the reasonable estimation of the licensee probably will be—paid no more than 5 business days after the client became liable.

**surplus liquid funds or SLF means adjusted assets minus adjusted liabilities:**

- (a) plus any non-current liabilities that were used in calculating adjusted liabilities and the value of any assets that are encumbered (where the licensee is not liable and the assets do not secure another person's current liability) that were deducted when calculating the licensee's adjusted liabilities; and
- (b) minus any non-current assets that were used in calculating adjusted assets; and
- (c) if the licensee is an eligible provider under paragraph (b) of the definition of "eligible provider" under this licence—plus one quarter of the value of the licensee's non-current assets minus any intangible assets and the amount of its non-current liabilities.

**Tier \$500,000 class assets means:**

- (a) real property (including mortgages or leases over real property in relation to real property) that is intended to be kept for the whole duration of the scheme or the relevant mortgage; and
- (b) physical assets including currency which as a matter of reasonable practice can be held by a custodian (such as valuables or precious metals); and
- (c) funds received from members within the previous:
  - (i) 6 months if held for the purposes of the initial investment by the responsible entity as part of the scheme; or
  - (ii) 13 months if held pending payment of expenses of the scheme held in a regulated trust account; and
- (d) special custody assets.

**trigger point means either of the trigger points described in condition 15 of this licence.**

**value of assets means, for the purpose of condition 14 of this licence, the value of assets and other scheme property and/or IDPS property determined as follows:**

- (a) in the case of assets that would be recognised in preparing a balance sheet for members under Chapter 2M of the Act - their value as if at that time such a balance sheet was being prepared; and
- (b) in the case of any other scheme property and/or IDPS property - its market value. For the purpose of this calculation mortgages held by members of a registered scheme and managed as part of the scheme must be treated as assets of the scheme.



**Addendum  
to  
HIFX Limited  
Terms and conditions  
for**

**Corporate Brokerage Services - New Zealand  
(Commercial Foreign Exchange services)**

**Client Name:** LM Investment Management Trading as:

LMIM atf Currency Protected Australian Income Fund  
LMIM atf Australian Income Fund Currency Protected  
LMIM atf Institutional Currency Protected Australian Income Fund  
LMIM atf Management Performance Fund  
PTAL atf First Mortgage Income Fund

**This is an Addendum to the Terms and Conditions of the Agreement currently in force between HIFX Limited and the above named Client and replaces any prior addendums (if applicable)**

**1. Interpretation**

- (a) Defined expressions used in the Agreement shall have the same meaning where they are used in this Addendum.
- (b) In this Addendum:

**"Agreement"** means the agreement dated 5th October 2006 between HIFX and the Client presently in force for provision of Commercial Foreign Exchange services, including the Terms and Conditions of that agreement.

**"Mark to Market"** means the value of Specified Trades calculated at the market rate then prevailing.

**"Risk Threshold"** means the amount specified in Schedule 1 (being the level of risk which HIFX is prepared to carry without having been paid any Margin, in the event of any adverse exchange rate movement)

**"Specified Trades"** means such (or all) of the Client's Forward Trades as HIFX in its discretion elects to operate under the terms of this Addendum.

**"Variation Margin Call"** means a call made on the Client under clause 3 of this Addendum.

**"Stop Loss order"** An instruction from the client to HIFX to limit an adverse FX market movement. The instruction is to sell one currency for another at the next best available price based upon market liquidity after the stop loss rate has been dealt in the wholesale market.

**2. Concessionary Margin**

The Concessionary Margin set out in Schedule 1 will apply in respect of the Specified Trades, instead of the Margin set out in clause 3.2 of the Agreement.

**3. Variation Margin Call**

In respect of any Specified Trades, and while this Addendum applies to them, the following clauses will apply instead of clause 3.7 of the Agreement:

A3.1 In the event that the value of any Specified Trades on a Mark to Market calculation exceeds the Risk Threshold, HIFX may make a Variation Margin Call and the Client shall immediately provide such additional funds as HIFX may reasonably specify in the call so as to restore the net Mark to Market value of the Client's Specified Trades less any Variation Margin Calls received to a level below the Risk Threshold that is acceptable to HIFX.

A3.2 If subsequently the value of the Specified Trades on a Mark to market calculation reduces below the Risk Threshold (because of favourable exchange rate movement) HIFX may in its discretion return to the Client such part of any previous Variation Margin Calls as it thinks fit, but without prejudice to its right to make further Variation Margin Calls in the event of later adverse exchange rate movements.

**4. Maturing Trades**

The Risk Threshold is not available for the cash flow implications of maturing contracts that are rolled over. Negative cash flows resulting from rolled-over contracts (as a consequence of being marked to market) must be paid to HIFX immediately.

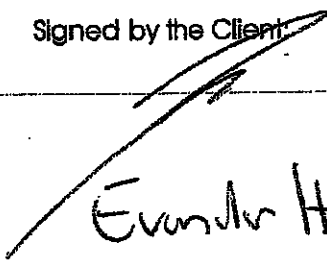
**5. Revocation**

HIFX reserves the right, at its absolute discretion, at any time and without being required to assign any reason, to revoke the concessions granted under this Addendum, and to revert to the terms and conditions of the Agreement. Revocation may be for all or any of the Client's Specified Trades. On such revocation, the Margin specified by clause 3.2 shall be restored and HIFX may make such Margin Call under clause 3.7 as is then appropriate.

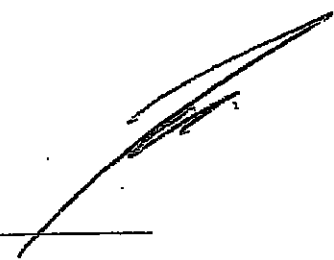
Dated

14/2/12

Signed by the Client

  
Euan Hume

Signed by HIFX Limited:



---

**Schedule 1****Risk Threshold** Nil**Concessionary Margin****Concessionary margin requirements**

- Margin required to be maintained with HIFX is 5.00% equivalent of the face value of the contracts plus any adverse mark to market variation.

**Maximum Term of Forward FX contracts**

- *Six months is the maximum term that LM Funds can deal on a forward basis.*

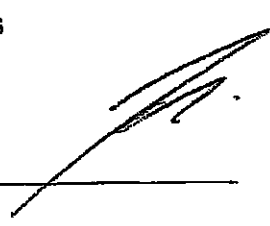
**Maximum open exposure of Forward FX contracts**

- Maximum amount of open forward transactions is capped at **AUD150 million**. This is cumulative cap for all LM's open foreign exchange positions held with HIFX Ltd.

**Daily revaluations**

- The day's mark-to-market rate and valuation of forward positions will be advised to LMIM daily by email by approximately midday NZ time.

**Stop loss**

- In addition to the above margin requirements, LM Funds will have a stop-loss order being 5.00% above or below the morning's mark-to-market rate, depending on the currency exposure, with the rate being adjusted by the variation margin due, once the position size for that fund exceeds a total of AUD\$5mio. An example of the stop loss calculate is below.
  - The stop loss will be adjusted to reflect the current days Mark to Market rate only upon variation margin being received and credited into HIFX's bank account,
  - HIFX will email LM to advise the Stop Loss rate in use each day. LM will advise HIFX if they dispute the stop loss rate, in absence of which the Stop Loss rate is deemed to be agreed.
- 

**Example of stop loss calculation**

- Open position - long 46 million NZD versus the AUD.
- Morning MTM rate is 0.8168
- Variation margin call of \$A300,000.

$$5\% \text{ of } 0.8168 = 0.04084$$

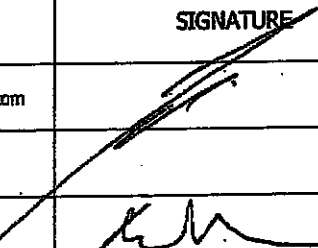
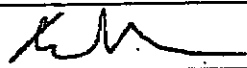
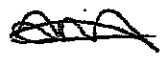


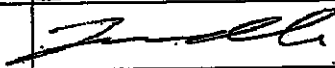
$$0.8168 - 0.04084 = 0.7760 \text{ (rounded)} @ \text{ NZD } 46,000,000 = \text{A\$}35,696,000 + \\ \text{A\$}300,000 = \text{A\$}33,996,000$$

$$\text{A\$}33,996,000 / \text{NZD } 46,000,000 = 0.7825$$



**LM AUTHORISED USERS**

The following is a list of users authorised to transact via phone/fax/email on behalf of LM Investment Management.

FULL NAME OF USER	POS*	EMAIL ADDRESS	SIGNATURE
Eghard van der Hoven	1	EVanderhoven@lmaustralia.com	
Andrew Petrik	3	apetrik@lmaustralia.com	
Eryn Wilson	2	ewilson@lmaustralia.com	
Ashleigh McKenna	2	amckenna@lmaustralia.com	
Virginia Battison	4	vbattison@lmaustralia.com	
Chris Phillips	4	cphillips@lmaustralia.com	
James Unterweger	4	junterweger@lmaustralia.com	
All Trading correspondence		fxtrading@lmaustralia.com	
All Margin Reporting		FX_Reports@lmaustralia.com	

**\*POSITION** (Indicate position with appropriate number):-  
**1. Director; 2 FC/Accountant; 3 Accounts Manager; 4 Admin Officer**

The undersigned Signing Officer confirms that the person(s) listed above are authorised to enter into transactions, as outlined, on behalf of LM Investment Management.

Name of Signing Officer	Position
Signature of Signing Officer	Date

GOLD COAST | SYDNEY | HONG KONG | AUCKLAND | QUEENSTOWN | LONDON | DUBAI | JOHANNESBURG | BANGKOK [www.LMaustralia.com](http://www.LMaustralia.com)

AUSTRALIA HEAD OFFICE Level 4 9 Beach Rd Surfers Paradise Qld 4217 Australia T +61 7 5584 4500 F +61 7 5592 2505 Freecall 1800 062 919 E mail@LMaustralia.com  
 PO Box 485 Surfers Paradise Qld 4217

ABN 68 077 208 461 Responsible Entity and Australian Financial Services Licensee No. 220281

## **Margin Call Agreement**

~~This Margin Call Agreement ("Agreement") is entered into by Associated Foreign Exchange, Pty Ltd ("AFEX") and LM Investment Management Ltd [LM Australian Income Fund] (the "Client") with respect to foreign exchange contracts entered into between the parties on, after and prior to the date this Agreement is executed by both parties ("Foreign Exchange Contracts") upon the following terms and conditions.~~

### **1. General Conditions**

- (a) Foreign Exchange Contracts include forward contracts, which may have settlement dates up to 12 months from the date of any such transaction as may be agreed between the parties.
- (b) Execution of this Agreement will not obligate either AFEX or Client to enter into any Foreign Exchange Contracts, which will be subject to separate agreements between the parties.
- (c) This Agreement and all Foreign Exchange Contracts between the parties are subject to the terms and conditions of the Business Account Application ("Application") and the Master Forward Contract ("Master Contract") executed by Client, each of which is incorporated into this Agreement by reference. Unless expressly excluded or modified in writing, the terms of this Agreement will apply to each Foreign Exchange Contract entered into hereafter. If there is any conflict between the terms of this Agreement and the Application or the Master Contract, the terms of this Agreement will control.

### **2. Margin Requirement**

AFEX requires that a Margin be paid by the Client subject to the following covenants and conditions:

- (a) If AFEX determines, in its sole discretion, that the net market value of all of the Client's Open Foreign Exchange Contracts has declined and the unrealized loss when marked to market exceeds \$100,000.00 measured in Australian Dollars, the Client is required to post with AFEX a cash margin in the amount of \$100,000.00. Each time the net market value of all of the Client's Open Foreign Exchange Contracts declines and the unrealized loss when marked to market increases by a further \$100,000.00, the Client is required to post with AFEX an additional cash margin in the amount of \$100,000.00 ("Margin Amount") to secure payment of Client's obligations under its Foreign Exchange Contracts. Payment of such Margin amount(s) is due before 5pm on the day AFEX gives Client notice of its demand for payment ("Margin Call") provided that such notice is made by AFEX before 2pm on that day. If the notice is given after 2pm, the payment of such Margin amount(s) will be due

before 11am the following business day. Payment of Margin amount must be evidenced by a payment confirmation from an Australian Bank.

3. **Remedy for Failure to Honor Margin Requirement**

If AFEX does not receive the Margin Amount when due, AFEX, at its option and in its sole discretion, may close out any or all of the Client's open Foreign Exchange Contracts and apply the proceeds first to reimburse AFEX for the amounts due under the Foreign Exchange Contracts, including all realized losses, and remit the balance of the proceeds, if any, to Client. If the proceeds of disposition are insufficient to fully satisfy the amount owing to AFEX, then Client shall pay to AFEX the difference within 1 working day.

**AFEX:**

**Associated Foreign Exchange, Pty Ltd**

By: \_\_\_\_\_

Print Name: Justine Hartman

Title: Global Credit Manager

Date: \_\_\_\_\_

**Client (to sign below):**

\_\_\_\_\_  
For and on behalf of  
LM Investment Management Ltd [LM Australian Income Fund]

\_\_\_\_\_  
For and on behalf of  
LM Investment Management Ltd [LM Australian Income Fund]

Print Name: EDWARD V D HOVEN

Print Name: G. FISCHER

Title: DIRECTOR

Title: CEO

Date: 16/12/11

Date: 16/12/11



**8973 - LM Administration Pty Ltd**

**Statement of Position**

**19-Mar-13**

**Book Value**

**\$**

**Assets**

**Cash Assets**

10901	LMA-Suncorp #130252727	-5,082.05
10903	LMA-Suncorp PAYG/GST holding acct	0
11040	IC-Drake Pty Ltd	299,116.53
11045	IC-Trustee for Ekard Property Trust	317,484.83
11055	IC-Lauxes	1,576,934.52
11065	IC-LM Coomera Pty Ltd	26,091.00
11070	IC-Trustee for Ekard Investments	925,104.40

27103	Loan Peter Drake	77,800.00
-------	------------------	-----------

11105	IC-Baronsand Pty Ltd - Trustee of McMurtrie FT	0
11135	IC-PC Drake	26,699,699.83
11160	Drake Management Trust	1,709,555.49
11501	Rental Bonds Held	63,080.07
11502	Security Deposits Held	3,728.25

**Cash Assets** **31,693,512.87**

**Investments**

12000	Investment in FMIF	37,468.83
12001	Investment in ASPF	41,983.64
12002	Investment in LM CPF	80,000.00
12010	LM Investment Management Canada Ltd	122,512.99
12400	Petty Cash-Cash on Hand	1,000.00

**Investments**

**Receivables**

13085	Tax Receivables(ICA)-Current	9,595.79
13090	Other Receivable	162,782.38
13095	Loan Management Fee Receivable	228,852.04

**Receivables**

**Current Assets** **401,230.21**

**Fixed Assets**

**Property**

17010	Computer Software at Cost	3,580,051.73
17011	Less Accum Dep-Computer Software	-1,373,596.31
17015	Software Development Costs	500,471.00
17020	Computer Hardware at Cost	191,785.76
17030	Plant and Equipment at Cost	190,804.40

17031	less P&E Accumulated Depreciation	-72,270.00
17060	Furniture & Fittings	451,593.84
17061	less F&F Accumulated Depreciation	-233,048.00
17070	Leasehold Improvements	2,061,628.94
17071	less Accum Depreciation Leasehold Improvements	-81,322.00
17080	Small Business Pool-General(low value pool?)	19,885.53
17210	Land & Building-Improvements	7,875.00

<b>Property</b>		<b>5,243,859.89</b>
<b>Fixed Assets</b>		<b>5,243,859.89</b>

<b>TOTAL ASSETS</b>		<b>37,621,568.43</b>
---------------------	--	----------------------

**Priority Creditors - Employees**

23007	Accrued Payroll Liability-Superannuation	53,097.33
	Wages & Super	
	Leave Entitlements	
	PILN	
	Excluded Employees	
<b>Total</b>		<b>53,097.33</b>

<b>Funds Available for Unsecured Creditors</b>		<b>37,568,471.10</b>
<b>Unsecured creditors</b>		

20000	Accounts Payable (Fund Comms Payable)	153,584.50
20001	Other Payables	53,723.85
20020	Fund Exp's pd by LMA (to be reimbursed by Fund)	-271,421.92
20500	Interest Payable - CBA Line of Credit	0
20740	GST Inputs	-260,793.37
20750	GST Outputs	1,412,932.60
20820	ATO BAS Submission	3,838,647.32
20834	Tax Arrangement with ATO	-3,050,000.00
23002	Accrued Depreciation Expense	400,000.00
23003	Accrued FBT Liability	-6,620.00
23005	Accrued Payroll Liability-PAYGWH-Current Year	45,463.00
24502	Income Received in Advance (Arrears)	1,468,900.29
24504	Hire Purchase Liability	138,834.02
24510	Income Received in Advance-Development Mgt Fees	13,000,377.87
25250	Premium Funding	6,960.57
11085	IC-LMIM Ltd	265,994.37

**Total**

**17,196,583.10**

**Surplus/(Deficit)**

**20,371,888.00**

**8973 - LM Administration Pty Ltd**  
**Statement of Position**

"GDM10"

**Notes**

**30-Apr-13**  
**Estimated Realisable**  
**Value**

**\$**

**Assets**

**Cash Assets**

Cash at Bank

LMA

50,367.41

Service fee income post appointment - LMIM

1,123,813.00

Operating expenses incurred by LMA to 30 April 2013. To be invoiced to LMIM

**Inter Company Loans**

IC-Drake Pty Ltd

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

IC-Trustee for Ekard Property Trust

160,000.00

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required. Note that LMA is registered owner of 2 properties at Couran Cove as Trustee of this trust which may assist recoverability.

IC-Lauxes

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

IC-LM Coomera Pty Ltd

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

IC-Trustee for Ekard Investments

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

IC-PC Drake

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

Drake Management Trust

Unknown

Demand letters issued. Debtor's capacity to pay unknown. Further investigations required.

Rental Bonds Held

4,000.00

**Cash Assets**

Unknown

**Investments**

Investment In FMIF

to be determined

Investment in ASPF

to be determined

Investment in LM CPF

to be determined

LM Investment Management Canada Ltd

14,000.00

**Investments**

to be determined

**Current Assets**

to be determined

Matthew Glennon Estimate

<b>Fixed Assets</b>	Computer Software at Cost	Unknown	further investigations required. Expect limited value for resale of software
	Software Development Costs	Unknown	further investigations required. Expect limited value for resale of software
	Computer Hardware at Cost	47,948.44	estimated value based on proportion of book value
	Plant and Equipment at Cost	29,633.50	estimated value based on proportion of book value
	Furniture & Fittings	54,636.25	estimated value based on proportion of book value
<b>Fixed Assets</b>	Leasehold Improvements	Nil	further investigations required to establish value. If leasehold then likely no recoverable value
		<b>132,216.19</b>	
	<b>TOTAL ASSETS</b>	<b>to be determined</b>	
<b>VA LIABILITIES</b>	Loan LMIM	775,000.00	operating expenses paid by LMA to week ending 28/4/13. To be invoiced to LMIM at EOM
	Other trading costs incurred and outstanding	403,299.00	operating expenses incurred by LMA to 30/4/13
	Legal Fees	to be determined	
	Remuneration	to be determined	
	Out of Pockets	to be determined	
<b>Funds Available for Priority Creditors</b>		<b>to be determined</b>	
<b>LIABILITIES</b>			
	<b>Priority Creditors</b>		
	Hire Purchase	138,834.02	
	Other Secured Creditors	Unknown	Sally provided figures as at 19/3
	Accrued Payroll Liability-Superannuation	80,955.00	Sally provided figures as at 19/3
<b>Total</b>	Leave Entitlements	751,000.00	Sally provided figures as at 19/3
	PILN/Redundancy	1,412,955.00	
		<b>2,383,744.02</b>	
<b>Funds Available for Unsecured Creditors</b>		<b>to be determined</b>	

**Unsecured creditors**

Unsecured creditors	214,268.92	book value
ATO	1,173,023.00	POD lodged
Income Received in Advance - Funds	13,776,886.38	
LMIM Ltd	265,994.37	pre-appointment loan account
<b>Total</b>	<b>15,430,173</b>	
<b>Surplus/(Deficit)</b>	<b>to be determined</b>	

From: Sarah Wooster [mailto:SWooster@piperaiderman.com.au] On Behalf Of Amanda Banton  
Sent: Monday, 8 April 2013 3:25 p.m.  
Cc: Shaan Palmer, Amanda Banton  
Subject: LM Investment Management Limited

Further to our earlier correspondence, we are considering applying to the court seeking a change in responsible entity of one or more of the funds managed by LM Investment Management Limited (LM), which are now in the control of administrators. The primary reasons for applying for such an order are as follows.

**Pursuance of Claims Against LM and related parties relating to the mismanagement of the funds**

A change in responsible entity will enable claims available to unit holders to be brought against LM and its associated parties relating to the mismanagement of the funds and the resultant losses sustained by unit holders. Such claims may provide a second source of money that unit holders will not otherwise have available to them if such claims are not pursued. If LM remains responsible entity this will present a significant hurdle to the investigation and pursuance of these claims as LM is unlikely to bring a claim against itself. This hurdle is already apparent as the administrators have confirmed that unit holders will not be treated as creditors of LM unless they are able to properly particularise and quantify their claims against LM and that will be extremely difficult unless a new responsible entity is able to access the books and records and undertake a proper investigation of the potential claims.

#### **Independence**

The administrators have had previous dealings with LM and its advisors and whilst the administrators are independent practitioners, we consider that the potential conflicts that may arise in relation to their duties owed to LM as a company and their duties owed to unit holders will present a conflict in due course, which can be avoided if an independent responsible entity is appointed.

#### **What We Need From You**

We wish to understand the desires of unit holders. Accordingly, please answer the following in relation to the client(s) you represent:-

- 1) What are the names of your client(s) as they appear on the register of the respective funds?
- 2) Which LM managed fund(s) did your client(s) invest in?
- 3) How much money did your client(s) invest in the fund (s) and have not been repaid?
- 4) Would your client(s) be supportive of a change in responsible entity in principle?

Please provide answers to the above by return email (or otherwise by close of business on Tuesday 9 April).

Yours sincerely,

Amanda Banton  
Partner | Piper Alderman



**Lobb, Renee**

---

**From:** Muller, Ginette  
**Sent:** Wednesday, April 10, 2013 9:38 AM  
**To:** Lobb, Renee  
**Subject:** FW: Article from NZ

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

below

---

**From:** Muller, Ginette  
**Sent:** Tuesday, 9 April 2013 6:29 PM  
**To:** philip.pan@au.kwm.com; Bender, Damian; Park, John; Lachlan McIntosh  
**Subject:** FW: Article from NZ

---

**From:** Francene Mulder [<mailto:FMulder@lmaustralia.com>]  
**Sent:** Tuesday, 9 April 2013 6:22 PM  
**To:** Bender, Damian; Stokes, Andrew  
**Cc:** Mallick, Jack; Billings, Daniel; Clark, Justin; Dunn, Joanne; McBryde, Sally; McIntosh, Lachlan; Michelle Ballard; Muller, Ginette; Park, John; Eghard van der Hoven; Katy Phillips  
**Subject:** RE: Article from NZ

Dear Ali,

Success – here it is below. They are definitely looking to make an application to the court.

It is a real fishing expedition.

- Note the big lie where they state LM has had previous dealings with FTI.
- They state there has been mismanagement of the funds as a fact – and it is certainly not a fact, or proven.
- They talk about LM's remaining as RE. As I understand it, we are suspended and FTI has a temporary licence in this respect?
- They state there is an impediment as unitholders are not creditors. Am sure there is a legal technical reason why this is not so as Unitholders are equity stakeholders in the assets of the funds?

Look forward to seeing your Dear Amanda letter John, when finalised.

Kind Regards,  
Francene

---

**From:** Sarah Wooster [<mailto:SWooster@piperalderman.com.au>] On Behalf Of Amanda Banton  
**Sent:** Monday, 8 April 2013 3:25 p.m.  
**Cc:** Shaan Palmer; Amanda Banton  
**Subject:** LM Investment Management Limited

Further to our earlier correspondence, we are considering applying to the court seeking a change in responsible entity of one or more of the funds managed by LM Investment Management Limited (LM), which are now in the control of administrators. The primary reasons for applying for such an order are as follows.

#### **Pursuance of Claims Against LM and related parties relating to the mismanagement of the funds**

A change in responsible entity will enable claims available to unit holders to be brought against LM and its associated parties relating to the mismanagement of the funds and the resultant losses sustained by unit holders. Such claims may provide a second source of money that unit holders will not otherwise have available to them if such claims are not pursued. If LM remains responsible entity this will present a significant hurdle to the investigation and pursuance of these claims as LM is unlikely to bring a claim against itself. This hurdle is already apparent as the administrators have confirmed that unit holders will not be treated as creditors of LM unless they are able to properly particularise and quantify their claims against LM and that will be extremely difficult unless a new responsible entity is able to access the books and records and undertake a proper investigation of the potential claims.

#### **Independence**

The administrators have had previous dealings with LM and its advisors and whilst the administrators are independent practitioners, we consider that the potential conflicts that may arise in relation to their duties owed to LM as a company and their duties owed to unit holders will present a conflict in due course, which can be avoided if an independent responsible entity is appointed.

#### **What We Need From You**

We wish to understand the desires of unit holders. Accordingly, please answer the following in relation to the client(s) you represent:-

- 1) What are the names of your client(s) as they appear on the register of the respective funds?
- 2) Which LM managed fund(s) did your client(s) invest in?
- 3) How much money did your client(s) invest in the fund (s) and have not been repaid?
- 4) Would your client(s) be supportive of a change in responsible entity in principle?

Please provide answers to the above by return email (or otherwise by close of business on Tuesday 9 April).

Yours sincerely,

Amanda Banton  
Partner | Piper Alderman

t +61 2 9253 9929 | f +61 2 9253 9900  
[abanton@piperalderman.com.au](mailto:abanton@piperalderman.com.au) | [www.piperalderman.com.au](http://www.piperalderman.com.au)

---

Francene Mulder  
Executive Director - Distribution/Product |

T +61 7 5584 4500 | D +61 7 5584 4529 | F +61 7 5592 2505 | E [fmulder@lmaustralia.com](mailto:fmulder@lmaustralia.com)  
A Level 1, 38 Cavill Ave Surfers Paradise, 4217, Queensland, Australia | P PO Box 485, Surfers Paradise, 4217,  
Queensland, Australia  
[www.LMaustralia.com](http://www.LMaustralia.com)

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the recipient to whom it is addressed. If you are not the intended recipient or the person responsible for delivering this e-mail to the intended recipient, you are advised that any use, dissemination, forwarding, printing, or copying of this e-mail and any file attachments is strictly prohibited. If you have received this e-mail in error, you must destroy the original transmission and any attachments and immediately notify the sender by reply e-mail.

**From:** Bender, Damian [<mailto:Damian.Bender@fticonsulting.com>]  
**Sent:** Tuesday, 9 April 2013 3:31 PM  
**To:** Stokes, Andrew  
**Cc:** Mallick, Jack; Billings, Daniel; Clark, Justin; Dunn, Joanne; McBryde, Sally; McIntosh, Lachlan; Michelle Ballard; Muller, Ginette; Park, John; Francene Mulder  
**Subject:** Re: Article from NZ

Francene

See below as Michelle is away, is it possible to get a copy of Bantons letter, clearly it is full of factual errors.

Sent from iPad

Damian Bender  
Senior Managing Director  
Corporate Finance

FTI Consulting  
+61.7.3225.4904 direct  
+61.7.3225.4999 fax  
[Damian.Bender@fticonsulting.com](mailto:Damian.Bender@fticonsulting.com)

22 Market Street  
Brisbane QLD  
4000  
Australia  
[www.fticonsulting-asia.com](http://www.fticonsulting-asia.com)

We've joined FTI Consulting – click here to learn more

On 09/04/2013, at 1:22 PM, "Stokes, Andrew" <[Andrew.Stokes@fticonsulting.com](mailto:Andrew.Stokes@fticonsulting.com)> wrote:

Dear all,

This has just appeared on the [stuff.co.nz](http://stuff.co.nz) site in New Zealand, which feeds into Fairfax Business publications.

## Kiwis sought to fight Aussie mortgage fund

Last updated 14:47 09/04/2013

Share

A high-profile Australian lawyer is looking for New Zealand investors to join an action against Australian mortgage fund LM.

Amanda Banton has written to financial advisers representing Kiwi investors whose dwindling investment is trapped in the giant Australian fund, seeking to act for their clients.

New Zealanders have about A\$140 million (NZ\$172m) trapped in LM's frozen First Mortgage Income Fund.

It was reported last week that Banton of Piper Alderman, who has made a name for herself in successful multi-million-dollar civil suits against Standard & Poor's and Lehman Brothers, was considering taking a case against LM's directors.

LM, founded by New Zealander Peter Drake, called in FTI Consulting as voluntary administrators last month, fearing it would be unable to pay its debts as they fell due.

Advisers to LM's New Zealand clients have now received a letter from Banton asking whether they would like to join the planned action.

The letter from Banton said Piper Alderman was considering applying to the court in a bid to get new fund managers appointed to some funds still under LM's control, something it appears to believe would make it easier for a case to be progressed against the directors.

"Such claims may provide a second source of money that unit holders will not otherwise have available to them if such claims are not pursued," the letter said.

"If LM remains responsible entity this will present a significant hurdle to the investigation and pursuance of these claims as LM is unlikely to bring a claim against itself."

FTI Consulting has told unit holders they won't be treated as LM creditors unless they could properly particularise and quantify their claims.

Piper Alderson said that would be difficult to do unless a new entity was able to access the books and records and investigate potential claims.

Banton's letter claimed FTI Consulting, formerly part of the Korda Mentha group of companies, had had previous dealings with LM that could present a potential conflict.

But in a media briefing to the media last week, FTI Consulting had said it had no prior dealings with LM, other than to the prepare for the orderly conduct of the administration.

**Confidentiality Notice:**

This email and any attachments may be confidential and protected by legal privilege. If you are not the intended recipient, be aware that any disclosure,



fyi

----- Forwarded message -----

From: Amanda Banton <[ABanton@piperalderman.com.au](mailto:ABanton@piperalderman.com.au)>

Date: 10 April 2013 16:45

Subject: Application for appointment of Trustee or Receiver to LM Managed Performance Fund ( Maddison Estate)

To: Amanda Banton <[ABanton@piperalderman.com.au](mailto:ABanton@piperalderman.com.au)>

Cc: Shaan Palmer <[SPalmer@piperalderman.com.au](mailto:SPalmer@piperalderman.com.au)>, Lisa Gallate <[LGallate@piperalderman.com.au](mailto:LGallate@piperalderman.com.au)>

**We refer to recent emails. We understand that you are a unitholder of the LM Managed Performance Fund (the Performance Fund). The Performance Fund has to date been managed by LM Investment Management Limited (LM). As you will know, LM was placed into voluntary administration and Administrators have been appointed to LM.**

**Application by Administrators to be appointed as Receivers or Trustees of the Performance Fund**

**The Administrators of LM have filed an application in the Supreme Court of Queensland, Brisbane Registry to be appointed as the several receivers and managers (or trustees) of the Performance Fund until further order of the Court. The application is listed for hearing this Friday 12 April 2013 at 10.00am.**

**Opposition to Application**

**We wish to urgently establish (by 10am tomorrow morning Sydney time) whether you are content for us to act for you, as a member of the Performance Fund to oppose the application to appoint the Administrators and instead seek to have independent interim receivers (or trustees) appointed to the Performance Fund instead.**

**The application would require that we enter a Notice of Address for Service on your behalf and prepare an affidavit, which would detail the basis upon which you oppose the appointment of Administrators of LM and seek to have independent receivers appointed to the Performance Fund. You would not be required to meet our legal costs of the application and you would not be required to attend the hearing. The affidavit would be prepared and sworn by myself on the basis of your instructions to do so.**

### ***Reasons for opposing appointment of Administrators***

**The reasons for opposing the proposed appointment of the Administrators to be Receivers (or Trustees) of the Performance Fund are as follows:**

#### **Conflict**

**There are potential conflict issues that arise if the Administrators of LM are appointed as the Receivers (or Trustees) of the Performance Fund.**

**In the “declaration of independence” attached to the Administrators’ Report to creditors of 21 March 2013, the Administrators posed the question “*what are the possible conflicts between roles as Voluntary Administrators and Responsible Entity*” and in response to that determine that no conflict arises. The reasons for that determination are said to be, *inter alia*:-**

***It is common practice for Administrators to be appointed to a group of companies and trusts and the mere existence of intragroup loans and other dealings does not of itself give rise to a conflict.***

***The services agreement between LMA [LM Administration Pty Ltd, a related entity of LM and its service entity that provide management services for a management fee] and LM is “deemed to be terminated forthwith” upon the appointment of Administrators.***

***In respect of the duties as Administrators and those owed to the funds, the Administrators state “the Trust assets will need to be realised to meet the claims of the Trust creditors and members. The Trust assets are held by an independent custodian. The Administrator is the only person entitled to exercise the RE/Trustee’s right of indemnity. To separate the roles of the Administrators and the RE/Trustee would likely only add delay, duplication, and additional complexity to the detriment of creditors and members of the funds.”***



*The Administrators can approach the court for directions if any conflicts or other issues arise.*

**In their response to the above question, the Administrators concede the possibility of conflicts arising that would require them to approach the Court. This approach necessarily means that if such conflicts arise and applications are made to the court, the cost will likely be borne by the Performance Fund and ultimately the unit holders.**

**In this regard we note that the Annual Financial Report for the LM First Mortgage Income Fund to 30 June 2012 states in the notes to the financial statements that the Performance Fund has second mortgages on loans that are first mortgages of the LM First Mortgage Income Fund totalling approximately \$60 million, and that the Performance Fund may pay development and construction costs on those related loans and will fund interest payments from time to time within approved loan facility limits. During the 30 June 2012 year, interest payments totalling \$635,000 were paid by the Performance Fund on behalf of borrowers.**

**The fact of these related party loans, adds further complexity to the issue of the appropriateness of the appointment of the Administrators of LM to become Receivers (or trustees) of the Performance Fund. These related party loans require investigation by a party that is independent of LM and the Administrators. These issues between the various stakeholders highlight the real possibility that conflicts will arise.**

**Further, there is the issue of the investigation and prosecution of the potential claims of unitholders against LMA, LM, and the potential conflict that would exist for the Administrators, if appointed as Receivers (or trustee) of the Performance Fund to investigate the claim against the party (LM) that they control. This issue is discussed below.**

**Unit holders may be deprived of the right to vote on the DOCA notwithstanding that the DOCA may compromise their rights by releasing claims against LM.**

**Further any action for mismanagement of the funds is best brought by the responsible entity (or Receiver or trustee) of the fund. That will pose a serious conflict for the Administrators as they control the party that the claim would be brought against. Such action is best brought by a new RE. The only other avenues are for ASIC or the unit holders (as a class) to bring the action. ASIC is unlikely to bring any such claim and a unit holders class action is difficult to bring as the case law is uncertain as to the rights of unit holders to bring a class action.**

### **Further potential conflicts**

**There is a real possibility that conflicts may arise as between the various funds as there are interrelated debts and first and second ranking securities by each of the funds in respect of some of the same properties. Whilst we cannot detail the full range of potential conflicts that may arise, one example of a conflict that we consider may arise would be in circumstance where a fund holding first ranking security wishes to sell a property and is prepared to**

**do so for a lower price than the fund holding the second ranking security (because the fund with a first ranking security is making a full recovery on its loan). Further, there may be situations where the Fund with the second ranking security may wish to develop a project to realise a better return and the fund holding the first ranking security may wish to sell.**

### **Alternative Appointments**

**Trilogy, who is the RE of the LM Wholesale Fund has consented to be a Trustee of the Performance Fund. They are not eligible to be appointed a Court Appointed Receiver of the Performance Fund. In this regard you will need to consider the potential conflicts that may arise as between the Performance Fund and the Wholesale Fund (and potentially the Income Fund). A copy of Trilogy's consent is attached.**

**Further Korda Mentha has consented to being appointed as the Receiver or Trustee of the Performance Fund. Attached is a letter from Korda Mentha.**

**Please confirm you are content for us to file an appearance on your behalf in the matter and indicate which of the appointments you support, that of Trilogy or that of Korda Mentha. We again confirm that you will not be liable for any fees if we file an appearance for you and act on your behalf.**

**We require your urgent response to this email by return email by 10am tomorrow morning (Sydney time) or by calling myself or Shaan Palmer on 9253 9920 or Lisa Gallate on 9253 3855.**

**Kind regards**

**Amanda Banton**

**Partner | Piper Alderman**



**Piper Alderman**

**t +61 2 9253 9929 | m +61 424 156 859 | f +61 2 9253 9900**

**[abanton@piperalderman.com.au](mailto:abanton@piperalderman.com.au) | [www.piperalderman.com.au](http://www.piperalderman.com.au)**

\*\*\*\*\*

**WARNING: This e-mail is from Piper Alderman.**

**The contents are confidential and may be protected by legal professional privilege. If you have received this e-mail in error, please reply to us immediately and delete the document.**

\*\*\*\*\*

**This message has been scanned by SurfControl plc. [www.surfcontrol.com](http://www.surfcontrol.com)**

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: BRISBANE  
NUMBER: BS 4728/10**

**First Plaintiff: KOSHO PTY LTD ACN 104 663 792**

**AND**

**Second Plaintiff: CITY CO PTY LTD ACN 099 0723 748**

**AND**

**Defendant: TRILOGY FUNDS MANAGEMENT LIMITED  
ACN 080 383 679**

**SECOND FURTHER AMENDED STATEMENT OF CLAIM**

1. The First Plaintiff (herein "Kosho"), at all times material to this proceeding:
- (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;
  - (b) was and is a "corporation" within the meaning of the *Trade Practices Act 1974* (Cth) (herein the "TPA");
  - (c) was (and remains) the registered proprietor of land more particularly described as Lot 2 on SP 107404 County of Ward, Parish of Gilston Title Reference 50257163 and located at 114-122 Nerang - Broadbeach Road, Carrara in the State of Queensland (herein the "Carrara Land").

**SECOND FURTHER AMENDED  
STATEMENT OF CLAIM**

Form 16 rr.22; 146

Filed on behalf of the Plaintiffs

**TressCox Lawyers**  
Level 40, Central Plaza 1  
345 Queen Street  
BRISBANE QLD 4000  
Tel: 07 3004 3533  
Fax: 07 3004 3599

This pleading was amended pursuant to the Order of Justice  
Applegarth made 1 August 2012.  
Signed: M. TressCox Solicitor for the Plaintiffs  
Date: 7<sup>th</sup> August 2012.

2. The Second Plaintiff, City Co Pty Ltd ACN 099 023 748 (herein "City Co"):
  - (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;
  - (b) was and is a "corporation" within the meaning of the TPA;
  - (c) was (and remains) the registered proprietor of land more particularly described as Lot 2 on RP 70727 Parish of Gilston, County of Ward, Title Reference 12831223 and located at 3 Beach Road, Surfers Paradise in the State of Queensland (herein the "Surfers Paradise Land").
3. Club Cavill Pty Ltd ACN 099 023 711 (herein "Club Cavill"):
  - (a) was and is a company duly incorporated according to law, and capable as such of being sued in its corporate name;
  - (b) was and is a "related" entity of Kosho and City Co as described in the Corps Act;
  - (c) was, until effective resumption in December 2005 by the Department of Main Roads (herein "DMR"), the registered proprietor of land more particularly described as Lot 3 on SP180847 Parish of Gilston, County of Ward Title Reference 50586172 being adjacent to and abutting the eastern boundary of the Carrara Land (herein the "Resumed Land").
4. Adam Slijderink (herein "Slijderink"), at all times material to this proceeding:
  - (a) was an employee or agent of the Coast Land International Group of Companies including Kosho and City Co;

- (b) as such, had the title of "CEO – Project Partner";
- (c) acted on behalf of Kosho and City Co in respect of the transactions and matters referred to in this pleading within the scope of his authority.

5. City Pacific Limited (herein "CPL"):-

- (a) was at all material times, and is, a duly incorporated public company listed on the Australian Stock Exchange;
- (b) was at all material times a financier and financial investment manager, alternatively, a provider of "financial services" within the meaning of that term as used in Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (herein "ASIC Act");
- (c) until on or about 20 July 2009, was the Manager and Responsible Entity (within the meaning of Part 5C.2 of Chapter 5 of the *Corporations Act 2001* (Cth) ("Corps Act")) of the City Pacific First Mortgage Fund (that being the name of the fund from 30 November 2007) (herein the "CPFM Fund") which fund was:
  - (i) constituted on 23 June 1998 by Deed;
  - (ii) registered with ASIC under No. ARSN 088139477;
  - (iii) alternatively, a "financial product" within the meaning of that term as used in Division 2 of the ASIC Act;
- (d) was at all material times a trading corporation within the meaning of that term as used:
  - (i) in the TPA; or
  - (ii) alternatively, in Division 2 of the ASIC Act;
- (e) was at all material times when engaging in the conduct alleged herein, engaging in "trade or commerce" within the meaning of that term as used:

- (i) in the TPA;
- (ii) alternatively, in Division 2 of the ASIC Act;
- (f) is now, and since about 7 August 2009 has been, in liquidation.

6. Steve McCormick (herein "McCormick"), at all times material to this proceeding:

- (a) was an officer in CPL's employ;
- (b) as an officer in the CPL's employ, had the title of "Group Executive Property Development Finance";
- (c) acted on behalf of CPL in respect of the transactions and matters referred to in this pleading;
- (d) in so acting on behalf of CPL, acted within the scope of his actual authority as CPL's "Group Executive Property Development Finance";
- (e) alternatively, in so acting on behalf of CPL, acted within the scope of his ostensible authority as CPL's "Group Executive Property Development Finance", such ostensible authority arising from:
  - (i) the fact that CPL employed McCormick in that capacity and authorised him to use that title;
  - (ii) the fact that McCormick's conduct referred to in this pleading fell within the scope of the usual authority of an executive officer described as "Group Executive Property Development Finance";
  - (iii) the fact that CPL did not, at any material time, convey to Kosho any material restriction with respect to McCormick's authority on behalf of CPL.



7. Alistair McCosh (herein "McCosh"), at all times material to this proceeding:

- (a) was an officer in CPL's employ;
- (b) as an officer in CPL's employ, had the title of "Lending Manager";
- (c) acted on behalf of CPL in respect of the transactions and matters referred to in this pleading;
- (d) in so acting on behalf of CPL, acted within the scope of his actual authority as CPL's "Lending Manager";
- (e) alternatively, in so acting on behalf of CPL, acted within the scope of his ostensible authority as CPL's "Lending Manager", such ostensible authority arising from:
  - (i) the fact that CPL employed McCosh in that capacity and authorised him to use that title;
  - (ii) the fact that McCosh's conduct referred to in this pleading fell within the scope of the usual authority of a senior officer described as "Lending Manager";
  - (iii) the fact that CPL did not, at any material time, convey to Kosho any material restriction with respect to McCosh's authority on behalf of CPL.

8. The Defendant (herein "Trilogy"):-

- (a) was at all material times, and remains:-
  - (i) a company duly incorporated and capable as such of being sued;
  - (ii) a public company listed on the Australian Stock

**Exchange;**

- (b) was at all material times a financier and financial investment manager, alternatively, a provider of "financial services" within the meaning of that term as used in Division 2 of ASIC Act;
- (c) was at all material times a trading corporation within the meaning of that term as used:
  - (i) in the TPA; or
  - (ii) alternatively, in Division 2 of the ASIC Act;
- (d) was at all material times when engaging in the conduct alleged herein, engaging in "trade or commerce" within the meaning of that term as used:
  - (i) in the TPA;
  - (ii) alternatively, in Division 2 of the ASIC Act.

**TRILOGY REPLACES CPL AS RESPONSIBLE ENTITY**

9. On or about 20 July 2009, Trilogy became and has been the Manager and Responsible Entity (within the meaning of Part 5C.2 of Chapter 5 of the Corps Act) of the CPM Fund, now described as the Pacific First Mortgage Fund (herein the "PFM Fund").
10. Upon Trilogy becoming the responsible entity of the PFM Fund:
  - (a) pursuant to section 601FS(1) of the Corps Act, the rights, obligations and liabilities of CPL in relation to the PFM Fund became the rights, obligations and liabilities of Trilogy, including in relation to the matters pleaded herein;
  - (b) pursuant to section 601FT(1) of the Corps Act, upon Trilogy becoming the responsible entity of the PFM Fund, a document to which CPL was a party, in which reference is

made to CPL or under which CPL acquired or incurred a right, obligation or liability, or might have acquired a right obligation or liability if CPL had remained the responsible entity, which document is capable of having effect after the change in responsible entity has effect as if TFM (and not CPL) was a party to it, was referred to in it or had or might have acquired the right, obligation and liability under it, including in relation to the matters pleaded herein.

#### **CARRARA LAND DEVELOPMENT**

##### **11. In or about January 2009:**

- (a) Kosho was desirous of proceeding with the construction of a residential unit development on the Carrara Land, described as the "Abadi Residential Village" (herein called "the project") and required substantial funding:
  - (i) as part of a restructure and in order to cover Kosho's present position with a then existing facility with CPL of \$12.6 million;
  - (ii) to assist with sales and marketing, development and construction costs of the initial part of the project, described as "Stage 1A";
- (b) Club Cavill was the beneficiary of a substantial compensation claim as a consequence of the resumption of the Resumed Land by the DMR (the "DMR compensation claim");
- (c) Kosho submitted a finance application for the project to CPL.

