

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS  
OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE  
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089  
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT  
2001

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Official Liquidator, state  
on