##### **11A. Thereafter:**

- (a) CPL in the period January to March 2009, reviewed the

finance application and Kosho, after various amendments to the finance application at CPL's request, submitted a funding proposal in March 2009 ("March funding proposal"):

Particulars

The March funding proposal was provided by Email from Slijderink to CPL (by Phil Sullivan) dated 2 March 2009 (4:52pm) comprising a funding submission titled "Funding Partner – Information Memorandum"; draft marketing budget and cashflow model

- (b) CPL on or about 26 March 2009 indicated its approval of the finance application, subject to approval of the Commonwealth Bank of Australia, with drawdown being end of May to mid June 2009:

Particulars

The indication was provided orally by CPL (by John Ellis and McCormick) at a meeting on 26 March 2009 at CPL's Offices between Slijderink and Reiko Fujino (Kosho & City Co) and Phil Sullivan, John Ellis and McCormick (CPL) the substance and effect of what was stated being as follows:

Slijderink: "If we get the CBA approval by 19 April we should be in a position to make the first drawdowns at end of May 2009 for payment mid June; that sound right to you guys?"

John Ellis: "That is about right."

Steve McCormick: "I agree."

- (c) Kosho on 2 April 2009, after various amendments to the March funding proposal at CPL's request, submitted a revised funding proposal ("Revised March funding proposal"):

Particulars

The Revised March funding proposal was provided by Email from Slijderink to CPL (by Phil Sullivan) dated 2 April 2009 and comprised a revised funding submission titled "Funding Partner – Information Memorandum" together with the following Annexures:

- a. Title Deed
- b. Company extracts
- c. Registration Plans
- d. Valuations
- e. Site Photos and Survey Plans
- f. Statement of Design Intent, Preliminary design drawings and Architectural drawings (Current Approval)
- g. CLI key resources resumes
- h. Feasibility and Cashflow
- i. Staging Plans and Building Numbering Plans
- j. Development Approval
- k. Certificate of currency
- l. Construction Estimate of Costs
- m. Matusik Property Insights Project Positioning Report
- n. Unit Floor Plans

12. CPL by letter of offer dated 24 June 2009 to Kosho (herein "letter of offer"), offered a finance facility (on the terms and conditions contained therein):

- (a) to cover Kosho's then present position with CPL and to assist

with the sales & marketing, development and construction costs in relation to Stage 1A of the project;

(b) in the amount of \$16 million for:

(i)	Current position	\$12,610,000
(ii)	Construction/Consultants	\$2,193,830
(iii)	Interest (to be retained)	\$860,000
(iv)	Contingency	\$336,170

(c) to fund the whole of Stage One (119 apartments and 1600m2 retail/commercial units over 36 months) of the Abadi Residential Village in accordance with the Revised March funding proposal:

(d) required, as a condition to the provision of finance, Koshe and Club Cavill to waive ~~assign~~ all rights and entitlement to the DMR compensation claim and Koshe and Club Cavill to assign all rights and entitlements under the Deed of Agreement between DMR, Koshe and Club Cavill to Sunrise Waters Pty Ltd in exchange for a three year finance facility and reduced interest rate over the 3 year finance facility term.

13. On 24 June 2009, Koshe accepted and executed the terms of the letter of offer and returned the duly executed letter of offer to CPL (herein the "finance facility").

14. CPL (by its Solicitors, Minter Ellison) on 1 July 2009 pursuant to and in performance of the finance facility ~~hand~~ delivered to the Solicitors of Koshe original documents for execution (herein "the documents for execution") comprising:

"...

2. copy of the variation letter of offer dated 24 June 2009;
3. deed of variation of charge between the lender and the borrower (in

- triplicate);
- 4. fixed and floating charge between the lender and City Co Pty Limited, third party chargor, (in triplicate);
- 5. deed of guarantee and indemnity given by Ms Reiko Fujino in favour of the lender, (in triplicate);
- 6. third party mortgage given by City Co Pty Limited in favour of the lender (in triplicate);
- 7. undertaking and authority to complete and disburse moneys (borrower);
- 8. undertaking and authority to complete (City Co Pty Limited);
- 9. certificate as to legal advice (borrower);
- 10. certificates as to legal advice (guarantors);
- 11. certificates as to legal advice (third party mortgagor);
- 12. Consumer Credit Act declaration by the borrower;
- 13. Consumer Credit Act declaration by the third party mortgagor;
- 14. statutory declaration as to the property (borrower);
- 15. statutory declaration as to the property (third party mortgagor);
- 16. corporate declaration as to the property (borrower);
- 17. corporate declaration (third party mortgagor); and
- 18. our memorandum of costs..."

15. Kosho agreed to and executed, or caused to be executed, each of the documents for execution and returned the duly execution documents for execution by hand delivery to CPL (by its Solicitors, Minter Ellison) on 2 July 2009.

#### **EXPRESS TERMS**

16. At all material times, there were terms of the finance facility (herein "express terms"), that CPL and Trilogy:
- (a) would (subject to the terms and conditions therein) advance funds to Kosho under the finance facility to enable Kosho to meet its current position and funds the constructions costs of the project;
  - (b) that the amount of funds to be advanced was in the sum of \$16 million for:
 

(i)	Current position	\$12,610,000
(ii)	Construction/Consultants	\$2,193,830
(iii)	Interest (to be retained)	\$860,000

- (iv) Contingency \$336,170
- (c) (special condition (g)) provided for funds to be advanced under the facility generally as outlined in the Total Facility Limit;
- (d) (special condition (q)) contemplated construction (funded by advances on the facility) and settlement of sale of the commercial pavilion (part of Stage 1A) to be completed by 28 February 2010;
- (e) provided for expiration of the facility on 30 June 2010 (page 2, Term).

**16A. Kosho or City Co satisfied (or was not required or otherwise disabled by CPL from satisfying) each of the following special conditions contained in the finance facility, namely:**

<b>Special Condition</b>	<b>Description</b>	<b>Manner or method provided</b>	<b>Note</b>	<b>Date</b>
<b>a</b>	<b><u>Acknowledgement Advice</u></b>	<b><u>Letter Hickey Lawyers to Minter Ellison</u></b>	<b><u>Satisfied</u></b>	<b><u>2.07.09</u></b>
<b>b</b>	<b><u>Statement of Position from Directors</u></b>	<b><u>Email Kosho to CPL 29.06.09 &amp; 30.06.09</u></b>	<b><u>Satisfied</u></b>	<b><u>30.06.09</u></b>
<b>c</b>	<b><u>Privacy Act Form</u></b>	<b><u>Delivered by hand to Minter Ellison</u></b>	<b><u>Satisfied</u></b>	<b><u>2.07.09</u></b>
<b>d</b>	<b><u>Memo and Articles and Trust Deed</u></b>	<b><u>Delivered by hand to Minter Ellison</u></b>	<b><u>Satisfied</u></b>	<b><u>2.07.09</u></b>
<b>e</b>	<b><u>Valuation Report 3 Beach Road (to be provided by 31 July 2009)</u></b>	<b><u>Delivered by hand and email to Minter</u></b>	<b><u>Satisfied</u></b>	<b><u>27.07.09</u></b>



		<u>Ellison</u>		
<u>f</u>	<u>Site visits by lender</u>		<u>Nil requested</u>	
<u>g</u>	<u>Payment Claims</u>		<u>N/A</u>	<u>Email Sliderink to McCosh dated 1 July 2009</u>
<u>h</u>	<u>Risk Insurance</u>		<u>Satisfied</u>	<u>2.07.09</u>
<u>i</u>	<u>New valuation reports</u>		<u>Satisfied</u>	<u>Letter Kosho to CPL (McCormick) dated 6 April 2009</u>
<u>j</u>	<u>Releases and Partial release fees</u>		<u>N/A</u>	
<u>k</u>	<u>Beach Road release of mortgage</u>		<u>N/A</u>	
<u>l</u>	<u>Lender to erect signage on site</u>		<u>Nil required</u>	
<u>m</u>	<u>Finance subject to Board approval</u>	<u>Email CPL to Kosho</u>	<u>Satisfied</u>	<u>24.06.09</u>
<u>n</u>	<u>Outsource of finance by lender</u>		<u>N/A</u>	
<u>o</u>	<u>Offer of finance subject to any other matter CPL panel solicitor advises to adequately secure this advance</u>	<u>Delivered by hand to Minter Ellison</u>	<u>Satisfied</u>	<u>2.07.09</u>
<u>p</u>	<u>Offer subject to provision of unconditional commercial contract</u>	<u>Provided under cover of letter Kosho to CPL</u>	<u>Satisfied</u>	<u>29.06.09</u>
<u>q</u>	<u>Offer conditional on settlement of commercial property 28 February 2010</u>		<u>Kosho disabled from satisfying Special Condition Q by CPL's failure to advance construction funds</u>	
<u>r</u>	<u>Contingency amount</u>	<u>Contingency amount</u>	<u>N/A</u>	

#### IMPLIED TERMS

17. At all material times, there were implied terms of the finance facility (herein "implied terms"), that CPL and Trilogy:

- (a) would do all such things and take all such steps as may be necessary to enable Kosho to have the benefit of the finance

facility;

- (b) would act reasonably, and reasonably expeditiously, in their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;
- (c) would in all times act in good faith in their dealings with Kosho in relation to their consideration of, and in determining issues of satisfaction in relation to, the conditions precedents under the finance facility;
- (d) would not unreasonably delay, in its consideration and determination of Kosho's compliance with the requirements of the finance facility or, facilitating drawn down of the funds for the development so as to disable Kosho from complying with:
  - (i) special condition (g) of the finance facility;
  - (ii) special condition (s) of the finance facility;
- (e) alternatively, would not unreasonably delay the advance of funds so as to disable Kosho's compliance with the finance facility.

18. The implied terms are:

- (a) implied from the terms of the finance facility itself and in order to give business efficacy to the transaction embodied in the finance facility; or
- (b) alternatively, implied by law.

**DEED OF ASSIGNMENT****19. Special conditions (s) & (t) of the finance facility provided:**

"(s) This offer of finance is conditional on, and subject to:

- (i) the borrower entering into a deed of assignment and consent in relation to the agreement between the Department of Main Roads, Kosho Pty Ltd, Club Cavill Pty Ltd (Assignment Deed) to be prepared by and on terms satisfactory to the Lender;
- (ii) the borrower causing Club Cavill Pty Ltd to enter into the Assignment Deed;
- (iii) the Department of Main Roads confirming that it is satisfied with the terms of the Assignment Deed; and
- (iv) the Assignment Deed being entered into and binding on the Borrower and Club Cavill Pty Ltd (and the Borrower providing two originals of the Assignment Deed executed by both the Borrower and Club Cavill Pty Ltd to the Lender) within 2 business days of receipt of the Assignment Deed.

(t) As part of this facility the City Pacific First Mortgage Fund agrees to rebate costs and fees to the borrower to a maximum amount of \$2,800,000.00. This is compensation for the transfer of the rights and obligations to Sunrise Waters Pty Ltd as agreed between Club Cavill Pty Ltd (as related entity of the borrower) and the Department of Main Roads, in relation to the adjacent Sunrise Waters property in accordance with special condition (s).

The compensation is paid on the basis that it is in full and final settlement of all claims that the Borrower and/or Club Cavill Pty Ltd may have at any time in relation to the resumption of the land from the property of the Department of Main Roads

The compensation will be paid by way of a discount to the prevailing interest rate as well as a rebate of application and administration fees that would otherwise have been charged on this facility..."

**EVENTS THAT HAVE TRANSPIRED****20. CPL (by its Solicitors, Minter Ellison) on 23 June 2009:**

- (a) prepared a seven (7) page draft deed of assignment and consent to assignment of deed of assignment (herein "draft assignment deed");
- (b) provided the draft assignment deed to Crown Law on behalf of the DMR.

21. By 23 July 2009:
- (a) Crown Law (on behalf of DMR) responded to Minter Ellison (for CPL) in respect of the draft assignment deed;
  - (b) Kosho (by Slijderink) emailed Minter Ellison (for CPL) requesting a copy of the draft assignment deed with marked up changes required by DMR.
22. On 24 July 2009, Kosho (by Slijderink) emailed Minter Ellison (for CPL) requesting a copy of the draft assignment deed with marked up changes required by DMR.
23. On 27 July 2009, Kosho (by Slijderink) wrote to Minter Ellison (for CPL) formally confirming its acceptance of the marked up changes from Crown law (for DMR), confirming its understanding that all conditions of the letter of offer were satisfied and that CPL was only waiting on the deed of assignment to permit drawdown and noting Minter Ellison was advancing post haste.
24. On 29 July 2009, Kosho (by Slijderink):
- (a) emailed Minter Ellison (for CPL) confirming its understanding that all conditions of the finance facility were satisfied and that CPL was only waiting on deed of assignment to effect same;
  - (b) telephoned Anthony Perich of Minter Ellison and was informed that Trilogy had taken over as responsible entity for the PFM Fund and that Minter Ellison had completed their due diligence and were advancing approval from Trilogy as to the proposed changes to the draft assignment deed

sought by DMR;

- (c) emailed Minter Ellison (for CPL) confirming the conversation.

25. On 31 July 2009:

- (a) Minter Ellison met with Trilogy in respect of the finance facility and the draft assignment deed;
- (b) Kosho (by Slijderink) wrote to Minter Ellison (for CPL) confirming discussions were held with Trilogy in relation to the draft assignment deed.

26. On 12 August 2009, Kosho (by Slijderink) emailed Trilogy (Michael Finlayson) noting that Kosho:

- (a) had complied with all conditions of approval with the only outstanding matter to be resolved (the signing of the draft assignment deed) being delayed as a consequence of the change in responsible entity;
- (b) required the advance of facility funds to service operational costs and advance the project.

27. On or about 21 August 2009, Kosho (by Slijderink) telephoned Minter Ellison (for CPL) and was informed by Anthony Perich that Trilogy funds had been frozen until the Commonwealth Bank of Australia (herein "CBA") had completed a review of proposed Trilogy cashflows ("CBA frozen representation").

27A. Trilogy did not ever withdraw, qualify or otherwise disabuse the plaintiffs about the CBA frozen representation, notwithstanding the

CBA had lifted the hold over Trilogy's facilities and the PFM Fund by 10 August 2009.

Particulars

Letter from Allens Linklaters to TressCox Lawyers dated 31 July 2012.

28. On 24 August 2009, Kosho (by Slijderink) emailed Trilogy (Michael Finlayson):

- (a) requesting a meeting to discuss the finance facility;
- (b) noting that delays in advancing the funds under the facility and making payments was due to the CBA;
- (c) noting that the CBA had previously approved the facility to Kosho prior to issuing the letter of offer.

29. On 1 September 2009, at a meeting with Neal Hinrichsen and Michael Vella and another representative of Trilogy, Kosho (by Slijderink, Reiko Fujino and Brian Scott) was informed ("funds availability representation"):

- (a) cashflow issues between Trilogy and CBA were likely to be resolved within one to two weeks;
- (b) shortly thereafter funds would be available to Kosho to enable it to advance the project through Trilogy either from the CBA or other funds.

29A. The funds availability representation was not relevantly withdrawn or qualified by Trilogy.

30. On 2 September 2009, Kosho (by Slijderink) provided to Trilogy (Neal Hinrichensen) the information requested in their meeting of the previous day.
31. On 7 September 2009, Kosho (by Slijderink) emailed Trilogy (Neal Hinrichensen) requesting timing for the advance of funds and resolution of issues with CBA and noting delays were costly to Kosho.
32. On 11 September 2009, Kosho (by Slijderink) emailed Trilogy (Neal Hinrichensen) requesting an update on resolution of cash flow difficulties and noting that all of Kosho's assets have been cross collateralized and Kosho was experiencing difficulty from the shortage of operating funds.
33. On 11 September 2009:
  - (a) Trilogy (Neal Hinrichensen) emailed Kosho (by Slijderink) noting Trilogy hoped to have a position by the following Monday and requested details on conditions precedent, deed of assignment, security documents and pre sale commercial contracts.
  - (b) Kosho (by Slijderink) emailed Trilogy (Neal Hinrichensen) providing the requested information and noting that all conditions precedent had been completed and satisfied with the exception of the signing of the draft assignment deed.
34. On 15 September 2009:
  - (a) Kosho (by Slijderink) emailed Trilogy (Neal Hinrichensen)

requesting confirmation as to timing of first draw down;

- (b) Trilogy (Neal Hinrichensen) emailed Kosho (by Slijderink) requesting costings for construction component with quantity surveyor's review, summary of loan components and approvals/ plans of Stage 1A.

- 35. Kosho (by Slijderink) provided the requested information to Trilogy (Neal Hinrichensen) by emails dated 22 September 2009 and 25 September 2009.
- 36. On 25 September 2009, Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) acknowledging receiving the requested information and noted that Trilogy was - "...working with Minters to finalise their due diligence on the CP's [conditions precedent] which will take around a week. We should be then in a position to recommend moving forward. We won't be able to advance any funds prior to then. Whilst this may not be ideal our hands are tied under the new arrangements. I will advise once Minters have completed their review".
- 37. On 28 September 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) stating - "further to our earlier discussions we confirm that funds allocated for the Abadi Residential Village Stage One A are somewhat contingent upon monies being received by Balmain Trilogy from other third party settlements. We also understand that such funds should be available with 2-3 weeks however you have raised concern in that it is reliant upon third parties for provision of same and delays may be greater than 3 weeks...".



38. On 9 October 2009, Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) confirming understanding that Minter Ellison had completed due diligence investigations in the previous week and that Kosho was to receive further advices in the week of 9 October 2009 as to timing for drawdown.
39. On 19 October 2009:
- (a) Kosho (by Slijderink) emailed Trilogy (Neil Hinrichensen) requesting an response 'to emails and phone messages in regards to the timing of the first draw down and timely advance of loan facility';
  - (b) Trilogy (Neil Hinrichensen) emailed Kosho (by Slijderink) stating - "further to previous correspondence, I understand Minters will be issuing a letter in the next day or so updating the position..."
40. By letter date 20 October 2009, from Minter Ellison (for Trilogy) to Hickey Lawyers (for Kosho) wrote stating -
- "We note that there are a number of outstanding conditions precedent in respect of the above facility, including:
- a. an unconditional sales contract for the commercial property;
  - b. a building contract with an independent and appropriately qualified third party consultant;
  - c. a civil works contract with an independent and appropriately qualified third party consultant;
  - d. deeds of security in respect of agreements in items b and c above (which will be prepared upon provision, and review of, the relevant agreements);
  - e. agreement to the deed, and sign off by, the Department of Main Roads and all relevant parties;
  - f. copies of the following documents previously requested:
    - i certificates of currency (noting our clients interests)
    - ii evidence of payment of council rates

iii evidence of payment of land tax.

In addition, our client is reviewing the due diligence enquiries relevant to this facility, including the valuations. To enable it to complete these enquiries please provide us with financial accounts of the guarantor, borrower and mortgagor..."

41. By letter dated 27 October 2009, Hickey Lawyers replied to Minter Ellison noting:

- (a) the copy unconditional commercial sales contract was provided on 29 June 2009 and Minter Ellison had on 11 August 2009 confirmed it was held on file;
- (b) that the parties had dealt with the issues in (b), (c) and (d) in emails dated 1 July 2009;
- (c) the draft assignment deed was in the hands of Trilogy but that Kosho and Club Cavil had approved the terms of the earlier deed provided by DMR on 27 July 2009;
- (d) copies of the documents in (f) had been provided on 2 July 2009;
- (e) copies of other documents had been provided on 29 June 2009 and 30 June 2009.

41A. Thereafter, between 9 November 2009 and 21 December 2009,

Kosho did request of CPL or Trilogy:

- (a) updates, from time to time, on progress of the Deed of Assignment and satisfaction of special condition (s) of the finance facility;
- (b) the expedition of the provision of the Deed of Assignment for execution by Kosho and Club Cavill in order to satisfy special condition (s) of the finance facility;
- (c) likely dates for drawn down of funds under the finance

facility.

Particulars

<u>No.</u>	<u>Particulars</u>	<u>Date</u>
<b>(a)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>9.11.09</u></b>
<b>(b)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>12.11.09</u></b>
<b>(c)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>16.11.09</u></b>
<b>(d)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>18.11.09</u></b>
<b>(e)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>24.11.09</u></b>
<b>(f)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>4.12.09</u></b>
<b>(g)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>8.12.09</u></b>
<b>(h)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>11.12.09</u></b>
<b>(i)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>14.12.09</u></b>
<b>(j)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>16.12.09</u></b>
<b>(k)</b>	<b><u>Kosho (Sliderink) to Trilogy (Hinrichsen)</u></b>	<b><u>18.12.09</u></b>

42. On 22 December 2009, Trilogy:

- (a) appointed Brian Noble of Clayton Utz as its Solicitors;
- (b) noted that an assignment of rights under a deed of assignment with DMR was a condition precedent to the facility being provided;
- (c) advised that a draft assignment deed had been submitted to

Crown Law (for DMR);

- (d) expected to hear back from Crown Law in the first 2 weeks of January 2010.

- 43. On 15 January 2010, Kosho (by Slijderink) emailed Clayton Utz (Brian Noble) requesting information as to progress and timing for completion of the draft assignment deed.
- 44. On 28 January 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink) noting that Clayton Utz had received a response from DMR in relation to the draft assignment deed to which Clayton Utz were replying and Clayton Utz expected to be in a position to provide a settled deed within 7 – 10 days.
- 45. On 9 February 2010, Kosho (by Slijderink) emailed Clayton Utz (Brian Noble) confirming that DMR had agreed to terms of draft assignment deed and requesting a meeting to discuss facility.
- 46. On 12 February 2010, Clayton Utz (Brian Noble) emailed Kosho (by Slijderink):
  - (a) advised that Sunrise Waters Pty Ltd had confirmed acceptable to the terms of the draft assignment deed; and
  - (b) stating - "On Tuesday morning I sent the Deed incorporating a number of amendments requested by Crown Law back to them for approval. When Crown Law approves the terms of the Deed I will send the Deed to you. I will chase them down on Friday as to their comments on the Deed I sent them today..."

50. On 26 February 2010, Michael Quinn of Q5 Law was appointed Solicitor for the Plaintiffs and wrote to Clayton Utz reserving their rights under the finance facility.

#### **BREACHES**

51. As at the date of commencement of this Proceeding, Trilogy:

- (a) has had possession of (and retains) the benefit of each of the documents for execution (and the equitable interests granted thereunder) provided by Kosho pursuant to and in accordance with the finance facility;
- (b) has had in excess of eight (8) months to consider the terms of the draft assignment deed and satisfy itself as to the requirements for any changes proposed by the DMR as early as July 2009;
- (c) failed or refused to make any or any additional advances to Kosho to enable sales & marketing, development and construction of Stage 1A in accordance with the finance facility.

52. Trilogy, by the its conduct pleaded herein (ante and post), has:

- (a) failed to do all such things and take all such steps necessary to enable Kosho to have the benefit of the finance facility;
- (b) notwithstanding the facts and matters pleaded in 14, 15 and 16A herein:
  - (i) unreasonably delayed in its consideration and determination of Kosho's compliance with the requirements of the finance facility, and in particular the draft assignment deed;

**MISLEADING AND DECEPTIVE CONDUCT****55. Further or in the alternative:**

- (a) on or about 24 June 2009, CPL (by McCormick and McCosh) represented orally to Kosho (by Slijderink) that funding would be available within 30 days, in accordance with the cash flows provided in January 2009;
- (b) the Plaintiffs repeat and rely on the CBA frozen representation pleaded in paragraph 27 above;
- (c) the CBA frozen representation was by reason of the facts pleaded in 27A above a continuing representation;
- (d) the Plaintiffs repeat and rely on the funds availability representation pleaded in paragraph 29 above.

**56. Kosho and City Co relied on each of the representations:**

- (a) in 55(a) above:
  - (i) in entering into and executing the finance facility;
  - (ii) in agreeing to special condition (s) in relation to the assignment of compensation to Sunrise Waters Pty Ltd;
  - (iii) in granting or extending the securities comprised in the documents for execution;
- (b) in 55(b) & 55(d) above:
  - (i) in continuing in and with the finance facility;
  - (ii) in failing to take, or not taking, steps to seek or obtain alternate construction finance.

56A. Further or alternatively, each of the representations were as to a "future matter" within the meaning of s.51A of the TPA.

57. The representations:

- (a) were committed in the course of trade or commerce; and
- (b) in the premises pleaded in paragraphs 14, 15, 16A and 20 to 50 hereof, were conduct which was misleading or deceptive in contravention of:
  - (i) s.52 of the TPA (now s.18, Schedule 2 of the Competition and Consumer Act 2010 (Cth));
  - (ii) alternatively, s.12DA of Division 2 of the ASIC Act.

58. In so far as the representations were as to a future matter, there was no reasonable basis for making # each, in that:

- (a) on 20 May 2009 notice was given of an extraordinary general meeting of members of the PFM fund, of which CPL was responsible entity, to be held on 25 June 2009, for the purpose of removing CPL as responsible entity;
- (b) on 23 June 2009 CPL failed in an attempt to obtain an injunction restraining the meeting;
- (c) on 24 June 2009 the meeting was held, and the members voted to remove CPL as responsible entity and replace CPL with Trilogy;
- (d) the CBA frozen representation was false because as was to the contrary the CBA had not frozen but merely placed a temporary hold on Trilogy facilities and the PFM Fund until 10 August 2009 and that hold was spent prior to the date of the making of the CBA frozen representation;

Particulars

Letter from Allens Linklaters to TressCox Lawyers dated 31 July 2012.

(e) Kosho and City Co rely upon s.51A of the TPA.

58A. By reason of the matters pleaded in 55 to 58 above, Kosho and City Co have suffered loss and damage, particulars of which are set out in paragraphs 110 and 111 below.

Unconscionable conduct

59. Further or alternatively, Kosho and City Co say as set out below in paragraphs 60 to 99.

60. Kosho and City Co repeat and rely on paragraphs 1 – 10 and 20 – 58 above.

61. On 13 February 2009, at a meeting:

(a) Kosho (by Slijderink) told CPL (by Ellis and McCormick), as was the fact, that:

(i) Stage 1A funding was required to design the first commercial building, civil works and landscaping;

(ii) a Put and Call Option contract had been executed in respect of the commercial allotments on the development, and was unconditional;

(iii) a 10% deposit had been paid into Hickey lawyers trust account;



- (b) Kosho tabled a copy of the executed Put and Call Option contract at the meeting with CPL.

62. Further:

- (a) on 1 April 2009 Kosho (by Slijderink) told CPL (by letter to Ellis), as was the fact, that there was an unconditional contract for the commercial allotments on the development with a 10% deposit paid;
- (b) CPL (by Ellis and McCormick) understood the statement in subparagraph (a) to refer to the Put and Call Option contract.

63. Further, a copy of the Put and Call option contract was provided to CPL or Trilogy:

- (a) on 8 April 2009 (in a landmark Valuation);
- (b) on 29 June 2009;
- (c) on 2 July (to Minter Ellison); and
- (d) on 11 August 2009 (by hand).

64. At no time between 13 February 2009 and 20 October 2009 did CPL or Trilogy express the view that the Put and Call Option contract was unacceptable or did not satisfy special condition (p) of the finance facility.

65. On 26 March 2009 CPL (by Ellis and McCormick) stated its agreement to the likely timetable being that payments under the then proposed finance facility would commence two months after approval of the facility by the CBA.

66. On 13 May 2009:

(a) CPL (by Ellis and McCormick):

- (i) agreed to Kosho using its own construction company for the development construction;
- (ii) agreed to give Kosho additional time beyond the 12 month period of the then proposed finance facility if Kosho required time to find an alternative financier in the event that CPL decided not to fund further stages of the development.

67. In mid June 2009 CPL (by McCormick) told Kosho (by telephone call to Slijderink) that:

- (a) Minter Ellison had commenced preparation of the draft assignment deed for issue to the Department of Main Roads;
- (b) it was CPL's intention to settle the deed as soon as possible.

68. On 22 June 2009:

- (a) CPL sent a draft facility letter to Kosho, with a schedule attached which set out the agreed amount and timing of the payments necessary to carry out the construction works the subject of the proposed finance facility;
- (b) CPL (by McCormick) told Kosho (by Slijderink) that:
  - (i) CPL was working towards the payments under the proposed finance facility commencing at the end of July;

- (ii) CPL understood that any significant delays in commencement and timing of the payments under the proposed finance facility would adversely impact on the programme for development;
- (iii) therefore CPL would work with Kosho if any delay in the payments was required; and
- (iv) CPL expected to start the payments at the end of July, and make them regularly thereafter.

69. Kosho relied upon each of the matters pleaded in paragraphs 65 to 68 above:

- (a) at each respective date prior to 25 June 2009, in taking steps thereafter to further the negotiations with CPL for the finance facility;
- (b) when entering into the finance facility on 25 June; and
- (c) in taking steps after 25 June to satisfy the conditions of the finance facility.

70. Further, at all material times CPL knew, as was the fact, that:

- (a) development costs were required for the design of the construction works;
- (b) that design had to be completed prior to inviting tenders for the civil and building work, and the engagement of the civil and building work contractors.

Particulars: the knowledge was held by Ellis, McCosh and McCormick.

71. By reason of the matters pleaded in paragraphs 60 to 70 above, as at 24 June 2009 CPL knew (by the knowledge of McCosh, McCormick, Ellis and Minter Ellison), as was the fact:

- (a) the timing on the development programme was tight and delays in commencement and timing of the payments under the proposed finance facility would adversely impact on the programme for development;
- (b) development costs were required for the design of the construction works;
- (c) that design had to be completed prior to inviting tenders for the civil and building work, and the engagement of the civil and building work contractors;
- (d) the existing facility had been extended from 19 April 2009 during the period when CPL was receiving and considering, including at Board level, the Kosho application for finance;
- (e) its assessment of the satisfaction of conditions precedent had to be achieved as quickly as possible to permit the regular payments that would allow the development to proceed;
- (f) Kosho was pressing for CPL's assessment of the satisfaction of conditions precedent had to be achieved as quickly as possible to permit the regular payments that would allow the development to proceed;
- (g) Kosho required funds to be released as soon as possible to proceed with the development;

- (h) Kosho required the draft deed of assignment to be finalised as quickly as possible to permit funds to be released for the development;
- (i) Kosho was relying upon CPL to progress their assessment of the conditions precedent as quickly as possible and in any event so that funds could be released by the end of July 2009;
- (j) Kosho required the payments under the finance facility in accordance with the cash flow schedule attached to the finance facility document dated 24 June 2009;
- (k) payments in accordance with the cash flow schedule attached to the finance facility document dated 24 June 2009 were necessary for the development to proceed in the 12 month period from 25 June 2009.

72. On 1 July 2009 CPL (by email from McCosh) agreed that:

- (a) special condition (g) of the finance facility referred to draws for construction under the proposed civil and building contracts;
- (b) finance facility drawdowns could be used for consultant and development costs which occurred prior to the civil and building contracts being finalised; and
- (c) initial progress claims for consultants' expenses (that is for non-construction claims) could be made without the requirement for the constructions contracts and civil works contracts.

73. On 2 July 2009, in reliance on the matters pleaded in paragraph 72 above, Kosho (by letter that day) told CPL (by Minter Ellison) that:
- (a) copies of building and civil construction contracts would be provided as available;
  - (b) the tripartite agreement between Kosho, the builder and CPL referred to in the facility letter dated 24 June 2009 would be entered into prior to letting the construction contracts.
74. At no time between 24 June 2009 and 20 October 2009 did CPL or Trilogy express the view that the tripartite agreement was to be provided notwithstanding that:
- (a) the design of the construction works had not been carried out;
  - (b) the building and civil construction contracts had not been finalised; and
  - (c) no drawdowns had been permitted for consultant and development costs.
75. On 1 July 2009 CPL (by letter from Minter Ellison) required certain documents to be provided.
76. On 2 July 2009 Kosho provided all the required documents apart from:
- (a) a valuation from PRP, which was yet to be finalised; and
  - (b) the assignment deed, which had not been finalised.

77. On or about 27 July 2009 Kosho (by email and hand delivered letter from Slijderink to Minter Ellison enclosing copies of the PRP valuation report required by CPL, and by email on or about 27 July 2009 from Slijderink to Minter Ellison, by telephone call between Slijderink and McCosh, and by email on or about 29 July 2009 from Slijderink-Hickey Lawyers to Minter Ellison):
- (a) provided copies of the PRP valuation report required by CPL;
  - (b) stated its understanding that the documents delivered to that point finalised all matters requiring documents to be submitted apart from the draft assignment deed;
  - (c) sought CPL's confirmation of that fact;
  - (d) notified its acceptance of the amendments to the draft assignment deed which had been made by Crown Law; and
  - (e) requested the draft assignment deed to be provided for signing.
78. At no time between 27 July 2009 and 20 October 2009 did CPL or Trilogy express the view that the provision of documents as at 2 July 2009 was deficient.
79. On 16 July 2009 CPL emailed a copy of the draft assignment deed to Kosho.
- 80A. The Plaintiffs repeat and rely on the CBA frozen representation and the funds availability representation.
80. On about 20 July 2009:

- (a) the Department of Main Roads (by Walkerley) told Kosho (by Slijderink) that the Department of Main Roads wanted the draft deed executed as soon as possible, and would attend to it promptly;
- (b) Kosho (by Slijderink) advised CPL of the response of the Department of Main Roads.

81. On 22 July 2009:

- (a) Kosho became aware that Trilogy had replaced CPL as responsible entity;
- (b) Kosho (by letter to McCormick) asked CPL to clarify what was happening in light of the change of responsible entity.

82. On 23 July 2009:

- (a) the Department of Main Roads (by letter from Walkerley) advised Kosho that Crown Law was engaged to deal with the draft assignment deed and had already responded by providing an amended deed;
- (b) Crown Law provided a copy of the amended deed to Kosho.

83. On 27 July 2009 Kosho (by letter that day) advised Minter Ellison that it accepted the amended deed provided by Crown Law.

84. On 29 July 2009:

- (a) Minter Ellison (by Lim) stated to Kosho (by Slijderink) that they were seeking Trilogy's response to the amended deed provided by Crown Law;



- (b) Minter Ellison (by Perich) stated to Kosho (by Slijderink) that Minter Ellison were meeting Trilogy the following day to obtain approval to settle the draft assignment deed.

85. Notwithstanding requests by Kosho (by Slijderink) for information as to the progress of the draft assignment deed:

- (a) on 31 July, by email to Perich;
- (b) on 3 August, by telephone to Perich;
- (c) on 12 August, by email to Finlayson of Trilogy;
- (d) on 17 August, by email to Perich;
- (e) on 21 August, by telephone to Perich; and
- (f) and 11 September, by email to Vella of Trilogy;

Trilogy did not, during the period from 29 July to 11 September 2009:

- (g) take any or any reasonable steps to finalise the draft deed;
- (h) give instructions to Minter Ellison to finalise the deed;
- (i) make contact with the Department of Main Roads or Crown Law to progress the finalisation of the draft deed.

86. On 20 October 2009 Trilogy (by letter from Minter Ellison) stated to Kosho that:

- (a) there were a number of outstanding conditions precedent, including:
  - (i) an unconditional sales contract for the commercial property;

- (ii) a building contract with an independent and appropriately qualified third party consultant;
    - (iii) a civil works contract with an independent and appropriately qualified third party consultant;
  - (b) Trilogy was reviewing the due diligence enquiries relevant to the finance facility, including valuations.
87. On 15 September 2009 Trilogy (by email from Hinrichsen) advised Kosho that trilogy was then "working through the file as quickly as we can", and requested further information, which was provided on 25 September 2009.
88. On 25 September 2009 Trilogy (by email from Hinrichsen) advised Kosho that:
- (a) Trilogy was then working with Minter Ellison to finalise their due diligence on the conditions precedent;
  - (b) that would "take around a week";
  - (c) it would not be in a position to advance any funds before then.
89. On 12 November 2009 Trilogy (by email from Heinrichsen) told Kosho (by Slijderink) that:
- (a) Trilogy had asked for a review of the draft assignment deed by its solicitors in Sydney;
  - (b) there were amendments they would like to make to the draft deed.

90. On 12 November 2009 Kosho (by email from Slijderink) requested that it be told what the proposed amendments were so that Kosho could consider them.
91. On 19 November 2009 Kosho (by email from Slijderink) requested that Trilogy advise what the proposed amendments were.
92. Notwithstanding the requests on 12 and 19 November 2009 Trilogy failed or refused to advise what amendments they were seeking to the draft assignment deed, and did not provide a copy of it to Kosho.
93. In approximately mid December 2009 (on a date that cannot be further particularised until after disclosure):
- (a) Trilogy provided a copy of its amended deed to Crown Law; but
  - (b) Trilogy did not provide a copy of its amended deed to Kosho.
94. Between July 2009 and the provision of the amended deed in mid December 2009:
- (a) no contact occurred between Trilogy and Crown Law in relation to the draft assignment deed;
  - (b) no contact occurred between Trilogy and the Department of Main Roads in relation to the draft assignment deed;
  - (c) Trilogy refused to provide Kosh with a copy of amendments it was proposing.
95. In the premises, in the period from 23 June 2009 to 24 June 2010, Trilogy:

- (a) unreasonably delayed in its consideration of, and response in relation to, Kosho's requests for steps to be taken to enable it to comply with the special conditions under the finance facility, so as to enable an early drawdown of funds, and in any event prior to 30 June 2010; in particular the unreasonable delay occurred in the following periods:
- (i) between 27 July 2009, when Kosho advised that it agreed to the amendments proposed by Crown Law to the draft assignment deed, until 24 June 2010, during which time a copy of the draft assignment deed was not provided to Kosho or City Co;
  - (ii) between 23 June 2009 and 1 September 2009, at which time Trilogy had the first meeting with representatives of Kosho and City Co, notwithstanding that it knew that from 14 July 2009, that Kosho and City Co had stated that the matter was urgent;
  - (iii) from 23 June 2009 to 15 September 2009, being the time which elapsed between Trilogy replacing CPL as the responsible entity, and when it sought additional documents from Kosho;
  - (iv) between 23 June 2009 and 25 September 2009, during which period Trilogy's due diligence on the special conditions had not been finalised;
  - (v) between 23 June 2009 and 14 October 2009, at which point Trilogy first announced its opposition

to Kosho's proposed form of contract for the commercial building and for the construction contract;

- (vi) between 23 June 2009 and 22 December 2009, being the time elapsed between when Kosho informed Trilogy that it agreed to the amendments to the draft assignment deed proposed by Crown Law, and when Trilogy returned a copy of the draft assignment deed to Crown Law for its consideration;
- (vii) the period between 22 December 2009 and 12 February 2010, being the time which elapsed between when Trilogy returned a copy of the draft assignment deed to Crown Law for its consideration, and Crown Law's failure to return a copy of the draft assignment deed;
- (viii) the period between 27 July 2009 when Kosho and City Co signified their agreement to Crown Law's draft assignment deed and 23 February 2010, when Trilogy stated its position to be that it would not review the status of special conditions until the draft assignment deed was finalised;
- (ix) the period between 27 July 2009 when Kosho and City Co signified their agreement to Crown Law's draft assignment deed and December 2010, during which time there was no, or no meaningful, contact with Crown Law or the Department of Main Roads to progress the finalisation of the draft assignment deed;

- (x) the period between 22 December 2009 when Trilogy announced that it had returned its draft assignment deed to Crown Law, and 25 March 2010, when Trilogy and Crown Law had their first meeting in relation to the draft assignment deed;
  - (b) failed or refused to consider and advance the satisfaction of the special conditions other than that relating to the draft assignment deed; particulars are contained in the paragraphs referred to above and in the email communications from Clayton Utz to Kosho on 17 February 2010 and 23 February 2010;
  - (c) failed or refused to take reasonable steps to advance the satisfaction of the special conditions;
  - (d) unreasonably delayed in its consideration and determination of Kosho's compliance with the requirements of the special conditions, and in particular that relating to the draft assignment deed;
  - (e) failed to act as pleaded in paragraph 29A above;
  - (f) acted as set out in paragraph 52 above.
96. On 20 April 2010 Trilogy (by Andrew Griffin, in a meeting with Paul Brinsmead and Peter Maders) stated words to the effect of the following in relation to Kosho, Slijderink, and the development the subject of the finance facility:
- (a) that slider dick cunt don't worry in two months we will fuck him up; they are a problem for us but we have a plan for him and Kosho just wait and see;

- (b) Kosho and City Pacific Limited have acted illegally and will be prosecuted:
  - (c) we have done a deal with a Queensland Minister and we will obtain approval even without land owner's consent; we don't need their compensation rights any more.
97. In the premises of the matters pleaded above, the court should infer that Trilogy's conduct was a deliberate tactic to ensure that it did not have to provide the funds under the finance facility.
98. In the premises of the matters pleaded in paragraphs 60 to 97 above, the conduct of Trilogy pleaded in paragraph 95 above was:
- (a) conduct in trade or commerce within the meaning of that term under the TPA;
  - (b) conduct in connection with the supply or possible supply of services to Kosho and City Co. within the meaning of that term in s 51AC(2) of the TPA;
  - (c) conduct in breach of s 51AC(2)(a) of the TPA.
99. By reason of Trilogy's breach of s 51AC(2) of the TPA, Kosho and City Co (and each of them) have suffered (and are liable to suffer) loss and damage. Particulars are set out in paragraphs 110 and 111 below.
100. Further or alternatively, Kosho and City Co say as set out below.
101. By the conduct referred to in paragraphs 55, 64 - 68, 72, 74, 78, 79 CPL represented that:
- (a) CPL would take all necessary steps to progress the provision of funds in a timely manner, and in any event in

accordance with the schedule attached to the finance facility document;

- (b) funds would be provided in a timely manner and in any event in accordance with the schedule attached to the finance facility document;
- (c) CPL was in a position to do the matters pleaded in subparagraphs (a) and (b) above, and/or bring those matters to pass.

102. In the premises, the conduct of CPL pleaded in paragraph 101 above was:

- (a) conduct in trade or commerce within the meaning of that term under the TPA;
- (b) misleading or deceptive, or likely to mislead or deceive, within the meaning of s.52 of the TPA, in that:
  - (i) there was no reasonable basis for making the representations in light of the matters pleaded in paragraph 58 above;
  - (ii) from 25 May 2009 onwards there was a reasonable possibility that CPL would be removed as responsible entity of the PFM fund;
  - (iii) on 24 June 2009 CPL was removed as responsible entity and even though CPL challenged that removal there was a reasonable prospect that the challenge would not succeed;
- (c) conduct in breach of s 52 of the TPA.



103. In reliance upon the conduct pleaded in paragraph 101 above:

- (a) Kosho and City Co relied upon that part of the conduct which occurred prior to 25 June 2009 in entering into the finance facility;
- (b) Kosho and City Co relied upon that part of the conduct which occurred after 25 June 2009 in continuing to seek the provision of funds under the finance facility from CPL and Trilogy.

104. By the ~~its~~ conduct referred to in paragraphs 84, 85, 87, 88 and 94 Trilogy (as pleaded herein) and silence otherwise:

- (a) continued the representations referred to in paragraph 101 save that Trilogy was now in the position formerly occupied by CPL;
- (b) Trilogy would take all necessary steps to progress the provision of funds in a timely manner, and in any event in accordance with the schedule attached to the finance facility document;
- (c) funds would be provided in a timely manner and in any event in accordance with the schedule attached to the finance facility document;
- (d) Trilogy was in a position to do the matters pleaded in subparagraphs (a) - (c) above, and/or bring those matters to pass.

105. In the premises, the conduct of Trilogy pleaded in paragraph 104 above was:

- (a) conduct in trade or commerce within the meaning of that term under the TPA;
  - (b) misleading or deceptive, or likely to mislead or deceive, within the meaning of s.52 of the TPA, in that:
    - (i) in so far as the representations are as to future matters within the meaning of s.51A of the TPA, Kosho and City Co rely upon s.51A;
    - (ii) by reason of the matters pleaded in paragraphs 80-97 above the court should infer that there was no reasonable basis for making the representations, or alternatively that Trilogy never intended to provide the funds under the finance facility;
  - (c) conduct in breach of s 52 of the TPA.
106. In reliance upon the conduct pleaded in paragraph 104 above Kosho and City continued to seek the provision of funds under the finance facility from Trilogy and none other.
107. By reason of the conduct pleaded in paragraphs 101 and 104 above Kosho and City Co have suffered loss and damage, particulars of which are set out in paragraphs 110 and 111 below.

#### **Failure to Discharge Security Over Surfers Paradise Land**

- 107A. On or about 18 October 2007 Kosho, as borrower, entered into a loan agreement with The Public Trustee of Queensland as Custodian for CPL as trustee for the CPFM Fund ("Custodian").

as lender, and with CPL as the "financial supply facilitator", for a \$12.6 million facility for the project (the "first finance facility").

### Particulars

The terms of the first finance facility are recorded in a letter dated 17 October 2007 from CPL to Kosho.

107B. The terms of the first finance facility relevantly included terms to the effect that:

- (a) The term of the first finance facility ended 18 months from the date of the initial advance:
- (b) City Co provide to the Custodian as security for the first finance facility:
  - (i) a first registered mortgage to CPM of the Surfers Paradise Land ("City Co Mortgage"):
  - (ii) a registered first ranking fixed and floating charge over its assets and undertaking ("City Co Charge")
- (c) pursuant to special condition (i)(2), the Custodian agreed to release any encumbrance over the Surfers Paradise Land upon the project Loan to Value Ratio ("LVR") not exceeding 71.5% on the basis of "Land Value As Is With Development Approval".

107C. The initial advance to Kosho under the first finance facility was made on 19 October 2007 so that the term of the first finance facility ended on 19 April 2009.

107D. The terms, LVR and "Land Value As Is With Development Approval":

- (d) were not defined terms in the first finance facility;
- (e) have the meaning ordinarily ascribed to them by custom and trade usage in the property lending industry.

107E. The plaintiffs will rely on the first finance facility for its full terms, true meaning and effect.

107F. On or about 19 October 2007 City Co granted the City Co Mortgage and the City Co Charge to the Custodian, pursuant to the first finance facility.

107G. As at 8 April 2009:

- (a) the balance owing under the first finance facility was \$12,028,322.48;
- (b) the "Land Value As Is With Development Approval" for the Carrara Land was \$17.5 million;

Particulars

Landmark White valuation report dated 19 March 2009 for the Carrara Land.

- (c) the project's LVR was 68.73%.

107H. On 8 April 2009, Kosho wrote to CPL and requested the release of the City Co Mortgage and the City Co Charge pursuant to special condition (i)(2) of the first finance facility, noting that the project LVR did not exceed 71.5% ("8 April 2009 letter").

107I. On or about 4 September 2009, the Custodian was replaced by Trust Company Fiduciary Services Ltd as the custodian for Trilogy as trustee of the CPM fund ("Second Custodian").

107J At no time since the 8 April 2009 letter has CPL or Trilogy:

- (a) responded to the 8 April 2009 letter;
- (b) released, or instructed the Custodian or Second Custodian to release, the City Co Mortgage and the City Co Charge.

#### **Expiration of Finance Facility**

108. On or about 30 June 2010:

- (a) the finance facility expired (as provided in the finance facility (page 2. Term));
- (b) Trilogy made demand of Kosho under the finance facility;

109. On or about 15 October 2010 Trilogy appointed a controller to the security properties whom was later replaced on 15 November 2010 when Trilogy appointed a Receiver:

- (a) to the Carrara Land;
- (b) to the Surfers Paradise Land.

#### **LOSS AND DAMAGE**

110. Kosho and City Co (and each of them) have suffered (and are liable to suffer) loss and damage as a consequence of Trilogy's breach.

111. By reason of Trilogy's breach:

- (a) ~~Kosho has incurred holding costs of \$2,763,077, particulars~~

whereof are as follows:

<b>General (Liabilities of Kosho incurred but some not yet paid)</b>	<b>AUD</b>
Wages & super	950,000
Land taxes/rates	100,000
Insurances	20,000
Office lease (old office)	5,077
Office running costs	10,000
Consultants costs	60,000
Accountancy fees	13,000
Misc (council fees/marketing)	5,000
Valuations/QS reports (finance application)	90,000
Legals (Hickey Lawyers)	15,000
<b>PFMF loan facility costs as of Feb 2010</b>	
Interest (Feb 2010) @ approx \$100K per month	800,000
fees and charges	15,000
legal costs	10,000
<b>Additional costs to result (March-June 2010)</b>	
Further PFMF interest allowance (until June 2010)	400,000
Refinance application fees	50,000
Refinance establishment fees	160,000
Legals (court proceedings)	60,000
<b><u>TOTAL COST TO DATE</u></b>	<b><u>\$2,763,077</u></b>

- (b) ~~Trilogy has since 2 July 2009 had the benefit of the securities comprised in the documents for execution;~~
- (c) ~~the grant and extension of securities comprised in the documents for execution has resulted in Kosho and City Co being precluded from accessing or dealing the equity in the Carrara Land and Surfers Paradise Land to:~~
- ~~(i) meet or service Kosho operational costs;~~
  - ~~(ii) develop the Carrara Land;~~
  - ~~(iii) develop the Surfers Paradise Land;~~

- ~~(iv) obtain refinance of the existing facility with Trilogy~~
- ~~(d) construction costs required by Kosho to develop Stage 1A of the project have increased;~~
- ~~(e) construction costs required for Kosho to develop the subsequent stages of the project have increased;~~
- ~~(f) City Co has (or is liable to) suffer an increase in the construction costs of the proposed development to its Surfers Paradise Land;~~
- (g) Kosho was precluded from progressing the development and construction of the project on the Carrara Land and has suffered Loss of Opportunity to Earn Development Profit in respect of the Carrara Land (assessed as at July 2009 and 30 June 2010);
- (h) Kosho has lost the value of its investment in the Carrara Land and the project and has suffered Loss of Equity in the Carrara Land (assessed as at July 2009 and 30 June 2010);
- (i) City Co has lost the value of its investment in the Surfers Paradise Land and:
  - i. has suffered Loss of Equity in the Surfers Paradise Land (assessed as at July 2009 and 30 June 2010);
  - ii. has suffered Loss of Opportunity in the Surfers Paradise Land (assessed as at July 2009 and 30 June 2010);
- (j) Kosho and City Co have suffered loss of opportunity loss Costs Not Otherwise Incurred (assessed as at July 2009 and 30 June 2010);
- ~~(k) Kosho and City Co have suffered loss and damage of the~~

order of \$77,807,313, particulars whereof are-

Costs to date	2,763,077
Loss of development profit (MIP sale) both Koshe and City Co properties	45,000,000
Liquidated damages for commercial contract termination	1,600,000
Opportunity Cost (say minimum 30%)	28,444,236
Total	\$77,807,313

- (l) further particulars will be provided, in the form of a forensic accounting experts report, after completion of interlocutory steps including disclosure herein.

**AND THE PLAINTIFFS CLAIM:**

1. ~~A declaration that in the events that have transpired (as pleaded in 14, 15, 16A, 20 to 50 and 51 to 54 of the Statement of Claim) the Defendant has breached the finance facility between the First Plaintiff and the Defendant dated 24 June 2009.~~
21. Damages in the amount of \$80,570,390 for breach of contract.
32. Further or alternatively, damages:
  - a. pursuant to s.82 for breach of s.52 of the *Trade Practices Act 1974* (now s.163, Schedule 2 of the *Competition and Consumer Act 2010* (Cth));
  - b. alternatively, pursuant to s.12GF of the *Australian Securities and Investments Commissions Act 2001* ("ASIC Act").
3. Damages or other relief or remedy for unconscionable conduct under the ASIC Act or the TPA.
54. Such further or other order as this Honourable Court may deem meet.
65. Interest pursuant to the *Supreme Court Act 1995*.



76. Costs.

Signed: .....

Description: Tresscox Lawyers, Solicitors for the Plaintiffs

This second further amended pleading was settled by Mr Robert Bain QC and Mr I A Erskine of Counsel.

**NOTICE AS TO DEFENCE**

Your defence must be attached to your notice of intention to defend.

SYDNEY | MELBOURNE | BRISBANE | CANBERRA

Our ref AXM:MZN:098998

31 January 2013

**Attention: Zac Chami**  
Clayton Utz  
Level 15  
1 Bligh Street  
SYDNEY NSW 2000

BY EMAIL: [zchami@claytonutz.com](mailto:zchami@claytonutz.com)  
[sburnett@claytonutz.com](mailto:sburnett@claytonutz.com)

Dear Sir

**Kosho Pty Ltd & Anor v Trilogy Funds Management Limited**  
Supreme Court of Queensland Proceedings BS4728/10

**Rleko Fujino ats Trilogy Funds Management Limited & Ors**  
Supreme Court of Queensland Proceedings BS10543/10

We refer to the above matters and the order of Justice Applegarth made 27 November 2012.

We enclose by way of service our clients' outline of submissions, to be filed on 1 February 2013.

Yours faithfully  
**TressCox**

  
per **Alex Moriarty**  
Email: [Alex\\_Moriarty@tresscox.com.au](mailto:Alex_Moriarty@tresscox.com.au)

TressCox  
ABN 93 281 528 297  
Level 4  
40 Creek Street  
Brisbane QLD 4000  
PO Box 5714  
Brisbane QLD 4001  
Phone 61 7 3004 3500  
Fax 61 7 3004 3599  
DX 248 Brisbane  
[www.tresscox.com.au](http://www.tresscox.com.au)

**Contact**  
Marion Niestroj  
(07) 3004 3506

**Partner**  
Alex Moriarty  
(07) 3004 3533

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: BRISBANE  
NUMBER: BS4728/10**

**Kosho & Anor –v- Trilogy Funds Management Ltd**

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: BRISBANE  
NUMBER: BS10543/10**

**Trilogy Funds Management Ltd & Ors –v- Rieko Fujino**

**OUTLINE OF SUBMISSIONS FOR KOSHO/FUJINO INTERESTS**

**CONTENTS**

<b>PRINCIPAL ACTION – KOSHO –v- TRILOGY</b>	<b>2</b>
• 2007 dealing	2
• Lender's "Absolute Discretion" Argument	4
• Special Conditions	4
• Special Condition (q)	9
• Sunrise Waters DA/Planning Issue	14
<b>IMPLIED TERMS</b>	<b>18</b>
• Dispensation with Performance of Condition	23
• Trilogy's delay	26
• Mr McCosh	28
<b>MISLEADING AND DECEPTIVE CONDUCT</b>	<b>30</b>
<b>CAUSATION</b>	<b>34</b>
• Pre-Sales	36
o Kosho anticipated sales rates reasonable	39
• Mr Gore	52
• Lytras Report	53
• S601 of the Corporations Act Issue	59
<b>THE EXCLUSION CLAUSE (CL 4) DOES NOT PROTECT THE LENDER</b>	<b>60</b>
• The Exclusion Clause (cl.4) does not protect the Lender	62
• The Indemnity Clause (Clause 12)	65

## PRINCIPAL ACTION – KOSHO –v- TRILOGY

### THE FACILITIES

#### **2007 dealing**

1. Trilogy Funds Management Ltd (“Trilogy”) asserts the 2007 lending (which Trilogy describes as the ‘First Facility’)<sup>1</sup> *“expired with no money having been repaid on it, and with interest of some \$3.7 million having been accrued”*<sup>2</sup> and *“a second facility was entered into on 24 June 2009”*.<sup>3</sup> That is inaccurate. The 2007 facility did not expire. Rather it was rolled into the 2009 facility, which then expired on 30 June 2010.
2. Trilogy’s pleaded case<sup>4</sup> is that the 2007 facility was varied by extending its term to 30 June 2010 and increasing it in amount to \$16 million. Shortly prior to that, City Pacific Limited (“CPL”) (of its own motion and to facilitate the parties’ coming to terms on that variation and extension) had extended the term of the 2007 facility to 30 April 2009. Such variation and extension had been contemplated by the language of the 2007 Letter of Offer for the 2007 facility<sup>5</sup> and that had also been the tenor of Kosho Pty Ltd’s (“Kosho”) March 2009 Revised Funding Submission.<sup>6</sup>
3. 30 June 2009 passed unremarked. The variation and extension had operated to extend the term. That is not to be conflated with alleged conditions thereunder being satisfied for further lending thereunder. So much was reflected in Trilogy’s Notices of Demand for payment made 8 July 2010.<sup>7</sup>
4. The facility limit of the 2007 facility was not extended beyond the approved \$12,600,000 facility ceiling and no default notice ever issued for that facility.
5. At no time prior to 30 June 2010, was Kosho ever in breach of the 2007 loan or the finance facility after variation and extension in 2009, as seems to be suggested by Trilogy.

#### **Finance Facility**

6. It is the (admitted) Letter of Offer dated 24 June 2009 (“finance facility”), which Trilogy describes as the ‘Second Facility’<sup>8</sup> that formed the basis of the legal relationship between the parties; no other loan agreement was drawn or executed (or required by CPL). The accepted 24 June 2009 Letter of Offer was the variation and extension referred to in Kosho’s Statement of Claim as the (relevant) finance facility. The only further

<sup>1</sup> Trilogy Submission filed 10 December 2012, para. 1(a)

<sup>2</sup> Trilogy Submission filed 10 December 2012, para. 1(a)

<sup>3</sup> Trilogy Submission filed 10 December 2012, para. 1(b)

<sup>4</sup> Amended Statement of Claim in BS10543/10, paras. 8 and 9 (Guarantee action)

<sup>5</sup> Exhibit 2, Item 47, page 1483 referring to “extend the facility ...”

<sup>6</sup> Exhibit 2, Item 27, pages 647-996

<sup>7</sup> Exhibit 24, paras. 17, 18 and Exhibits thereto

<sup>8</sup> Trilogy Submission filed 10 December 2012, para. 1(b)

documents that Kosho executed were fixed and floating charges and mortgages over relevant properties<sup>9</sup> as apprehended by that facility.

7. The 24 June 2009 Letter of Offer provided "*that the amount of funds to be advanced was in the sum of \$16 million for:*

(i)	<i>Current position</i>	<i>\$12,610,000</i>
(ii)	<i>Construction/Consultants</i>	<i>\$2,193,830</i>
(iii)	<i>Interest (to be retained)</i>	<i>\$860,000</i>
(iv)	<i>Contingency</i>	<i>\$336,170"</i>

8. The finance facility provided the extension of the extant \$12,610,000 loan and additional funds for sales, marketing, finalisation of plans and drawings, consultations and costs of construction of the commercial component of the project ("Abadi") which was to be used as Kosho's onsite sales office. The additional component of \$2,193,830, was funding for Stage 1A of the project.
9. Time constraints in the making of the further advance(s) thereunder were essential.
10. The finance facility contemplated a \$16m facility (after bringing into account the "proceeds of sale of the Commercial Property \$2,647,937..."<sup>10</sup>). The requirement in special condition (g) for sale of the Commercial Property to settle on or before 28 February 2010, informs the implication of terms for timely advance of the further loan funds for which Kosho contends. So, too, does the recognition by Trilogy of key time frames or events reflected in other further express terms including that the Letter of Offer expressly provided for the "*expiration of the facility on 30 June 2010 (page 2, Term)*"<sup>11</sup> and drawdown schedule attached thereto.
11. Trilogy, in its approach to the construction of the finance facility, seeks to dissect and construct each term of the Letter of Offer in isolation. That approach is artificial and ignores the surrounding circumstances known to the parties at the time of contracting and the purpose and object of the transaction itself.
12. On settled principle, the finance facility, being a commercial contract, 'should be given a business like interpretation'.<sup>12</sup> An individual contractual provision cannot properly be construed in isolation. The proper construction of a commercial contract is to be determined by what a reasonable person in the position of the parties would have understood the provision to mean. That requires consideration not only of the text of the

<sup>9</sup> Exhibit 24, para. 13

<sup>10</sup> Exhibit 2, Item 47 page 1482 under Total Facility Amount

<sup>11</sup> SFASOC, para. (e); TFAD, para. 16(d)

<sup>12</sup> see *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in Liq)* [2011] QCA 163 per Fraser JA at [6] and authorities there considered; see also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 At 179 [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 174 [53]; *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98]

particular document but also the surrounding circumstances known to the parties at the time of contracting and the purpose and object of the transaction.<sup>13</sup>

### **Lender's Absolute Discretion Argument**

13. Trilogy seeks to rely upon an *absolute* discretion<sup>14</sup> arising out of an express term of the nature referred to in *Questband*.<sup>15</sup> That well-known principle is: "when the terms of a contract confer upon one of the parties to it an absolute or unfettered discretion to do or refrain from doing an act, the term must be given effect and the words conferring the discretion their full force".<sup>16</sup>

14. The Letter of Offer provided:<sup>17</sup>

*"Please note that we also reserve the right to withdraw or amend the loan approval at any time without liability at our absolute discretion if, in our opinion or the opinion of the Lender's solicitors, there arises any matter which may adversely affect the proposed loan..." [emphasis added]*

15. The stipulated discretion is "absolute" but only arises, and the operation of the provision is dependent, upon a relevant opinion being held or formed by Trilogy or its solicitors: "*if, in our opinion or the opinion of our Lender's Solicitors, there arises any matter which may adversely affect the proposed loan*". There is no evidence that Trilogy (or its solicitors) at any stage formed such an opinion; indeed, there was no suggestion of that.
16. There is no evidence that Trilogy (or its solicitors) considered *any matter* existed capable of having any *adverse affect* on the *proposed loan*. Moreover, at no stage was Kosho informed of any matter considered by Trilogy (or its solicitors) that may have "adversely affect[ed] the proposed loan" nor was Kosho given any notice of any purported reliance upon such discretion in the finance facility.
17. The submission erects a fiction. The finance facility reserved a right on the part of Trilogy to withdraw or amend the loan approval in its discretion and on certain pre-condition but Trilogy did not ever (or ever seek to) do that.

### **EXPRESS TERMS**

#### **Special Conditions**

18. Trilogy asserts non-satisfaction of only three conditions of the finance facility: (p), (q) and (s).

<sup>13</sup> see *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462; see also *JV Property Syndicates P/L v Croakybill Ltd* [2005] QCA 479 (and cases cited therein) at [18] ff [2005] QCA 479

<sup>14</sup> Trilogy Submission filed 10 December 2012, paras. 8 - 9

<sup>15</sup> [2009] QSC 7

<sup>16</sup> *Questband*, *ibid*, per Chesterman JA at [102]; see also Fraser JA held in *Platinum United II Pty Ltd v Secured Mortgage Management Ltd (in Liq)* [2011] QCA 162 at [5] citing *Questband*; Chesterman JA and Fryberg J agreeing

<sup>17</sup> Exhibit 2, Item 47, page 1487

### **Special Condition (p)**

19. Trilogy contends<sup>18</sup> that special condition (p) was not satisfied because Kosho did not provide a copy of an unconditional sale contract for the commercial property.
20. Special condition (p) was satisfied (certainly as accepted by CPL as substantial performance which binds Trilogy) and further or different compliance was not otherwise required.
21. Kosho presold the commercial building comprising Stage 1A of the project to a Japanese businessman,<sup>19</sup> Hiroo Ota, who on 28 January 2009 paid into the trust account of Hickey Lawyers the \$800,000 deposit<sup>20</sup> payable under the contract.
22. The deposit remained there until October 2010 (at which time Kosho had to terminate the Put and Call option).<sup>21</sup>
23. The Option deed<sup>22</sup> is a style of contract recognised by PAMDA of the type often used in off-the-plan "multiple lot" commercial sales in the development industry in Queensland.
24. The submission of Trilogy ignores the terms of the Put Option. There are no rights to terminate reposed in the Buyer and all the flexibility lay with the Seller:
  - (a) clause 6.2 - irrevocable offer by Grantee to enter into binding agreement for the purchase of the lots from Grantor
  - (b) if the Buyer did not exercise the Call option, the Put option entitled Kosho to compel execution of a contract in terms of the Schedule 2 Contract (which is unconditional in its terms)
  - (c) Kosho could act under an irrevocable power of attorney given at clause 14.1 to –
    - (i) sign on buyer's behalf the unconditional contract
    - (ii) sign any such other forms required by PAMDA
    - (iii) do all acts and things grantee required to do in connection with the deed
    - (iv) execute all documents the grantee required to execute under the unconditional contract;
    - (v) register the power of attorney with titles office
25. The Buyer had no latitude relevantly and Kosho could have compelled the Buyer's entry into (and later settlement of) the contract. Under the terms of the document, Hiroo Ota, was bound unconditionally and irrevocably to the Put Option, which was capable of

<sup>18</sup> Trilogy Submission filed 10 December 2012, paras. 32 - 43

<sup>19</sup> Exhibit 2, Item 18, pages 428-541

<sup>20</sup> Exhibit 2, para. 228, Item 18, pages 426-427

<sup>21</sup> Exhibit 2, paras. 230 - 231

<sup>22</sup> Exhibit 2, Item 18, page 435

being exercised by Kosho, regardless of any action or inaction by him, to compel the unconditional contract (Schedule 2) and settlement (being 30 days after date of contract).

26. By clause 12.2, the security bond was to be credited toward the deposit payable under the unconditional contract – the security bond was equal exactly to the 10% deposit amount payable under the contract (viz, \$800,000).<sup>23</sup>
27. Trilogy relies upon the fact that Kosho could terminate but again this ignores the fact that the clause 28.1 is a clause for Kosho's benefit alone (clause 28.2). In any event Kosho had obtained its Development Approval on 20 January 2009<sup>24</sup> in the same month that the Put and Call Option was executed and prior to Kosho's approaching CPL for finance. This issue was never raised with Kosho and had it been, Kosho would have waived the opportunity. It was entirely in Kosho's interests to obtain finance and settle the sale of the commercial property. Clauses 28.2 and 28.6 make clear that clause 28 was for the benefit of Kosho and could be waived.
28. CPL had full knowledge of the particular form of document entered into;<sup>25</sup> it was discussed in detail during pre-contractual negotiations with CPL executives;<sup>26</sup> Kosho informed CPL of the presale (which represented a 100% presale of Stage 1A) and the fact that it was in the form of a Put and Call Agreement.<sup>27</sup>
29. The sale of the commercial property occurred over the period December 2008 - early 2009. CPL was told of it in February 2009.<sup>28</sup> It was not an issue for CPL as Mr McCormick - "...*thought at that stage the only thing outstanding was the deed of assignment...*"...it (ie drawdown) was "*imminent...very close*".<sup>29</sup>
30. McCormick referred to "*a final report that Pilot Partners prepared, there was mention in there of the Kosho facility and that it had all been approved by that stage and that draw downs were scheduled to occur in July...*".<sup>30</sup>
31. McCormick knew of the Put and Call as early as February 2009<sup>31</sup> and he and Mr McCosh put together the Letter of Offer of 24 June 2009 (perhaps with assistance of Minter Ellison) and CPL Board approval followed (prior to the Letter of Offer being sent), all based on the revised March 2009 Funding Submission provided on 2 April 2009 ("funding submission") which contained a copy of the Put and Call Option.
32. On no fewer than five occasions over many months a copy of the Put and Call Option agreement was provided to CPL and Trilogy.<sup>32</sup>

<sup>23</sup> Exhibit 2, Item 18, page 463 - Clause 26.3 of Contract Date for Completion

<sup>24</sup> Exhibit 2, para. 44-45, Item 13, page 374-376

<sup>25</sup> Exhibit 2, paras. 90-91, 220, Exhibit 3, paras. 53-55, Exhibit "AKS-11"

<sup>26</sup> Exhibit 2, paras. 63 - 67

<sup>27</sup> Exhibit 2, paras. 64, 66

<sup>28</sup> Exhibit 2, paras. 54, 64

<sup>29</sup> T2-82, lines 57-58, T2-83, line 5

<sup>30</sup> T2-82, lines 54-57; The Pilot Partners report referred to by McCormick was not disclosed by Trilogy in this proceeding

<sup>31</sup> T2-85, lines 35-41

<sup>32</sup> Exhibit 2, paras. 87-89, 94-96, 220, 311-312



- (a) on 2 April 2009 (included in the March 2009 Funding Submission);
  - (b) on 8 April 2009 (in a Landmark Valuation);
  - (c) on 29 June 2009;
  - (d) on 2 July (to Minter Ellison); and
  - (e) on 11 August 2009 (by hand).
33. At no time between 13 February 2009 and 20 October 2009 did CPL or Trilogy express the view that the form of the contract was unacceptable or did not satisfy special condition (p) of the finance facility.<sup>33</sup> In contractual formulation, Kosho's proffered performance was accepted (as it well should have been) and the condition was satisfied.
34. Trilogy relies<sup>34</sup> upon a single request in a letter dated 20 October 2009, from Minter Ellison (for Trilogy) to Hickey Lawyers (for Kosho) specifying a "shopping list" of items:

*"We note that there are a number of outstanding conditions precedent in respect of the above facility, including:*

- a. an unconditional sales contract for the commercial property;*
- b. a building contract with an independent and appropriately qualified third party consultant;*
- c. a civil works contract with an independent and appropriately qualified third party consultant;*
- d. deeds of security in respect of agreements in items b and c above (which will be prepared upon provision, and review of, the relevant agreements);*
- e. agreement to the deed, and sign off by, the Department of Main Roads and all relevant parties;*
- f. copies of the following documents previously requested:*
  - i certificates of currency (noting our clients interests)*
  - ii evidence of payment of council rates*
  - iii evidence of payment of land tax.*

*In addition, our client is reviewing the due diligence enquiries relevant to this facility, including the valuations. To enable it to complete these enquiries please provide us with financial accounts of the guarantor, borrower and mortgagor..."*

35. That submission ignores the detailed response from Hickey Lawyers dated 27 October 2009<sup>35</sup> stating the copy unconditional commercial sales contract had already been provided on 29 June 2009 and that Minter Ellison had on 11 August 2009 confirmed it was held on file.<sup>36</sup>

"...

- (a) *an unconditional sales contract for the commercial property*
  - 1. *Our client instructs that they provided a copy of the unconditional Put and Call Commercial Sales Contract via email directly to the Responsible Entity of the PFMF on the 29 June 2009 (refer Annexure A). We are further instructed that an additional copy was provided by our client directly to Minter Ellison Layers on 11 August 2009.*

<sup>33</sup> Exhibit 2, para. 232

<sup>34</sup> Trilogy Submission filed 10 December 2012, para. 38

<sup>35</sup> Exhibit 2, para. 394, item 129, pages 2081-2121

<sup>36</sup> Exhibit 2, para. 394, item 129, page 2081

2. *Minter Ellison has previously confirmed that a copy is held on file. Please see email from your Anthony Perich dated 11 August 2009 attached in Annexure A*
3. *We are instructed that our client has previously advised and provided the Responsible Entity with copies of the commercial sales contract prior to receiving and signing the contractual loan documents on the basis the Responsible Entity was satisfied with the Contract form and materials provided.*
4. *We confirm that we hold \$800,000.00 in our trust account, being the security bond paid by the Grantee under the Put and Call Option Deed.*
5. *Our client instructs that the provision of \$800,000.00 represents a substantive commitment from the buyer...*"

36. The letter also stated.<sup>37</sup>

*"...To be clear, my client considers that they have provided all the required items in accordance with the Letter of Offer and have already complied with all conditions precedent in a timely and proper fashion.*

*Provision of such materials gave rise to the signing and formation of contractual loan documents between our respective clients on the 2 July 2009"*

37. Mr Slijderink on 30 October 2009 emailed those documents to Trilogy (Neil Henrichsen).<sup>38</sup> There was no response to that correspondence from Hickey Lawyers, let alone demur, and despite follow up by Mr Slijderink and Hickey Lawyers.<sup>39</sup>
38. There was never otherwise any mention to Kosho that the particular form of Put and Call Option did (or may) not have satisfied the requirement of special condition (p). Nor was there ever any request for a different form of contract.
39. Trilogy submits (without citing authority) that *"a failure to advise another party to a contract that they have not met their obligations is, without more, no basis to say that the relevant obligation ought be expunged from the contract"* [emphasis added]. Even if correct that recognises that regard must be had to the circumstances known to the parties and the particular facts of the case. It was for Trilogy to reject the proffered performance if it thought it had such entitlement. It did not, and continued not to do that in the face of the Hickey Lawyers' letter,<sup>40</sup> moreover.
40. The evidence shows that Trilogy (by Clayton Utz) seemed content to wait finalisation "of the terms of the Deed" of assignment with the Department of Transport and Main Roads ("DTMR") before it would "review status of the loan conditions"<sup>41</sup> apparently on the basis that Deed and special conditions were "interdependent"<sup>42</sup> but that cannot be and is not an answer to the unconditional sales contract issue. Neither the Deed of Assignment nor its terms had anything whatsoever to do with the particular form of the sales contract for the commercial property. Were Trilogy not satisfied with the particular form of

<sup>37</sup> Exhibit 2, para. 394

<sup>38</sup> Exhibit 2, para. 395, Item 130, page 2122

<sup>39</sup> See Exhibit 2, paras. 395, 399-403

<sup>40</sup> Exhibit 2, para. 395, Item 130

<sup>41</sup> Exhibit 2, Item 170

<sup>42</sup> Exhibit 2, Item 167

contract, it could (and ought to) have challenged the proffered performance. The first time that Trilogy raised with Kosho that special condition (p) was not satisfied was in the Defence filed in this proceeding.

41. The requirement of special condition (p), particularly when construed having regard to the surrounding circumstances known to the parties at the time of contracting and the purpose and object of the transaction, was satisfied on the evidence.
42. Alternatively, Kosho was entitled to consider (as was the case) the requirement satisfied in which circumstances Kosho was excused from some other literal performance of the condition.<sup>43</sup>

#### **Special Condition (q)**

43. Special condition (q) provided:<sup>44</sup>

*"This offer is conditional upon the commercial property settling on or before 28 February 2010"*

44. On its proper construction, and having regard to the surrounding circumstances known to the parties at the time of contracting and the purpose and object of the transaction, the condition was a condition subsequent to the making of the advance, the predominant purpose of which was to enable construction of the very building (commercial pavilion) the subject of the Contract that the condition (q) required to be settled by 28 February 2010.
45. Manifestly, objectively, construction of that building was entirely dependent upon the provision of funds by Trilogy. The construction costs were expressly contemplated and referred to in the funding submission<sup>45</sup> which clearly identified that funding was required for 'construction'<sup>46</sup> and identified the 'timing of the required funding'.<sup>47</sup>
46. The funding submission referred to the commercial property and the funding required for Stage 1A (Schedule One: Building Costs "Stage One Construction Costs - Commercial Building A... \$880,000").<sup>48</sup>
47. As to the timing of loan advances, the funding submission had annexed a spreadsheet<sup>49</sup> ("spreadsheet") that clearly showed the settlement of commercial property (\$2,750,000) in month 7 of the project Time Line – with construction costs required to build the commercial property to be drawn down at - Month 3 - \$318,750 – Month 4 - \$318,750 –

<sup>43</sup> See cases referred to under heading 'Dispensation with Performance of Condition'

<sup>44</sup> Exhibit 2, Item 47, page 1486

<sup>45</sup> Exhibit 2, Item 27, pages 665, 676-678, 938-953

<sup>46</sup> Exhibit 2, Item 27, page 659, 665

<sup>47</sup> Exhibit 2, Item 27, page 653, cash flow at pages 670-673

<sup>48</sup> Exhibit 2, Item 27, page 677

<sup>49</sup> Exhibit 2, Item 27, pages 670-673

Months 5 and 6 - \$225,000: see "Construction Costs" under heading "Development Costs" and cf. Construction Spreadsheet.<sup>50</sup>

48. It was the "Construction Costs" component of the funding submission spreadsheet that CPL incorporated into the cashflow attached to the Letter of Offer ("cashflow schedule")<sup>51</sup> - and which itself adopted a month-to-month timetable for cash requirements commencing (it may be readily inferred) on the date of first drawdown.
49. The cash amounts in the cashflow schedule coincide with the numbers in the spreadsheet plainly showing the anticipated (and agreed) timing requirements for the construction funding. Objectively, it was a timetable for payments. A matter supported; and unchallenged, in Alastair McCosh's affidavit.<sup>52</sup>
50. Moreover, Mr Slijderink in September 2009 (by email) identified (and confirmed) to Mr Neil Henrichsen (for Trilogy) the construction cost requirements for the building.<sup>53</sup>
51. It was the failure to advance the monies intended for construction costs that disabled Kosho from being in a position to satisfy special condition (q).
52. Inevitably Kosho was disabled from satisfying special condition (q) by reason of Trilogy's conduct, in failing to advance (timeously or at all) any funding, whether intended for pre-construction or construction, under the finance facility.

#### Special Condition (s)

53. Special condition (s) provided:

*"(s) This offer of finance is conditional on, and subject to:*

- (i) the borrower entering into a deed of assignment and consent in relation to the agreement between the Department of Main Roads, Kosho Pty Ltd, Club Cavill Pty Ltd (Assignment Deed) to be prepared by and on terms satisfactory to the Lender;*
- (ii) the borrower causing Club Cavill Pty Ltd to enter into the Assignment Deed;*
- (iii) the Department of Main Roads confirming that it is satisfied with the terms of the Assignment Deed; and*
- (iv) the Assignment Deed being entered into and binding on the Borrower and Club Cavill Pty Ltd (and the Borrower providing two originals of the Assignment Deed executed by both the Borrower and Club Cavill Pty Ltd to the Lender) within 2 business days of receipt of the Assignment Deed. [underline added]*

54. No Assignment Deed was ever presented to Kosho for its execution and return within two business days as required by sub clause (iv). Such execution and return was the only obligation with which the clause burdened Kosho.

<sup>50</sup> Exhibit 2, Item 27, pages 670-673

<sup>51</sup> Exhibit 2, Item 47, page 1490

<sup>52</sup> Exhibit 16

<sup>53</sup> See also Exhibit 16, Affidavit of McCosh, para. 6 (unchallenged)

55. Otherwise, it was incumbent on Trilogy to facilitate the timeous satisfaction of that special condition. It lay entirely in the control of Trilogy to facilitate what was contemplated by the Letter of Offer – a simple deed of assignment of rights already existing under the 2007 Deed of Agreement, which rights would only become operative upon waiver by Club Cavill Pty Ltd (“Club Cavill”) of its compensation rights.
56. It failed to do so despite the passage of twelve months. What Trilogy did instead was to seek to exploit the opportunity to extract new and additional rights for the benefit of itself and a defaulting borrower of Trilogy, Sunrise Waters Pty Ltd (“Sunrise Waters”).
57. The first draft Assignment Deed emerged on 23 June 2009 – prepared by Minter Ellison – and (properly) sought merely to assign the rights and entitlements under the 2007 Deed of Agreement (as contemplated by Letter of Offer).<sup>54</sup>
58. Moreover, the first draft Assignment Deed contained a provision whereby Club Cavill waived its rights to compensation<sup>55</sup> as contemplated by the unequivocal acknowledgement signed by Club Cavill and attached to the Letter of Offer.<sup>56</sup>
59. On 22 July 2009,<sup>57</sup> Crown Law provided its response to CPL with markups (such markups being minor drafting matters with no substantive difference from Minter Ellison’s proposed terms). There were no areas of material disagreement that emerged – at that stage there was substantial accordance and concurrence as to the terms.
60. Kosho (by Mr Slijderink) communicated<sup>58</sup> to CPL its acceptance of those terms.
61. Between 22 July 2009 and 11 December 2009 – Trilogy did nothing on the evidence (sufficiently or anything at all) to progress the Assignment Deed with Crown Law or Kosho.
62. After Trilogy’s appointment as Responsible Entity on 22 July 2009, it took five months for Clayton Utz (for Trilogy) to produce and provide an entirely new draft to Crown Law – which correspondence noted:<sup>59</sup>  
  

*“My client is in a position to require Club Cavill to assign its rights under the deed and the right to compensation arising from the resumption referred to in the deed.”*
63. This document was a very different, effectively new deed pursuing a radically changed purpose. It is notable (amongst other things) that Club Cavill had already at least since June 2009, in accordance with the Letter of Offer agreed to waive its right to compensation, as reflected in the first draft Assignment Deed. When Trilogy entered on

<sup>54</sup> Exhibit 2, para. 325, item 95, page 1915-1924

<sup>55</sup> Exhibit 2, item 95, clause 3 on page 1920

<sup>56</sup> Exhibit 2, item 47, page 1491

<sup>57</sup> Trial Bundle pages 401-410

<sup>58</sup> Exhibit 2, para. 332 and item 73

<sup>59</sup> Exhibit 11

that course is not plain but, to inference, its embarking on that course in opportunistic self-interest would explain the long unproductive delay until then.

64. Trilogy submits<sup>60</sup> it did not delay unduly – pointing to an email exchange of 16 July 2010 – but this was almost one month after facility had expired,<sup>61</sup> after demands were made on 8 July 2010<sup>62</sup> and proceedings had been commenced by Kosho in May 2010. Reliance on the July 2010 exchange, apparently manufactured *ex post facto* to serve and protect Trilogy's interests, is risible.
65. Moreover, the content of the email dated 16 July 2010 (8:51am)<sup>63</sup> from Neil Henrichsen to Clayton Utz and Crown Law is instructive:

*"Brendon/Brian*

*Can you please chase up Crown Law on this matter. The delay in final agreement is becoming ridiculous given we had an agreed position back in March. I am almost inclined to let Club Cavill/Kosho back in to sort this out" [underline added]*

as is the response (1:03pm)<sup>64</sup> from Robyn Hill which states:

*"Dear Brendon*

*I refer to your clients email below.*

*As you are aware, I am not in the office today.*

*The latest amended draft of the Deed was received by me on Friday 9<sup>th</sup> July at 4:55 pm, only four business days before your client sent the email.*

*I also thought we had reached agreement in March, but unfortunately, the amended document provided to me did not reflect that agreement. Subsequent documentation has introduced new issues which were not originally part of negotiations. Accordingly, the delay is not Crown Law's." [underline added]*

66. Neil Henrichsen's email demonstrates both that Trilogy considered Kosho had the ability to settle the matter quickly and that Trilogy had deliberately excluded Kosho from resolving the matter.
67. Both the representatives of Trilogy, by then the controller<sup>65</sup> of the Sunrise Waters land, and Crown Law, even as late as March 2010, had considered that a suitable consensus as to the form of a particular document had been reached; by July 2010, Crown Law were expressing their frustration with the delay; and Trilogy (by Clayton Utz) had sought to introduce "new issues which were not originally part of negotiations". Trilogy, not Crown Law, was responsible for the delay.

<sup>60</sup> Trilogy Submission filed 10 December 2012, para. 58

<sup>61</sup> Exhibit 2, Item 47, page 1483

<sup>62</sup> Further Amended Defence and Counterclaim BS10543/10 (Guarantee Action), para. 27

<sup>63</sup> Exhibit 36

<sup>64</sup> Exhibit 36

<sup>65</sup> Trilogy was (in effect) standing in the shoes of Sunrise Waters from the date of appointment of Receivers to Sunrise Waters by Trilogy, who was from 12 January 2010 mortgagee in possession of Sunrise Waters land

68. The last draft Assignment Deed, provided on 6 September 2010,<sup>66</sup> contained new terms – again some 3 months after the facility had expired,<sup>67</sup> after demands made by Trilogy on 8 July 2010<sup>68</sup> and proceedings commenced in May 2010.
69. In order to satisfy its obligations under the Letter of Offer, Trilogy had to take reasonable steps to arrange merely an assignment of rights already existing and contained in the Deed of Agreement with DTMR to Sunrise Waters, and not to attempt to negotiate a new, substantially different and commercially advantageous arrangement for itself. It indulged in illegitimate opportunism.
70. In any event, the time spent or taken (or caused to be taken) by Trilogy in taking steps to satisfy itself as to the particular form of Deed of Assignment constituted unreasonable delay in the circumstances.
71. As at July 2009, Kosho had done all that it could do, including obtaining from Club Cavill its waiver of any rights to compensation as part of the funding package under the finance facility. So much is made clear from the terms of special condition (t):
- “(t) ...*This is compensation for the transfer of the rights and obligations to Sunrise Waters Pty Ltd as agreed between Club Cavill Pty Ltd (as related entity of the borrower) and the Department of Main Roads, in relation to the adjacent Sunrise Waters property in accordance with special condition (s).*
- The compensation is paid on the basis that it is in full and final settlement of all claims that the Borrower and/or Club Cavill Pty Ltd may have at any time in relation to the resumption of the land from the property of the Department of Main Roads...*”
72. The 2007 Deed of Agreement was not the source of Club Cavill’s right to compensation – that arose as a consequence of the Notice of Resumption and the operation of the *Acquisition of Land Act 1967 (Qld)*.
73. The Letter of Offer did not contemplate the assignment of compensation rights to any of CPL, Trilogy or Sunrise Waters – as Trilogy knew from an email from Mr Slijderink (December 2009) requesting a copy deed to facilitate execution by DMTR (it noted that only Club Cavill had rights and obligations in respect of the compensation).<sup>69</sup>
74. It went nowhere for Clayton Utz (by Noble) to seek to have (in the last version of the deed dated 6 September 2010) recognition of assignment to Trilogy and waiver by Trilogy of Club Cavill’s compensation rights.
75. Kosho was disabled from satisfying special condition (s) by Trilogy’s unreasonable delay, alternatively, by reason of Trilogy’s absence of good faith manifest in its

<sup>66</sup> Exhibit 36

<sup>67</sup> Exhibit 2, Item 47, page 1483

<sup>68</sup> Further Amended Defence and Counterclaim BS10543/10 (Guarantee Action), para. 27

<sup>69</sup> Exhibit 2, Item 145, page 2140

illegitimate pursuit of self-interest in seeking to settle upon a form of Deed of Assignment with DTMR.

76. On balance Kosho has established that, acting reasonably and in good faith, the parties ought to have executed the Deed of Assignment shortly after Kosho gave its notice on 27 July 2009 that it accepted the Deed promulgated by DTMR on 22 July 2009. Trilogy has not demonstrated otherwise.

**Sunrise Waters DA/Planning Issue**

77. Under the Letter of Offer, Trilogy had to arrange a mere assignment of the 2007 Deed of Agreement, nothing more.
78. The terms of the Letter of Offer did not permit Trilogy to change or renegotiate the terms of the 2007 Deed of Agreement or, indeed, to consider possible ancillary benefits to Sunrise Waters. Nor did it place (implicitly) any condition on Kosho in its satisfaction of special condition (g) to improve the probability of obtaining or satisfying the Sunrise Waters development approval or consents or to improve the efficiency and profitability of Sunrise Waters' development.
79. Trilogy has provided no evidence as to what (if any) amendments or consents were (in fact) required by Sunrise Waters to satisfy development conditions.
80. Trilogy raises two whimsical matters relating to the development approval obtained by Sunrise Waters in its efforts to seek to justify its delay – the access corridor and pedestrian access – matters entirely independent of the 2007 Deed of Agreement and the Letter of Offer.
81. Club Cavill sought access to the land for flood mitigation and stormwater purposes – hence the 2007 Deed of Agreement dealt with flood conveyance and storage issues relevant to potential and likely development on the land. The 2007 Deed of Agreement provided Club Cavill sufficient access to develop the land with these factors in mind.
82. The submission of Trilogy<sup>70</sup> is incorrect and ignores the terms of the 2007 Deed of Agreement.
83. The 2007 Deed of Agreement<sup>71</sup> between Club Cavill, Kosho and DTMR already granted to Club Cavill full rights and entitlements to enter the resumed land and to complete all works required to implement the Preliminary Approval and any Future Approvals.<sup>72</sup>

Recital I and L provided -

*"I By letter dated 4 August 2006, the Council issued the Preliminary Approval. A copy of the Preliminary Approval is annexed to this Deed of Agreement as*

<sup>70</sup> Trilogy Submission filed 10 December 2012, para. 52

<sup>71</sup> Exhibit 2, Item 17, pages 382-423

<sup>72</sup> Exhibit 2, Item 17, page 382



*Schedule 1. The Preliminary Approval was in respect of the River Central Precinct Land, the Hill Central Precinct Land and the Resumed Land.*

- ...  
 L. *The DMR has agreed to enter this Deed of Agreement to grant to [Club Cavill] and the successors in title to [Club Cavill], full rights and entitlements to enter the Resumed Land to complete all works required to implement the Preliminary Approval (should that be granted by the Court), including satisfaction of any conditions of approval, and any Future Approvals (and to comply with their conditions)...*"

By clause 1 -

*"the Preliminary Approval" means the preliminary approval contained in the negotiated decision notice by the Council dated 4 August 2006...and annexed...as Schedule 1. Where that phrase is used in and after clause 3 of this Deed, it also refers to a preliminary approval of the development application granted by the Court in identical terms to that contained in Schedule 1 or different terms."*

Clause 4 provided -

"...

4. **THE DMR'S OBLIGATION AND LICENCE**

- (1) *Subject to clause 8, the DMR grants to [Club Cavill]...respective successors in title, any future owners of the Lands or part of the Lands or Lots created by a building lot or volumetric lot subdivision of the Lands...their servants and agents and all persons authorised by the owners of the Lands from time to time full right and liberty to:*
- (a) *have access to the Resumed Land and pass and repass over the Resumed Land ...for all purposes connected with the execution of the works contemplated by the Preliminary Approval and any Future Approvals;*
  - (b) *excavate and remove the Resumed Land soil and do other works for the purposes of flood mitigation and as otherwise required by the Preliminary Approval and any Future Approvals;*
  - (c) ...
  - (d) *construct any works or install any devices in the Resumed Land necessary for stormwater treatment in accordance with the Preliminary Approval and any Future Approvals;*
  - (e) *utilise the Resumed Land for passive recreation/open space pursuits as contemplated by the Development Application including any path or bikeways in accordance with the Preliminary Approval and any Future Approvals..."*

84. There was nothing in terms of a 'services corridor' or 'bicycle pathway' requirement under the preliminary approval<sup>73</sup> that Club Cavill (and any successor in title) was not already entitled to have done under the terms of the 2007 Deed of Agreement.
85. Notably, a condition for the creation of a 'services corridor' was not included with the preliminary approval and nor was any later imposition of any such condition entered into evidence by Trilogy.

<sup>73</sup> Negotiated Decision Notice – Exhibit 2, Item 17, page 401

86. Under the 2007 Deed of Agreement, Kosho was already able to undertake any Works required to satisfy any development approval or future approval – including the access corridor and pedestrian access. The terms of the grant were sufficiently wide to contemplate such matters of detail which would be the subject of future detailed designs and regulatory approvals.
87. Even as late as September 2010,<sup>74</sup> Clayton Utz were requesting things already granted to Club Cavill under the 2007 Deed of Agreement.
88. Trilogy plainly sought to leverage a simple assignment to negotiate additional benefits for the Sunrise Waters development (which by then was an asset controlled by Trilogy), all the while, it can be inferred, obtusely ignoring its extant obligations under the Kosho loan facility.<sup>75</sup> Any suggestion that Trilogy could frustrate or delay the Kosho loan facility to obtain a 'better deal' for Sunrise Waters is untenable. Trilogy was concerned not with the increasingly perilous position of Kosho but with its position in and with Sunrise Waters.
89. Moreover, Kosho, despite a litany of requests, was never consulted or included in any correspondence from date of Trilogy's appointment to the date of commencement of this proceeding concerning negotiations as to the terms of the Assignment Deed.

#### **Tripartite Agreement between Borrower, Builder and Mortgagee**

90. Trilogy alleges<sup>76</sup> that the facility was subject to and conditional upon a tripartite agreement being entered into between Kosho, Trilogy and a third party builder.
91. The Letter of Offer (at top of page 3) under heading:

#### ***"SECURITY***

...

#### ***To be taken***

- *Tri-Partite Agreement between the Borrower, Builder and Mortgagee".*

<sup>74</sup> Exhibit 36

<sup>75</sup> Mr Brinsmead's evidence concerning Trilogy's, by Mr Griffin's, position [T2-66, lines 1 - 19] was:

Could you tell his Honour what that was?— We made a suggestion at the meeting that the land had some significant access issues and other issues and that the land was probably worth very little unless these issues were resolved. We said that Adam Slijderink and his company Kosho Co needed to be negotiated with. Without any further advance on that discussion, Andrew Griffin made it very clear to us that he had little time for Adam. He made some derogatory comments about him and he suggested that Adam had been acting somehow illegally and that in regard to the access issues he had done some deal with the Queensland Minister and those issues would all go away and our suggestion that the land had big problems and was of little value was wrong because he had solved them all. Do you recall, after that meeting, conveying to Mr - that is, telling Mr Slijderink something of what had happened at the meeting?— Yes, I did.

The fact of meetings between DTMR and Mr Griffin was referred to in the evidence of Mr Madras [T2-60, lines 36-46]:

Well, can you give his Honour the substance and effect of what Mr Griffin said concerning Mr Slijderink?— I think Mr Griffin was focused on possibly discrediting the claims that we had suggested Adam Slijderink had made and that is being able to resolve the issues with the easement. He said to us that he had been - he had had significant meetings with the Department of Main Roads and had come to an agreement or he had an agreement - had executed agreement. I cannot recall exactly, but that's - you know, that's the sort of context of the conversation and Mr Griffin's comments were basically just to discredit those claims, I believe.

<sup>76</sup> TFAD, para. 16(e)(i)

92. The clause appears under the broad heading "SECURITY" (commencing at middle of page 2) and does not appear under the heading "SPECIAL CONDITION".
93. It does not, as a matter of construction, comprise a special condition in the sense used elsewhere in the Letter of Offer (commencing bottom of page 3). On any reasonable view, it is not, as Trilogy submits, a condition precedent to the drawing-down of non-construction advances under the facility, which would have enabled the development to be progressed.
94. The evidence of Mr McCosh<sup>77</sup> (not challenged in cross-examination) confirmed that "initial progress claims for consultant expenses etc (i.e. non-construction claims) can be made without the requirement for the construction contracts and civil works contracts".
95. It was only draw-downs to meet construction costs that were dependent upon the coming into existence of the construction contracts and civil works contracts.<sup>78</sup>
96. That was supported by the evidence of Mr McCormick at Transcript 2-91, lines 1 – 30:

*"Can you recall that subject in this or any other meeting being raised, that there would be need for Kosho to have access to some of the additional funds even before, for example, concluding a builder's agreement and the like?— Yes, that was—*

*What can you tell his Honour of your recollection of that topic?— Well, the request would have come through to access some of the approval or approved funds that had been allocated for the likes of whether it was architecture or planning or any of those fees and that was not unusual, that was very usual. If we looked at a lot of the development projects and approvals that were made, we - the way we did it, we allocated various we call them buckets that made up the total amount that was loaned and those buckets might be for marketing, they might be for planning, they could be for legal fees and they would be for construction and so on. Certain buckets would be allowed access to, as long as, you know, there was - we were happy with what they were looking for and they were within the letter of offer for the facility.*

*Was it ever your view or your intention in respect of the letter of offer to say that, for example, a tripartite agreement, Kosho, financier and builder, had to be struck before additional funds could be obtained for finalisation of design?— No, no.*

*Did that make sense at all?— No.*

*Or is it just nonsensical?— Well, it doesn't make sense..."*

97. It is entirely unexceptional that there be drawdowns of the agreed loan for consultants' and other non-construction development expenses prior to finalisation of construction contracts. The requirement of the finalisation and execution of the tri-partite agreement as a pre-condition to any drawdowns asserted by Trilogy ignores the surrounding

<sup>77</sup> Exhibit 16, para. 11(a); Exhibit "AM-3"

<sup>78</sup> Exhibit 16, para. 11(b); Exhibit "AM-3"

circumstances known to the parties at the time of contracting and the purpose and object of the transaction.

98. Kosho, prior to entering into the Letter of Offer, had received confirmation from McCosh in an email dated 1 July 2009 in response to an email from Mr Slijderink of the same date.<sup>79</sup>

*"Adam*

*Your understanding is correct.*

*Initial progress claims for consultants expenses etc (i.e. non-construction claims) can be made without the requirement for the construction contracts and civil works contracts."*

99. It was never the objective intention of the parties to require entry into the Tri-partite agreement prior to advances for non-construction expenses and progress claims. Trilogy's submission<sup>80</sup> that Hickey Lawyers' detailed letter of 27 October 2007 ignored this condition is false, as it was addressed in detail.<sup>81</sup>
100. Plainly, no pre-construction draws meant no finalised drawings or designs, no building contract – and no Tri-partite agreement.
101. Trilogy (as Lender) did not ever provide a draft Tri-partite agreement to Kosho.
102. Kosho had obtained quotes and revised quotes for the commercial building and had a builder ready to proceed, pending finalised drawings or designs: Kuzmicz (Silverback Constructions).<sup>82</sup> The final quotation was dated 15 June 2009, before the Letter of Offer was executed, and Silverback Constructions needed only a 12 to 16 week lead-time to complete the Pavilion.<sup>83</sup>

## **IMPLIED TERMS**

### **Legal Principles**

103. In *Questband Pty Ltd v Macquarie Bank Limited*,<sup>84</sup> Chesterman JA summarised the principles concerning the implication of contractual terms as follows:<sup>85</sup>

*"The relevant legal principles are:*

1. *A term will not be implied into a contract if the implication is contrary to or inconsistent with an express term of the contract or with the intention of the parties as revealed by the terms of the contract. Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 at 422; Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd v Tooth & Co*

<sup>79</sup> Exhibit 2, Item 55, page 1517

<sup>80</sup> Trilogy Submissions filed 10 December 2012, para. 62

<sup>81</sup> Exhibit 2, page 2082, paras. 6 - 11 and the annexures referred to therein

<sup>82</sup> Exhibit 14, Affidavit of Kuzmicz, Exhibits "AK-1", "AK-2"

<sup>83</sup> Exhibit 14, paras. 4, 7

<sup>84</sup> [2009] QSC 7; affirmed on appeal in *Questband Pty Ltd v Macquarie Bank Limited* [2009] QCA 266

<sup>85</sup> [2009] QSC 7 at [102]; adopted by Fraser JA (with whom McMurdo P and Philippides J agreed) on appeal [2009] QCA 266 at [11], [32], [66]

*Ltd* [1987] 10 NSWLR 468 at 487; *BP Refinery (Western Port) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26 (condition 5).

2. *When a contract provides that something is to be done but does not fix a time for the act the law implies a term that the act must be done within a reasonable time. York Air Conditioning and Refrigeration (A/SIA) Pty Ltd v The Commonwealth* (1950) 80 CLR 11 at 62.
3. *When by a contract an act is required to be performed within a reasonable time what is a reasonable time is a question of fact which depends upon the circumstances including the context in which the contract was made. The limit of a reasonable time is determined by reference with what is fair to both parties. Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 567-8. *Whether a reasonable time, or more than a reasonable time, has elapsed must be decided at the point when the lapse of time is said by one party to have become unreasonable. It cannot be determined at the date of the contract. Rudi's Enterprises Pty Ltd* (1987) 10 NSWLR 568 at 576. *A relevant fact is delay by the party complaining about the lapse of time. Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1988- 1989) 166 CLR 623 at 638-9. *When what is in issue is the exercise of a right or the giving of a notice what is a reasonable time is to be determined by reference to the circumstances when the right is to be exercised (Business and Professional Leasing Pty Ltd v Akuity Pty Ltd* [2008] QCA 215 at [46] *or when the notice is given; Australian Blue Metal Ltd v Hughes* [1963] AC 74 at 99.
4. *The term implied by law into every contract that each party agrees to do all such things as are necessary on his part to enable the other party to have the benefit of the contract (Butt v M'Donald* (1896) 7 QJL 68 at 70-71) *extends to contractual promises but not to a commercial benefit which a party to a contract expected to obtain from its performance. Jackson Melanese Pty Ltd v Hansen Building Products Pty Ltd* [2006] QCA 126 at [50] - [51]; *Australia Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 124-5.
5. *Terms may be implied by law or because the contracts in question belong to a particular class; or to give business efficacy to the particular contract the parties made. Breen v Williams* (1995-1996) 186 CLR 71 at 102. ...
6. *When the terms of a contract confer upon one of the parties to it an absolute or unfettered discretion to do or refrain from doing an act the term must be given effect and the words conferring the discretion their full force. Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439; *Australian Mutual Providence Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417. *The conferral of an absolute discretion on a party to a contract excludes an obligation to act reasonably in the exercise of the discretion. Vodafone Pacific Ltd v Mobile Innovations Ltd* (2004) NSWCA 15 para 195."

104. What is a reasonable time is a question of fact that depends upon the circumstances including the context in which the contract was made.
105. The circumstances which are relevant in determining a reasonable time do not include those which were under the control of the party performing the services<sup>86</sup> and the relevant considerations which govern the reasonableness of the time taken must be determined as at the date of the contract.
106. As to the principle - "*that each party agrees to do all such things as are necessary on his part to enable the other party to have the benefit of the contract*", the law is neatly summarised in *Secure Parking (WA) Pty Ltd v Wilson*,<sup>87</sup> per Buss JA<sup>88</sup>.

***"The implied duty of each party to a contract to cooperate in the performance of contractual obligations"***

***[88] The parties to a contract may be under an implied duty to cooperate in the performance of contractual obligations.***

***[89] In Mackay v Dick (1881) 6 App Cas 251, Lord Blackburn stated the applicable principle, as follows:***

*I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances (263).*

*Lord Blackburn's statement was cited with approval by Isaacs J in Ray v Davies (1909) 9 CLR 160 at 170.*

***[90] In Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596, the parties were agreed that the contract between them imposed an implied duty on each party to do all that was reasonably necessary to secure performance of the contract. Mason J (Barwick CJ, Gibbs, Stephen and Aickin JJ agreeing), after referring to the statement of Lord Blackburn in Mackay, said:***

*It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to cooperate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract (607).*

*Mason J then referred (607), with approval, to this observation of Griffiths CJ in Butt v McDonald (1896) 7 QJL 68:*

<sup>86</sup> [2009] QCA 266 at [31] per Fraser JA citing *Hick v Raymond & Reid* [1893] AC 22; *Sopov v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141 per Maxwell P, Kellam JA and Whelan AJA; *Telina Developments Pty Ltd v Stay Enterprises Pty Ltd*, [1984] 2 Qd R 585 at 591, citing *Re Longlands Farm* [1968] 3 All ER 552 at 556 per Cross J and *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 608.

<sup>87</sup> (2008) 38 WAR 350

<sup>88</sup> With whom Martin CJ agreed. Murray AJA adopted this summary at [178]

*It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract (70–71).*

*Mason J continued:*

*It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself (607–608).*

*[91] The general principle of construction, according to which parties are taken to agree to do all that is reasonably necessary to secure performance of their contract, was reiterated more recently in Park v Brothers [2005] HCA 73; (2005) 80 ALJR 317 [38] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). Also see Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635 at 659 (Deane, Dawson and Gaudron JJ); Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215 at 219 (Dawson and Toohey JJ), 226 (McHugh and Gummow JJ); Peters (WA) Ltd v Petersville Ltd [2001] HCA 45; (2001) 205 CLR 126 [36] (Gleeson CJ, Gummow, Kirby and Hayne JJ).*

*[92] The duty to cooperate does not, however, rise above the promises made by the parties to the contract. In other words, the duty 'cannot over-ride the express provisions of the contract': Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349 at 368 (Sheller JA, Powell and Beazley JJA agreeing). Also see Maitland Main Collieries Pty Ltd v Exstrata Mt Owen Pty Ltd [2006] NSWSC 1235 [49] (Bergin J)."*

107. Where performance of the contract is conditional on some event which is to any degree within the control of a party, that party must co-operate reasonably in bringing it about. Failure to co-operate in that way will generally disqualify the defaulting party from relying upon the non-fulfilment of the condition, or, to put it differently (as is sometimes done), courts will, in such cases, treat the condition as having been satisfied. In *Expectation Pty Ltd v Pinnacle VRB Ltd*,<sup>89</sup> Steytler J held:<sup>90</sup>

*"As will be apparent, the parties were obliged, by cl 6 of the Letter Agreement, to negotiate in good faith to close the transactions contemplated in the Letter Agreement in an expeditious manner and as soon as practicable. Even if that had not been so, it is a general rule applicable to every contract that each party agrees, by implication, to do all that is necessary on its part to enable the other party to have the benefit of the contract: Butt v McDonald (1896) 7 QJL 68 at 70*

<sup>89</sup> [2002] WASCA 160

<sup>90</sup> At [89]; Miller J agreeing

- 71 and *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607. It follows that if performance of the contract is conditional on some event which is to any degree within the control of a party, that party must co-operate reasonably in bringing it about. Failure to co-operate in that way will generally disqualify the defaulting party from relying upon the non-fulfilment of the condition, or, to put it differently (as is sometimes done), courts will, in such cases, treat the condition as having been satisfied: see *Newmont*, above, at 352; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 637; *Mackay v Dick* (1881) 6 App Cas 251 at 270; *Foran v Wight* (1989) 168 CLR 385 at 433 and *Paltara Pty Ltd v Dempster* (1991) 6 WAR 85."

108. Expressed in another way, when a contract is conditional, terms may be implied that neither party will do anything to prevent fulfilment of the condition, and that one of the parties will make reasonable efforts (or do their best) to see that the condition is fulfilled. In *Duncan v Mell*,<sup>91</sup> a contract for the sale of a leasehold interest was contingent upon ministerial approval of the sale. Before that approval was granted, the purchaser obtained a second leasehold interest that made it highly unlikely that approval would be granted in respect of the first sale. The sale was ultimately not approved. Cullen CJ (with whom Pring J concurred) held:<sup>92</sup>

*"As every contract implies that neither party will do anything to prevent its performance, the contract between the plaintiff and the defendant implied that neither should do anything to prevent the consent of the Minister being given.*

*If nothing appeared beyond the fact that the Minister had refused his consent, the plaintiff would be entitled to say "this contract failed, not because of anything done by me, but because of the exercise of a discretion by the Minister which could not be controlled." ... [I]t seems to me that the correct conclusion is that the Minister's refusal was the direct consequence of the act of the plaintiff in purchasing from McGrath after he had entered into this contract with the defendant."*

Harvey J (as His Honour then was) held:<sup>93</sup>

*"It is also, I think, an implied term on the part of both purchaser and vendor that neither will do any act which would jeopardise the consent. I do not think the purchaser in any wise warrants or agrees that he has done nothing to jeopardise the consent or that he is a person to whom the Minister would grant his consent, but I think he does undertake that he will not do anything which will jeopardise the consent."*

109. In *Butts v O'Dwyer*,<sup>94</sup> a contract provided for the lease of land subject to certain legislative provisions, which provisions invalidated any such lease without the consent of

<sup>91</sup> (1914) 14 SR (NSW) 333

<sup>92</sup> At 337-338

<sup>93</sup> At 339

<sup>94</sup> (1952) 87 CLR 267; cf also *Fitzgerald v FJ Leonhardt Pty Ltd*, (1997) 189 CLR 215; "though ultimately, it may be that the correct interpretation of the particular contract depends not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself": *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607-8



the relevant Minister having been obtained. Dixon CJ and Williams, Webb and Kitto JJ held:<sup>95</sup>

*"In other words the parties may enter into a transfer subject to a condition that it is not to become effective unless the Minister's consent has been obtained. Prima facie this would import an obligation on the part of the person giving the transfer to do all that was reasonable on his part to the end that the Minister's consent might be obtained. Such a condition could be either express or implied. There is in the present case no express condition as in Roach v Bickle (1915) 20 CLR 663, but we think that such a condition should be implied. It has been held in cases too numerous to mention both before and after the classic statement of Bowen LJ in the case of The Moorcock (1889) 14 PD 64, at p 68 that the law raises an implication from the presumed intention of the parties where it is necessary to do so in order to give to the transaction such efficacy as both parties must have intended that it should have. Similar implications were raised under other sections of the Crown Lands Consolidation Act in Duncan v Mell (1914) 14 SR (NSW) 333, at p 339; 31 WN 113, at p 114, and Egan v Ross (1928) 29 SR (NSW) 382; 46 WN 90."*

#### **Dispensation with performance of condition**

110. In *K&K Real Estate Pty Ltd v Adellos Pty Ltd*,<sup>96</sup> Young JA held:<sup>97</sup>

*"The leading case on...dispensations is Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd [1954] HCA 25; 90 CLR 235, where Dixon CJ said at 246-247:*

*"... it was always the law that, if a contracting party prevented the fulfillment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof. But a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention."*

*It is clear that the intimation need not be express. It may be conveyed by conduct."*

111. In *Mullins v Kelly-Corbett*,<sup>98</sup> Muir JA considered the principles concerning such dispensation:<sup>99</sup>

*"[18] Mason CJ explained the consequences of affirmation of a contract by an innocent party after repudiatory conduct by the other party in Foran v Wight as follows:*

*"A failure by the innocent party to treat an anticipatory breach of an essential term as a repudiation and to terminate the contract has the effect of leaving the contract on foot, in which event it remains in*

<sup>95</sup> At 279-280

<sup>96</sup> [2010] NSWCA 302

<sup>97</sup> At [92], [93]; Giles JA concurring (at [4]) and Handley AJA agreeing

<sup>98</sup> [2010] QCA 354

<sup>99</sup> At [18]- [28] (all footnotes omitted); Fraser JA and Boddice J agreeing

*of interest, fees and/or margins applicable to any accommodation was varied in the manner set out in that notice: cf Paragon Finance Plc v Nash [2002] 1 WLR 685 at 699-700; [2002] 2 All ER 248 at 260-261. In my opinion it is appropriate to imply a term of good faith in the facility agreement as a matter of law.*

*[152] So far as those authorities which condone an exclusion of a term otherwise implied by law are concerned, there was, in my view, no express provision to this effect and no inconsistency in the terms of the facility agreement or in the matrix of facts in which the transaction took place to lead to such a result.*

*[153] I was invited to depart from Burger King on the basis that any extension of the type of contract in which an implication as a matter of law should be made should be circumscribed and not extended to commercial contracts generally. I decline to do so. I regard myself as bound by Alcatel (at 369) and Burger King (at [167] and [168]) to the view that such implication arises or may arise in commercial contracts.*

*[154] In my view, once it is accepted that a term of good faith may be implied in a contract of a particular type as a matter of law if it is both reasonable and necessary to do so in the sense specified in Byrne, there seems no good reason to confine the types of contract in which the implication may arise or to allow for extension of the categories in limited circumstances only.*

*[155] The Court of Appeal in Burger King did not discuss the content of the implied term of good faith save to comment, apparently favourably, upon the apparent equation of the notions of reasonableness and good faith in Alcatel (at 369). The matter was considered by Barrett J in Overlook (at [61]-[67]). His Honour concluded that the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter but is not fixed with a duty to subordinate self-interest entirely. The duty is not one to prefer the interests of the other contracting party. Rather it is a duty to recognise and to have due regard to the legitimate interests of both parties in the enjoyment of the fruits of the contract as delineated in its terms. The cross-claimants submitted that I should adopt his Honour's delineation of the content of the duty and I am content to do so for the purpose of this case, mentioning only that the content of the implied term of good faith may need further scrutiny to avoid being merely a slogan."*

#### **Trilogy's delay**

116. Trilogy has breached the implied terms of the finance facility including its obligation of good faith, by Trilogy's:

- (a) failing to do all such things and take all such steps necessary to enable Kosho to have the benefit of the finance facility;
- (b) unreasonably delaying in its consideration and determination of Kosho's compliance with the requirements of the finance facility, and in particular the draft assignment deed;
- (c) failing, and unreasonably refusing, to advance funds under the finance facility;

- (d) failing to advance funds under the finance facility by (at the latest) end October to early November 2009, so as to enable Kosho to commence development or construction of the project;
  - (e) alternatively, delaying arbitrarily and capriciously in its consideration and determination of Kosho's compliance and satisfaction with the requirements necessary to comply with the conditions imposed by CPL in the finance facility;
  - (f) by reason of the above, disabling Kosho from complying with special conditions (q) and (s) of the finance facility.<sup>112</sup>
117. Significantly, Kosho was not asking Trilogy to do anything outside of, or inconsistent with, the contract. It is objecting to Trilogy's failure to fulfil its obligations consistently with and under the contract.
118. Not once did Trilogy indicate to Kosho that funding would not be provided or suggest that Kosho look elsewhere for finance. There were excuses,<sup>113</sup> there were promises,<sup>114</sup> the CBA bank was blamed,<sup>115</sup> the DTMR was blamed,<sup>116</sup> there was implied blame about other people taking their time to consider a proposed deed of assignment of a certain benefit and so on,<sup>117</sup> but never materially was there a suggestion of non-performance by Kosho. Nor did Trilogy seek the assistance of Kosho in advancing the finalisation of the Deed of Assignment with the DTMR, despite repeated requests by Mr Slijderink.<sup>118</sup>
119. All that the DTMR was being asked to do was merely to consent to the assignment and they were not in a position to put extra conditions on it.<sup>119</sup>
120. The delay on the part of Trilogy to attend to satisfaction of the special conditions and Letter of Offer was unreasonable and unfair to Kosho. It was cynical and inexcusable.
121. From as early as July 2009, Trilogy knew of the position and status of the Kosho loan and the imminent requirement for Kosho to draw down the agreed further lending to advance its development. Trilogy also knew that drawdowns were scheduled to commence in July 2009. Trilogy also knew that the loan facility had all been approved by that stage, subject only to the Deed of Assignment issue.

#### Mr McCormick

122. The evidence of Mr McCormick confirmed the fact and extent of Trilogy's knowledge of the status of the Kosho facility from as early as July 2009:
- (a) he had overall supervision of the loan book for the mortgage fund;<sup>120</sup>

<sup>112</sup> SFASOC, paras. 52, 53

<sup>113</sup> Exhibit 2, paras. 215-217, Items 82, 128, 139, 154, 167, 170

<sup>114</sup> Exhibit 2, paras. 244, 265, 300(c), Items 141, 163

<sup>115</sup> Exhibit 2, paras. 349, 356-364, 376-377, Items 108, 111, Exhibit 3, paras. 69-86 and Exhibits thereto

<sup>116</sup> Exhibit 2, paras. 412, 417, 424, Trial Bundle pages 480-481

<sup>117</sup> Exhibit 2, para. 386, 389, 399, Items 134, 144, 148, 158

<sup>118</sup> Exhibit 2, para. 290, Item 86, page 1745, Exhibit 3, paras. 87-93, Agreed Trial bundle pages 480, 481

<sup>119</sup> T2-43, lines 29-30

- (b) after CPL was replaced as responsible entity he remained engaged by Trilogy as a consultant;<sup>121</sup>
- (c) in July 2009, he made Trilogy aware of the imminent need by Kohso of funds under the Letter of Offer;<sup>122</sup>
- (d) he and Mr McCosh were flown to Sydney to spend a day with Trilogy where they worked through each loan of the fund outlining what the position was and what was required going forward;<sup>123</sup>
- (e) there was no question in his mind as to where the subject loan lay and how close was the need for it to happen;<sup>124</sup>
- (f) he presented Trilogy a dossier of every loan in the loan book including Kosho and a report prepared by Pilot Partners;<sup>125</sup>
- (g) in the final report prepared by Pilot Partners there was mention of the Kosho facility and that it had all been approved by that stage and that draw-downs were scheduled to occur in July subject only to the Deed of Assignment issue. That was the only thing outstanding.<sup>126</sup>

123. So from the commencement of the time period contemplated by the Letter of Offer, Trilogy knew the loan facility was approved, that drawdowns were scheduled (and needed) to commence in July 2009 and that the only outstanding issue related to the four or so page Deed of Assignment which had been prepared by Minter Ellison, reviewed by DTMR and virtually in final form. Moreover, for the first six or so months from the commencement of the time period contemplated by the Letter of Offer, Trilogy had access to the assistance of two of the very officers formerly at CPL who had put together the Letter of Offer and had had the carriage of the loan facility for CPL. The evidence of Mr McCosh<sup>127</sup> and Mr McCormick<sup>128</sup> was that Trilogy did not ever have recourse to them to seek to advance the loan and the finalisation of the Deed of Assignment.

#### **Mr McCosh**

124. The evidence of Mr McCosh was that during that period he "was not at any time consulted to review or settle any problems raised by CPL or Trilogy with the Finance Facility" and he "was not aware of what decisions Trilogy made in relation to the Kosho

<sup>120</sup> T2-81, lines 24-28

<sup>121</sup> T2-81, line 30ff

<sup>122</sup> T2-81, lines 45-47

<sup>123</sup> T2-81, line 55 - T2-82, line 1ff

<sup>124</sup> T2-82, lines 14-16

<sup>125</sup> T2-82, lines 45-55

<sup>126</sup> T2-82, lines 52-58 - T2-83, lines 1-3

<sup>127</sup> T2-78, lines 36-41

<sup>128</sup> T3-8, line 52 - T3-9, line 21

loan facility upon or after their appointment as responsible entity for the CPFM [Fund]”.<sup>129</sup>

125. Contrary to evidence of Mr McCosh; for the entire 12 month facility period contemplated by the Letter of Offer (and ending on 30 June 2010), Trilogy, on its case, was supposedly:

- (a) still earnestly and studiously conducting (with the assistance of newly appointed solicitors) due diligence in terms of the conditions in the Letter of Offer;
- (b) considering still whether the special conditions had, in fact, been satisfied by Kosho;

all this while the development lay idle, whilst monthly interest on a substantial facility accumulated to the obvious detriment of Kosho, and in circumstances where Kosho and City Co Pty Ltd (“City Co”) were hamstrung, in a real commercial sense, City Co having effectively, and on the strength of assurances made by CPL, recommitted the Surfers Paradise Land as collateral security in support of the facility contemplated in the Letter of Offer.

**Cash flow requirements, timing of advances & CPL/Trilogy knowledge of same**

126. The time frames for the provision of the funding were, to Kosho, critical.
127. The time frames contemplated by the Letter of Offer itself were also the situation (and reality) inherited by Trilogy. Trilogy was apprised of Kosho’s imminent needs for funds by Mr McCormick.<sup>130</sup> The time frame for the provision of funds, and the critical importance thereof to Kosho, comprised an integral part of the negotiations leading to the finance facility.
128. There was (and could be) no doubt on the part of CPL as to the expected (and actual) cashflow<sup>131</sup> requirement of Kosho in terms of proceeding with Stage 1A.
129. The cashflow schedule attached to the Letter of Offer:
- (a) was prepared by CPL, not Kosho;
  - (b) incorporated as part of the Letter of Offer, also prepared by CPL;
  - (c) was based on cash flow requirements contained in the revised March 2009 Funding Submission provided on 2 April 2009.
130. Mr McCosh’s evidence (unchallenged in cross-examination) was that: “the cashflow schedule attached to the Letter of Offer represented the intended payment schedule for the 2009 facility”.<sup>132</sup>

<sup>129</sup> Exhibit 16, paras. 13 - 14

<sup>130</sup> T2-81, lines 45-47

<sup>131</sup> Exhibit 2, Item 47, page 1490

131. The evidence of Mr McCormick<sup>133</sup> established knowledge by CPL:
- (a) that drawdown was required as soon as possible, and expected in July 2009; and
  - (b) that Minter Ellison had been instructed to expedite the formal documentation.
132. Kosho's requirement for cash drawdowns in accordance to the document attached to the Letter of Offer:
- (a) was critical;
  - (b) was known to CPL;
  - (c) indeed was expressly contemplated by the Cashflow Schedule prepared by CPL;
  - (d) was made known to Trilogy in July 2009 and plain on the material in Trilogy's hands.
133. Mr Slijderink, in a meeting with Trilogy staff on 1 September 2009, confirmed Kosho's cashflow and finance requirements.<sup>134</sup> These requirements were further outlined in emails by Slijderink to Trilogy on 11 September 2009,<sup>135</sup> 22 September 2009,<sup>136</sup> 28 September 2009,<sup>137</sup> 16 November 2009,<sup>138</sup> 18 November 2009,<sup>139</sup> and 24 November 2009<sup>140</sup>.
134. The evidence discloses delay on the part of Trilogy well beyond any delay that might be described as reasonable or that might have been reasonably contemplated by the parties in the context of the Letter of Offer, the surrounding circumstances known to the parties at the time of contracting and the purpose and object of the transaction.

#### **MISLEADING AND DECEPTIVE CONDUCT**

135. In the alternative, Kosho claims that Trilogy is liable to Kosho for loss and damage suffered by reason of the making of certain representations,<sup>141</sup> which were relied upon by Kosho and were conduct which was misleading or deceptive in contravention of section 52 of the *Trade Practices Act 1974* (Cth) ("TPA"), or alternatively section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ("ASIC Act").<sup>142</sup>
136. Kosho alleges three misleading and deceptive representations by CPL's and Trilogy's representatives: viz, that:

---

<sup>132</sup> Exhibit 16, para 6

<sup>133</sup> T2-82, lines 52-56, T2-83, lines 3-5, T3-7, lines 13-32

<sup>134</sup> Exhibit 2, paras. 356-364

<sup>135</sup> Exhibit 2, para. 368

<sup>136</sup> Exhibit 2, para. 375

<sup>137</sup> Exhibit 2, para. 380

<sup>138</sup> Exhibit 2, para. 403

<sup>139</sup> Exhibit 2, para. 404

<sup>140</sup> Exhibit 2, para. 407

<sup>141</sup> SFASOC, para. 55

<sup>142</sup> SFASOC, para. 55 - 58A

- (a) on or about 24 June 2009, CPL (by McCormick and McCosh) represented orally to Kosho (by Slijderink) that funding would be available within 30 days, in accordance with the cash flows provided in January 2009;<sup>143</sup>
- (b) on or about 21 August 2009, Kosho (by Slijderink) telephoned Minter Ellison, then Trilogy's lawyers, and was informed by Anthony Perich that Trilogy's funds had been frozen until the Commonwealth Bank of Australia ("CBA") had completed a review of proposed Trilogy cashflows ("CBA frozen representation");<sup>144</sup> and
- (c) on 1 September 2009, at a meeting with Neal Henrichsen and Michael Vella and another representative of Trilogy, Kosho (by Slijderink, Rieko Fujino and Brian Scott) was informed:
  - (i) cashflow issues between Trilogy and CBA were likely to be resolved within one to two weeks; and
  - (ii) shortly thereafter funds would be available to Kosho to enable it to advance the project through Trilogy either from the CBA or other funds ("funds availability representation").<sup>145</sup>

137. The evidence of both Mr Slijderink<sup>146</sup> and Mr McCormick proved that the 24 June 2009 representation was made. Whilst Mr McCormick's recollections of his dealings with Kosho in mid 2009 were not as vivid as Mr Slijderink's, his testimony confirmed that:

*"there was certainly no question as to where [the Kosho] loan was at and how close it was to need to happen";<sup>147</sup>*

*"in our [CPL's] records and in our cash flows it was always July for that first drawdown".<sup>148</sup>*

138. Each of the CBA frozen representation and the funds availability representation was proved especially given that Mr Slijderink was not challenged on his evidence<sup>149</sup>, and Trilogy did not call (or explain the absence of) the representors, Messrs Perich, Henrichsen and Vella, Trilogy's natural witnesses.
139. The CBA frozen representation and funds availability representation were also continuing representations which were never relevantly withdrawn or qualified by Trilogy.<sup>150</sup> This was also proved by Mr Slijderink's extensive recounting of his dealings

<sup>143</sup> SFASOC, para. 55(a)

<sup>144</sup> SFASOC, paras. 27, 27A and 55(b)

<sup>145</sup> SFASOC, paras. 29, 29A and 55(c)

<sup>146</sup> Exhibit 2, paras. 134 - 135

<sup>147</sup> T2-82, lines 15-17

<sup>148</sup> T3-7, lines 31-32

<sup>149</sup> Exhibit 2, paras. 345, 361

<sup>150</sup> SFASOC, paras. 27A, 29A

- with Trilogy in his primary affidavit,<sup>151</sup> all of which evidence was left relevantly unchallenged by Trilogy.
140. Kosho's reliance on each representation in the manner alleged<sup>152</sup> is also proved by unopposed (and uncontroversial) aspects of Mr Slijderink's primary affidavit.
141. Each of the representations was, taken in proper context and viewed in a natural and commonsense way (as those certainly were by Mr Slijderink), a representation about a future matter within the meaning of s 51A of the *TPA*. In substance, each representation was about the forthcoming commencement of drawdowns (or forthcoming removal of impediments to drawdowns) for Kosho to advance its project in accordance with CPL's "Compensation Reconciliation Schedule" at Annexure A to the 24 June 2009 Letter of Offer (the cashflow schedule).
142. It is fatal to Trilogy's defence that Trilogy did not adduce any evidence to rebut the presumption that it (and its statutory predecessor, CPL) did not have reasonable grounds for making any of the representations. The application of s 51A(2) of the *TPA* and s 12 of the *ASIC Act* correspondingly to make out Kosho's misleading and deceptive conduct claim against Trilogy is unexceptional. While those provisions are for evidentiary facilitation and impose no strict burden of proof on the representor to establish the reasonableness of the grounds for the future representation (other than an obligation to lead some evidence to rebut the presumption), it is effective as proof that the future representation was misleading where that minimal obligation is left unmet by the representor. So much is trite but as explained (Flick J) in *Alpine Beef Pty Ltd v Trycill Pty Ltd* [2010] FCA 136 [at 76]:

*"Notwithstanding some divergence as to the manner of operation of s 51A(2) (cf Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd (No 2) [2008] FCA 1480 at [91] to [99]), it is considered that that provision is to be interpreted and applied in the manner explained by Emmett and Allsop JJ in McGrath v Australian Naturalcare Products Pty Ltd [2008] FCAFC 2, 165 FCR 230. Emmett J there observed:*

*[44] Under s 51A(1) of the Trade Practices Act, a representation is to be taken to be misleading if it is a representation with respect to any future matter and the maker of the representation does not have reasonable grounds for making the representation. Under s 51A(2), the maker of the representation with respect to any future matter is to be deemed not to have had reasonable grounds for making the representation unless it adduces evidence to the contrary. However, if evidence is adduced by a representor to the effect that the representor had reasonable grounds for making the representation, the deeming provision will not operate. Where the representor adduces such evidence, it is then a matter for the Court to determine, on the balance of probabilities in the ordinary way, whether or*

<sup>151</sup> Exhibit 2

<sup>152</sup> SFASOC, para. 56



*not the representor had reasonable grounds for making the representation...*"

143. There is a considerable irony in Trilogy's misconceived attempt to gain something<sup>153</sup> from the evidence of Messrs Fazzolari, McCosh and McCormick. None of those gentlemen said anything illuminating Trilogy's taking a position antagonistic to that of Kosho, in opportunistically attempting to serve Trilogy's interests as earlier discussed. None of those gentlemen had a role or gave any evidence which warranted, let alone required, his being examined or cross-examined about such things. Rather, none of Mr Griffin and others, Trilogy's natural witnesses, were called to address the matters of which Kosho complained. That was so notwithstanding the evidence of Messrs Madrrers and Brinsmead and other repeated reference to the "Trilogy people" and their involvement in Trilogy's correspondence and records.
144. Nor did Trilogy disclose or adduce any internal documents which reasonably ought to exist concerning the Kosho facility, such as Pilot Partners' report, loan and asset reviews, receivers' reports, valuations, emails and the like, passing between Mr Griffin and Trilogy's staff reflecting what Mr Griffin had, according to the Pearls' witnesses, said about Trilogy's attitude in preferring Sunrise Waters' interests over the Kosho loan facility.
145. It is Trilogy which, repeatedly, is to be viewed askant from a *Jones v Dunkel* perspective.

#### **UNCONSCIONABLE CONDUCT**

146. Kosho also claims that Trilogy engaged in conduct in breach of section 51AC(2) of the *TPA*,<sup>154</sup> and further or in the alternative section 52 of the *TPA*.<sup>155</sup> Kosho relies upon equivalent provisions in the *Competition and Consumer Act 2010*. The relevant conduct is pleaded in paragraphs 60 to 97 and paragraphs 101 and 104 respectively of the Second Further Amended Statement of Claim.
147. In terms of moral obloquy or turpitude in the end it is (it is submitted) a value judgment for the Court on the whole of the facts and circumstances of the particular case.
148. In this case, Kosho had a performing loan (one of few) in CPL's loan books; it had the added advantage of the services of a proven successful developer (Mr Slijderink) at the helm; it had established relations and secured sales from overseas investors (total \$8m for whole of Stage 1A and whole of commercial part of Stage 1B) - going into the 2009 facility Kosho already had 22.6% of presales for Stage 1B; it had an established network of institutional investment purchasers (Gore and his ilk); it had a track record of securing substantial funds from non-bank lenders (Goh) in a very short period of time; and

<sup>153</sup> See for example Trilogy Submissions filed 10 December 2012, para. 74

<sup>154</sup> SFASOC, para. 98

<sup>155</sup> SFASOC, para. 102, 105

required 70-80% presales to obtain funding from those non-bank lenders and 80-100% presales to qualify for funding from traditional lenders (Banks) - this it could not achieve without the advances promised by CPL and Trilogy.

149. Trilogy delayed egregiously (even intentionally were one to believe the Pearls Australasia witnesses) to the economic harm of Kosho; it actively excluded Mr Slijderink from anything to do with the finalisation of the Deed of Assignment; it made promises and gave assurances of imminent funding with no suggestion that funding would not be forthcoming; it knew (because it was being told by Mr Slijderink) of the perilous financial predicament and jeopardy the delay was directly causing Kosho and the project; it failed to take advantage (active or at all) of the knowledge and experience reposed in McCormick and McCosh despite Trilogy hiring them for that very purpose; it delayed unduly (by its lawyers) in chasing down issues more concerned with Sunrise Waters' interests and which had already been dealt with in the Letter of Offer (Club Cavill waiver of compensation) and the 2007 Deed of Agreement (access to resumed land for pedestrian pathway and services corridor).
150. As earlier observed, Trilogy served its own ulterior and extraneous interests opportunistically to improve Trilogy's financial position; which was neither permitted nor required by the approved finance facility.

### **CAUSATION**

151. Whether cast in contract (being put in the position as if the promise(s) had been performed) or remediation of misleading and deceptive conduct and/or unconscionability (to be put in the position that would have obtained but for such conduct) the result here is effectively the same. The Abadi project was time-sensitive as was City Co's hotel project. The projects were well conceived and viable notwithstanding the GFC. Trilogy did not lend when it should have lent; it promised that it would lend and reinforced that by continuing like promises and representations (which is to the same effect); it served its own illegitimate ulterior purposes to improve its financial position at the expense of Kosho and City Co; by not lending it prevented those companies pursuing their projects – in City Co's instance because it prevented the circumstances occurring which would have released City Co's land from being collateral security; and, not to be forgotten at the core of things, by not lending in accordance with the 24 June 2009 Letter of Offer – the finance facility – it caused the circumstance to arise that required outstanding monies – the extended initial loan – to be repaid when it had compromised Kosho's ability to do that because, as Trilogy well knew, Kosho's ability to do that lay in the successful pursuit of the project which had been approved for further funding in the cognisance of the GFC and after revision of the funding submission which specifically addressed that.

On that basis Kosho's and City Co's properties were taken out of their hands by Trilogy's appointment of receivers and that concluded any prospect of Kosho and City Co being able to pursue their projects.

152. Debt-funded property development is time-sensitive and any unreasonable delay in the provision of funds can be critical to the success or failure of the development; a point that was unapologetically belaboured by Mr Slijderink in all of his dealings with CPL and then Trilogy. CPL responded in a timely and businesslike manner in contrast to Trilogy's gyrating approach.
153. Trilogy crippled and then defeated those projects in the same timeframe which should have been effectively the foundation year for the Abadi project with resultant facilitation of City Co being able to pursue its project with its land available to it as primary security for that project. Instead of having that foundation Kosho was faced with the ruination of its project by Trilogy's persistent failure to lend in accordance with its promise of 24 June 2009 and related assurance of advances of loan funds appropriately promptly to meet timeframes of which it had been repeatedly apprised and which it and CPL had accepted as an incident of the lending by the Letter of Offer explicitly based on that plan.

#### **LOSS**

154. Each of Kosho and City Co is to be compensated for the worth of the lost opportunity inhering in their respective projects.
155. To meet that liability Trilogy now tries to denigrate the worth of the respective projects both intrinsically and to the extreme extent that the Court is invited to conclude that the projects would not have been funded (in absolute) because of economic circumstances.
156. Whilst, of course, regard must be had for risk through contingencies and exigencies, in assessing the worth of the lost opportunity it is well-settled that it is erroneous to proceed on the crude basis of enquiry whether, as a matter of probability, an event would have happened. Such "50% prospect or better" may be appropriate to the disposition of a matter where the central issue is whether or not an event has occurred but it is inapplicable to determination of an issue whether something would or may have occurred.
157. That was the point of the High Court's explanation in *Sellars v Adelaide Petroleum NL*<sup>156</sup> - which is just as applicable to breach of contract sounding in the worth of the lost opportunity to pursue future development as it was to contravention of the *Trade Practices Act* and the like.

---

<sup>156</sup> (1994) 179 CLR 332

158. The majority of the Court explained<sup>157</sup> the distinction between determination of whether an event has occurred and, on the other hand, how the likelihood of the future event occurring is to be addressed in the context of the worth of a lost opportunity. Likewise their Honours, by reference to *Commonwealth v Amann Aviation Pty Ltd*,<sup>158</sup> affirmed that a lost commercial advance or opportunity was a compensable loss even if having less than 50% likelihood that that would have been realised; that damages were to be assessed by reference to the probabilities and possibility of what would have happened (not just preponderant probability); and that what was to be compensated is the value of the lost chance itself, the Defendant not being allowed to take advantage of the effects of its wrongdoing to escape liability by pointing to the obvious, viz that it was theoretically more probable than not that a less than 50% chance of success would have resulted in failure. That is reinforced by their Honour's reference to *Chaplin v Hicks*<sup>159</sup> reminding that in contract the loss of the chance to win a prize, caused by a breach of contract to provide the chance, was compensable notwithstanding that, in probability, it was more likely than not that the Plaintiff would not win the prize. It is only if the chance is so low as to be regarded as speculative, "say less than 1 percent", that the chance will be effectively disregarded.
159. Here, the worth of the loss under contract and detriment under statute is the loss of the worth of the chance to have pursued the project(s). Trilogy's approach to that is, it is submitted, wrong because Trilogy proceeds on the basis of challenge specifically rejected by the High Court in *Sellars*.

#### Pre-Sales

##### *Kosho Sales and Marketing Strategy*

160. Kosho had a defined sales and marketing strategy. It was detailed, considered and formulated reflecting then current market conditions. It had been tuned and refined through the long experience demonstrated by Mr Slijderink as a property developer on Gold Coast and elsewhere. It could be adapted to moving market conditions and focused on local, international and investment markets. It had broad appeal to over 50s, the retirement market and property investors.<sup>160</sup>
161. Kosho had made substantial expenditure in advancing the marketing strategy in anticipation of construction progress payments, a significant amount of that made before the finance facility.<sup>161</sup> Kosho was not starting any pre-sales campaign from a "nil" base. It had already secured in relation to Stage 1B the sale of the entire 'commercial component' [this was the balance \$8m purchase of which the \$800,000 represented a

<sup>157</sup> by reference to *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638

<sup>158</sup> (1991) 174 CLR 64

<sup>159</sup> [1911] 2KB 785

<sup>160</sup> Exhibit 33, para. 6, T7-16, lines 34-37

<sup>161</sup> T6-91, lines 16-40

10% deposit – i.e. total contract amount under the Put and Call option was \$8 million for Stage 1A and the whole of commercial property content for Stage 1B].

162. Kosho's detailed marketing budget and sales and marketing strategy was scheduled to commence from the first month following drawdown of the necessary funds.<sup>162</sup> Kosho's marketing strategy was outlined in its revised March Funding Proposal<sup>163</sup> provided to CPL/Trilogy.<sup>164</sup>
163. In reality Kosho had already secured 22.6% of the required 100% of debt coverage pre-sales at the time of submitting the revised Funding Submission in March 2009.<sup>165</sup>
164. A key part of the sales strategy included the construction of the commercial building in Stage 1A, known as the "Pavilion",<sup>166</sup> which was expected to be under construction in about September 2009<sup>167</sup> and completed by about February 2010.<sup>168</sup>
165. The construction of the Pavilion on the project site, together with a temporary sales booth, was to be used in conjunction with Kosho's planned "whisper campaign"<sup>169</sup>, designed to build momentum to the formal opening of the project<sup>170</sup> and would have generated interest and sales in the project.<sup>171</sup> Once constructed, the Pavilion was to be used as a sales office<sup>172</sup>, and would have been beneficial for the long-term marketing campaign of the project.<sup>173</sup>
166. Kosho was ready and willing to commence pre-sales marketing of the residential units immediately upon the advance of funds under the finance facility: "we [were] ready to roll with nearly everything to go ... All we needed was funds to go and implement the program."<sup>174</sup>
167. In that regard:
  - (a) Kosho had various marketing plans and material including information memoranda, on-line sales brochures and mail out brochures<sup>175</sup> prepared in early 2009<sup>176</sup>, coloured floor plan (layout) images,<sup>177</sup> 3D imaging and panoramic photos of the project site;<sup>178</sup>

<sup>162</sup> Exhibit 33, para 6c.iv, v.

<sup>163</sup> Exhibit 2, Item 27, pages 678 - 682

<sup>164</sup> Exhibit 2, para. 358, 375, T2-11, lines 19-22

<sup>165</sup> Exhibit 2, Item 27, page 647; and if include two offshore sales achieved and the further 5 expressions of interest Kosho had achieved 32% of presales for Stage 1B

<sup>166</sup> T6-51, lines 57-58, T6-52, lines 1-13, T6-67, lines 44-51

<sup>167</sup> T6-91, lines 50-51

<sup>168</sup> T6-91, line 53

<sup>169</sup> T6-52, lines 5-7

<sup>170</sup> T6-52, lines 5-7

<sup>171</sup> T6-91, lines 54-58, T6-92 lines 1-5

<sup>172</sup> T1-81, lines 47-49

<sup>173</sup> T6-67, lines 44-51

<sup>174</sup> T6-92, lines 12-14

<sup>175</sup> Exhibit 5; Exhibit 33, para. 6c.ii

<sup>176</sup> T2-11, lines 42-43

<sup>177</sup> Exhibit 6; T2-11, lines 19-21, Exhibit 33, para. 6c.iii

<sup>178</sup> Exhibit 9

- (b) other marketing material in the way of mail-outs and hand-outs were also ready to be compiled;<sup>179</sup>
  - (c) Kosho had also briefed external media consultants who were awaiting instructions to commence the "whisper campaign";<sup>180</sup>
  - (d) advertising had already commenced in publications such as "Retirement Life";<sup>181</sup>
  - (e) Kosho had obtained advertising approval from the Gold Coast City Council for billboard signage, street signs and flagpoles;<sup>182</sup>
  - (f) Achieved two offshore sales (contracted)<sup>183</sup> and further 5 expressions of interest.<sup>184</sup>
168. In mid-2009, Mr Slijderink had also been in contact with Mr Michael Gore of Equitisolutions, which was a specialist Gold Coast project/investment marketing company. Mr Gore was prepared to immediately proceed with a specialised sales campaign for the project.<sup>185</sup>
169. Mr Slijderink gave further detailed evidence summarising the state of Kosho's marketing and sales strategy, particularly:<sup>186</sup>

*"I note that in my funding submission to City Pacific, I included a whole section on how we were going to do our presale marketing, our whisper campaign, prelaunch, hard sales, et cetera. We'd also allocated in the budget I think it was \$24,750 from memory, on or about that sort of number, starting from month one. We - prior to commencing the facility with City Pacific, I had a hard brochure prepared which was a brochure I previously attended here in the last proceedings, if that's the word to use. I also had an e-mail brochure prepared so we could saturate all the marketing companies and the real estate agents database, and that's a black, sort of, brochure so it would come up on the screen very vivid, the imagery. We also had engaged our PR consultants for our prelaunch whisper campaigns and things like that. Our editorials and all that sort of stuff. We started some marketing by way of Retirement Life, so the magazine, we'd already started advertising the development with them. Timeless - my buddy the Timeless Development, things like that. So we'd already started gaining some momentum late 2008, early 2009, and we're expecting to just build off the back of that and roll straight through with this whisper campaign."*

170. It was not suggested to Mr Slijderink that anything of what he said was wrong, misconceived or other than he related.
171. As Trilogy now contends in its submissions,<sup>187</sup> Mr Slijderink is "clearly an experienced property developer who is keen to ensure that the projects he undertakes are successful and profitable". This is also supported by Mr Slijderink's *Curriculum Vitae* and its long

<sup>179</sup> T6-91, lines 43-46

<sup>180</sup> Exhibit 33, para. 6c.vi

<sup>181</sup> T6-91, line 31

<sup>182</sup> T6-92, lines 9-12

<sup>183</sup> Evidence thereof provided in Exhibit 35, page 3

<sup>184</sup> Exhibit 33, paras. 6a-b.

<sup>185</sup> Exhibit 31, paras. 1, 3, 7

<sup>186</sup> T6-91, lines 16-37

<sup>187</sup> Trilogy Submission filed 10 December 2012, para. 112

track-record of successful developments now spanning three decades.<sup>188</sup> There is nothing, in this sense, to suggest that Abadi would not have met with the same success enjoyed by him previously.

172. The abiding impression is of a professional and experienced operator, well positioned to see through the usual exigencies of developments on the Gold Coast, in the prevailing economic climate. Kosho, through Mr Slijderink and Ms Fujino, also had an established network of international investors, as evidenced by the Hiroo Ota contract and their association with Mr Goh. Abadi was, and remains, an appealing product differentiated from its market and adjusted in terms of its product and price point to meet post-GFC market conditions.
173. As at the time of Trilogy's breach in mid-2009, Kosho had not started its sales and marketing campaign nor construction and thus remained in a position where it could flexibly adapt the Abadi project to ensure it continued to meet its market.
174. In the end, however, Kosho's presales and marketing strategies were unable to be implemented in the absence of the required funding from Trilogy.<sup>189</sup>

***Kosho anticipated sales rates reasonable***

175. Trilogy's submission<sup>190</sup> attacks the premise of using Riverwalk and Sphere as "comparatives" to Abadi – for the purpose of analysing sales rates and prices notwithstanding that both CBRE<sup>191</sup> and Landmark White<sup>192</sup> considered those successful developments as apt and direct comparatives to Abadi, a view later supported by PHV Valuers in review.
176. Kosho had identified and adopted a sales rate for the project between 4 and 6 sales per month. This was in line with the sales and marketing strategy and its cash flows and feasibilities were also based on this.
177. Kosho only required 4.75 sales per month to achieve 100% presales in 12 months. But Kosho did not need 100% presales to qualify for additional finance – it only required sales equivalent to 100% of debt coverage which equated to 70% presales or 47 units and that could be achieved at a sales rate as low as 4 sales per month.
178. The expert evidence as to achievable monthly sales was:
  - (a) PHV (Mr Kogler) - 5 – 6 per month;<sup>193</sup>
  - (b) Landmark White - 4 – 5 (with average 4.75) per month; and
  - (c) CBRE<sup>194</sup> 3 – 4 per month.

<sup>188</sup> Exhibit 2, Item 112, pages 2020-2030

<sup>189</sup> Amended Further and Better Particulars para. 3(a), Exhibit 2, paras. 324, 375, Item 120, T6-51, lines 1-3, T6-54, lines 15-20, T6-92, lines 7-9.

<sup>190</sup> Trilogy Submission filed 10 December 2012, para. 101b.

<sup>191</sup> Exhibit 2, Item 27, pages 709-771

<sup>192</sup> Exhibit 2, Item 28, pages 1002-1432

<sup>193</sup> Exhibit 19, Annexure 13

179. The retrospective review by PHV in terms of Sphere and Riverwalk disclosed achieved sales rates (in fact) in line with the upper-end of those forecasts. Actual sales achieved at Riverwalk Precinct were 5.81 units per month and actual sales achieved at Sphere were 5.73 units per month.
180. Kosho's sales did not have to perform as well as those comparable developments.
181. In terms of the results for 2009 – 2010:
- (a) 1.07.09 to 30.12.09 in 6 months - Riverwalk achieved 32 sales at average \$538k (\$100k more than Abadi average);
  - (b) 1.07.09 to 30.06.10 in 12 months - Riverwalk achieved 53 sales totalling \$28M – the same selling period Kosho anticipated – at average \$534,542 per unit;
  - (c) 1.07.09 to 30.06.10 in 12 months - Sphere totalled 51 sales totalling \$24,300,000 at average \$476,000 per unit.
182. This evidence was not rebutted by Mr Norling or any other expert on behalf of Trilogy.
183. Not only did Kosho not have to sell as many units as those comparable developments, it could sell at a much lower price point - at average \$438,000.
184. Kosho's product fell within the sub \$500,000 category - the market:
- (a) Mr McCormick said<sup>195</sup> was the best performing; and
  - (b) Mr Norling said<sup>196</sup> fared better than anything above it.
185. On the whole of the evidence, Kosho could very reasonably have been expected to have achieved 4 sales per month – which extrapolates to 48 over a 12 month period to meet 100% of debt coverage, which equated to 70% presales or 47 units.

#### **Mr Norling**

#### ***Qualifications***

186. Mr Norling (as was properly conceded):<sup>197</sup>
- (a) is not a financial adviser;
  - (b) is not a valuer;
  - (c) is not an investment adviser;
  - (d) is not a financier and had not undertaken any finance research in respect of the Gold Coast since 2008;
  - (e) professes no expertise in the field of sales and marketing for property developers.

<sup>194</sup> Exhibit 2, Item 27, pages 709-771

<sup>195</sup> T2-21, lines 51-52

<sup>196</sup> T7-25, lines 1-34

<sup>197</sup> T7-23, lines 55-58, T7-32, lines 15-33, also see Exhibit 37, para. 15, pages 26-27



**Midwood report**

187. He relied heavily upon the Midwood report which, (by his own admission) is prepared utilising *ad hoc* (selective) third-party response from property developers.
188. Mr Norling confirmed the Midwood report to be an unreliable data source, confirming that it is anecdotal information only and subject to the reporting bias, and truthfulness, of the salespeople called by Midwood's staff.<sup>198</sup>
189. Mr Norling was then (perhaps understandably) confused as to whether that reporting bias might lead to an under-reporting or over-reporting of actual sales activity, depending on the particular motivation of the salespeople called by Midwood.<sup>199</sup>
190. Mr Norling placed more faith in the reliability of the Midwood report than its author,<sup>200</sup> even after his attention was drawn for the first time to its author's very broad disclaimer of any reliance being placed upon it,<sup>201</sup> and after admitting he did not even know what are the author's qualifications.<sup>202</sup>
191. It is the disclaimer in the Midwood report itself which is most instructive, viz:

*"Information contained in this report is to the best of the author's and publisher's knowledge accurate as at the date of printing. The report should not be used as a general guide and should not be construed as a representation by the author or the publisher as to the accuracy of its contents."*<sup>203</sup>

192. The Midwood report cannot be relied upon as a definitive or reliable source of actual sales activity on the Gold Coast – though useful for identifying general market trend – it is of little use in ascertaining the factual matrix of actual sold and settled properties and/or the proposed market acceptability of any proposed specific development.

**Sales rates**

193. Mr Norling adopted an unduly and unreasonably pessimistic view in terms of a sales rate of one unit per month.
194. Under cross-examination it became clear that Mr Norling's assertion that Abadi would likely have achieved one sale per month was based on nothing more than his general feeling rather than any clear and cogent analysis. He frequently admitted matters which, although not touched upon or left unexplored in his own report, undermined and confused his own position, while demonstrating his lack of any careful analysis.
195. Mr Norling's assessment of likely sales of one unit per month was based on several fallacies, each undermining his analysis:

<sup>198</sup> T7-18, lines 51-5

<sup>199</sup> T7-19, lines 1-20

<sup>200</sup> T7-20, lines 36-39

<sup>201</sup> T7-19, lines 12-29

<sup>202</sup> T7-19, lines 10-11

<sup>203</sup> T7-20, lines 10-21

- (a) Mr Norling, as an economist based in Brisbane with no direct experience of the Gold Coast property market, based his analysis of likely sales rates on yet another secondary data source, namely the Midwood report; however Mr Kogler, who was the only appropriately qualified expert called by either party with direct experience in that market, labelled the report as being unreliable "hearsay information" and not as accurate as his own research.<sup>204</sup> The Midwood report, according to Mr Kogler, is compiled by its employees ringing up developers and sales offices and asking, "How many sales have you made this month?",<sup>205</sup> and
  - (b) Mr Norling expressly disclaims in his report any property valuation expertise, and yet his assessment of likely sales is based on his (non-expert) views that Nerang sales data, and the Nerang market, which included the Boulton Ridge Estate, are comparable to Abadi for valuation purposes. These views were cogently rebutted by Mr Kogler's visual presentation and testimony;<sup>206</sup> and
  - (c) Mr Kogler's analysis is based on a comparison of actual sales rates and prices achieved by the Riverwalk Precinct and Sphere development in 2009 and 2010, using RP Data as his source; however these developments and their sales data were rejected by Mr Norling on the technical and fallacious basis that Abadi falls within the Nerang municipal boundary; yet inexplicably for a market the size of the Gold Coast, Mr Norling did not perform or proffer any alternative project's marketing and sales records to underpin his assumption of "1 unit sale per month".
196. The artificiality of Mr Norling's reliance on "Nerang" is underscored by Trilogy's own description of the Abadi site as being at "Carrara".<sup>207</sup>
197. CBRE and Landmark White were (and are) expert international and national valuers engaged in (and familiar with) the relevant market at the relevant time. At the time, in the circumstances that prevailed, those experts largely agreed on anticipated sales rates.
198. The PHV review<sup>208</sup> - based on actual RP Data - demonstrates actual sales rates on comparative developments, as matters have transpired and confirms results in the market consistently with the views of Kosho's experts dispelling the artificially pessimistic picture painted by Mr Norling. Norling did not rebut this factual data.
199. Tellingly, Mr Norling did not undertake any analysis of any of the Abadi, Riverwalk or Sphere development projects (all integrated master-planned developments) and did not consult any registered property valuers in compiling his report. His evidence is unreliable as to saleability. It is, at best, an impressionistic and very general overview of his own preference.

<sup>204</sup> T4-68, lines 20-24, T4-77, lines 18-24

<sup>205</sup> T4-68, lines 32-36

<sup>206</sup> T4-70, line 41 - T4-73, line 23

<sup>207</sup> Trilogy Asset Review 2009 at Exhibit 3, "AKS-20", page 304

<sup>208</sup> Exhibit 19, Annexure 12

200. Mr Norling was not adamant that those developments were not comparable to Abadi – but rather merely said he “...could not necessarily agree that” Riverwalk and Sphere were “comparable product”.<sup>209</sup>
201. Mr Norling admitted there is still some level of construction going on the Gold Coast post September 2008,<sup>210</sup> although he was not in a position to say how much.<sup>211</sup>
202. Mr Norling also conceived of upwards of \$4 billion in aggregate sales on the Gold Coast from sales greater than \$5 million each transaction – being “not in a position to say that I don’t believe the figures”.<sup>212</sup>
203. He admitted that Queensland since 2008 has maintained the highest intra-Australian migration rate, consistently outperforming other States,<sup>213</sup> and that the great bulk of people migrating come to South-east Queensland.<sup>214</sup>
204. He admitted that although he had not “separately teased out the data”,<sup>215</sup> his view was that of those migrants to South-east Queensland.<sup>216</sup>

*“the Gold and Sunshine Coasts have gained the greatest shares, and the Gold Coast has obtained a greater growth than the Sunshine Coast.”*

205. He admitted that:<sup>217</sup>

*“there is in general terms an undersupply of retirement village stock, that is independent living unit stock, that are appropriately priced for retirees.”*

206. Mr Norling’s conceded increase (‘spike’) in sales shown in his own Report occurred during the same period that Kosho’s stock would have been marketed for sale,<sup>218</sup> but he failed properly to concede<sup>219</sup> that level of activity altered his description of the effects of the GFC.

<sup>209</sup> T7-26

<sup>210</sup> T7-9, lines 48-49

<sup>211</sup> T7-10, lines 7-8

<sup>212</sup> T7-9

<sup>213</sup> T7-14, lines 28-33

<sup>214</sup> T7-15, lines 1-2

<sup>215</sup> T7-15, line 9

<sup>216</sup> T7-15, lines 10-13

<sup>217</sup> T7-15, lines 21-25

<sup>218</sup> T7-28, lines 10-45:

“We can see that over the 2008/2009 year as against the 2009/2010 year, the residential sales rate, in fact, doubles more or less from 162 to 364 in 2009/2010?– ...

And you’ll see that the sales rates, as I have suggested, when you total them up increase in the 2009/10 year to 364 from 162 over the 2008/09 year; are you conscious of that?– Okay. I have not added the four quarters up, but I note that the quarter ending November ’09 and the quarter ending February 2010, there was a large spike in sales in those two quarters, and that is likely to have resulted in the ’09/10 figures being higher, and substantially higher, than the ’08/09 figures, correct.

But nonetheless whether it be described as a hike or spike or anything else, that is, in fact, the performance of the market in that fiscal 2010 year?– That is.

All right. And that is the segment of the market to which you place Abadi, of course?– Well, yes, Abadi would be competing against that product.

All right. Competition aside, of a segment, of a type, Abadi may have other competitive advantages, but of its type that’s where you place it. You have said so in the opening words in paragraph 36?– Yes, yes.”

<sup>219</sup> T7-47, lines 7-9:

“My learned friend put to you, Mr Norling that you had not considered the approximately \$4 billion worth of sales above \$5 million of sizeable sites. Does your failure in this respect undermine or alter your description of the effect of the GFC on the Gold Coast property market?– No, it doesn’t”.

207. Mr Norling's assertion<sup>220</sup> that the fall in Gold Coast sales volume post 2008 must be a demand-side effect rather than supply-side related is inconsistent with countervailing findings elsewhere in his report, viz.:

- (a) that the median price sale peaked at \$395,000 in 2008 and then again in 2010<sup>221</sup> — it is self-evident that a peak median price is not attributable to a lack of demand;
- (b) that the 38% fall in sales volume between 2007 and 2008 understated the underlying demand for units on the Gold Coast;<sup>222</sup>
- (c) that there was an undersupply of retirement village stock,<sup>223</sup> a major segment of the Gold Coast market.

208. Mr Norling's evidence of a 90% sales drop<sup>224</sup> is an overstatement of the effects of the GFC based on limited and selective data:

- (a) without logical comparisons of selected data— e.g. he compared November to November with June to June, rather than January to December or July to June only - not even by comparing any corresponding 6 or 12 month periods can one discern the alleged 90% sales drop from his table;
- (b) on incomplete data sets — his table shows figures for August and November 2012 is "n/a";
- (c) ignoring the 2009-2010 period which is the very period that Kosho's stock would have been released to the market;
- (d) ignoring periods with less favourable comparisons from his (and Trilogy's) perspective, e.g. the 20% difference in sales from Nov 07 to Aug 08 when compared to Nov 09 to Aug 10; and
- (e) ignoring the Pricefinder data (actual settled sales) for Nerang and Carrara (proximate to Abadi and ignoring the remainder of the whole of the Gold Coast) (combined Table at 39 and 42) in his report that show actual sales in:

- (i) 2009 — 407 Units;
- (ii) 2010 — 302 Units;
- (iii) 2011 — 223 Units.

209. The evidence and data in Mr Norling's report does not support the conclusion that Kosho was likely only to achieve sales of only one unit per month in the years 2009 – 2010.

210. Had funding been advanced, Kosho's sales and marketing would have occurred from July 2009 to June 2010.

<sup>220</sup> Exhibit 37, para. 38.

<sup>221</sup> Exhibit 37, para. 30.

<sup>222</sup> Exhibit 37, para. 31.

<sup>223</sup> T7-15, lines 21-25

<sup>224</sup> T7-29, see also Exhibit 37, paras. 36-38

211. In the period that Kosho would have been in the sales market, there was no marked decrease in sales – rather the market had rebounded strongly; the Norling report itself demonstrates sales in medium rise product doubling (162 increasing to 364)<sup>225</sup> when compared to the previous 12 month period and with an increase in sales values also being achieved – as Mr Norling conceded in cross-examination.<sup>226</sup>
212. The improvement in sales and general market over the 2009 and 2010 period gave rise to an improved sales market and conceived end to GFC conditions by end of 2010 and early 2011; a professional view formed by Norling himself.<sup>227</sup> Yet this was not considered in his review of the likely sales achieved over that period.
213. Mr Norling accepted even the Midwood report showed the retirement market to have been undersupplied with 6000 dwellings required over and above those already available.<sup>228</sup> Mr Norling failed to have any proper regard for the massive undersupply.
214. Importantly, Trilogy did not lead any evidence of valuations, competing feasibility analyses or other analytical dissection of Kosho's constitution of the Abadi project to rebut the evidence of Kosho. The only inference ought be that such evidence was not available.

***Surfers Paradise Land – Value and Feasibility Study***

215. Mr Kogler's \$4 million valuation and its accompanying feasibility study of the Surfers Paradise Land ought to be accepted by the Court as reliable and independent. It was prepared for and relied on by CPL in July 2009 for first mortgage purposes for the 2009 facility. Trilogy did not adduce any competing valuation or feasibility evidence.
216. The criticisms using Mr Norling as its principal antagonist which Trilogy levelled at Mr Kogler's valuation are based on a selective misreading of Mr Kogler's un-contradicted evidence in cross-examination.
217. According to Mr Kogler, the difference between the \$5,202 per square metre of land value, which he ascribed to the subject property, and those properties yielding only \$2,000 per square metre (which is the value contended for by Trilogy) is accounted for by the following factors:
- (a) the subject property is a central CBD site;<sup>229</sup>
  - (b) by contrast, the other sales identified by Trilogy's Counsel were:
    - (i) "fringe", and "not within the immediate location of the CBD";<sup>230</sup> and
    - (ii) "significantly inferior" to the subject property;<sup>231</sup>

<sup>225</sup> Exhibit 37, para. 36, page 7 "July 2008-June 2009 vs July 2009-June 2010"

<sup>226</sup> T7-28, lines 11-34

<sup>227</sup> Exhibit 37, page 5, para 26

<sup>228</sup> T7-15, lines 15-25

<sup>229</sup> T4-51, line 5

<sup>230</sup> T4-51, lines 5-6

- (c) the subject property allowed for a plot ratio in a range of 4:1 to 6.5:1<sup>232</sup> whereas in most cases outside the CBD the plot ratio would be limited to 4:1,<sup>233</sup>
- (d) none of the comparable sales used by Mr Kogler was an hotel.<sup>234</sup>
218. Mr Kogler's evidence was that the difference in values between the comparable sales analysed by him<sup>235</sup> was not simply due to the fall in the market in between 2007 and 2009. Rather the change in market conditions and the risks presented by the GFC to the Gold Coast market were already accounted for by Kogler's valuation.<sup>236</sup> Mr Kogler took a sophisticated and informed approach to accounting for the change in market conditions between 2007 and 2009, as was explained by him in cross-examination.<sup>237</sup>
219. Mr Kogler explained cogently there was and remains a market for a boutique hotel in the Surfers Paradise CBD, with the Surfers Paradise Land being one of the last available sites.<sup>238</sup>
220. The conservative nature of Mr Kogler's \$4 million valuation is also apparent from the fact that it is only \$200,000 greater than its \$3.8 million statutory unimproved land value (for land tax) as at 30 June 2008.<sup>239</sup>
221. Trilogy's submission that Mr Kogler made no allowance in his feasibility study<sup>240</sup> for the cost of capital or for interest in his valuation, and that one or both of these factors (it is unclear on Trilogy's submissions which) comprises a "\$10 million oversight",<sup>241</sup> is inaccurate and misunderstands Mr Kogler's methodology in his feasibility study, which in fact:
- (a) projected that a developer of the hotel would conclude the project with a 40% equity position in the land and development, being approximately \$10 million. This was an equity position as at completion, including land value and development profit;
  - (b) the feasibility study performed by Mr Kogler reflects the position that City Co would have been in had it undertaken the development, namely starting with a \$4 million unencumbered property as its initial equity position, then used to obtain finance.

---

<sup>231</sup> T4-51, lines 23

<sup>232</sup> Exhibit 19, Annexure 7, page 25

<sup>233</sup> T4-58, lines 41-42

<sup>234</sup> T4-58, lines 55

<sup>235</sup> Exhibit 19, Annexure 7, page 23

<sup>236</sup> Exhibit 19, Annexure 7, pages 19 and 26

<sup>237</sup> T4-52 and T4-53

<sup>238</sup> T4- 76, line 6-7, T4-78, lines 30, 56

<sup>239</sup> Exhibit 17, Annexure 7, page 10

<sup>240</sup> Exhibit 17, Annexure 7, page 30ff

<sup>241</sup> Trilogy Submission filed 10 December 2012, para. 82a.

222. Trilogy's submission<sup>242</sup> to the effect that Mr Kogler did not make any allowance for the cost of demolishing the existing building on site in his feasibility study is fallacious. Mr Kogler's testimony was:<sup>243</sup>

*"[Mr Horton] Yes, and so in valuation terms, that's a worse, isn't it, it has to be demolished?—[Mr Kogler] It needs to be demolished on re-development, yes.*

*Do you make any allowance for demolition in your calculation of the existing building?— No, I don't."*

223. The question put to Mr Kogler, and his answer, was clearly directed towards his valuation of the site, for which Mr Kogler used the direct comparison method, and not towards his feasibility study. It is the latter which grounds City Co's claim for its lost opportunity to earn development profits and which Trilogy's submission seeks to impugn. Mr Norling notes the requirement for demolition of the existing building in his report.<sup>244</sup> The feasibility study does not include a specific line item for "demolition costs" however the common sense view is that this must be taken up by the project's "construction costs". This was not put to Mr Kogler in cross-examination.
224. Trilogy's somewhat cute assertion<sup>245</sup> about the "unreality" of the hotel development being sold in 3 months after opening, given the hypothetical nature of three years' EBITDA, does not take into account Mr Kogler's explanation about how such transactions are negotiated in practice based on a *projection* of three years' EBITA.<sup>246</sup> Similarly the suggestion that the sales process would need to be completed in 3 months does not allow for a sales campaign commencing during the 12 month construction phase as one would expect.
225. As to the design of the hotel and the amenity of the basement level nightclub:
- (a) the ground floor plan for the hotel shows that the night club entry is quite separate from the hotel entry and both front onto, and together with the service entry and cafe entry comprise, the hotel drop off/pick up layby area;<sup>247</sup>
  - (b) obviously the night club was soundproofed<sup>248</sup> and separated from guest rooms on the higher levels by the ground floor;
  - (c) Trilogy's manufactured assertion<sup>249</sup> that the fact the nightclub was to be held in strata title diminishes the hotel operator's control is not supported by any

<sup>242</sup> Trilogy Submission filed 10 December 2012, para 82b

<sup>243</sup> T4-50, lines 48 - 52

<sup>244</sup> Exhibit 19, Annexure 7, page 14

<sup>245</sup> Trilogy Submissions filed 10 December 2012, para. 82c

<sup>246</sup> T4-62, lines 26-41, which reads:

"But it would be settling in April 2011 without having any three year such stabilised EBITDA?-- That's true, however, the negotiations for the sale would need to have been done on the projections completed.

Yes?— In a new hotel asset a vendor would be quite silly to negotiate the sale of a hotel based on EBITDA in year one, because it's well known that year one is a commencement of a consolidation period.

Yes?— Your EBITDA would normally be much lower than when it would be stabilised over time and it's not uncommon for a new asset to negotiate a sale based on stabilised year three, which is why - in these cases you would need to do a discounted cash flow, which I've done, using the projections rather than the EBITDA in year one."

<sup>247</sup> Exhibit 19 (Lytras Report), Annexure 7 (PHV Valuation), Appendix 7 – plan entitled "D6 Amended Ground Floor Plan Indicating Drop Off/Pick Up Layby to PHV Valuation

<sup>248</sup> Exhibit 19, Annexure 7, Appendix 7

evidence. The nightclub operator would be subject to body corporate by-laws addressing these factors.

***Mr Norling's views on availability of finance***

226. At paragraph 91 of Trilogy's submissions, in terms of the effects of the GFC on credit markets, Trilogy has sought selectively to adopt only those parts of Mr Kogler's evidence it contends are supportive of its case and seemingly consistent with the evidence of Mr Norling.
227. Mr Norling contended that there was no chance of the project being funded but the reality (on cross-examination) was that he focussed only on the "big four banks", ignoring second tier, mortgage and private lenders and the like and, even so, had to acknowledge that post - GFC, projects on the Gold Coast had been funded by the banks, unsurprisingly on a case-by-case basis.<sup>250</sup>
228. Mr Norling's opinions, although no doubt subjectively valid to him, were insubstantial and unreliable in any objective or direct sense pertaining to Abadi, having been impressed upon him by reason only of his recent professional experiences and interests maintained as a property consultant, viz:<sup>251</sup>
- (a) his consulting firm has had clients in the last four years that "can't get finance";
  - (b) his having "read the press widely about the withdrawal of Suncorp from the property sector";
  - (c) his having read, "with interest the tightened lending criteria by Australia's big four banks";
  - (d) his having "seen the ABS data on reduced commercial and home lending finance" and having read the Midwood report.
229. When cross-examined specifically on whether all of these factors had prevented substantial development from going ahead on the Gold Coast, Mr Norling conceded it had not.<sup>252</sup>
230. When it came to factors genuinely probative of Abadi's ability to obtain finance:
- (a) Mr Norling had not undertaken any analysis of what projects had commenced, been funded and been successful on the Gold Coast since 2008, nor had he tried to ascertain where funding on the Gold Coast came from;<sup>253</sup>

<sup>249</sup> Trilogy Submissions filed 10 December 2012, para 82e.iii

<sup>250</sup> T7-45, line 5-T7-46, line 47

<sup>251</sup> T7-45, lines 8-18, which read: "I have clients in the last four years that can't get finance. I have projects that have fallen over, consulting jobs that have fallen over. I have read in the press widely about the withdrawal of Suncorp from the property sector. I have read with interest the tightened lending criteria by Australia's big four banks. I have seen the ABS data on reduced commercial and home lending finance. I have read and quoted the Midwood Reports statements historically about this. So I'm suggesting to you that it's not a matter of my imagination."

<sup>252</sup> T7-45, lines 23-26 which read:

"Now, that said, all those factors have not prevented development going ahead as we discussed at the outset, and substantial development?— No - some developments are able to proceed, particularly those developments that are not - or especially those developments that are not reliant upon those traditional financing sources."



- (b) Mr Norling agreed that ultimately banks lend on a project by project basis depending upon the project, the quality of the people running the project, where the project is pitched in market and in concept.<sup>254</sup>
231. By contrast, Mr Kogler's balanced and informed perspective on whether each of the Surfers Paradise and Abadi projects would have obtained funding from 2009 through to 2012 was:
- (a) in respect of the Surfers Paradise hotel project, funding was and is available on the Gold Coast from overseas private equity investors, "especially in the hotel industry",<sup>255</sup> and
- (b) in respect of Abadi, that it was less amenable to that type of overseas private equity finance and more so suited to "traditional lending" while noting, importantly, that the sources of finance on the Gold Coast have traditionally extended beyond the "eight main banks".<sup>256</sup>

***The market for Abadi and Abadi's positioning for its market***

232. Mr Norling's pejorative evidence about his perceived mismatch between the Abadi concept and its high level of amenity when compared to the existing market for units "so close to the Nerang Railway station" ought be rejected outright in favour of the expert evidence led by Kosho including:
- (a) each of the three valuations of the Carrara Land (CBRE, Landmark White and PHV) relied upon by Kosho, which closely considered every aspect of the site's amenity (both positively and negatively affecting value), its location and Abadi's product offering; and
- (b) Mr Kogler's cogent and detailed visual demonstration,<sup>257</sup> and his accompanying testimony, concerning the development site's locality and amenity, and the superior nature of the Abadi development to the mess of very different and unappealing 4-9 storey apartment blocks and townhouses constituting Boulton Ridge.<sup>258</sup>
233. The attack on Mr Kogler is gratuitous and baseless. His demolition of *Boulton Ridge* was measured, well-detailed and well-based. It arose directly out of and in response to cross-examination. He was knowledgeable and assured in identifying the particular matters which made good his confident rejection of *Boulton Ridge* as any litmus and, indeed, the "Nerang" theory relied on by Trilogy, at large. The things he detailed (including visually) were stark, sensible and manifestly correct. He was an impressive,

<sup>253</sup> T7-46, lines 18-21

<sup>254</sup> T7-46, lines 22-32

<sup>255</sup> T4-76, lines 42-46

<sup>256</sup> T4-77, lines 1-3

<sup>257</sup> Employing the Court's "visualiser" technology

<sup>258</sup> T4-70, line 41 to T4-73, line 23

informed, experienced and objective witness able and prepared to justify in detail, the well-qualified and comprehensive valuation opinion he provided including as regards local amenity and transport considerations.

234. Mr Kogler's evidence concerning the sales rates and prices that would have been achieved for the life of the development and for the 2009-2010 financial year<sup>259</sup> is to be preferred to Mr Norling's more generalised and (as he expressed it) quite subjective assessment.
235. Trilogy's assertion<sup>260</sup> that Mr Kogler "accepted in cross-examination that the unit sales he advanced in Annexure 13 and particularly at page 2 were of '*absolutely no help when one is talking about the Carrara and Nerang apartment markets*' misinterprets Mr Kogler's testimony. Mr Kogler's testimony was:<sup>261</sup>

*"[Mr Horton] When it comes to your annexure 13, and particularly the second page of that annexure, page 2 of 2?—[Mr Kogler] Second page, yes.*

*The unit sales you advance as being informative are for the Gold Coast as a whole, is that right, on that page?— Yes.*

*And I want to suggest to you that's absolutely no help when one is talking about the Nerang/Carrara market?— Not specifically, no."*

236. Mr Kogler's testimony only went as far as to say that the Gold Coast sales data used by him partly to support his analysis was not specifically applicable to the Nerang/Carrara market; which says nothing about whether it was not applicable to the development.
237. Read properly, Mr Kogler's evidence is consistent with his analysis of likely sales rates,<sup>262</sup> which was principally supported by actual sales achieved at the Riverwalk Precinct and Sphere developments. Mr Kogler confirmed that:
- (a) the *Riverwalk Precinct* and *Sphere* developments were comparable projects;<sup>263</sup> and
  - (b) projects such as *Boulton Ridge* and *Emerald Lakes*, although more proximate to the development "may as well be 50 kilometres away",<sup>264</sup> were like "cheese and chalk" when compared to the development<sup>265</sup> and, in the case of *Emerald Lakes*, the developer had "completely missed [the] market".<sup>266</sup>
238. Mr Norling's evidence was most damaging to his own thesis when it came to the crucial question of defining and then examining the correct market for the development's units. In his report, Mr Norling incongruously relied only upon broad market data to form very

<sup>259</sup> Exhibit 19, Annexures 12, 13

<sup>260</sup> Trilogy Submission filed 10 December 2012, para. 101.c

<sup>261</sup> T4-67, lines 28-35

<sup>262</sup> Ex 19, Annexure 12

<sup>263</sup> T4-63, line 53

<sup>264</sup> T4-67, line 20

<sup>265</sup> T4-67, line 25

<sup>266</sup> T4-72, line 53

specific (and damning) views on the prospects of Abadi. Yet he admitted, to the contrary, that:<sup>267</sup>

*"if one wants to value a property or a unit, or one wants to define a specific marketing program for a particular development, then, yes, one has to drill down to the details of the product positioning of that particular product."*

239. In his evidence, Mr McCormick had elegantly linked CPL's prediction of success for the project to it being appropriately pitched to its market, when he said as follows:<sup>268</sup>

*"the [sub-\$500,000] price range was in that area that would move."*

240. But Mr Norling admitted he had not considered in his report the market for units in the crucial sub-\$500,000 price range:<sup>269</sup>

*"I haven't separately undertaken analysis of the price changes for those units priced below the \$500,000 range. But I would agree that the dramatic effects that we've seen at the high-rise units market is likely to still be evident in the medium rise or the lower price point units, but may not be as dramatic."*

241. Having considered the matter for the first time under cross-examination, Mr Norling expressed what must be taken to be his honest, un-guarded and un-varnished views of the market for units in the sub-\$500,000 price range:<sup>270</sup>

*"Yes, that sub \$500,000 market is, in my view, likely to have better weathered the storm than the high-rise and the higher priced high-rise units."*

242. Mr Norling then gave evidence that Abadi would attract buyers who might originally tend towards other locations on the Gold Coast and high-rise units. Thus the demarcation in his report between the high-rise markets and four to nine storey markets was revealed as an artificial consequence of data used by him from the Midwood report (albeit intrinsically unreliable) and Pricefinder. To wit, he said:<sup>271</sup>

*"So I think that there are purchasers that would look widely across, but, no, I'm not suggesting to the Court that the only purchasers that would be interested in Abadi are those that want to be in four storeys to nine storeys only."*

243. And then, illuminating the limitations of his report's analysis and findings further:

*"The product that you've described [Abadi] is more likely to be saleable than an expensive waterfront high-rise apartment within this same difficult market";<sup>272</sup>*

and

*"The design of Abadi and the landscaping and the commercial facilities and the pools and ponds that were provided and its elevation offering views and exposure to sea breezes, are all things that I think would be favourable to purchasers."<sup>273</sup>*

<sup>267</sup> T7-17, lines 2-30

<sup>268</sup> T2-21, lines 51-52

<sup>269</sup> T7-24, lines 34-39

<sup>270</sup> T7-25, lines 1-4

<sup>271</sup> T7-44, lines 15-19

<sup>272</sup> T7-25, lines 31-35

<sup>273</sup> T7-44, lines 37-41

244. Thus there is no need to discount the achievable sales targets established by Mr Kogler, even if one accepts Mr Norling's evidence that the broader macro-economic malaise must have affected the Gold Coast market to some extent. As Mr Kogler confirmed, his analysis of the development was that it was already appropriately adjusted to market for the effects of the Global Financial Crisis (T4-73, lines 8-23):

*"[Mr Bain] But speaking of what you know just as it presents now of Abadi as it was approved or funded and agreed to be funded in 2009, how does that sit with what you just said of hitting the market of being appropriately sized and priced?—[Mr Kogler] This has been the trend not only in the early years after the GFC but certainly currently. The unit size and price points are significant in the success - the sales success of the project in the market place.*

*And your view of Abadi as a valuer?— Well—*

*Is it appropriately pitched?— Indeed so, and I think that from a unit size and design point of view, that's why I thought that Riverwalk and Sphere [were comparable] - if you look at my analysis, unit size, et cetera, et cetera, it fitted the correct designation of the market place at the time."*

#### Mr Gore

245. Mr Gore, whilst a licensed real estate agent, has for many years operated a property investment and marketing firm. That firm had successfully marketed Mr Slijderink's other project and achieved 28 settled sales in 2009.<sup>274</sup>
246. Trilogy's criticism of the evidence of Mr Gore ignores the fact that his buyers are pre-qualified and purchase on loan capacity and rental returns – defined financial investment parameters. The purchase is a non-emotive decision – buyers do not necessarily see or go to site, but are more concerned with rentability, depreciation schedules, long term capital gain, location to transport nodes and market acceptance.<sup>275</sup>
247. The submission<sup>276</sup> misunderstands Mr Gore's evidence - his clients are driven by financial performance, tax depreciation, tax effective investments, rental yields, and long term capital growth<sup>277</sup> – Mr Gore's comment was from an investment product point of view – so long as a particular investment product met those requirement – it met product requirement.

#### Mr Goh

248. The evidence of Mr Goh confirmed that money was available to fund the Abadi project and that he definitely could fund.<sup>278</sup> And he had previously lent the substantial sum of \$30 million to Kosho on very short notice – five business days.<sup>279</sup>

<sup>274</sup> Exhibit 31, para. 2, T6-21, lines 1-4

<sup>275</sup> T6-24, line 31 – T6-25, line 6, T6-25, lines 29-47, T6-26, lines 22ff

<sup>276</sup> Trilogy Submission filed 10 December 2012, para. 100

<sup>277</sup> T6-24, line 31 – T6-25, line 6, T6-26, lines 22-28, 43-49

<sup>278</sup> T6-8, lines 1-4, T6-13 line 30

<sup>279</sup> T6-10, lines 10-14, T6-48, lines 39-46

249. He is a high net-worth person with knowledge of the project and who deals with his own family's (and not investor's) money – he is not bound by regulatory exactitudes of bank lenders. He has undertaken extensive lending throughout Australia – short term, mid term and long term funding – and taken a property developer equity position – mezzanine or full funding – subject to his having funds available at the relevant time. He was not merely a mezzanine lender.<sup>280</sup>
250. He did have money at the time Kosho would have required it – subject to 70-80% pre-sales being achieved – not dissimilar to Westpac; as a total requirement of sales assuming 80% pre-sales: 43 sales approximately, and given Kosho already had 7 sales by EOI, only 36 sales over 12 months would have been required to then approach Goh.<sup>281</sup>
251. His evidence confirmed<sup>282</sup> pre-sales were required to progress any facility with his assistance.
252. The effect of his evidence is – had Kosho obtained pre-sales of at least 70-80% (T6-13 and line 30) of required funding – he could and would have considered favourably the provision of finance for the project.
253. There is nothing remarkable in the fact that Kosho had not applied for finance – it knew pre-sales were required and there was little point in applying until pre-sales had been achieved.
254. Mr Norling conceded funding was available from non-traditional lenders.<sup>283</sup> Mr Goh was one such a lender.
255. The obtaining of funding from Mr Goh was much more than merely speculative possibility, it was a real and tangible prospect with a lender who had already loaned substantially greater funds on the same project and who was, on good terms with Kosho.

#### **Lytras Report**

256. The absence of valuation evidence for Trilogy on which to challenge that for Kosho and City Co has been noted, as has been Mr Kogler's demolition of Mr Norling's unqualified and inappropriate advancing of Boulton Ridge as a comparator and the "Nerang" theory. The simple position remains that the valuation evidence for the Kosho interests was comprehensive and cogent; it took account of all the matters of location, amenity, type of development, market reaction, broader economic circumstances post GFC, and saleability in the usual way. In that process, to the extent that any of those considerations may have tempered the ascription of value, that was done in a conventional way and it was not properly suggested to Mr Kogler that there was any want of methodology in his work (or in that of anyone else which he adopted). Mr Norling's observations about

<sup>280</sup> T6-10, lines 3-4, T6-16, lines 24-28

<sup>281</sup> Exhibit 30, para.11, T6-12, 32-35, T6-13, lines 1-2

<sup>282</sup> T6-11.

<sup>283</sup> T7-46, line 40

matters of valuation and realisable value did not rise above his advancing his subjective and general impression of economic circumstances based on the Midwood report when any such considerations had already been taken in by qualified valuers well cognisant of the same circumstances.

257. Mr Lytras' work, adopting the valuation evidence provided for the plaintiffs appropriately did not have to re-hash valuation considerations. Mr Lytras did not feign to be a valuer and he was entitled to proceed that way. It is, with respect, not necessary to rehearse what is said out in Mr Lytras' report<sup>284</sup> (especially given his summary of opinion in the second section of it). Indeed, to do so, would risk unhelpful gloss being intruded.
258. As earlier observed this is a matter in which the Court's assessment of the worth of lost opportunity(s), if found, is just that – a matter for the Court's assessment. Suffice it that the plaintiffs predictably contend for significant compensation but recognise that Mr Lytras has assisted the Court by identifying bases on which some discounting may (in the Court's judgment) be appropriate; what Mr Lytras referred to as his "framework".<sup>285</sup>
259. In that circumstance we address the few further considerations essayed with Mr Lytras in cross-examination.
260. Mr Lytras' assumption of the availability of development finance beyond the term of the original (2007) lending<sup>286</sup> was appropriate. Considerations about that have been addressed above and there was a sensible reliable prospect of such funding being obtainable. Any latent risk in that sounds only at the level of being a component of discount, not as a basis for rejection of the plaintiffs' claims. That also extends to the pursuit of City Co's hotel project taking in any lead time until (Trilogy acting properly and reasonably) the Surfers Paradise Land was to be released from commitment as security for the Abadi project.<sup>287</sup>
261. The continuing validity of the 2009 cashflows as explained by Mr Slijderink and as well-based in the un-refuted valuation opinions for Kosho were not something that Mr Lytras had to re-engineer. Nonetheless, it is instructive that Mr Lytras did address those with Mr Slijderink and did not simply "pay a lip service"<sup>288</sup> – i.e. accept uncritically – the cashflow. In effect Mr Lytras spot tested or stress tested those in discussion with Mr Slijderink – "to give [Lytras] more comfort as much as anything ..." as he put it<sup>289</sup> and on occasion sought further material or explanation from Mr Slijderink. That care by Mr Lytras is not to be overlooked because it was an experienced accountant's ensuring that

<sup>284</sup> Exhibit 19

<sup>285</sup> T4-5, lines 20-29

<sup>286</sup> T4-6, lines 11-15

<sup>287</sup> T4-10, lines 19-24: in which regard the 2009 Letter of Offer at special condition (j) replicated the earlier provision for the release of mortgage of City Co's land featured in the 2007 Letter of Offer; the spreadsheet attaching to revised March funding submission reflects the intended/expected timing; and Exhibit 2, pages 19–21, 29, 30, relate relevant discussion between Mr Slijderink and CPL

<sup>288</sup> T4-7, lines 14-21

<sup>289</sup> T4-8, lines 15-20

what Mr Slijderink (a proven and experienced developer) presented passed muster as a proper and reliable work of its type and was not evidently wanting. Mr Lytras' being satisfied of that is hardly surprising given that CPL had assessed it in the same way as evidently entirely satisfactory, especially after the revisions in cognisance of the GFC which informed the revised March funding submission<sup>290</sup> and, of course, at no stage thereafter did Trilogy, for its part, assert there was anything wanting about that or suggest, for example, that the cashflows were no longer of reliable currency for the purposes of making the advance under the finance facility (or as regards any future funding for the project).

262. It is instructive that CPL had accepted the Abadi cashflows, while there is no evidence that Trilogy had, at any time prior to these proceedings commencing, raised any concerns with the financial modelling or viability of the projects.
263. Not only was Mr Lytras entitled to be satisfied about the cashflows but his testing of those with Mr Slijderink may fairly be seen as having provided further justification and assurance as regards Kosho's (and Trilogy's) continuing reliance on those.
264. In like regard, Mr Lytras tested the underlying market demand/take up rates and sale prices which informed the cashflows and was satisfied of how that had been treated by Mr Slijderink in reliance upon the "various reports that have come through ... the market taking up the demand, the supply".<sup>291</sup> Again Mr Lytras was not affording "lip service" but required to be satisfied of apparently sound basis in Mr Slijderink's work and what Mr Slijderink was proceeding upon in the way of expert opinion and Mr Lytras had that satisfaction.
265. Mr Lytras was also himself attentive to the underlying expert analyses on which Mr Slijderink's work proceeded. For example Mr Lytras (very justifiably and correctly) took the "message" from Mr Kogler's opinion:

*"... that despite [the Gold Coast economy 2009/2010 the product was going to be – for example was going to be pitched – in particular Abadi was going to be pitched – at a level that would be acceptable to the market and I guess Mr Kogler's report to me gave me some confidence that sales were still happening in the Gold Coast. It was not just everything stopped."*<sup>292</sup>

266. That apt observation by Mr Lytras highlights the superficiality of Mr Norling's pessimism. In short (and at the risk of tedious repetition) Kosho's Abadi development and City Co's boutique hotel were adapted and pursued in an appropriate consciousness and embrace of post-GFC considerations. The analysis of those projects must be very specific to them rather than being inappropriately degraded by GFC-driven anxiety about

<sup>290</sup> The recognition of the pending GFC for six to nine months before the collapse of Lehman Bros in September 2008 and on and from that that event recognition of the full impact of the GFC was explained by Mr Lytras at T4-39 line 12 - T4-41, line 22

<sup>291</sup> T4-28, lines 20-23

<sup>292</sup> T4-41, lines 56 - T4-42, line 3

- a "parlous economy" or "the Gold Coast", in contrast to the close analysis upon which Kosho and City Co proceeded very soberly and with much work and expertise.
267. It may be noted that Mr Lytras' report<sup>293</sup> did not address a couple of matters that may be taken into account.
268. He explained that the time value of money as a basis of discount back to the claim dates is something that is sometimes done and sometimes not and if not why not.<sup>294</sup> He identified the potential conflict in outcomes between discount at inflation rates set against a statutory interest rate applicable to the claim as a sound foundation for his having left any such discount aside (and that it was he who had elected not to include it).<sup>295</sup>
269. Accepting that there should be discount for development risk on the Gold Coast<sup>296</sup> he emphasised the necessity to gauge that as relating to a Carrara market not "Nerang" market and re-emphasised, also in that context, the significance of PHV's confirmatory work on properly comparable developments and retrospectively, which was not challenged and emphatically supports Mr Slijderink's and Kosho's analysis.<sup>297</sup>
270. Mr Lytras identified other risk(s) which may ground discount but did not allocate any figure to those:<sup>298</sup> those were inability to obtain finance for the future stages of the development, any blow-out of costs in relation to it; higher interest rates on future finance, selling and obtaining completion of contracts struck off-the-plan. Those things noted, it was not suggested to Mr Lytras (or anyone else) that those factors meant that the Abadi project would fail post GFC; rather, quite deliberately, Trilogy's exploration of that with Kosho's witnesses were left at the level of identifiable risk, which is telling.
271. Mr Lytras has separately accounted for substantial equity available to Kosho and City Co in their properties in the combined sum of \$8,767,410 as at 30 June 2009 and \$7,329,574 as at 30 June 2010.<sup>299</sup> As Mr Lytras opined,<sup>300</sup> the equity in each property was an asset which, putting to one side the further benefits, namely the profits from the projects that could have flowed from them, has been lost in its entirety.
272. Put another way, Mr Lytras' assessment of the lost development profit from each project necessarily assumes, for there to have been a profit, that all project-specific expenses and liabilities including the finance facility and subsequent (extended or new) facilities would have been progressively repaid in full, according to their terms. The "loss of equity in the properties owned" component "gives some certainty to the Court",<sup>301</sup> as Mr Lytras put it,

<sup>293</sup> Exhibit 19

<sup>294</sup> T4-33, lines 39- T4-34, line 1

<sup>295</sup> T4-33, line 47 - T4-34, line 8

<sup>296</sup> T4-34, lines 30-32 where he offered a "stab in the dark" "in the range of 20 to 35 per cent" for that development risk

<sup>297</sup> T4-34, line 48 - T4-35, line 7, T4-36, line 41ff

<sup>298</sup> T4-35 lines 15- 56, T4-36, lines 2 - 35

<sup>299</sup> Exhibit 19, paras. 8.22, 9.14.

<sup>300</sup> Exhibit 19, paras. 2.8, 2.9.

<sup>301</sup> See T4-24, lines 10-13



and conceding the risks (both upside and downside) of further movements in value, that the companies enjoyed substantial equity that only would be diminished in the (unlikely) event a project did not break even.

**Discharge of Surfers Paradise Land as security for the finance facility**

273. In terms of the probable release of the Surfers Paradise Land, Trilogy's submission<sup>302</sup> is entirely false. Provisions for the release of the Surfers Paradise Land were included in both letters of offer and the conditions for its release well understood (and agreed).

274. The 2007 Letter of Offer at special condition (j) stated –

*"(j) The Lender agrees to release any encumbrance over Lot 3 Beach Road upon provision of-*

- (1) alternate equivalent security (cash or property) to the value of \$3,460,000 (GST ex), or*
- (2) the Project Loan to Value Ratio (LVR) not exceeding 71.5% on the basis of "Land Value As Is with Development Approval"*

*Any alteration to the original security as detailed in Security To Be Taken above is to be acceptable to CPL acting reasonably."*

275. The letter of 8 April 2009 from Kosho (by Mr Slijderink) is hardly remarkable given that it sought release of the City Co land prior to the date of approval of the finance facility – i.e., 24 June 2009.

276. Indeed Kosho's letter (8.04.09) stated –

*"Notably the existing security is sufficient to protect any City Pacific Limited interests in regards to the funding facility.*

*We look forward to confirmation that the City Co Pty Ltd Lot 3 Beach road property has been discharged as cross collateralized security.*

*We further confirm that on acceptance of our refinance application recently submitted for approval City Co Pty Ltd will again provide Lot 3 Beach Road as cross collateralized security..." [underline added]*

277. It is not surprising then that a similar provision as that contained in the 2007 Letter of Offer was included in the 2009 Letter of Offer, viz. -

*"(k) The Lender agrees to release any encumbrance over Lot 3 Beach Road upon provision of \$3,000,000.00 cash payment and/or achieving Project (Stage 1A) loan to value ratio of 67% and/or future Project Sub-stages achieving a loan to value ratio less than 70%. Any release of security will be subject to an updated valuation of the remaining security property dated within 20 days of the release."*

278. This was as a direct consequence no doubt of the conversations between Mr Slijderink and John Ellis and others – Exhibit 2 at page 19 (paras. 81-82) and pages 29 -31 (commence para. 115, bottom of page 29) -

<sup>302</sup> Trilogy Submission filed 10 December 2012, para. 27(b)

*Slijderink:* "Ok...now in regards to the cross collateralised security I confirm we are in agreement that we will put Lot 3 Beach Road back in as cross collateralised security on the proviso that when we demonstrate Stage One (A) LVR does not exceed 67% noting \$2,800,000 in prepaid interest monies and/or if we provide alternative security to achieve the 67% and/or pay cash to the value of \$3,000,000 you will release the property. Agreed?"

*Steve McCormick:* "Agreed".

*John Ellis:* "Agreed".

*Reiko Fujino:* "What does this mean?"

*Slijderink:* "It means that once we have locked in the costs for construction and civil works and demonstrate maximum 67% LVR as proposed for Stage One A Beach Road will be released as security. Also if the LVR went to say 100% and we wanted to discharge beach road we have to pay \$3,000,000 in cash."

*Reiko Fujino:* "So this can happen quickly"

*Slijderink:* "Yes once we finalise detailed design we can finalise costs. That's correct, yes?"

*John Ellis:* "Yes".

279. This was not challenged in cross-examination.

280. This is also consistent with the evidence of Mr McCormick at T2-86, line 15ff -

*Do you remember any conversation on that occasion about the City Co Beach Road property?— Yes. I know Mr Slijderink was very keen for us to release that as part of the security, which we weren't in agreeance with, however, did agree that if certain loan to security ratios were fulfilled, then that was an option.*

*Do you recall from the 2007 facility there having been a right in the borrowers, provided an LVR was at a certain level, to require the Beach Road property to be released as a security?— Yes, it was.*

281. It was never the intention of either Kosho or CPL that the Surfers Paradise Land remain as collateralized security for the term of the finance facility.

282. The evidence is entirely consistent with City Co's desire that the property be released as the earliest opportunity – no doubt to enable it to proceed with its own development.

283. Had Trilogy advanced the funds under the finance facility, it is more probable than not that the City Co property would have been released as cross-collateralized security. Kosho and City Co lost that chance by reason of the failure of Trilogy to advance those (or any) funds.

284. Kosho could only get to the stage of release with the funds promised to it under the finance facility – the funds to enable it to inter alia to commence its presales campaign and to construct (and in February 2010 settle the contract for) the Pavilion.

285. It is unremarkable, as was correctly conceded by Mr Slijderink in cross-examination,<sup>303</sup> that Trilogy might have insisted upon a fresh valuation of the Surfers Paradise Land prior

<sup>303</sup> T6-55, lines 29-33

to its release; similarly it is unremarkable that City Co did not obtain that fresh valuation given how events unfolded.

**s601 of the Corporations Act 2001**

286. Upon Trilogy becoming the responsible entity of the PFM Fund:

- (a) pursuant to section 601FS(1) of the *Corporations Act 2001*, the rights, obligations and liabilities of CPL in relation to the PFM Fund became the rights, obligations and liabilities of Trilogy, including in relation to the matters pleaded herein; and
- (b) pursuant to section 601FT(1) of the *Corporations Act*, upon Trilogy becoming the responsible entity of the PFM Fund, a document to which CPL was a party, in which reference is made to CPL or under which CPL acquired or incurred a right, obligation or liability, or might have acquired a right obligation or liability if CPL had remained the responsible entity, which document is capable of having effect after the change in responsible entity has effect as if TFM (and not CPL) was a party to it, was referred to in it or had or might have acquired the right, obligation and liability under it, including in relation to the matters pleaded herein.

287. In short Trilogy is fixed with liability arising from CPL's conduct, agreement(s) and dealings in relation to the subject facility just as much as such things in its time as the responsible entity.

**GUARANTEE ACTION – FUJINO –ats- TRILOGY**

288. Ms Fujino relies upon the matters pleaded by way of defence by Kosho in its action and taken up in her Defence and Counterclaim.<sup>304</sup>

289. Ms Fujino relies on the matters also agitated by Kosho for its part for discharge of or release from her guarantee. In the alternative there is no realisable sum on the guarantee having regard to Kosho's entitlements on its counter-claim.

290. Ms Fujino abandons the additional matters in her pleading as regards her personal capabilities and the circumstances of her executing the subject guarantee: viz subparagraph 12(b) and paragraphs 12A to 25 (inclusively) of her Counterclaim.

291. Pursuant to the terms of the Guarantee:

**"2. Guarantee**

<sup>304</sup> *Doherty & Ors v Murphy & Anor* [1996] 2 VR 553, *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439; cf *Forsyth v Gibbs* [2009] 1 Qd R 403, *Young v NAB* [2004] QASCA 298

*The Guarantor unconditionally and irrevocably guarantees to the Lender the due and punctual payment of the Moneys Hereby Secured to a maximum of the Guaranteed Amount in consideration of the Lender agreeing to provide or to continue to provide the Loan to the Borrower under the Loan Agreement."*

## Principles

292. The authorities illuminating the proper construction of guarantees are conveniently analysed in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton*,<sup>305</sup> where Basten JA said:

### *"Principles of construction"*

*[23] Before considering the proper construction of the indemnity clause, it is desirable to identify the principles governing the exercise. These were set out in the joint judgment in Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28; 217 CLR 424 at [17]-[23] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). Their Honours affirmed the principle stated by Lord Oliver of Aylmerton in Coghlan v SH Lock (Australia) Ltd (1987) 8 NSWLR 88 at 92 in relation to "certain well-known principles of construction in relation to guarantees":*

*Such a document falls to be construed strictly; it is to be read contra proferentem; and, in case of ambiguity, it is to be construed in favour of the surety.*

*[24] Those principles were restated in Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549 at 561, in the joint judgment of Mason ACJ, Wilson, Brennan and Dawson JJ:*

*At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety.*

*[25] In this respect, Andar Transport followed Chan v Cresdon Pty Ltd (1989) 168 CLR 242 at 256 which, in the joint judgment of Mason CJ, Brennan, Deane and McHugh JJ, set out with approval the passage just quoted from Ankar. The principles were applied in Chan so as to relieve a guarantor of the obligations of the lessee under a lease in circumstances where the lease, though executed, was not registered and thus had no effect in law, as opposed to giving rise to equitable rights flowing from the execution of the agreement.*

*[26] In Andar Transport, the application of the principles resulted in an indemnity clause being read down so as to limit the indemnity given by the appellant to "the indemnification of Brambles against any vicarious liability which Brambles might incur against third parties": at [24]. That result was achieved primarily because of the contractual context which allowed that "a suit against Brambles premised upon vicarious liability was, in these circumstances, a distinct possibility": at [25]."*

<sup>305</sup> (2008) 173 IR 412; [2008] NSWCA 114

*Discharge for the Lender's Failure to Make the Further Advance*

293. Rowlatt on the Law of Principal and Surety observes.<sup>306</sup>

*"It is essential that the principal should get the full benefit to procure which the surety intervened; otherwise the surety will not be bound. Thus, where the debt guaranteed was to be incurred in consideration of the conveyance of property subject to specified encumbrances, and there was another encumbrance unknown to the surety and forgotten by the creditor, the surety was relieved.*

*...  
Where the guarantee was in consideration of a bank 'lending' the principal the sum of £1,000 for seven days from the date of the guarantee, and the bank, without placing £1,000 to his credit, merely honoured cheques upon his current account, which did not create an overdraft of £1,000 within the seven days, it was held that the surety was not liable..."*

294. In *Lensworth Finance Limited v Worner*,<sup>307</sup> Worner executed a guarantee in favour of Lensworth in consideration of the sum of \$121,000 agreed to be lent to the principal debtor at the guarantor's request. In fact less than that amount was lent, because the borrower, after drawing down \$33,750, had failed to pay an amount of development costs that it was supposed to have paid, and had been dilatory with its interest payment, and the bank had relied on provisions in the agreement with the borrower, of which the guarantor was not aware, entitling it to decline, in those circumstances, to make further advances. It was held that the guarantor was not liable, as the lending of the full amount was a condition precedent to the guarantor's liability arising. Andrews J said:<sup>308</sup>

*"In Eshelby v Federated European Bank Limited [[1932] 1 KB 254], Swift J sets out statements to the effect that a guarantor is entitled to be held only 'to the strict letter of his engagement'."*

295. His Honour then set out a lengthy passage from the judgment in that case, and continued:<sup>309</sup>

*"A statement of Mellish LJ in Burton v Gray [[1873] 8 Ch App 932, 937], although dealing closely with the facts in that case, is a clear illustration of how such statements are to be applied:*

*'I am clearly of the opinion, on the construction of this document, that unless £1,000 sterling was advanced for seven days in accordance with the consideration as stated in the commencement, this guarantee and mortgage never came into operation. ... It seems to me quite impossible to put any other meaning on the words than this: 'if you will advance £1,000 instantly for seven days, then, and not otherwise, I agree to give the deposit of title deeds and to become security'.'*

<sup>306</sup> 4<sup>th</sup> ed at 84-85 (footnotes omitted)

<sup>307</sup> (1979) Qd R 159; See also *Ankar Pty Ltd v National Westminster Finance (Australia) Limited* (1987) 162 CLR 549 at 555-556

<sup>308</sup> At 165

<sup>309</sup> At 166

*In my view, the plaintiff here failed to lend the sum of \$121,000, relying upon conditions which could not be tacked on to the guarantee and the defendant was thereby discharged from any obligation thereunder."*

296. Where the expression "condition precedent" is used in this context, it means a condition precedent to liability under the guarantee (sometimes referred to as a condition subsequent, in contrast to a condition precedent to the formation of the contract),<sup>310</sup> and not a condition precedent to the guarantee contract being formed.
297. Trilogy breached the finance facility and failed to advance the agreed further funds. As in *Lensworth*, it does not matter that some moneys had been advanced. Therefore, the guarantor is discharged from liability under the guarantee.

**The Exclusion Clause (cl. 4) does not Protect the Lender**

298. Clause 4 of the guarantee provides:

**"4. Unconditional nature of obligation**

*The liability of the Guarantor under this Guarantee shall not be affected by anything which, but for this provision, might operate to release or otherwise exonerate it from its obligations in whole or in part, including, without limiting the generality of the foregoing:*

- (a) *the grant to the Borrower, the Guarantor or to any surety or other person of any time, waiver or other indulgence, or the discharge or release of the borrower or any other security or any other person;*

...

- (b) *the amendment ... of enforceability, failure, loss, release, discharge, abandonment ... either in whole or in part ... of any Transaction Document or any Encumbrance or Guarantee now or in the future held by or in favour of the Lender from ... the Borrower ... or by the taking of or failure to enter into any Transaction Document or to take any such Encumbrance or Guarantee or any Transaction Document or any such Encumbrance or Guarantee becomes void or voidable;*

...

*whether with or without the consent of the Guarantor."*

299. That clause is directed to some provision that "might operate to release or otherwise exonerate" the guarantors from a liability that has already arisen. The making of the advance from time to time up to the full amount is not regarded as releasing a guarantor, but rather as a condition precedent to liability on default by the principal debtor. The expression "exonerate" implies that there is a liability from which the guarantor is to be exonerated. Here, the liability has not arisen in the first place.

<sup>310</sup> See, e.g., Cheshire & Fifoot's Law of Contract, 8<sup>th</sup> Aust ed, paras. [5.21],[20.4]

300. The Full Court of the Supreme Court of Queensland considered analogous provisions in *The Fletcher Organisation Pty Ltd v Crocus Investments Pty Ltd*.<sup>311</sup> The relevant provisions there included:

"3. ... The Guarantor ... agrees and declares that any compounding, granting, giving of time, indulgence, waiver, deferment or varying as aforesaid, or any favour, grace or consideration whatsoever given or shown by the Mortgagee to the Mortgagor or to the Guarantor ... shall in no way or at no time prejudice, reduce or discharge the liabilities of the Guarantor hereunder.

...

6. ... In order to give full effect to the provisions of this instrument, the Guarantor agrees and declares that the Mortgagee shall be at liberty to act as though the Guarantor were the principal debtor and the Guarantor hereby waives all rights in connection with such provisions that it might otherwise be entitled to claim or enforce.

...

12. ... The Guarantor hereby waives all the Guarantors rights as surety (legal, equitable, statutory or otherwise) which may at any time be inconsistent with any of the provisions of this instrument or to the detriment or disadvantage of the Mortgagee."

301. In a compromise with the principal debtor, the lender had agreed to a discharge of a mortgage given by way of security for the loan in return for part payment of the debt. The judge at first instance held that these provisions did not stop the guarantor from being discharged. However, on appeal, his decision was reversed, and the lender was held entitled to recover from the guarantor. Shepherdson J said:<sup>312</sup>

"The question then is - did clause 6 exclude the second defendant's right to contribution and right to the benefit of every security held by the plaintiff. The answer to this involves a question of construction."

302. After considering a number of cases, his Honour concluded:<sup>313</sup>

"It may be said that these cases are referable to their own facts ... but they all show that a party originally a surety may contract himself out of certain rights which he, as surety, would otherwise have against the principal creditor, and may make himself liable to the creditor as if he were the principal debtor and not simply a surety.

I have come to the firm view that in clause 6 the second defendant agreed to be sued as if he were the principal debtor and he agreed that the plaintiff would not be subject to special restrictions imposed on it as creditor, including his right analogous to marshalling of securities ... and his right, assuming he did have it, or requiring the plaintiff to obtain and retain all securities listed in clause 6 of the heads of agreement."

<sup>311</sup> [1988] 2 QdR 517

<sup>312</sup> At 524

<sup>313</sup> At 527

303. Williams J came to the same conclusion, relying on clause 3, as well as clauses 6 and 12.<sup>314</sup>

304. Ryan J said:<sup>315</sup>

*"It is ... well established that a surety may be deprived by a provision in the guarantee of the contractual right which he would otherwise have to be discharged by the release of securities."*

305. After setting out clause 3, his Honour continued:

*"The learned trial judge expressed the opinion that the authority given by the guarantor to the financier in clause 3 ... was not sufficiently wide to authorise the financier to release a security given by the second guarantor."*

306. However, after a detailed analysis of clause 3, his Honour held that it did not save the guarantee.

307. His Honour went on to consider clauses 6 and 12, and concluded<sup>316</sup> that notwithstanding the requirement to read the document against the creditor, the reading contended for by the guarantor deprived them of all effect.

308. But in this case, whether or not such a clause protects the lender depends on a close analysis of the precise terms of the clause. It is submitted that the clause in the present case does not protect the lender from the consequences of non-fulfilment of a condition precedent to the guarantor's being liable, as opposed to events happening after the guarantor has become liable in consequence of a default by the borrower.

#### **Clause 5 (Principal and Independent Obligation)**

309. Clause 5 starts:

##### **"5. Principal and independent obligation**

*This Guarantee shall be:*

- (a) *A principal obligation and shall not be treated as ancillary or collateral to any other right or obligation;*

*... "*

310. The fact that the guarantee is not ancillary or collateral does not insulate against the principles referred to above applying: that is to say, the making of the further advance and the planning of the contemplated security are still conditions precedent to liability.

<sup>314</sup> At 537

<sup>315</sup> At 540

<sup>316</sup> At 543



**The Indemnity Clause (Clause 12)**

311. Clause 12 starts:

***"12. Indemnity against avoidance of moneys hereby secured***

*If any of the Moneys Hereby Secured ... are or may be irrecoverable from the Borrower and any such Moneys are not recoverable from the Guarantor by the Lender on the footing of a guarantee, then and in each case:*

*(i) the Guarantor, as a separate and additional liability, indemnifies the Lender ...;*

*..."*

312. In the present case, the moneys secured are not irrecoverable from the borrower. It is submitted that is not a case of the moneys lent being irrecoverable. So clause 12 does not apply.

31 January 2013

**R.G. Bain QC**

**I.A. Erskine**

**[Counsel for the Plaintiffs in Proceeding 4728/10 and the Defendant in Proceeding 10543/10]**

"GDM13"

**Australian Securities &  
Investments Commission**

**Form 388**

Corporations Act 2001  
284, 294B, 295, 298-301, 307, 308, 319, 321, 322  
Corporations Regulations  
1.0.08, 2M.3.01, 2M.3.03

# Copy of financial statements and reports

If there is insufficient space in any section of the form, you may photocopy the relevant page(s) and submit as part of this lodgement

**Company/scheme details**

Company/scheme name

TRILOGY FUNDS MANAGEMENT LIMITED

ACN/ARSN/PIN/ABN

080 383 679

**Lodgement details**

An image of this form will be available as  
part of the public register.

Who should ASIC contact if there is a query about this form?

ASIC registered agent number (if applicable)

Firm/organisation

TRILOGY FUNDS MANAGEMENT LIMITED

Contact name/position description

PHILIP RYAN

Telephone number (during business hours)

( ) 07 3039 2828

Email address (optional)

Postal address

GPO BOX 1648

Suburb/City

BRISBANE

State/Territory

QLD

Postcode

4001

**1 Reason for lodgement of statement and reports**

Tick appropriate box.

See Guide for definition of Tier 2 public  
company limited by guarantee

See Guide for definition of large proprietary  
company

See Guide for definition of small proprietary  
company

Dates on which financial year begins  
and ends

- ☒ A public company or a disclosing entity which is not a registered scheme or prescribed interest undertaking (A)
- ☐ A Tier 2 public company limited by guarantee (L)
- ☐ A registered scheme (B)
- ☐ Amendment of financial statements or directors' report (company) (C)
- ☐ Amendment of financial statements or directors' report (registered scheme) (D)
- ☐ A large proprietary company that is not a disclosing entity (H)
- ☐ A small proprietary company that is controlled by a foreign company for all or part of the period and where the company's profit or loss for the period is not covered by the statements lodged with ASIC by a registered foreign company, company, registered scheme, or disclosing entity (I)
- ☐ A small proprietary company, or a small company limited by guarantee that is requested by ASIC to prepare and lodge statements and reports (J)
- ☐ A prescribed interest undertaking that is a disclosing entity (K)

Financial year begins

01/07/11  
D D M M Y Y

to

Financial year ends

30/06/12  
D D M M Y Y

## 2 Details of large proprietary company

See Guide for definition of large and small proprietary companies.

If the company is a large proprietary company that is not a disclosing entity, please complete the following information as at the end of the financial year for which the financial statements relate:

A What is the consolidated revenue of the large proprietary company and the entities that it controls?

B What is the value of the consolidated gross assets of the large proprietary company and the entities that it controls?

C How many employees are employed by the large proprietary company and the entities that it controls?

D How many members does the large proprietary company have?

## 3 Auditor's or reviewer's report

Tick one box and complete relevant section(s)

Were the financial statements audited or reviewed?

☒ Audited - complete B only

☐ Reviewed - complete A and B

☐ No

If no, is there a class or other order exemption current for audit/review relief?

☐ Yes

☐ No

### A. Reviewed

Is the reviewer a registered company auditor, or member of The Institute of Chartered Accountants in Australia, CPA Australia Limited, or National Institute of Accountants and holds a practising certificate issued by one of those bodies?

☐ Yes

☐ No

### B. Audited or Reviewed

Is the opinion/conclusion in the report:

Modified? (The opinion/conclusion in the report is qualified, adverse or disclaimed)

☐ Yes

☒ No

Does the report contain an Emphasis of Matter and/or Other Matter paragraph?

☐ Yes

☒ No

#### 4 Details of current auditor or auditors

**Notes:**

- Registered schemes must advise ASIC of the appointment of an auditor on a Form 5137 *Appointment of scheme auditor* within 14 days of the appointment of the auditor.
- A public company limited by guarantee may, in some circumstances, have their accounts reviewed. These companies are still required to have an auditor and these details must be provided.

Auditor registration number (for individual auditor or authorised audit company)

Family name

Given name

or

Company name

ACN/ABN

or

Firm name (if applicable)

BDO AUDIT (QLD) PTY LTD

Office, unit, level

Street number and Street name

300 QUEEN STREET

Suburb/City

BRISBANE

State/Territory

QLD

Postcode

4000

Country (if not Australia)

Date of appointment

26/11/10

DD MM YY

A company may have two appointed auditors, provided that both auditors were appointed on the same date. Otherwise, an appointed auditor must resign, be removed or otherwise ceased before a subsequent appointment may be made.

Auditor registration number (for individual auditor or authorised audit company)

Family name

Given name

or

Company name

ACN/ABN

or

Firm name (if applicable)

Office, unit, level

Street number and Street name

Suburb/City

State/Territory

Postcode

Country (if not Australia)

## 5 Statements and reports to be attached to this form

Financial statements for the year (as required by s295(2) and accounting standards)

- Statement of comprehensive income, may also include a separate income statement for the year
- Statement of financial position as at the end of the year
- Statement of cash flows for the year
- Statement of changes in equity.

OR

If required by accounting standards -- the consolidated statements of comprehensive income/income statement, financial position, cash flows and changes in equity.

Notes to financial statements (see s295(3))

- Disclosures required by the regulations
- Notes required by the accounting standards
- Any other information necessary to give a true and fair view (see s297).

The signed directors' declaration about the statements and notes (see s295(4)).

The signed directors' report for the year, including the copy of the auditor's or reviewer's independence declaration (see s298 to s300A).

Signed auditor's report or, where applicable, reviewer's report (see s301, s307 to s308).

Concise report (if any) (see s319).

### Signature

See Guide for details of signatory.

I certify that the attached documents marked ( ) are a true copy of the original reports required to be lodged under s319 of the Corporations Act 2001.

Name

PHILIP RYAN

Signature



Capacity

☒ Director

☐ Company secretary

Date signed

3 1 1 0 1 2  
[D] [M] [Y]

### Lodgement

Send completed and signed forms to:  
Australian Securities and Investments Commission,  
PO Box 4000, Gippsland Mail Centre VIC 3841.

Or lodge the form electronically by:

- visiting the ASIC website [www.asic.gov.au](http://www.asic.gov.au)
- using Standard Business Reporting enabled software. See [www.sbr.gov.au](http://www.sbr.gov.au) for more details.

For more information

Web [www.asic.gov.au](http://www.asic.gov.au)

Need help? [www.asic.gov.au/question](http://www.asic.gov.au/question)

Telephone 1300 300 630

# **Trilogy Funds Management Limited**

**ABN: 59 080 383 679**

**AFS Licence No: 261 425**

## **Annual Financial Report For the year ended 30 June 2012**

**Trilogy Funds Management Limited**  
**Contents page**

	<b>Page No</b>
<b>Directors' report</b>	<b>1</b>
<b>Auditor's independence declaration</b>	<b>6</b>
<b>Statement of comprehensive income</b>	<b>7</b>
<b>Statement of financial position</b>	<b>8</b>
<b>Statement of changes in equity</b>	<b>9</b>
<b>Statement of cash flows</b>	<b>10</b>
<b>Notes to the financial statements</b>	<b>11</b>
<b>Directors' declaration</b>	<b>31</b>
<b>Independent audit report</b>	<b>32</b>

## Trilogy Funds Management Limited Directors' report

The Directors of Trilogy Funds Management Limited (Responsible Entity) (Company), a wholly owned subsidiary of Trilogy Capital Services Pty Limited (TCS) present their report together with the financial report for the Company for the financial year ended 30 June 2012.

### Corporate Information

The Company is incorporated and domiciled in Australia. The registered office and principal place of the Company is:

Brisbane Club Tower  
Level 10  
241 Adelaide Street, Brisbane, Queensland

### Directors

The names of the directors in office at any time during, or since the end of the financial year are:

<i>Name and qualifications</i>	<i>Age</i>	<i>Experience and special responsibilities</i>
Robert M Willcocks Independent Non-Executive Chairman BA, LL.B, LL.M	64	Chairman of the Audit, Compliance and Risk Management Committee Former partner with the law firm now called King & Wood Mallesons. Mr Willcocks has been a director (including Chairman) of a number of listed public companies. He is currently a director of the following listed public companies: ARC Exploration Limited, APAC Resources Limited (Hong Kong listed) and Living Cell Technologies Limited. Chairman - Responsible Entity since 9 October 2009
Rodger I Bacon Executive Deputy Chairman BCom(Merit), AICD, SFFin	66	Member of the Audit, Compliance and Risk Management Committee Former executive director of Challenger International Limited Mr Bacon is a director of several public and private companies including, Financial Services Institute of Australasia and Trilogy Capital Services Pty Ltd. Director - Responsible Entity since 9 July 2004
John C Barry Executive Director BA, ACA	60	Member of the Audit, Compliance and Risk Management Committee Former executive director of Challenger International Limited Mr Barry is a director of several public and private companies including Trilogy Capital Services Pty Ltd and Chairman of Westpac RE Limited Director - Responsible Entity since 9 July 2004
Philip A Ryan Executive Director and Company Secretary LL.B, Grad Dip Leg Prac, FTIA, FFIN	51	Mr Ryan is a solicitor and member of the Queensland Law Society Inc. Member of the Compliance Committee Former partner of a Brisbane law firm Mr Ryan is a director of several private companies including Trilogy Capital Services Pty Ltd Director - Responsible Entity since 13 October 1997



## Trilogy Funds Management Limited Directors' report

### Directors (continued)

<p><b>Rohan C Butcher</b>                      43      Member of the Lending Committee  Non-Executive Director  Grad Dip PM, BASc(QS),  Registered Builder,  Licensed Real Estate Agent</p>	<p>Consultant to several major public and private companies providing development management services  Director – Responsible Entity since 29 July 2008</p>
---	---

<p><b>Nigel A Chamier</b>                      61  Independent Non-Executive Director  OAM, RN01kl, FAPI,  FAIDC</p>	<p>Chairman of the Audit, Compliance and Risk Management Committee (resigned 14 May 2012)  Chairman of NAC Investments (Qld) Pty Ltd and a Director of several private companies  Mr Chamier is the Honorary Consul for Sweden  Former Joint Managing Director (Qld) Jones Lang LaSalle  Director – Responsible Entity since 14 October 2009 (resigned 14 May 2012)</p>
--	---

Directors have been in office since the start of the financial year to the date of this report unless otherwise stated.

### Principal activities

The Company holds an Australian Financial Services Licence (AFSL), and acts as the Responsible Entity for the following registered managed investment scheme's (Scheme's):

- Trilogy Monthly Income Trust (TMIT);
- Trilogy Wholesale First Mortgage Income Trust (TWPMIT);
- Pacific First Mortgage Fund (PFMF) (formerly City Pacific First Mortgage Fund);
- Trilogy Investor Choice MediLink Property Income Syndicate (MediLink);
- Trilogy Investor Choice Melbourne Campus Office Syndicate (Melbourne Campus);
- Trilogy HealthCare REIT (Healthcare REIT);
- Cape Park Funds (Cape Funds);
- Trilogy Epping Commercial Office Property Trust (TECOPT);
- Austgrowth Property Syndicate No 18 (APSPS);
- Austgrowth Property Syndicate No 18 Unit Trust (APSUT);
- Brisbane Property Syndicate (BNEPS) - (Property sold on 11 November 2011);
- Brisbane Property Syndicate Unit Trust (BNEUT) - (Property sold on 11 November 2011);
- Canberra Property Syndicate (CANPS) - (Property sold on 12 October 2012); and
- Canberra Property Syndicate Unit Trust (CANUT).

There has been no significant change in the nature of this activity during the year.

### Review of operations

#### Financial summary

The Company produced a net profit after tax of \$10,588 for the year ended 30 June 2012 (2011: Profit \$56,686), after recording impairment losses of \$99,022 (2011: \$81,463). Total revenues reduced by 18.0% in comparison to the previous financial year, largely as a result of the decline in the gross asset value of the PFMF.

During the year, the Company repaid \$400,000 (2011: \$500,000) against its subordinated loan facility, resulting in a balance at year end of \$1,750,000 (2011: \$2,150,000). The total assets of the Company amounted to \$4,310,580 as at 30 June 2012 (2011: \$5,210,799).

## **Trilogy Funds Management Limited Directors' report**

### **Dividends**

No dividends were declared or paid during the year (2011: nil), or since the end of the year.

### **Significant changes in state of affairs**

In the opinion of the Director's there were no significant changes in the state of affairs of the Company that occurred during the financial year.

### **Events subsequent to the end of the reporting period**

#### ***Proposal to replace LM Investment Management (LM) as Responsible Entity***

Subsequent to the end of the reporting period, the Company has issued a Notice of Meeting (NoM) and Explanatory Memorandum (EM) to unitholders in the LM Wholesale First Mortgage Income Fund (FMIF) and the LM Currency Protected Australian Income Fund (CPAIF), following a meeting convened by certain investors in those funds to occur on 1 November 2012 to consider and pass resolutions to replace LM with Trilogy Funds Management Limited as Responsible Entity for the FMIF and the CPAIF.

#### ***Appointment as Responsible Entity***

A meeting was held on 4 June 2012 and resumed on 14 June 2012, to vote on a resolution to remove APGF Management Limited (APGF) as Responsible Entity of APS Number 21 and APS Number 24 (property syndicates), and replace them with Trilogy Funds Management Limited. Legal proceedings were issued subsequent to the unitholder meeting.

On 9 August 2012 Justice M. Wilson made a consent order that APGF be removed as Responsible Entity, and Trilogy Funds Management Limited be appointed Responsible Entity for the property syndicates subject to the following terms and conditions listed in the Commitments Note 19.

On 13 August 2012 the Company was listed on the ASIC register as Responsible Entity for both property syndicates.

The books and records of the Scheme were transferred to the New Responsible Entity on 17 August 2012.

### ***Sale of investment properties***

#### ***Canberra Property Syndicate and the Canberra Unit Trust***

The investment property held by the Canberra Property Syndicate was sold on 12 October 2012. The Responsible Entity will proceed to wind-up the Scheme.

#### ***The Trilogy Healthcare REIT (Crows Nest)***

A contract of sale for the Crows Nest property owned by Trilogy Healthcare REIT was signed on 22 October 2012, with settlement scheduled for 30 days after the exchange of contracts. The Responsible Entity will proceed to wind-up the Scheme following the settlement of the property.

Other than the items mentioned above, there has not arisen in the interval between the end of the financial year and the date of this report any item, transaction or event of a material and unusual nature likely, in the opinion of the Company, to affect significantly the operations of the Company, the results of those operations, or the state of affairs of the Company, in future financial years.

### **Likely developments and expected results of operations**

Further information about likely developments in the operations of the Company and the expected results of those operations in future financial years has not been included in this report because disclosure of the information would be likely to result in unreasonable prejudice to the Company.

### **Environmental regulation**

The operations of the Company are not subject to any particular or significant environmental regulation under a law of the Commonwealth or of a State or Territory. There have been no known significant breaches of any other environmental requirements applicable to the Company.

## Trilogy Funds Management Limited Directors' report

### Options granted

No options over issued shares or interests in the Company were granted during or since the end of the financial year and there were no options outstanding at the date of this report.

Meetings of Directors'	Board Meetings		Audit, Compliance and Risk Management Committee Meetings	
	A	B	A	B
Robert M Willcocks (*)	11	5	6	4
Rodger I Bacon	11	10	2	2
John C Barry	11	10	6	5
Philip A Ryan	11	11	-	-
Trevor J D Gibson (resigned 1 August 2011)	2	2	-	-
Rohan C Butcher	11	11	-	-
Nigel A Chamier (resigned 14 May 2012)	10	6	5	4

A = Number of meetings held during the time the director was in office during the period.

B = Number of meetings attended.

(\*) Leave of absence granted.

### Indemnification of Directors and Officers

During the year, TCS paid a premium (the disclosure of the premium is prohibited by the contract) on behalf of the Company for the year ended 30 June 2012 to indemnify all current and former directors and officers of the Company (including agents of the Company) out of the property of the Company against:

- (a) any liability for costs and expenses which may be incurred by that person in defending civil or criminal proceedings in which judgement is given in that person's favour, or in which the person is acquitted, or in the connection with an application in relation to any such proceedings in which the court grants relief to the person under the Corporations Act 2001 (Act); and
- (b) liability incurred by the person, as a director or officer of the Company or of a related body corporate, to another person (other than the Company or a related body corporate) unless the liability arises out of conduct involving a lack of good faith.

No indemnities have been given or insurance premiums paid, during or since the end of the financial year for the auditor of the Company.

### Litigation and contingent liabilities

#### *Litigation involving borrowers of the PFMF and other Scheme's*

The Responsible Entity of the PFMF is party to litigation with borrowers (Kosho Pty Ltd (Receiver & Manager Appointed) and City Co Pty Ltd (Receiver & Manager Appointed)) alleging it had breached the finance facility agreement or, alternatively, the Trade Practices Act 1974 (Cth). The maximum awardable amount for this contingent liability is estimated to be \$81 million. The Responsible Entity has filed a defence denying liability in respect of this claim in June 2010.

The Responsible Entity's evidence in chief was filed and served on 10 September 2012, the trial commenced on 24 September 2012 and was expected to run for 7 days. On 2 October 2012 the matter was adjourned to 26 November 2012 (for 3 days) by reason of the borrowers' request to tender additional evidence (to which the Responsible Entity objected). The borrowers were ordered to pay the Responsible Entity's costs, fixed at \$24,000, by reason of the adjournment.

The Company is also party to other proceedings in its capacity as Responsible Entity, however Directors are not aware of any material liability likely to arise to the Company as a result of litigation matters.

## **Trilogy Funds Management Limited Directors' report**

### **Litigation and contingent liabilities (continued)**

#### ***Dispute with borrower***

The Company was awarded judgement for unpaid application fees due from a borrower during the year. The borrower subsequently appealed the ruling to the Queensland Court of Appeal, which was unsuccessful. The borrower has since sought leave to appeal to the High Court of Australia for which a decision is pending.


The Company has recently served a bankruptcy notice on the borrower and have received legal advice to the effect that if the bankruptcy action is successful, the borrower will be precluded from pursuing his appeal. The Company is unable to determine the likely amount of the recovery should it be successful in its action.

No person has applied for leave of Court to bring proceedings on behalf of the Company or intervene in any proceedings to which the Company is a party under section 237 of the Act.

#### **Auditor's independence declaration**

The Auditor's independence declaration is set out on page 6 and forms part of the Directors' report for the year ended 30 June 2012.

This report is made in accordance with a resolution of the Directors of the Company.



**Philip A Ryan**  
Executive Director  
Dated: 31 October 2012  
Brisbane



**Rodger I Bacon**  
Executive Deputy Chairman  
Dated: 31 October 2012  
Brisbane



Tel: +61 7 3237 5999  
Fax: +61 7 3221 9227  
www.bdo.com.au

Level 18, 308 Queen St  
Brisbane QLD 4000,  
GPO Box 457 Brisbane QLD 4001  
Australia

**DECLARATION OF INDEPENDENCE BY P A GALLAGHER TO THE DIRECTORS OF TRILOGY FUNDS  
MANAGEMENT LIMITED**

As the lead auditor of Trilogy Funds Management Limited for the year ended 30 June 2012, I declare that, to the best of my knowledge and belief, there have been no contraventions of:

- the auditor independence requirements of the *Corporations Act 2001* in relation to the audit; and
- any applicable code of professional conduct in relation to the audit.

A handwritten signature in black ink, appearing to read 'P A Gallagher', is written over the printed name.

P A Gallagher

Director

BDO Audit Pty Ltd

Brisbane, 31 October 2012

**Trilogy Funds Management Limited**  
**Statement of comprehensive income**  
**For the year ended 30 June 2012**

	Note	2012 \$	2011 \$
<b>Revenue and other income</b>			
Revenue from borrowers	4(a)	474,897	367,801
Revenue from managed investment schemes	4(b)	4,903,592	6,218,462
Other revenue	4(c)	166,916	192,452
		<u>5,545,405</u>	<u>6,778,715</u>
<b>Expenses</b>			
Accounting fees		(2,865)	(4,379)
Amortisation expense		(1,834)	-
Auditor's remuneration	5	(12,965)	(25,060)
Director's fees	17	(100,325)	(106,222)
Expenses from managed investment schemes		(785,305)	(828,953)
Finance costs	6	(243,959)	(318,448)
Impairment losses			
• Trade and other receivables	9(a)	(72,698)	(81,463)
• Investments	10	(26,324)	-
Legal fees		(21,443)	(24,382)
Management fees	15(a)	(4,246,040)	(5,319,039)
Other expenses		(16,069)	(12,173)
		<u>(5,629,827)</u>	<u>(6,720,119)</u>
<b>Profit for the year before tax</b>		<b>15,578</b>	<b>58,596</b>
Income tax expense	7	(4,990)	(1,910)
<b>Profit for the year</b>		<b><u>10,588</u></b>	<b><u>56,686</u></b>
<b>Other comprehensive income</b>			
Other comprehensive income		-	-
<b>Total comprehensive income for the year</b>		<b><u>10,588</u></b>	<b><u>56,686</u></b>

The Statement of comprehensive income is to be read in conjunction with the accompanying notes to the financial statements.

**Trilogy Funds Management Limited**  
**Statement of financial position**  
**As at 30 June 2012**

	Note	2012 \$	2011 \$
<b>Current assets</b>			
Cash and cash equivalents	8	2,691,317	2,140,107
Trade and other receivables	9	1,211,341	2,245,901
<b>Total current assets</b>		<u>3,902,658</u>	<u>4,386,008</u>
<b>Non-current assets</b>			
Trade and other receivables	9	149,000	218,254
Investments in joint ventures	10	-	-
Deferred tax assets	7	258,922	606,537
<b>Total non-current assets</b>		<u>407,922</u>	<u>824,791</u>
<b>Total assets</b>		<u>4,310,580</u>	<u>5,210,799</u>
<b>Current liabilities</b>			
Trade and other payables	11	1,665,581	1,735,163
Borrowings	12	-	100,000
<b>Total current liabilities</b>		<u>1,665,581</u>	<u>1,835,163</u>
<b>Non-current liabilities</b>			
Trade and other payables	11	149,000	149,000
Borrowings	12	1,744,687	2,138,449
Deferred tax liabilities	7	244,088	591,551
<b>Total non-current liabilities</b>		<u>2,137,775</u>	<u>2,879,000</u>
<b>Total liabilities</b>		<u>3,803,356</u>	<u>4,714,163</u>
<b>Net assets</b>	18(c)	<u>507,224</u>	<u>496,636</u>
<b>Equity</b>			
Share capital	13	392,400	392,400
Retained earnings		114,824	104,236
<b>Total equity</b>		<u>507,224</u>	<u>496,636</u>

The Statement of financial position is to be read in conjunction with the accompanying notes to the financial statements.

**Trilogy Funds Management Limited**  
**Statement of changes in equity**  
**For the year ended 30 June 2012**

	Share Capital			Cumulative redeemable preference shares	Retained earnings	Total equity
	Ordinary shares	A class shares		\$	\$	\$
Balance at 1 July 2010	100,400	27,000		286,000	47,550	439,950
Total comprehensive income						
Profit/(loss) for the year					56,686	56,686
Other comprehensive income for the year					-	-
Total comprehensive income for the year					56,686	56,686
Transactions with owners, in their capacity as owners						
Dividends paid or provided for	-	-		-	-	-
Shares issued during the year	-	-		-	-	-
Balance at 30 June 2011	100,400	27,000		286,000	104,236	496,636
Total comprehensive income						
Profit/(loss) for the year					10,588	10,588
Other comprehensive income for the year					-	-
Total comprehensive income for the year					10,588	10,588
Transactions with owners, in their capacity as owners						
Dividends paid or provided for	-	-		-	-	-
Shares issued during the year	-	-		-	-	-
Balance at 30 June 2012	100,400	27,000		286,000	114,824	507,224

The Statement of changes in equity is to be read in conjunction with the accompanying notes to the financial statements.



**Trilogy Funds Management Limited**  
**Statement of cash flows**  
**For the year ended 30 June 2012**

	Note	2012 \$	2011 \$
<b>Cash flows from operating activities</b>			
Receipts from customers		6,394,131	4,848,125
Payments to suppliers		(5,325,383)	(5,036,331)
Interest received		122,822	155,682
Finance costs		(240,360)	(315,881)
<b>Net cash provided by/(used in) operating activities</b>	14	<u>951,210</u>	<u>(347,405)</u>
<b>Net cash provided by/(used in) Investing activities</b>		<u>-</u>	<u>-</u>
<b>Cash flows from financing activities</b>			
Proceeds from borrowings		-	-
Repayment of borrowings		(400,000)	(500,000)
<b>Net cash used in financing activities</b>		<u>(400,000)</u>	<u>(500,000)</u>
<b>Net increase/(decrease) in cash held</b>		<u>551,210</u>	<u>(847,405)</u>
<b>Cash at beginning of financial year</b>		<u>2,140,107</u>	<u>2,987,512</u>
<b>Cash at end of financial year</b>	8	<u>2,691,317</u>	<u>2,140,107</u>

The Statement of cash flows is to be read in conjunction with the accompanying notes to the financial statements.

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 1 Reporting entity**

Trilogy Funds Management Limited, a wholly owned subsidiary of Trilogy Capital Services Pty Limited (TCS) is a public company limited by shares, incorporated in Brisbane on 13 October 1997, and domiciled in Australia. The financial report is for the year ended 30 June 2012.

The Company holds an Australian Financial Services Licence (AFSL), and is the Responsible Entity and Manager for a number of managed investment scheme's (MIS).

The registered office of the Company is located at Brisbane Club Tower, Level 10, 241 Adelaide Street, Brisbane, Queensland, 4000.

#### **Note 2 Basis of preparation**

##### **(a) Statement of compliance**

The financial statements are a general purpose financial report which has been prepared in accordance with Australian Accounting Standards including Australian Accounting Interpretations and the *Corporations Act 2001 (Act)*. The financial statements cover Trilogy Funds Management Limited as an individual entity. The financial statements of the Scheme complies with International Financial Reporting Standards and interpretations in their entirety.

The financial statements have been prepared on an accruals basis and are based on historical costs, modified where applicable, by the measurement at fair value for investment properties, financial assets and financial liabilities.

This financial report has been prepared for a for-profit entity.

The financial statements were approved by the Board of Directors of Trilogy Funds Management Limited on 31 October 2012.

##### **(b) Interests in joint ventures**

A joint venture is a contractual arrangement whereby two or more parties undertake an economic activity that is subject to joint control. The financial statements of the joint venture are prepared for the same reporting period as the Company, using consistent accounting policies. Adjustments are made to bring into line any dissimilar accounting policies that may exist in the underlying records of the joint venture.

##### **(c) Functional and presentation currency**

These financial statements are presented in Australian dollars, which is the Company's functional currency.

##### **(d) Key assumptions and sources of estimation**

The preparation of financial statements requires management to make judgements, estimates and assumptions that affect the application of accounting policies and the reported amounts of assets, liabilities, income and expenses. Actual results may differ from these estimates.

Estimates and underlying assumptions are reviewed on an ongoing basis. Revisions to accounting estimates are recognised in the period in which the estimate is revised and in any future periods affected.

In particular, information about significant areas of estimation uncertainty and critical judgements in applying accounting policies that have most significant effect on the amounts recognised are disclosed in:

- Note 9: Impairment losses (Trade and other receivables);
- Note 10: Investments in joint ventures (impairment losses);

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 2 Basis of preparation**

##### **(e) Key assumptions and sources of estimation**

- Note 13: Cumulative redeemable preference shares;
- Note 15(a): Financial risk management (credit risk).

#### **Note 3 Significant accounting policies**

The accounting policies set out below have been applied consistently to all periods presented in these financial statements, unless otherwise stated. The Scheme has not early adopted any accounting standard.

##### **(a) Financial instruments**

###### **(i) Classification**

Investments and financial assets in the scope of *AASB 139 Financial Instruments: Recognition and Measurement* are categorised as either financial assets at fair value through profit or loss, loans and receivables, held-to-maturity investments, or available-for-sale financial assets. The classification depends on the purpose for which the investments were acquired or originated. Designation is re-evaluated at each reporting date, but there are restrictions on reclassifying to other categories.

###### **(ii) Recognition**

The Scheme recognises financial assets and financial liabilities on the date it becomes a party to the contractual provisions of the instrument.

Financial assets are recognised using trade date accounting. From this date any gains and losses arising from changes in fair value of the financial assets or financial liabilities are recorded.

###### **(iii) Measurement**

Financial instruments are measured initially at fair value plus transaction costs except where the instrument is classed at fair value through profit or loss in which the transaction costs are expensed immediately. Transaction costs on financial assets and financial liabilities are amortised over the life of the asset or liability using the effective interest method.

Subsequent to initial recognition, all instruments classified at fair value through profit or loss are measured at fair value with changes in their fair value recognised in the profit or loss.

Loans and receivables are financial assets with fixed or determinable payments that are not quoted in an active market. Such assets are recognised initially at fair value plus any directly attributable transaction costs. Financial assets classified as loans and receivables subsequently are carried at amortised cost using the effective interest rate method, less impairment losses, if any.

Financial liabilities, other than those at fair value through profit or loss, are measured at amortised cost using the effective interest rate.

###### **(iv) Impairments**

Financial assets, other than those at fair value through profit or loss, are assessed for indicators of impairment at the end of each reporting period. Financial assets are considered to be impaired when there is objective evidence that, as a result of one or more events that occurred after the initial recognition of the financial asset, the estimated future cash flows of the investment have been affected.

An impairment loss in respect of a receivable carried at amortised cost is reversed if the subsequent increase in recoverable amount can be related objectively to an event occurring after the impairment loss was recognised.

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 3 Significant accounting policies (continued)**

##### **(a) Financial instruments (continued)**

###### **(v) Derecognition**

The Scheme derecognises a financial asset when the contractual rights to the cash flows from the financial asset expire or it transfers the financial asset and the transfer qualifies for derecognition in accordance with AASB 139.

The Scheme uses the weighted average method to determine realised gains and losses on derecognition of financial assets.

A financial liability is derecognised when the obligation specified in the contract is discharged, cancelled or expires.

###### **(vi) Specific instruments**

###### ***Cash and cash equivalents***

Cash comprises current deposits with banks. Cash equivalents are short-term highly liquid investments that are readily convertible to known amounts of cash, are subject to an insignificant risk of changes in value, and are held for the purpose of meeting short-term cash commitments rather than for investment or other purposes.

###### **(a) Revenue recognition**

Revenue is recognised to the extent that it is probable that the economic benefits will flow to the Company and the revenue can be reliably measured. The following specific recognition criteria must also be met before revenue is recognised:

###### **Revenue from borrowers**

###### ***Administration and performance***

The Company derives a fee from borrowers for managing the lending operations of the mortgage investment schemes. The fee is recognised as revenue when the Company has a right to receive the revenue.

###### ***Application, settlement and exit fees***

The Company is entitled to a fee from borrowers on the approved value of loans. The fee is recognised as revenue on the date the loan has settled.

###### **Revenue from MIS**

###### ***Trust establishment fees***

The Company is entitled to an establishment fee on the date of acquisition of a property for a syndicate. The fee is recognised as revenue on the date of acquisition.

###### ***Equity generation fees***

The Company is entitled to an equity generation fee for raising investor funds to reduce the debt on a property syndicate. The fee is recognised as revenue on a proportional basis to the amount of funds raised.

###### ***Selling and performance fees***

The Company may be entitled to a fee from the sale of a property syndicate where the net proceeds from sale exceed a particular benchmark. The fee is recognised as revenue when the Company has a right to receive it.

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 3 Significant accounting policies (continued)**

##### **(a) Revenue recognition (continued)**

###### *Cost recovery fees*

The Company levies a fee on the Pacific First Mortgage Fund (formerly City Pacific First Mortgage Fund) (PFMF) for the provision of custodian and investor registry services. This fee is determined by applying 12 basis points (bps) p.a. (plus GST, less reduced input tax credits (RITC)) to the gross asset value of the Scheme.

###### *Interest revenue*

Interest revenue is recognised using the effective interest method. All revenue is stated net of the amount of goods and services tax (GST).

###### *Other*

The Company incurs direct expenses on behalf of the MIS which it seeks recovery from the Scheme at cost. Cost recovery fees are recognised as revenue when the Company has a right to receive it.

##### **(b) Expenses**

All expenses, including management fees, are recognised in the profit or loss on an accruals basis.

##### **(c) Taxation**

###### *Income tax*

The income tax expense for the year is the tax payable on the current period's taxable income based on the national income tax rate for each jurisdiction adjusted by changes in deferred tax assets and liabilities attributable to temporary differences between the tax bases of assets and liabilities and their carrying amounts in the financial statements, and to unused tax losses.

Deferred tax assets and liabilities are recognised for temporary differences at the tax rates expected to apply when the assets are recovered or liabilities are settled, based on those tax rates which are enacted or substantially enacted for each jurisdiction. The relevant tax rates are applied to the cumulative amounts of deductible and taxable temporary differences arising from the initial recognition of an asset or a liability. No deferred tax asset or liability is recognised in relation to these temporary differences if they arose in a transaction, other than a business combination, that at the time of the transaction did not affect either accounting profit or taxable profit or loss.

Deferred tax assets are recognised for deductible temporary differences and unused tax losses only if it is probable that future taxable amounts will be available to utilise those temporary differences and losses.

Deferred tax assets and liabilities are offset when there is a legally enforceable right to offset current tax assets and liabilities and when the deferred tax balances relate to the same taxation authority. Current tax assets and tax liabilities are offset where the entity has a legally enforceable right to offset and intends either to settle on a net basis, or to realise the asset and settle the liability simultaneously. Current and deferred tax balances attributable to amounts recognised directly in equity are also recognised directly in equity.

###### *Goods and Services Tax (GST)*

Revenues, expenses and assets are recognised net of the amount of GST, except where the amount of GST incurred is not recoverable from the Australian Tax Office. In these circumstances the GST is recognised as part of the cost of acquisition of the asset or as part of an item of the expense. Receivables and payables in the statement of comprehensive income are shown inclusive of GST.

Cash flows are presented in the statement of cash flows on a gross basis, except for the GST component of investing and financing activities, which are disclosed as operating cash flows.

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 3 Significant accounting policies (continued)**

##### **(d) Interest bearing loans and liabilities**

All loans and borrowings are initially recognised at the fair value of the consideration received less directly attributable transaction costs.

After initial recognition, interest bearing loans and borrowings are subsequently measured at amortised cost using the effective interest method. Fees paid on the establishment of loan facilities that are yield related are included as part of the carrying amount of the loans and borrowings.

Borrowings are classified as current liabilities unless the Company has an unconditional right to defer settlement of the liability for at least 12 months after the reporting date.

##### **(e) Borrowings costs**

Borrowings are initially recognised at fair value, net of transactions costs incurred. Borrowings are subsequently measured at amortised costs using the effective interest rate method. Under this method, fees, costs, discounts and premiums directly related to the financial liability are spread over its expected life. Borrowings are classified as current liabilities unless the Company has an unconditional right to defer settlement of the liability for at least 12 months after reporting date.

Finance costs directly attributable to the acquisition, construction and production of assets that necessarily take a substantial period of time to prepare for their intended use or sale, are added to the cost of those assets, until such time as the assets are substantially ready for their intended use. All other finance costs are recognised in the profit or loss in the period in which they are incurred.

##### **(f) Trade and other receivables**

Receivables are recognised and carried at original amount, less a provision for any uncollectible debts. An estimate for doubtful debts is made when collection of an amount is no longer probable. Bad debts are written off when identified.

Amounts are generally received within 30 days of being recorded as receivables.

##### **(g) Impairment of assets**

At the end of each reporting period, the Company assesses whether there is any indication that an asset maybe impaired. The assessment will include considering external and internal sources of information. If such an indication exists, an impairment test is carried out on the asset by comparing the recoverable amount of the asset to its carrying value. Any excess of the asset's carrying value over its recoverable amount is expensed to the profit or loss.

Where it is not possible to estimate the recoverable amount of an individual asset, the Company estimates the recoverable amount of the cash-generating unit to which the asset belongs.

##### **(h) Trade and other payables**

Trade and other payables represent the liability outstanding at the end of the reporting period for goods and services received by the Group during the reporting period, which remains unpaid. The balance is recognised as a current liability with the amounts normally paid within 30 days of recognition of the liability.

##### **(i) Share capital**

Share capital is recognised at the fair value of the consideration received by the Company. Any transaction costs arising on the issue of ordinary shares are recognised directly in equity as a reduction of the share proceeds received.

# Trilogy Funds Management Limited

## Notes to the financial statements For the year ended 30 June 2012

### Note 3 Significant accounting policies (continued)

#### (i) Comparative figures

When required by Accounting Standards, comparative figures have been adjusted to conform to changes in presentation for the current year.

#### (k) New and amended standards and interpretations

A number of new standards, amendments and interpretations are effective for annual periods beginning after 1 July 2011, and have not been applied in preparing these financial statements. None of these is expected to have a significant effect on the financial statements, except for the

#### (i) AASB 9 Financial Instruments (effective from 1 January 2015)

AASB 9 Financial Instruments addresses the classification, measurement and de-recognition of financial assets and financial liabilities. It simplifies the approach for classification and measurement of financial assets compared with the requirements of AASB 139. Financial assets are to be classified based on (a) the objective of the entity's business model for managing the financial assets; and (b) the characteristics of the contractual cash flows. This replaces the numerous categories of financial assets in AASB 139. The Responsible Entity does not plan to adopt this standard early and the extent of the impact has not been determined.

### Note 4 Revenue and other income

	Note	2012 \$	2011 \$
(a) Revenue from borrowers			
Administration and performance fees		202,399	153,291
Application and settlement fees		272,498	214,510
Total revenue from borrowers	15(a)	474,897	367,801
(b) Revenue from MIS			
Expense recoveries		481,719	468,113
Selling and performance fees		884,243	-
Management fees		3,562,160	5,802,270
Management fees waived/rebated		(24,530)	(51,921)
Total revenue from MIS	15(a)	4,903,592	6,218,462
(c) Other revenues			
Interest revenue		123,352	165,718
Other revenue		43,564	26,734
Total other revenues		166,916	192,452
Total revenue and other income		5,545,405	6,778,715

### Note 5 Auditor's remuneration

During the year the following fees were paid or payable for services provided by the auditor of the Company:

- audit and review of the financial reports of the Company (i)	(8,715)	(21,060)
- other assurance services in relation to the Company (i)		
• compliance plan audit	(2,500)	(2,500)
	(11,215)	(23,560)
- other services (ii)		
• taxation services	(1,750)	(1,500)
	(1,750)	(1,500)
	(12,965)	(25,060)

(i) The Responsible Entity engaged BDO Audit Pty Ltd as the Company's auditor. Total remuneration paid and or payable to BDO Audit Pty Ltd for the year ended 30 June 2012 totalled \$11,215 (2011: \$23,560), which includes an over-accrual of \$11,310 from previous financial years.

# Trilogy Funds Management Limited

## Notes to the financial statements For the year ended 30 June 2012

### Note 5 Auditor's remuneration (continued)

(ii) Taxation services have been undertaken by BDO Pty Ltd, a related practice of BDO Audit Pty Ltd.

Note	2012	2011
	\$	\$
Amortised borrowing costs	12(iii) (2,567)	(2,567)
Interest expense	12(i) (241,392)	(315,881)
	<u>(243,959)</u>	<u>(318,448)</u>

### Note 7 Income tax expense

The major components of income tax expense are:

Income tax expense comprises:

Current tax	(4,838)	124,094
Deferred tax	(152)	(141,835)
Under provision in respect of prior years	-	15,831
Income tax expense	<u>(4,990)</u>	<u>(1,910)</u>

The aggregate amount of income tax expense attributable to the financial year differs from the amount calculated on the net operating profit. The differences are reconciled as follows:

Accounting profit before tax from continuing operations	15,578	58,596
Income tax expense calculated @ 30% (2011: 30%)	(4,673)	(17,579)
Less: Tax effect of;		
• Permanent differences	(317)	(162)
• Net over/under provision from prior year	-	15,831
Aggregate income tax expense	<u>(4,990)</u>	<u>(1,910)</u>

	Opening balance	Charged to income	Charged directly to equity	Exchange differences	Closing balance
<b>2012</b>					
Deferred tax assets	\$	\$	\$	\$	\$
Current year tax loss	124,094	(124,094)	-	-	-
Carried forward tax losses from prior years	26,670	(26,670)	-	-	-
Trade and other payables	455,773	(196,851)	-	-	258,922
	<u>606,537</u>	<u>(347,615)</u>	-	-	<u>258,922</u>
<b>2012</b>					
Deferred tax liabilities					
Trade and other receivables	591,551	(347,463)	-	-	244,088
	<u>591,551</u>	<u>(347,463)</u>	-	-	<u>244,088</u>
Net deferred tax	<u>14,986</u>	<u>(152)</u>	-	-	<u>14,834</u>
<b>2011</b>					
Deferred tax assets					
Current year tax loss	-	124,094	-	-	124,094
Carried forward tax losses from prior years	26,670	-	-	-	26,670
Trade and other payables	47,343	408,430	-	-	455,773
	<u>74,013</u>	<u>532,524</u>	-	-	<u>606,537</u>



# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

### Note 7 Income tax expense (continued)

	Opening balance	Charged to income	Charged directly to equity	Exchange differences	Closing balance
2011					
Deferred tax liabilities	\$	\$	\$	\$	\$
Trade and other receivables	57,117	534,434	-	-	591,551
	57,117	534,434	-	-	591,551
Net deferred tax	16,896	(1,910)	-	-	14,986

### Note 8 Cash and cash equivalents

	2012	2011
	\$	\$
Cash at bank and in hand	966,307	115,097
Short-term bank deposits	1,725,010	2,025,010
	2,691,317	2,140,107

The effective interest rate on short-term bank deposits was 5.70% p.a. (2011: 6.24% p.a.) these deposits have an average maturity of 183 days (2011: 142 days).

### Note 9 Trade and other receivables

Trade receivables		43,355	11,536
Other receivable		57,129	84,340
Prepaid expenses		5,500	-
Interest receivable		36,237	35,707
Related party loan - MIS	15(a)	25	123,818
Related party receivable - MIS	15(a)	1,055,522	1,973,917
Related party receivable - Trilogy Capital Services Pty Ltd (TCS)	15(a)	149,000	218,254
Related party receivable - Cyre Trilogy Investment Management Pty Ltd (CTIM)	15(a)	14,460	16,583
		1,361,228	2,464,155
Impairment losses		(887)	-
		1,360,341	2,464,155
Represented by:			
Current		1,211,341	2,245,901
Non-current		149,000	218,254
		1,360,341	2,464,155

#### (a) Provision for impairment of receivables

At 30 June 2012, as part of the annual balance date review procedures the Company recorded impairment losses in respect of its trade receivables of \$72,698 (2011: \$81,463) for the year. During the year the Directors wrote off \$71,811 as a bad debt (2011: \$100,899).

Movement in the provision for impairment of receivables is as follows:

	Opening balance	Charge for the year	Amounts written off	Closing balance
	\$	\$	\$	\$
2012				
Trade receivables	-	72,698	(71,811)	887
	-	72,698	(71,811)	887
2011				
Trade receivables	19,436	81,463	(100,899)	-
	19,436	81,463	(100,899)	-

# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

### Note 9 Trade and other receivables (continued)

#### (a) Provision for impairment of receivables (continued)

The Company considers that, based on evidence available as at 30 June 2012, the balance of net impaired trade debtors will be recovered in full and accordingly no further impairment losses have been recorded.

#### (b) Past due but not impaired receivables

The Company has a significant concentration of credit risk with respect to a single counterparty other than those receivables specifically provided for and mentioned within Note 9. The main source of credit risk to the Company is considered to relate to the class of assets described as Related party receivable - MIS.

The following table details the Company's trade and other receivables exposed to credit risk (prior to collateral and other credit enhancements) with ageing analysis and impairment provided for thereon. Amounts are considered as 'past due' when the debt has not been settled within the terms and conditions agreed between the Company and the customer or counterparty to the transaction. Receivables that are past due are assessed for impairment by ascertaining solvency of the debtors and are provided for where there are specific circumstances indicating that the debt may not be fully repaid to the company.

The balances of receivables that remain within initial trade terms (as detailed in the table) are considered to be of high credit quality.

	Gross Amount \$	Past due and impaired \$	Past due but not impaired (days overdue) less than 30 \$	31 to 60 \$	61 to 90 \$	Greater than 90 \$
<b>2012</b>						
Trade receivables	43,355	-	20,181	14,708	4,645	3,821
Related party receivable - MIS	1,055,522	-	623,927	210,035	205,824	
Related party loan - MIS	25	-	25	-	-	-
Related party receivable - TCS	149,000	-	-	-	-	149,000
Related party receivable - CTIM	14,460	-	14,460	-	-	-
<b>Total</b>	<b>1,262,362</b>	<b>-</b>	<b>658,593</b>	<b>224,743</b>	<b>210,469</b>	<b>152,821</b>
<b>2011</b>						
Trade receivables	11,536	-	11,186	-	-	350
Related party receivable - MIS	1,973,917	-	519,296	924,961	517,636	12,024
Related party loan - MIS	123,818	-	123,818	-	-	-
Related party receivable - TCS	218,254	-	-	19,254	-	199,000
Related party receivable - CTIM	16,583	-	16,583	-	-	-
<b>Total</b>	<b>2,344,108</b>	<b>-</b>	<b>670,883</b>	<b>944,215</b>	<b>517,636</b>	<b>211,374</b>

The Company does not hold any financial assets whose terms have been renegotiated, but which would otherwise be past due or impaired.

#### (c) Collateral pledged

No collateral is held over trade and other receivables.

# Trilogy Funds Management Limited

## Notes to the financial statements For the year ended 30 June 2012

<b>Note 10 Investments in joint ventures</b>	<b>2012</b>	<b>2011</b>
	\$	\$
CTIM	26,324	-
Impairment losses	(26,324)	-
	<u>-</u>	<u>-</u>

The Company entered into a joint venture agreement with Cyre Funds Management Limited (CYRE) to form Cyre Trilogy Investment Management Pty Ltd, a property and investment management entity. Under the Heads of Agreement governing the operation, Trilogy Funds Management Ltd holds a 50% interest in CTIM. The results of operations from CTIM are not material, hence no disclosure has been made in this financial report.

### (a) Provision for impairment of investments

At 30 June 2012, as part of the annual balance date review procedures the Company recorded impairment losses in respect of its investment in CTIM of \$26,324 (2011: Not applicable) for the year.

Movement in the provision for impairment of investments is as follows:

	Opening balance	Charge for the year	Amounts written off	Closing balance
	\$	\$	\$	\$
<b>2012</b>				
Investments	-	26,324	-	26,324
	<u>-</u>	<u>26,324</u>	<u>-</u>	<u>26,324</u>
<b>2011</b>				
Investments	-	-	-	-
	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>

<b>Note 11 Trade and other payables</b>	<b>Note</b>	<b>2012</b>	<b>2011</b>
		\$	\$
Audit and tax fees		20,325	26,410
GST payable		157,133	92,655
Income tax payable		4,839	-
Related party payable - Rojacan Pty Ltd	15(a)	149,000	149,000
Related party payable - MIS	15(a)	68,297	-
Related party payable - BTIM	15(a)	768,163	1,410,142
Related party payable - CTIM	15(a)	213,964	16,583
Related party payable - TCS	15(a)	287,556	6,849
Trade payables		145,304	182,524
		<u>1,814,581</u>	<u>1,884,163</u>
<i>Represented by:</i>			
Current		1,865,581	1,735,163
Non-current		149,000	149,000
		<u>1,814,581</u>	<u>1,884,163</u>

### Note 12 Borrowings

Loan - Popandnic Pty Ltd (BESF)	-	100,000
Loan - Bacon Management Services Pty Limited (BMS)	1,744,687	2,138,449
	<u>1,744,687</u>	<u>2,238,449</u>
<i>Represented by:</i>		
Current	-	100,000
Non-current	1,744,687	2,138,449
	<u>1,744,687</u>	<u>2,238,449</u>

# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

### Note 12 Borrowings (continued)

The details of borrowings as at 30 June 2012 are set out below:

Facility	Secured	Maturity date	Facility 30 Jun 2012	Utilised 30 Jun 2012	Facility 30 Jun 2011	Utilised 30 Jun 2011
Loan BESF (ii)	Yes	30/06/2012	-	-	200,000	100,000
Loan BMS (i)	Yes	28/07/2019	3,150,000	1,750,000	3,150,000	2,150,000
Total facilities			3,150,000	1,750,000	3,350,000	2,250,000
Less unamortised transaction costs (iii)				(5,313)		(11,551)
Total borrowing			3,150,000	1,744,687	3,350,000	2,238,449

(i) The Company entered into a loan agreement with Bacon Management Services Pty Limited ATF the Bacon Family Trust (an entity associated with an Executive Director of the Company) on 24 July 2009. The purpose of the loan was to provide funding in support of the Company's AFSL requirements (as at 30 June 2012 the amount of the loan which has been subordinated with ASIC totals \$1,750,000 (2011: \$2,250,000)). The interest rate charged on the facility is the business overdraft rate issued by Westpac Banking Corporation Limited (Westpac) plus 2.00% p.a. margin to be reset quarterly.

Interest	2012	2011
Variable	10.71%	11.81%

The loan was written on normal commercial terms and conditions. The Company repaid \$400,000 against the facility during the year (2011: \$500,000).

(ii) The Company entered into a loan agreement with Popandnic Pty Ltd ATF for the Bacon Executive Superannuation Fund (an entity associated with an Executive Director of the Company) on 30 June 2011 to fund the costs associated with the Epping Commercial Office Income Trust (EPCOIT). The Company ultimately resolved not to proceed with the property acquisition and the loan was subsequently repaid.

(iii) Deferred borrowing costs comprise all costs in relation to the establishment, arrangement and documentation of the debt facility. Such costs are recognised as part of the amortised cost of the borrowing using the effective interest method.

Note 13 Issued capital	2012	2011
	\$	\$

#### (a) Share capital

##### Ordinary shares

100,400 (2011: 100,400) fully paid ordinary shares	100,400	100,400
	100,400	100,400

##### A class shares

27,000 (2011: 27,000) fully paid A class shares	27,000	27,000
	27,000	27,000

##### Cumulative redeemable preference shares

265,000 (2011: 265,000) fully paid cumulative redeemable preference shares	265,000	265,000
	265,000	265,000

# Trilogy Funds Management Limited

## Notes to the financial statements For the year ended 30 June 2012

### Note 13 Issued capital (continued)

#### (b) Movement in share capital

	2012 Number	2011 Number
Balance at 1 July	392,400	392,400
New shares issued	-	-
Shares redeemed	-	-
Balance at 30 June	<u>392,400</u>	<u>392,400</u>

#### (c) Terms and conditions

The ordinary shares, A class shares and cumulative redeemable preference shares entitle the holder to receive notice of meetings and to cast one vote for each share held. All shares carry the right to receive dividends when declared at the discretion of the Directors, however the amount declared on the shares of any such class may be at a higher or lower rate than or at the same rate as the dividend declared on the shares of the other classes provided that the shares in each class are treated equally. Upon a reduction of capital or winding up of the company, each share class ranks equally with other shares in the capital of the Company.

### Note 14 Reconciliation of cash flow from operations with profit for the year

	2012 \$	2011 \$
Profit for the year	10,588	56,686
<i>Adjustments for:</i>		
Amortised borrowing costs	2,567	2,567
Impairment - loans and other receivables	72,698	81,463
<i>Change in operating assets and liabilities:</i>		
(Increase)/decrease in trade and other receivables	1,103,813	(1,722,850)
(Increase)/decrease in deferred taxes	347,615	(532,524)
Increase/(decrease) in trade and other payables	(69,582)	1,232,819
Increase/(decrease) in deferred tax liabilities	(347,463)	534,434
<i>Adjustments for balance sheet:</i>		
(Increase)/decrease in trade and other receivables	(172,697)	-
Increase/(decrease) in trade and other payables	3,671	-
Net cash provided by operating activities	<u>951,210</u>	<u>(347,405)</u>

### Note 15 Related party transactions

#### (a) Transactions with related parties

Transactions between related parties are on normal commercial terms and conditions no more favourable than those available to other parties unless otherwise stated.

The following transactions occurred with related parties:

		2012	2011
<i>Transactions recorded in the Statement of comprehensive income</i>	Note	\$	\$
Revenue from borrowers	4(a)	474,897	367,801
Revenue from managed investment scheme's (refer Table 15.1)	4(b)	<u>4,903,592</u>	<u>6,218,462</u>
		<u>5,378,489</u>	<u>6,586,263</u>

# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

<b>Note 15</b>	<b>Related party transactions (continued)</b>	<b>Note</b>	<b>2012</b>	<b>2011</b>
	<b>(a) Transactions with related parties (continued)</b>		<b>\$</b>	<b>\$</b>
<b>Transactions recorded in the Statement of comprehensive income</b>				
	<b>Management fees expense</b>			
	Management fees - TCS (i)		(1,269,563)	(1,032,873)
	Management fees - Balmain Trilogy Investment Management Pty Limited (BTIM) (ii)		(2,170,278)	(4,286,166)
	Management fees - (CTIM) (iii)		(806,199)	-
			<u>(4,246,040)</u>	<u>(5,319,039)</u>
	Finance costs (iv)		(241,391)	(315,881)
	Director's fees		(100,325)	(106,222)
			<u>(341,716)</u>	<u>(422,103)</u>
			<u>(4,587,756)</u>	<u>(5,741,142)</u>

## Transactions recorded in the Statement of financial position

### Assets

Related party loan - MIS (refer table 15.1)	25	123,818
Related party receivable - MIS (refer table 15.1)	1,055,522	1,973,917
Related party receivable - TCS	149,000	218,254
Related party receivable - CTIM	14,460	16,583
<b>Total assets</b>	<b>1,219,007</b>	<b>2,332,572</b>

### Liabilities

Related party payable - BTIM	(768,163)	(1,410,142)
Related party payable - CTIM	(213,964)	(16,583)
Related party payable - MIS (refer table 15.1)	(68,297)	-
Related party payable - Rojacan Pty Limited	(149,000)	(149,000)
Related party payable - TCS	(287,556)	(6,849)
<b>Borrowings</b>	<b>(1,744,687)</b>	<b>(2,238,449)</b>
<b>Total liabilities</b>	<b>(3,231,666)</b>	<b>(3,821,023)</b>
<b>Net assets</b>	<b>(2,012,659)</b>	<b>(1,488,451)</b>

(i) Represents charges by TCS to the Company for the provision of management, client service, accounting, administration and compliance services;

(ii) Upon the Company's appointment as Responsible Entity for the PFMF, it entered into an agreement with BTIM to provide asset management services to the Company on behalf of the Scheme. BTIM is a joint venture enterprise between TCS and Balmain Corporation;

(iii) Upon the Company's appointment as Responsible Entity for the Austgrowth funds, it entered into an agreement with CYRE to provide asset management services to the Company on behalf of the Scheme. CYRE Trilogy is a joint venture enterprise between TFM and CYRE; and

(iv) Represents interest charged on the loan from BMS to the Company.

# Trilogy Funds Management Limited

## Notes to the financial statements For the year ended 30 June 2012

### Note 15 Related party transactions (continued)

#### (a) Transactions with related parties (continued)

Table 15.1	2012			2011		
	Revenue from MIS \$	Related party receivable (i) \$	Related party payable \$	Revenue from MIS \$	Related party receivable (i) \$	Related party payable \$
TMIT	73,682	15,457	68,297	70,177	8,145	-
TWFMIT	(111)	-	-	-	-	-
PFMF	3,662,027	661,242	-	5,992,703	1,936,130	-
MediLink	51,941	4,792	-	52,254	4,803	-
Melbourne Campus	74,420	6,966	-	86,467	7,978	-
Cape Funds	874	1,238	-	277	277	-
TECOPT	-	-	-	-	123,818	-
APSPS	52,500	4,813	-	4,375	4,375	-
BNEPS	556,979	-	-	5,542	5,542	-
CANPS	431,280	361,039	-	6,667	6,667	-
Total	4,903,592	1,055,547	68,297	6,218,462	2,097,735	-

(i) Includes related party loans receivable.

Trilogy Monthly Income Trust (TMIT);

Trilogy Wholesale First Mortgage Income Trust (TWFMIT);

Pacific First Mortgage Fund (PFMF) (formerly City Pacific First Mortgage Fund);

Trilogy Investor Choice MediLink Property Income Syndicate (MediLink);

Trilogy Investor Choice Melbourne Campus Office Syndicate (Melbourne Campus);

Cape Park Funds (Cape Funds);

Trilogy Epping Commercial Office Property Trust (TECOPT);

Austgrowth Property Syndicate No 18 (APSPS);

Brisbane Property Syndicate (BNEPS); and

Canberra Property Syndicate (CANPS).

#### (c) Related party investments held by the Company

The Company has no investment in the MIS's it act's as Responsible Entity for.

### Note 16 Dividends

No dividends were paid nor declared during the year, or the prior year.

The balance of the franking account at year end, adjusted for franking credits from payment of provision for income tax and dividends recognised as receivables, franking debits arising from payment of proposed dividends and franking credits that may be prevented from distribution in subsequent financial years.

2012	2011
\$	\$
52,211	52,211

### Note 17 Key personnel

Fees paid to Directors for attendance at Board meetings during the year are as follows:

Post employment benefits	(4,122)	(4,635)
Short term benefits	(96,203)	(101,587)
Total	(100,325)	(106,222)

## Trilogy Funds Management Limited

### Notes to the financial statements For the year ended 30 June 2012

#### Note 18 Financial risk management

##### Overview

The Company's assets principally consist of investments in short term deposits with financial

##### Specific financial risk exposures and management

The main risks the Company is exposed to through its financial instruments are credit risk, liquidity risk, and market risk relating to interest rate risk.

The nature and extent of the financial instruments employed by the Company are discussed below. This note presents information about the Company's exposure to each of the above risks, the Company's objectives, policies and processes for measuring and managing risk.

The Board of Directors of the Company has overall responsibility for the establishment and oversight of the Company's risk management framework.

The Board is responsible for developing and monitoring the Company's risk management policies, including those related to MIS. The Responsible Entity's risk management policies are established to identify and analyse the risks faced by the Company, to set appropriate risk limits and controls, and to monitor risks and adherence to limits. Risk management policies and systems are reviewed regularly to reflect changes in market conditions and the Company's activities.

The Company's Compliance Committee and its Audit, Compliance and Risk Management Committee oversees how management monitors compliance with the Company's risk management policies and procedures and reviews the adequacy of the risk management framework in relation to the risks faced by the Company.

##### (a) Credit risk

Credit risk is the risk that a counterparty to a financial instrument will fail to discharge an obligation or commitment that it has entered into with the Company and cause a loss. The Company manages the exposure to credit risk on an ongoing basis.

The carrying amount of the Company's financial assets represents the maximum credit exposure. The Company's maximum exposure to credit risk at the reporting date is as follows:

		2012	2011
	Note	\$	\$
<b>Financial assets</b>			
Trade and other receivables	9	1,360,341	2,464,155
<b>Total financial assets</b>		<u>1,360,341</u>	<u>2,464,155</u>

All cash held by the Company is invested with approved deposit institutions (ADI's).

The Company has a single credit risk exposure in relation to the management fees receivables from the PFMF (a scheme for which it acts as Responsible Entity) totalling \$661,242 (2011: \$1,936,131), equating to 48.61% (2011: 78.57%) of total trade and other receivables.

This risk is minimised by regularly reviewing the Company's trade and other receivables. Refer note 9 for information regarding ageing of trade receivables, and impairments recorded during the period.

##### (b) Liquidity risk

Liquidity risk arises from the possibility that the Company might encounter difficulty in settling its debts or otherwise meeting its obligations related to financial liabilities. The Company manages this risk through the following mechanisms:

- preparing forward-looking cash flow analysis in relation to its operational, investing and financing activities;
- monitoring undrawn credit facilities;



# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

### Note 18 Financial risk management (continued)

#### (b) Liquidity risk (continued)

- maintaining a reputable credit profile;
- managing credit risk related to financial assets;
- only investing surplus cash with major financial institutions; and
- comparing the maturity profile of financial liabilities with the realisation profile of financial assets.

The timing of cash flows presented in the table below to settle financial liabilities reflect the earliest contractual settlement dates and do not reflect management's expectations that banking facilities will be rolled forward.

The tables below reflect an undiscounted contractual maturity analysis for financial liabilities.

2012	Contractual cash flows	Less than 1 month	1-3 months	3-12 months	Greater than 12 months
	\$	\$	\$	\$	\$
<b>Financial liabilities</b>					
Borrowings	1,744,687	-	400,000	-	1,344,687
Trade and other payables	1,814,581	1,613,856	31,035	20,690	149,000
<b>Total contractual outflows</b>	<b>3,559,268</b>	<b>1,613,856</b>	<b>431,035</b>	<b>20,690</b>	<b>1,493,687</b>

#### 2011

<b>Financial liabilities</b>					
Borrowings	2,238,449	-	100,000	-	2,138,449
Trade and other payables	1,884,163	38,130	1,688,230	8,803	149,000
	<b>4,122,612</b>	<b>38,130</b>	<b>1,788,230</b>	<b>8,803</b>	<b>2,287,449</b>

Interest on borrowings have not been included as they have been paid to the end of the respective financial year.

#### (c) Capital management

Management controls the capital of the Company in order to maintain a good debt to equity ratio, provide the shareholders with adequate returns and to ensure that it can fund its operations and continue as a going concern.

The Company's capital management objectives aim to:

- ensure that the Company complies with its AFSL requirements;
- ensure sufficient capital resources to support the Company's operational requirements;
- continue to support the Company's credit worthiness; and
- safeguard the Company's ability to continue as a going concern.

Management effectively manages the Company's capital by assessing its financial risks and adjusting its capital structure in response to changes in these risks and in the market. These responses include the management of debt level, distributions to shareholders and share issues.

There have been no changes in the strategy adopted by management to control the capital of the group since the prior year.

The Company monitors capital on the basis of the gearing ratio. The ratio is calculated as net debt divided by adjusted assets. Net debt is calculated as total borrowings less cash and cash equivalents. Adjusted assets are calculated as total assets less cash and cash equivalents. The gearing ratios as at 30 June 2012 and as at 30 June 2011 were as follows:

# Trilogy Funds Management Limited

## Notes to the financial statements

For the year ended 30 June 2012

### Note 18 Financial risk management (continued)

#### (c) Capital management (continued)

	Notes	2012	2011
		\$	\$
Total borrowings	12	1,744,687	2,238,449
Less: Cash and cash equivalents	8	(2,691,317)	(2,140,107)
Net debt		(946,630)	98,342
Total assets		4,310,580	5,210,799
Less: Cash and cash equivalents	8	(2,691,317)	(2,140,107)
Adjusted		1,619,263	3,070,692
Gearing ratio		(58.5%)	(3.2%)

The Company's gearing ratio is low due to cash and cash equivalents being in excess of total borrowings.

#### AFSL adjusted net tangible asset requirement

It is a requirement of the Company's AFSL that it hold adjusted net tangible assets (NTA) (refer table below) of 0.50%, of the value of total funds under management for all MIS for which it acts as Responsible Entity. The amount of this requirement as at 30 June 2012 totalled \$1,048,222 (2011: \$2,276,624).

	Notes	2012	2011
		\$	\$
Adjusted net assets			
Net assets from the Statement of financial position		507,224	496,636
Adjustments:			
Subordinated loan - BMS	12(i)	1,750,000	2,150,000
Other adjustments		(1,746)	(72,609)
Deferred tax assets		(258,922)	(606,537)
Deferred tax liabilities		244,088	591,551
Total adjusted net assets		2,240,644	2,559,041

The Company has maintained sufficient NTA in satisfaction of its AFSL for the year ended 30 June 2012.

#### (d) Market risk

Market risk is the risk that changes in market prices, such as interest rates, will affect the Company's income or the value of its holdings of financial instruments. Market risk embodies the potential for both loss and gains. The objective of market risk management is to manage and control market risk exposures within acceptable parameters, while optimising the return on risk.

##### i. Interest rate risk

The majority of the Company's financial liabilities are interest bearing loans which are subject to variable interest rates. The following table summaries the balances at risk:

	2012	2011
	\$	\$
Loan BESF	-	100,000
Loan BMS	1,750,000	2,150,000
	1,750,000	2,250,000

## Trilogy Funds Management Limited

### Notes to the financial statements

For the year ended 30 June 2012

#### Note 18 Financial risk management (continued)

##### (d) Market risk (continued)

##### i. Interest rate risk (continued)

The following table provides a sensitivity analysis of a 3.00% p.a. increase/decrease in the interest rate for the above balances at risk at the end of the financial year.

As at 30 June 2012	Profit \$	Equity \$
+ 3% in interest rates	6,273	513,497
- 3% in interest rates	14,903	522,127
As at 30 June 2011		
+ 3% in interest rates	51,138	547,774
- 3% in interest rates	62,234	558,870

##### ii. Other market risk

The Company is not exposed to other material market risk on its financial assets and liabilities.

##### (e) Estimation of fair value

The carrying values approximate the value of the Scheme's financial assets and liabilities.

#### Note 19 Commitments

The Supreme Court of Queensland made a consent order on 9 August 2012 in the matter of APGF Management Limited vs. Vivian Annette Anderson (Chair person elected at a meeting of unitholders on 4 June 2012) that the following costs be paid on the terms stipulated below:

- \$665,278 (representing the balance of an MIS's unsecured facility with its former Responsible Entity) is due and payable by a MIS to APGF Management Limited upon the registration of the Company as Responsible Entity (refer Note 21). It is a condition of the Court Order that no interest be charged provided the Company ensure the payment is made on or before 31 December 2012;
- \$17,474 (representing unpaid management fees to a former Responsible Entity) is due and payable on demand by the MIS to APGF Administration Pty Ltd;
- \$12,913 (representing unpaid property management fees) is due and payable on demand by an MIS to APGF Investment Management Pty Ltd; and
- \$150,000 (representing a portion of the performance fees payable on sale of the property) is due and payable by an MIS to APGF Investment Management Pty Ltd.

In the event the MIS is unable to pay the amounts stated above by the due date, the Company will be liable for these debts.

#### Note 20 Litigation and contingent liabilities

##### *Litigation involving borrowers of the PFMF*

The Responsible Entity of the PFMF is party to litigation with borrowers (Kosho Pty Ltd (Receiver & Manager Appointed) and City Co Pty Ltd (Receiver & Manager Appointed)) alleging it had breached the finance facility agreement or, alternatively, the Trade Practices Act 1974 (Cth). The maximum awardable amount for this contingent liability is estimated to be \$81 million. The Responsible Entity has filed a defence denying liability in respect of this claim in June 2010.

The Responsible Entity's evidence in chief was filed and served on 10 September 2012, the trial commenced on 24 September 2012 and was expected to run for 7 days. On 2 October 2012 the matter was adjourned to 26 November 2012 (for 3 days) by reason of the borrowers' request to tender additional evidence (to which the Responsible Entity objected). The borrowers were ordered to pay the Responsible Entity's costs, fixed at \$24,000, by reason of the adjournment.

## **Trilogy Funds Management Limited**

### **Notes to the financial statements**

**For the year ended 30 June 2012**

#### **Note 20 Litigation and contingent liabilities (continued)**

##### *Litigation involving borrowers of the PFMF (continued)*

The Company is also party to other proceedings in its capacity as Responsible Entity for the PFMF, however Directors are not aware of any material liability likely to arise to the Company as a result of litigation matters.

##### *Dispute with borrower*

The Company was awarded judgement for unpaid application fees due from a borrower during the year. The borrower subsequently appealed the ruling to the Queensland Court of Appeal, which was unsuccessful. The borrower has since sought leave to appeal to the High Court of Australia for which a decision is pending.

The Company has recently served a bankruptcy notice on the borrower and have received legal advice to the effect that if the bankruptcy action is successful, the borrower will be precluded from pursuing his appeal. The Company is unable to determine the likely amount of the recovery should it be successful in its action.

No person has applied for leave of Court to bring proceedings on behalf of the Company or intervene in any proceedings to which the Company is a party under section 237 of the Act.

#### **Note 21 Events subsequent to reporting date**

##### *Proposal to replace LM Investment Management (LM) as Responsible Entity*

Subsequent to the end of the reporting period, the Company has issued a Notice of Meeting (NoM) and Explanatory Memorandum (EM) to unitholders in the LM Wholesale First Mortgage Income Fund (FMIF) and the LM Currency Protected Australian Income Fund (CPAIF), following a meeting convened by certain investors in those funds to occur on 1 November 2012 to consider and pass resolutions to replace LM with Trilogy Funds Management Limited as Responsible Entity for the FMIF and the CPAIF.

##### *Appointment as Responsible Entity*

A meeting was held on 4 June 2012 and resumed on 14 June 2012, to vote on a resolution to remove APGF Management Limited (APGF) as Responsible Entity of APS Number 21 and APS Number 24 (property syndicates), and replace them with Trilogy Funds Management Limited. Legal proceedings were issued subsequent to the unitholder meeting.

On 9 August 2012 Justice M. Wilson made a consent order that APGF be removed as Responsible Entity, and Trilogy Funds Management Limited be appointed Responsible Entity for the property syndicates subject to the following terms and conditions listed in the Note 19.

On 13 August 2012 the Company was listed on the ASIC register as Responsible Entity for both property syndicates.

The books and records of the Scheme were transferred to the New Responsible Entity on 17 August 2012.

##### *Sale of investment properties*

##### Canberra Property Syndicate (CANPS) and the Canberra Unit Trust (CANUT)

The investment property held by the Canberra Property Syndicate was sold on 12 October 2012. The Responsible Entity will proceed to wind-up the Scheme.

**Trilogy Funds Management Limited**

**Notes to the financial statements  
For the year ended 30 June 2012**

**Note 21 Events subsequent to reporting date**

***Sale of investment properties (continued)***

**The Trilogy Healthcare REIT (Crows Nest)**

A contract of sale for the Crows Nest property owned by Trilogy Healthcare REIT was signed on 22 October 2012, with settlement scheduled for 30 days after the exchange of contracts. The Responsible Entity will proceed to wind-up the Scheme following the settlement of the property.

Other than the items listed above, there has not arisen in the interval between the end of the financial year and the date of this report any item, transaction or event of a material and unusual nature likely, in the opinion of the Responsible Entity, to affect significantly the operations of the Scheme, the results of those operations, or the state of affairs of the Scheme, in future financial years.

**Trilogy Funds Management Limited  
Directors' declaration**

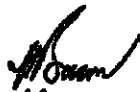
The Directors' of Trilogy Funds Management Limited declare that:

- (a) The financial statements and notes, as set out on pages 7 to 30 are in accordance with the Corporations Act 2001, including;
  - (i) giving a true and fair view of the Scheme's financial position as at 30 June 2012 and of its performance, for the financial year ended on that date; and
  - (ii) complying with Australian Accounting Standards (including the Australian Accounting Interpretations) and the Corporations Regulations 2011;
- (b) the financial report also complies with International Financial Reporting Standards as disclosed in Note 1; and
- (c) There are reasonable grounds to believe that the Scheme will be able to pay its debts as and when they become due and payable.

Signed in accordance with a resolutions of the Directors of the Responsible Entity.



Philip A Ryan  
Executive Director  
Dated: 31 October 2012  
Brisbane



Rodger I Bacon  
Executive Deputy Chairman  
Dated: 31 October 2012  
Brisbane



Tel: +61 7 3237 5999  
Fax: +61 7 3221 9227  
www.bdo.com.au

Level 18, 300 Queen St  
Brisbane QLD 4000,  
GPO Box 457 Brisbane QLD 4001  
Australia

## INDEPENDENT AUDITOR'S REPORT

To the members of Trilogy Funds Management Limited

### Report on the Financial Report

We have audited the accompanying financial report of Trilogy Funds Management Limited, which comprises the statement of financial position as at 30 June 2012, the statement of comprehensive income, statement of changes in equity, and statement of cash flows for the year then ended, notes comprising a summary of significant accounting policies and other explanatory information, and the directors' declaration of the company.

### Directors' Responsibility for the Financial Report

The directors are responsible for the preparation of the financial report that gives a true and fair view in accordance with Australian Accounting Standards and the *Corporations Act 2001* and for such internal control as the directors determine is necessary to enable the preparation of the financial report that gives a true and fair view is free from material misstatement, whether due to fraud or error. In Note 1, the directors also state, in accordance with Accounting Standard AASB 101 *Presentation of Financial Statements*, that the financial statements comply with *International Financial Reporting Standards*.

### Auditor's Responsibility

Our responsibility is to express an opinion on the financial report based on our audit. We conducted our audit in accordance with Australian Auditing Standards. Those standards require that we comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance about whether the financial report is free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial report. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial report, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the company's preparation of the financial report that gives a true and fair view in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the company's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the directors, as well as evaluating the overall presentation of the financial report.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

### Independence

In conducting our audit, we have complied with the independence requirements of the *Corporations Act 2001*. We confirm that the independence declaration required by the *Corporations Act 2001*, which has been given to the directors of Trilogy Funds Management Limited, would be in the same terms if given to the directors as at the time of this auditor's report.



### Opinion

In our opinion:

- (a) the financial report of Trilogy Funds Management Limited is in accordance with the *Corporations Act 2001*, including:
  - (i) giving a true and fair view of the company's financial position as at 30 June 2012 and of its performance for the year ended on that date; and
  - (ii) complying with Australian Accounting Standards and the *Corporations Regulations 2001*; and
- (b) the financial report also complies with *International Financial Reporting Standards* as disclosed in Note 1.

BDO Audit Pty Ltd

A handwritten signature in black ink, appearing to read 'P A Gallagher', is written over the printed name.

P A Gallagher

Director

Brisbane, 31 October 2012



Pacific First Mortgage Fund  
(Formerly City Pacific First Mortgage Fund)  
ARSN 008 139 477

**Pacific First Mortgage Fund**  
**Contents page**

	<b>Page No</b>
<b>Directors' report</b>	<b>1</b>
<b>Auditor's independence declaration</b>	<b>3</b>
<b>Interim statement of profit or loss and other comprehensive income</b>	<b>4</b>
<b>Interim statement of financial position</b>	<b>5</b>
<b>Interim statement of cash flows</b>	<b>6</b>
<b>Notes to the interim financial statements</b>	<b>7</b>
<b>Directors' declaration</b>	<b>17</b>
<b>Independent auditor's review report</b>	<b>18</b>

## **Pacific First Mortgage Fund**

### **Directors' report**

The Directors of Trilogy Funds Management Limited (Responsible Entity), the Responsible Entity of the Pacific First Mortgage Fund (Scheme), present their report together with the financial statements of the Scheme for the six months ended 31 December 2012 and the auditor's report thereon.

#### **Responsible Entity**

The Responsible Entity is incorporated and domiciled in Australia. The registered office and principal place of business of the Responsible Entity and the Scheme is:

Brisbane Club Tower  
Level 10  
241 Adelaide Street, Brisbane, Queensland

#### **Directors**

The names of the directors in office at any time during, or since the end of the period are:

<b>Name</b>	<b>Position</b>
Robert M Willcocks	Independent Non-Executive Chairman
Rodger I Bacon	Executive Deputy Chairman
John C Barry	Executive Director
Philip A Ryan	Executive Director and Company Secretary
Rohan C Butcher	Non-Executive Director

Directors have been in office since the start of the financial year to the date of this report unless otherwise stated.

#### **Review of operations**

The net loss attributable to unitholders for the six months ended 31 December 2012, after impairment losses of \$9,218,143 (31 Dec 2011: \$78,058,320) totalled \$6,514,123 (31 Dec 2011: loss \$68,745,917). The impairment losses of \$9,218,143 (31 Dec 2011: \$78,058,320) comprise impairments of interest receivable of \$5,364,289 (31 Dec 2011: \$13,464,457), mortgage loan impairments of \$3,846,001 (31 Dec 2011: \$64,469,873) and investment property impairments of \$7,853 (31 Dec 2011: \$123,990).

The impairment losses relate to an analysis of impaired mortgage loans during the period and at balance date to reflect the fair value of mortgage loans and interest receivable of those loans. These impairment losses represent estimates of losses that may be incurred based on a number of assumptions including amounts that may be received upon repayment or sale of the security properties and the period until funds are returned. In the current economic climate there is uncertainty as to the amount that could be realised on the sale of security properties, and the time it may take to achieve a sale. Accordingly, actual impairment losses incurred may differ significantly from these estimates.

#### **Return of capital to unitholders**

The Responsible Entity made a further return of capital to unitholders during the period totalling \$6,593,421 (\$0.0075 per unit) (31 Dec 2011: \$8,844,106).

#### **Finance facility with Commonwealth Bank of Australia ("CBA")**

In order to maintain the covenants of the Facility Agreement, the Scheme was required to repay \$9,000,000 during the reporting period. The balance of the facility at 31 December 2012 was \$10,000,000 (30 Jun 2012: \$19,000,000).

**Pacific First Mortgage Fund  
Directors' report**

**Events subsequent to the end of the reporting period**

***Finance facility with CBA***

The finance facility with the CBA expired on the 28 February 2013. The Responsible Entity has successfully negotiated a further extension of the facility. The key terms of the extension are as follows:

- payment of a \$100,000 principal reduction;
- expiry 28 August 2013;
- 75% of settlement proceeds to be applied to repayment of the CBA facility;
- suspension of further capital repayments, distributions and redemptions in the absence of CBA's prior written consent: and
- reduction of the CBA facility to \$6,000,000 by 29 March 2013.

Following the above and other principal reductions made by the Responsible Entity, the remaining debt under the CBA facility stands at \$6,642,694 as at the date of this report.

***Sale of security***

Settlement of a residual security forming part of a mortgage asset has been effected on 28 February 2013. Net proceeds received totalled \$3,716,722 of which \$2,787,541 has been applied to the principal debt pursuant to the CBA finance facility.

Other than the items noted above, there has not arisen in the interval between the end of the reporting period and the date of this report, any item, transaction or event of a material and unusual nature likely, in the opinion of the Responsible Entity, to affect significantly the operations of the Scheme, the results of those operations, or the state of affairs of the Scheme, in future financial periods.

**Auditor's independence declaration**

The Auditor's independence declaration is set out on page 3 and forms part of the Directors' report for the six months ended 31 December 2012.

This report is made in accordance with a resolution of the Directors of the Responsible Entity.



**Philip A Ryan**  
Executive Director  
Dated: 14 March 2013  
Brisbane



**Roger I Bacon**  
Executive Deputy Chairman  
Dated: 14 March 2013  
Brisbane



Tel: +61 7 3237 5999  
Fax: +61 7 3221 9227  
www.bdo.com.au

Level 18, 300 Queen St  
Brisbane QLD 4000,  
GPO Box 457 Brisbane QLD 4001  
Australia

**DECLARATION OF INDEPENDENCE BY PAUL GALLAGHER TO THE DIRECTORS OF TRILOGY FUNDS  
MANAGEMENT LTD AS RESPONSIBLE ENTITY FOR THE PACIFIC FIRST MORTGAGE FUND**

As lead auditor of Pacific First Mortgage Fund for the half year ended 31 December 2012, I declare that, to the best of my knowledge and belief, there have been no contraventions of:

- the auditor independence requirements of the *Corporations Act 2001* in relation to the review; and
- any applicable code of professional conduct in relation to the review.

PA Gallagher

Director

BDO Audit Pty Ltd

Brisbane, 14 March 2013

**Pacific First Mortgage Fund**  
**Interim statement of profit or loss and other comprehensive income**  
**For the six months ended 31 December 2012**

	Note	31 Dec 2012	31 Dec 2011
		\$	\$
<b>Revenue and other income</b>			
Interest revenues - mortgage loans		5,364,290	12,765,536
Interest revenue - cash and cash equivalents		118,002	122,624
Fees income - mortgage loans		-	30,257
Rental income		-	3,189
<b>Total revenue and other income</b>		<u>5,482,292</u>	<u>12,921,606</u>
<b>Expenses</b>			
Auditor's remuneration		(79,920)	(78,173)
Direct property expenses and outgoings		-	484
<i>Impairment expense:</i>			
• Trade and other receivables	4	(5,364,289)	(13,464,457)
• Investment property	5	(7,853)	(123,990)
• Investment in financial assets - mortgage loans	6	(3,846,001)	(64,469,873)
Legal fees		(1,297,686)	(23,005)
Other expenses		(283,769)	(195,901)
Responsible Entity management fees	9(a)	(652,429)	(2,082,026)
		<u>(11,531,947)</u>	<u>(80,436,941)</u>
<b>Loss from operating activities before finance costs</b>		<u>(6,049,655)</u>	<u>(67,515,335)</u>
<i>Finance costs:</i>			
• Amortisation of loan transaction costs		(39,589)	(125,343)
• Interest expense		(424,879)	(1,105,239)
		<u>(464,468)</u>	<u>(1,230,582)</u>
<b>Loss attributable to unitholders</b>		<u>(6,514,123)</u>	<u>(68,745,917)</u>
<b>Other comprehensive income:</b>			
Other comprehensive income		-	-
<b>Total comprehensive loss for the period</b>		<u>(6,514,123)</u>	<u>(68,745,917)</u>

The Interim statement of profit or loss and other comprehensive income is to be read in conjunction with the accompanying notes to the financial statements.

**Pacific First Mortgage Fund**  
**Interim statement of financial position**  
**As at 31 December 2012**

	31 Dec 2012	30 Jun 2012
	\$	\$
<b>Assets</b>		
Cash and cash equivalents	2,790,632	9,527,617
Trade and other receivables	4 17,892	23,430
Mortgage loans	6 111,667,003	126,870,947
Investment property	5 -	217,500
<b>Total assets</b>	<b><u>114,475,527</u></b>	<b><u>136,639,494</u></b>
<b>Liabilities</b>		
Trade and other payables	845,402	901,826
Borrowings	7 10,000,000	19,000,000
<b>Total liabilities (excluding liabilities attributable to unitholders)</b>	<b><u>10,845,402</u></b>	<b><u>19,901,826</u></b>
<b>Net assets attributable to unitholders</b>	<b><u>8 103,630,125</u></b>	<b><u>116,737,668</u></b>
<b>Total liabilities</b>	<b><u>114,475,527</u></b>	<b><u>136,639,494</u></b>

The Interim statement of financial position is to be read in conjunction with the accompanying notes to the financial statements.

**Pacific First Mortgage Fund**  
**Interim statement of cash flows**  
**For the six months ended 31 December 2012**

	31 Dec 2012	31 Dec 2011
	\$	\$
<b>Cash flows from operating activities</b>		
Interest received - mortgage loans	-	231,154
Interest received - financial institutions	129,722	102,611
Responsible entity fees and other costs paid	(2,266,788)	(2,836,154)
Borrowing costs paid	(506,954)	(1,402,895)
<b>Net cash provided by/(used in) operating activities</b>	<b>(2,644,020)</b>	<b>(3,905,284)</b>
<b>Cash flows from investing activities</b>		
Mortgage loan funds advanced	(2,094,036)	(7,387,794)
Mortgage loan funds repaid	13,384,845	29,147,621
Acquisition of investment property	-	(3,102)
Proceeds from sale of investment property	209,647	-
Refund of deposit - investment property	-	41,250
<b>Net cash provided by/(used in) investing activities</b>	<b>11,500,456</b>	<b>21,797,975</b>
<b>Cash flows from financing activities</b>		
Repayment of borrowings	(9,000,000)	(2,900,000)
Payments for return of capital	(6,593,421)	(8,844,106)
Payments for redemption of units	-	(500,000)
<b>Net cash provided by/(used in) financing activities</b>	<b>(15,593,421)</b>	<b>(12,244,106)</b>
<b>Net increase/(decrease) in cash held</b>	<b>(6,736,985)</b>	<b>5,648,585</b>
<b>Cash and cash equivalents as at 1 July</b>	<b>9,527,617</b>	<b>1,312,625</b>
<b>Cash and cash equivalents at 31 December</b>	<b>2,790,632</b>	<b>6,961,210</b>

The Interim statement of cash flows is to be read in conjunction with the accompanying notes to the financial statements.



**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 1 Reporting entity**

The Pacific First Mortgage Fund (Scheme) is a registered managed investment scheme under the Corporations Act 2001 (Act). The Scheme was constituted on 23 June 1998 and will terminate on 23 June 2078 unless terminated in accordance with the Constitution. The financial report of the Scheme is for the six months ended 31 December 2012.

The Scheme prepared a consolidated financial report for the year ended 30 June 2012, incorporating its controlled entity. Due to a change in strategy regarding the Scheme's investment property (Refer Note 5), there was no longer a requirement to operate a separate entity. As a result the Responsible Entity, deregistered its controlled entity. The Scheme is no longer required to prepare consolidated financial reports.

**Note 2 Basis of preparation**

**(a) Statement of compliance**

The interim financial report is a general purpose financial report which has been prepared in accordance with AASB 134 Interim Financial Reporting and the Act.

The interim financial report does not include all of the information required for a full Annual financial report, and should be read in conjunction with the annual financial report of the Scheme as at and for the year ended 30 June 2012.

The interim financial report has been prepared on an accruals basis and is based on historical cost modified by the revaluation of selected non-current assets, and financial assets and financial liabilities for which the fair value basis of accounting has been applied.

**(b) Key assumptions and sources of estimation**

The preparation of Interim financial report requires management to make judgements, estimates and assumptions that affect the application of accounting policies and the reported amounts of assets, liabilities, income and expenses. Actual results may differ from these estimates.

Estimates and underlying assumptions are reviewed on an ongoing basis. Revisions to accounting estimates are recognised in the period in which the estimate is revised and in any future period affected.

In particular, information about significant areas of estimation uncertainty and critical judgements in applying accounting policies that have most significant effect on the amounts recognised are disclosed in:

- Note 3(a): Material uncertainty regarding going concern;
- Note 4: Impairment losses (interest receivable); and
- Note 5: Impairment losses (mortgage loans).

**Note 3 Significant accounting policies**

The accounting policies and methods of computation applied by the Scheme in this Interim financial report are the same as those applied by the Scheme for the year ended 30 June 2012.

**(a) Material uncertainty regarding going concern**

The financial report has been prepared on a going concern basis, which contemplates the continuation of normal business operations and the realisation of assets and settlement of liabilities in the normal course of business.

During the six months ended 31 December 2012:

- All parties who had borrowed from the Scheme continue to be unable to repay or refinance existing mortgage loans due for repayment during the period, resulting in expected cash inflows to the Scheme not being received as anticipated;
- City Pacific Limited (Receivers and Managers Appointed) (In Liquidation) (Former Responsible Entity), the former responsible entity of the Scheme, cancelled income distributions to unitholders in July 2008. As a result, no income distributions were paid during the period;
- As disclosed in Notes 4, 5 and 6, the Scheme recognised impairment losses of \$9,218,143 (31 Dec 2011: \$78,058,320);

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 3 Significant accounting policies (continued)**

**(a) Material uncertainty regarding going concern (continued)**

- In October 2008 the Former Responsible Entity resolved that the Scheme was a "non-liquid" registered managed investment scheme in accordance with the Scheme's Constitution and the Act. As a result no redemptions were paid by the Scheme to unitholders from this date until the end of the current reporting period;
- Pursuant to the terms of the Scheme's finance facility, \$9,000,000 (31 Dec 2011: \$2,900,000) was repaid during the period. The repayment was required to ensure the Scheme maintained the facility's covenants;
- Return of capital payments totalling \$6,593,421 (30 Jun 2012: \$26,426,561) were repaid to unitholders; and
- Hardship redemptions totalling \$nil (31 Dec 2011: \$500,000) were paid to qualifying applicants.

The Directors of the Responsible Entity have prepared the financial statements on a going concern basis, as it is their intention to:

- Seek an extension to the facility pending the realisation of sufficient cash to repay the residual debt of \$10,000,000 as at the balance date (the extension of the facility until 28 August 2013 has been formalised and the residual debt reduced to \$6,642,694 subsequent to the reporting date, refer Notes 7 and 12);
- Recommence the return of capital payments to unitholders subject to the Scheme having sufficient liquidity;
- Continue to fund the maintenance and improvement (where applicable) of security properties in order to facilitate the sale of completed properties; and
- Continue, subject to market conditions, to dispose of saleable Scheme assets in a timely & structured fashion.

The Responsible Entity has prepared cash flow projections that support the Scheme's ability to meet financial liability repayments, and continue funding the maintenance and improvement (where applicable) of security properties.

To continue as a going concern, it will be necessary for the Scheme to:

- Continue the existing finance arrangements with its financier; and
- Realise sufficient cash funds from the repayment or refinancing of mortgage loans to:
  - Seek an extension to the facility pending the realisation of sufficient cash to repay the residual debt of \$10,000,000 as at the balance date (the extension of the facility until 28 August 2013 has been formalised and the residual debt reduced to \$6,642,694 subsequent to the reporting date, refer Notes 7 and 12);
  - Fund costs associated with the maintenance and improvement (where applicable) of security properties to facilitate their timely realisation;
  - Recommence the return of capital to unitholders; and
  - Fund all other costs associated with the operation of the Scheme.

In the unlikely event of the above matters proving unsuccessful, there exists material uncertainty that may cast significant doubt on the Scheme's ability to continue operating as a going concern. This could result in Scheme having to realise its assets and extinguish its liabilities other than in the ordinary course of business, and at amounts different from those stated in the financial statements. No adjustment for such eventuality has been made in the financial statements due to its unlikelihood in light of the Scheme's current projections.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 4 Trade and other receivables**

	31 Dec 2012	30 Jun 2012
	\$	\$
Interest receivable - mortgages	93,735,841	118,760,876
Impairment losses	(93,735,841)	(118,760,876)
	-	-
Interest receivable - financial institutions	7,007	18,726
Other receivables	10,885	4,704
	<u>17,892</u>	<u>23,430</u>

**(a) Impaired receivables**

At 31 December 2012, as part of the annual balance date review procedures the Scheme recorded impairment losses in respect of interest receivable of \$5,364,289 (30 Jun 2012: \$23,701,366) for the period. During the period the repayment of 6 (30 Jun 2012: 9) mortgage loans resulted in realised impairment losses of \$30,389,324 (30 Jun 2012: \$29,965,178) in respect of interest receivable.

Movement in the provision for impairment of receivables is as follows:

	Opening balance	Charge for the period	Amounts written off	Closing balance
	\$	\$	\$	\$
31 Dec 2012				
Interest receivables - mortgages	118,760,876	5,364,289	(30,389,324)	93,735,841
	<u>118,760,876</u>	<u>5,364,289</u>	<u>(30,389,324)</u>	<u>93,735,841</u>
30 Jun 2012				
Interest receivables - mortgages	125,024,688	23,701,366	(29,965,178)	118,760,876
	<u>125,024,688</u>	<u>23,701,366</u>	<u>(29,965,178)</u>	<u>118,760,876</u>

In assessing whether interest receivable may be impaired, the Responsible Entity's considerations included but were not limited to:

- Valuations of security properties completed by registered valuer listed on the Scheme's panel;
- Appraisals from real estate agents;
- Actual sale prices realised on completed projects;
- Recent offers to purchase security properties arising out of marketing campaigns;
- Current market conditions as at 31 December 2012;
- Status of individual loans; and
- Estimated time to realise mortgage loans and interest receivable.

These impairment losses represent estimates of losses that may be incurred based on a number of assumptions including amounts that may be received upon repayment of the loan or sale of the security property and the period in which funds are returned. In the current economic conditions there is uncertainty as to the amount that could be realised on the sale of security properties, and the time it may take to achieve a sale. Accordingly, actual impairment losses may differ significantly from these estimates.

The Responsible Entity considers that, based on evidence available as at 31 December 2012, the net impaired interest on remaining mortgage loans should be recovered in full and accordingly no further impairment losses have been recorded.

**Property markets**

The ongoing volatility in Australia's property markets may negatively impact asset values in the future, however, these financial statements set out the financial position as at the reporting date based on available evidence and accounting estimates.

It is common knowledge that the property market throughout Australia and particularly in south east Queensland has been very difficult in recent times and particularly over the past 4 years.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 4 Trade and other receivables (continued)**

**(a) Impaired receivables (continued)**

*Property markets (continued)*

In the case of undeveloped land (rural or urban) and finished apartment buildings, there has been extraordinary weakness and very low transaction volumes, with some transactions exhibiting severely distressed sale values.

In carrying out the duties of Directors of the Responsible Entity under the Act, it is necessary to form a view of the value of the assets of the Scheme, and to increase the impairment provisions where the Directors consider that would be a prudent course when reporting to unitholders.

In this process the Directors seek and obtain the views of the Investment Manager of the Scheme (Balmain Trilogy Investment Management Pty Ltd) as it is they who have a good understanding of such assets and the markets in which they may be transacted.

These views take into account the plans for orderly realisation of assets and the stated policy of 'no fire sales of assets'.

On a regular basis or when circumstances are deemed to require it, the Directors also seek independent professional valuation reports to assist in forming their views on the fair values of the relevant assets. However, it must be recognised that establishing values in market conditions such as have prevailed in the last year can be a very difficult exercise. This is especially so if the assets are unusual or unique, such as those assets secured by property at Martha Cove.

**Note 5 Investment property**

	31 Dec 2012	30 Jun 2012
	\$	\$
Balance as at 1 July	217,500	511,159
Acquisitions - management rights	3,500	-
Less: Impairment losses - management rights	(3,500)	(27,807)
Refund of deposit	-	(16,500)
Acquisitions - residential apartment	520	642
Sale - residential apartment	(213,667)	-
Less: Impairment losses - residential apartment	(4,353)	(96,182)
Refund of deposit	-	(24,750)
Balance as at 31 December	<u>-</u>	<u>346,562</u>

The Investment Manager recommended that the Scheme acquire a residential apartment with a strategy to gradually gain control over the entire complex (in which the Scheme held a number of apartments as security for a mortgage loan) with the intention of capitalising on the potential development opportunity presented by the site, in order to maximise the recovery to unitholders. The Scheme paid a deposit to acquire an additional apartment, as well as the management rights over the entire complex.

Subsequent to the proposed acquisition of the additional apartment and the management rights, the south east Queensland property market experienced further significant deterioration, which no longer made the Investment Manager's strategy feasible. As a consequence, the apartment held by the Scheme was placed on the open market and sold, with settlement occurring on 17 September 2012. The planned acquisition of the additional apartment and management rights were aborted and the deposit monies returned to the Scheme.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 6 Investment in financial assets**

	31 Dec 2012	30 Jun 2012
<b>Mortgage loans</b>	\$	\$
<i>Held directly:</i>		
Mortgage loans (i)	390,393,338	542,722,310
Impairment losses	(278,726,335)	(415,851,363)
	<u>111,667,003</u>	<u>126,870,947</u>
 <i>Maturity analysis</i>		
Not longer than 3 months	390,393,338	542,722,310
Longer than 3 months but less than 12 months	-	-
Total mortgage loans before impairment	<u>390,393,338</u>	<u>542,722,310</u>

(i) All loans are secured by registered first and second mortgages and secured over real property in Australia.

As at 31 December 2012, as part of the balance date review procedures, the Scheme recorded impairment losses in respect of mortgage loans of \$3,846,001 (30 Jun 2012: \$120,231,589) for the period. During the period, 6 mortgage loans (30 Jun 2012: 9) were repaid in full or in part from the sale of underlying security properties or refinance, resulting in realised impairment losses of \$140,971,029 (30 Jun 2012: \$71,954,721) in respect of mortgage loans.

Movement in the provision for impairment of mortgage loans is as follows:

	Opening balance \$	Charge for the year \$	Amounts written off \$	Closing balance \$
<b>31 Dec 2012</b>				
Mortgage loans	415,851,363	3,846,001	(140,971,029)	278,726,335
	<u>415,851,363</u>	<u>3,846,001</u>	<u>(140,971,029)</u>	<u>278,726,335</u>
 <b>30 Jun 2012</b>				
Mortgage loans	367,574,495	120,231,589	(71,954,721)	415,851,363
	<u>367,574,495</u>	<u>120,231,589</u>	<u>(71,954,721)</u>	<u>415,851,363</u>

**(a) Impaired mortgage loans**

In assessing whether mortgage loans may be impaired, the Responsible Entity considerations included but were not limited to:

- Valuations of security properties completed by registered valuers listed on the Scheme's panel;
- Appraisals from real estate agents;
- Actual sale prices realised on completed projects;
- Recent offers to purchase security properties arising out of marketing campaigns;
- Current market conditions as at 31 December 2012;
- Status of individual loans; and
- Estimated time to realise mortgage loans and interest receivable.

The provision for impairment losses represents estimates of losses that may be incurred based on a number of assumptions, including amounts that may be received upon repayment of the loan or sale of the security property and the period in which funds are recovered. In the current economic conditions there is uncertainty as to the amount that could be realised on the sale of security properties, and the time it may take to achieve a sale. Accordingly, actual impairment losses incurred may differ significantly from these estimates.

The Responsible Entity considers that, based on evidence available as at 31 December 2012, and subject to market conditions, all unimpaired principal on remaining mortgage loans should be recovered in full and accordingly no further impairment losses have been recorded.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 6 Investment in financial assets (continued)**

**(a) Impaired mortgage loans (continued)**

*Property markets*

The ongoing volatility in Australia's property markets may negatively impact asset values in the future, however, these financial statements set out the financial position as at the reporting date based on available evidence and accounting estimates.

It is common knowledge that the property market throughout Australia and particularly in south east Queensland has been very difficult in recent times and particularly over the past 4 years.

In the case of undeveloped land or finished apartments, there has been extraordinary weakness and very low transaction volumes, some transactions have exhibited the characteristics of very distressed sale values.

In carrying out the duties of Directors of the Responsible Entity under the Act, it is necessary to form a view of the value of the assets of the Scheme, and to increase the impairment provisions where the Directors consider that would be a prudent course when reporting to unitholders.

In this process the Directors seek and obtain the views of the Investment Manager of the Scheme as it is they who possess a good understanding of such assets and the markets in which they may be transacted.

These views take into account the plans for orderly realisation of assets and the stated policy of 'no fire sales of assets'.

On a regular basis or when circumstances are deemed to require it, the Directors also seek independent professional valuation reports to assist in forming their views on the fair values of the relevant assets. However, it must be recognised that establishing values in market conditions such as have prevailed in the last year can be a very difficult exercise. This is especially so if the assets are unusual or unique, such as those assets secured by property at Martha Cove.

**Note 7 Borrowings**

*Finance facility (Commercial bills)*

*Multi option facility*

	31 Dec 2012	30 Jun 2012
	\$	\$
	10,000,000	19,000,000
	<u>10,000,000</u>	<u>19,000,000</u>

The details of borrowings as at 31 December 2012 are set out below:

Facility	Secured	Maturity date	Facility 31 Dec 2012	Utilised 31 Dec 2012	Facility 30 Jun 2012	Utilised 30 Jun 2012
			\$	\$	\$	\$
Multi option facility	Yes	28/02/2013	10,000,000	10,000,000	19,000,000	19,000,000
<b>Total borrowings</b>				<b>10,000,000</b>		<b>19,000,000</b>

The facility is secured by a fixed and floating charge over the assets of the Scheme, providing the financier with first priority over Scheme assets. The interest charged on the facility is variable and is 5.66% p.a. (30 Jun 2012: 6.13% p.a.) at 31 December 2012. The rate includes a margin of 2.50% p.a. (30 Jun 2012: 2.50% p.a.). Principal reductions to the loan have been made as required during the period to maintain the facilities loan covenants.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 8 Net asset value per unit**

	31 Dec 2012			30 Jun 2012		
	Ordinary units	Contributed Capital	Accumulated Profit	Ordinary units	Contributed Capital	Accumulated Profit
	No	\$	\$	No	\$	\$
Balance at the beginning of the reporting period	879,122,759	814,005,922	116,737,668	884,410,563	841,688,392	273,205,601
<i>Units issued:</i>						
Units redeemed	-	-	-	(5,287,804)	(1,255,909)	(1,255,909)
Return of capital	-	(6,593,421)	(6,593,421)	-	(26,426,561)	(26,426,561)
Total						
comprehensive income for the year	-	-	(6,514,123)	-	-	(128,785,463)
Balance at the end of the reporting period	879,122,759	807,412,501	103,630,125	879,122,759	814,005,922	116,737,668

*The net asset value per unit are:*

Cents per unit as at 30 June 2012	0.13
Cents per unit as at 31 December 2012	0.12

Units in the Scheme entitle the unitholder to participate in distributions and proceeds on the winding up of the Scheme in proportion to the number of units held.

On a show of hands each unitholder present at a meeting in person or by proxy is entitled to one vote, and on a poll each member has one vote for each dollar of the value of the total units they have in the Scheme.

**Note 9 Related party transactions**

**(a) Transactions with related parties:**

Transactions between related parties are on normal commercial terms and conditions no more favourable than those available to other parties unless otherwise stated.

The following transactions occurred with the Responsible Entity:

	31 Dec 2012	31 Dec 2011
<i>Transactions recorded in the Interim statement of profit or loss and other</i>		
<i>i. comprehensive income</i>	\$	\$
Responsible Entity management fees paid (i)	(511,620)	(713,684)
Responsible Entity management fees payable (i)	(140,809)	(1,368,342)
	(652,429)	(2,082,026)
Expenses reimbursed (ii)	(3,949)	(35)
	(656,378)	(2,082,061)
<i>ii. Balances recorded in the Interim statement of financial position</i>		
Responsible Entity management fees payable (iii)	(140,809)	(1,368,342)
	(140,809)	(1,368,342)

(i) The Responsible Entity is entitled to a management fee of 1.50% p.a. (plus GST less RITC). These fees are calculated on the total gross asset value of the Scheme. The Responsible Entity has waived a portion of its management fee during the period in line with its commitment to return \$0.04 per unit to unitholders in April 2011 and a further \$0.04 per unit in October 2011. The Responsible Entity has excluded the unpaid portion of the scheduled capital repayments from the gross asset value of the Scheme for purposes of calculating the management fee;

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 9 Related party transactions (continued)**

**(a) Transactions with related parties (continued):**

(ii) The Responsible Entity incurs costs on behalf of the Scheme for which it is reimbursed; and

(iii) Due to the delay in a number of asset sales that were due to occur during the previous financial year, the Responsible Entity agreed to defer the payment of its management fee for the period 1 September 2011 to 31 December 2011.

*Related party transactions*

All transactions with related parties are conducted on normal commercial terms and conditions. There have been no guarantees provided or received for any related party receivables.

**(b) Units in the Scheme held by other related parties**

As at 31 December 2012 no Directors of the Responsible Entity held units in the Scheme (30 Jun 2012: nil).

**Note 10 Financial risk management**

The Scheme's financial risk management objectives and policies are consistent with those disclosed in the Annual financial report as at and for the year ended 30 June 2012.

**(a) Credit risk**

*Loans secured by property at Martha Cove*

As at 31 December 2012, the Scheme had the following mortgage loans and interest receivable, after impairment losses, secured by registered first and second mortgages over land situated at Martha Cove, Victoria. The recoverability of these loans is supported by independent valuations from registered panel valuers, appraisals from real estate agents, actual sales prices realised and estimates from management in relation to the fair value of the security property on an orderly realisation basis.

Marina Cove Pty Limited (Receivers and Managers Appointed) (in Liquidation) (Marina Cove) is a 100% owned entity by CP1 Limited (Receiver Appointed) (in Liquidation) (CP1 Limited) and the owner of various property holdings at Martha Cove, which comprises the security for the Scheme's mortgage loans and interest receivable noted above. In addition to Marina Cove there are several other property owners with land holdings at Martha Cove, some of which having sourced financing from other financiers and provided mortgage security over same.

CP1 Limited, Marina Cove Pty Limited and certain other development companies holding the Scheme's mortgage security assets at Martha Cove are in breach of the finance facilities provided by the Scheme and/or other financiers and have been placed under external administration as a result.

The properties located at Martha Cove are held in structures that are both cumbersome and complex in nature and, in some instances, involve the interests of other financiers, as well as the Scheme. Given the complex nature of the Scheme's exposure at Martha Cove (which is comprised of 9 separate precincts and over 123 allotments, the Responsible Entity undertook an international expressions of interest (EOI) campaign in October 2011. The portfolio was offered on an open basis, giving the option of acquiring any, some or all of the constituent precincts. This strategy was aimed at generating interest from as broad a spectrum of potential purchasers as possible and fostering competitive tension among them to increase the prospects of a reasonable recovery to unitholders. Several potential purchasers have indicated their interest in purchasing the selected precincts. Negotiations continue with these short-listed parties to procure an offer that the Responsible Entity considers to be in the best interests of the unitholders.

The adopted carrying value of the Martha Cove securities as at 31 December 2012 is reflective of the interest received to date and subsequent to the end of the reporting period (including the time value of money, costs to hold and realise the portfolio). The terms and conditions of these offers have not been disclosed as they are commercially sensitive and subject to further negotiations with the various parties.



**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 11    Litigation and contingent liabilities**

***Kosho & City Co***

The Responsible Entity of the Scheme is party to litigation with a borrower (Kosho Pty Ltd (Receiver & Manager Appointed)) and third party mortgagor (City Co Pty Ltd (Receiver & Manager Appointed)) alleging the Responsible Entity breached the finance facility agreement between it and Kosho or, alternatively, the Trade Practices Act 1974 (Cth). The maximum awardable amount for this contingent liability is estimated to be \$81 million. The Responsible Entity filed a defence denying liability in respect of this claim in June 2010.

Trial commenced in the Supreme Court of Queensland on 24 September 2012 and on 2 October 2012 was adjourned to 26 November 2012 for 2 additional days, culminating with the Responsible Entity putting forth its case. The Responsible Entity filed and served its written submissions on 7 December 2012 and on 20 February 2013 filed written submissions in reply to those filed by the Kosho interests.

The parties' closing oral submissions were listed to be heard by Justice Applegarth on 2 March 2013 but were adjourned to 28 March 2013 at the request of the Kosho parties and notwithstanding the Responsible Entity's objection to that adjournment.

Although difficult to predict in the absence of any indication by the Court, judgment may be handed down in the period June to August 2013.

***Federal Court proceedings against former CPL directors and officers***

The Responsible Entity is pursuing a claim against Messrs Philip Sullivan, Thomas Swan, Stephen McCormick and Ian Donaldson, former credit committee members and directors of the Former Responsible Entity, in the Federal Court of Australia.

The \$60 million claim was filed on 27 April 2012 and alleges breaches by the former directors and officers of their statutory duties under the Act. At the centre of the claim are loans provided by the Former Responsible Entity to borrowing entities Bullish Bear Holdings Pty Ltd (Receiver and Manager Appointed) and Atkinson Gore Agricultural Pty Ltd (Receivers and Managers Appointed) (In Liquidation) between 2006 and 2009, which resulted in substantial losses to the Scheme.

In September 2012 Mr McCormick (third respondent, first cross-claimant) lodged an application to have his cross claim determined in full prior and separately to the hearing of the Responsible Entity's claim. Mr McCormick's motion, which the Responsible Entity opposed, claimed that he ought to be indemnified by the Responsible Entity for legal costs he incurred in defending its claim against him, at least until the claim is determined.

On 26 February 2013 Mr McCormick's application was dismissed by Justice Emmett, who ordered Mr McCormick to pay the Responsible Entity's legal costs pertaining to that application. Following the Court's dismissal of the application, a trial date may be allocated at the upcoming directions hearing on Thursday, 14 March 2013, subject to:

- (i) a further application which may be brought by the defendants to have the proceedings moved to the Supreme Court of Queensland (and heard together with another action); and
- (ii) the schedule and convenience of the Court, particularly given that a trial judge has not yet been appointed in Justice Emmett's place following his appointment to the NSW Court of Appeal effective 7 March 2013.

The Directors are not aware of any material liability likely to arise to the Scheme as a result of litigation matters.

**Pacific First Mortgage Fund**  
**Notes to the interim financial statements**  
**For the six months ended 31 December 2012**

**Note 12    Events subsequent to reporting date**

***Finance facility with CBA***

The finance facility with the CBA expired on the 28 February 2013. The Responsible Entity has successfully negotiated a further extension of the facility. The key terms of the extension are as follows;

- payment of a \$100,000 principal reduction;
- expiry 28 August 2013;
- 75% of settlement proceeds to be applied to repayment of the CBA facility;
- suspension of further capital repayments, distributions and redemptions in the absence of CBA's prior written consent: and
- reduction of the CBA facility to \$6,000,000 by 29 March 2013.

Following the above and other principal reductions made by the Responsible Entity, the remaining debt under the CBA facility stands at \$6,642,694 as at the date of this report.

***Sale of security***

Settlement of a residual security forming part of a mortgage asset has been effected on 28 February 2013. Net proceeds received totalled \$3,716,722 of which \$2,787,541 has been applied to the principal debt pursuant to the CBA finance facility.

Other than the items noted above, there has not arisen in the interval between the end of the reporting period and the date of this report any item, transaction or event of a material and unusual nature likely, in the opinion of the Responsible Entity, to affect significantly the operations of the Scheme, the results of those operations, or the state of affairs of the Scheme, in future financial periods.

**Pacific First Mortgage Fund  
Directors' declaration**

In the opinion of the Directors of Trilogy Funds Management Limited, the Responsible Entity of Pacific First Mortgage Fund (Scheme):

- (a) The attached financial statements and notes, as set out on pages 4 to 16, are in accordance with the Corporations Act 2001 (the Act), including;
- (i) giving a true and fair view of the Scheme's financial position as at 31 December 2012 and of its performance for the half year ended on that date; and
  - (ii) complying with Accounting Standard AASB 134 *Interim Financial Reporting* and the Corporations Regulations 2001 and other mandatory professional reporting requirements; and
- (b) there are reasonable grounds to believe that the Scheme will be able to pay its debts as and when they become due and payable.

Signed in accordance with a resolution of the Directors.



---

**Philip A Ryan**  
Executive Director  
Dated: 14 March 2013  
Brisbane



---

**Rodger I Bacon**  
Executive Deputy Chairman  
Dated: 14 March 2013  
Brisbane

## INDEPENDENT AUDITOR'S REVIEW REPORT

To the Unitholders of the Pacific First Mortgage Fund

We have reviewed the accompanying half-year financial report of the Pacific First Mortgage Fund, which comprises the statement of financial position as at 31 December 2012, the statement of profit or loss and other comprehensive income, statement of cash flows for the half-year ended on that date, notes comprising a summary of significant accounting policies and other explanatory information, and the directors' declaration.

### Directors of the Responsible Entity's Responsibility for the Half-Year Financial Report

The directors of the responsible entity of the Pacific First Mortgage Fund are responsible for the preparation of the half-year financial report that gives a true and fair view in accordance with Australian Accounting Standards and the Corporations Act 2001 and for such internal control as the directors of the responsible entity determine is necessary to enable the preparation of the half-year financial report that is free from material misstatement, whether due to fraud or error.

### Auditor's Responsibility

Our responsibility is to express a conclusion on the half-year financial report based on our review. We conducted our review in accordance with Auditing Standard on Review Engagements ASRE 2410 Review of a Financial Report Performed by the Independent Auditor of the Entity. In order to state whether, on the basis of the procedures described, we have become aware of any matter that makes us believe that the half-year financial report is not in accordance with the Corporations Act 2001 including: giving a true and fair view of the disclosing entity's financial position as at 31 December 2012 and its performance for the half-year ended on that date; and complying with Accounting Standard AASB 134 Interim Financial Reporting and the Corporations Regulations 2001. As the auditor of the Pacific First Mortgage Fund, ASRE 2410 requires that we comply with the ethical requirements relevant to the audit of the annual financial report.

A review of a half-year financial report consists of making enquiries, primarily of persons responsible for financial and accounting matters, and applying analytical and other review procedures. A review is substantially less in scope than an audit conducted in accordance with Australian Auditing Standards and consequently does not enable us to obtain assurance that we would become aware of all significant matters that might be identified in an audit. Accordingly, we do not express an audit opinion.

### Independence

In conducting our review, we have complied with the independence requirements of the Corporations Act 2001. We confirm that the independence declaration required by the Corporations Act 2001, which has been given to the directors of the responsible entity, would be in the same terms if given to the directors of the responsible entity as at the time of this auditor's review report.

**Conclusion**

Based on our review, which is not an audit, we have not become aware of any matter that makes us believe that the half-year financial report of the Pacific First Mortgage Fund is not in accordance with the *Corporations Act 2001* including:

- A. giving a true and fair view of the disclosing entity's financial position as at 31 December 2012 and of its performance for the half-year ended on that date; and
- B. complying with Accounting Standard AASB 134 *Interim Financial Reporting and Corporations Regulations 2001*.

**Emphasis of Matter - Material Uncertainty Regarding Recoverability of Loans and Receivables**

Without modifying the above conclusion, we draw attention to Note 6 of the half-year financial report, which indicates the scheme has loans and receivables with a carrying value of \$111,667,004 (30 June 2012: \$126,870,947). The ability of the Pacific First Mortgage Fund to recover from borrowers is dependent upon normal debt and property markets prevailing and the scheme achieving the desired exit strategies that will allow recovery of the loans and receivables. Note 6(b) identifies that whilst an impairment assessment was performed by the directors of the responsible entity as at 31 December 2012 for loans and receivables based on independent valuations or other information that represents the recoverable amount and an impairment loss recognised, loans and receivables could be realised for values either above or below the recoverable amounts used in the impairment assessment. Should the loans and receivables be realised at a value below the recoverable amounts used in the impairment assessment and/or adverse changes occur, further impairment losses could arise in a short period of time. Should either normal property and debt markets not prevail after 31 December 2012 or the scheme be unable to achieve the desired exit strategies that will allow recovery of the past due loans and receivables, then the carrying value of the past due loans and receivables may not be recoverable. No adjustments have been made to the carrying values of past due loans and receivables should the desired exit strategies not be achieved.



### Emphasis of Matter - Material Uncertainty Regarding Continuation as a Going Concern

Without modifying the above conclusion, we draw attention to Note 3(a) Going Concern to the half-year financial report which indicates that the ability of the Fund to continue as a going concern is dependent upon the continuation of the existing finance arrangement, realising sufficient cash funding from the repayment or refinancing of existing mortgage loans of the Fund, provide funding for the ongoing business operations including the maintenance and improvement of security properties, and other operational costs of the Fund, and to recommence the return of capital payments to unit-holders. Due to the matters set out in Note 3(a) Going Concern, a material uncertainty exists which casts significant doubt about the Fund's ability to continue as a going concern and therefore whether it will realise its assets and extinguish its liabilities in the ordinary course of business and at the amounts stated in the financial report. No adjustments have been made to the carrying value of assets or recorded amount of liabilities in the Fund should the Fund not continue as a going concern.

BDO Audit Pty Ltd

PA Gallagher

Director

Brisbane, 14 March 2013

pimf

PACIFIC FIRST MORTGAGE FUND

Trilogy Funds Management Pty Limited ABN 59 080 383 679  
Responsible Entity of the Pacific First Mortgage Fund  
Level 10, Brisbane Club Tower  
241 Adelaide Street, Brisbane QLD 4000  
Tel: 1800 194 500 Fax: 1800 194 516

[www.pimf.com.au](http://www.pimf.com.au)  
[www.balmaintrilogy.com.au](http://www.balmaintrilogy.com.au)

**8974 - LM Investment Management Pty Ltd**

**Statement of Position**

**30-Apr-13**

**Estimated Realisable  
Values  
\$**

**ASSETS**

**Current Assets**

**Cash at Bank**

LMIM general account	231,533.93
LMIM - MIF	506,507.00
LMIM Rent Acct	1,688.20
	<b>739,729.13</b>

**Cash Assets**

**Intercompany Loans**

LM Administration Pty Ltd	775,000.00
LM Administration Pty Ltd	Nil
IC-LM - Dubai	Nil
IC-LM HK	Nil
IC-LM UK	Nil
	<b>775,000.00</b>

**Intercompany**

**Current Assets**

**1,514,729.13**

**Non Current Assets**

**Investments**

16222 Investment-38 Cavill Av P'ship	2,046,000.00
17200 20 Albatross Ave	685,000.00
16223 Shares in LMIM Dubai (LM FZE)	Nil
16224 Shares in LMIM Hong Kong Ltd	Nil
16225 Shares in LMIM NZ Ltd	Nil
16226 Shares in LMIM UK Ltd	Nil
	<b>2,731,000.00</b>

**Non Current Assets**

**TOTAL ASSETS**

**4,245,729.13**

**VA LIABILITIES**

LMA Service costs incurred	720,514.00
LMA service costs accrued	403,299.00
Other trading costs incurred and outstanding	195,867.00
Legal Fees	to be determined
Remuneration	to be determined
Out of Pockets	to be determined

**Funds Available for Priority Creditors**

**to be determined**

**Less Priority Creditors**

**Wages & Super**

**6,000.00**

**Funds Available for Unsecured Creditors**

**to be determined**

**Unsecured Creditors**

**1,071,101.00**



Surplus/(Deficit)

to be determined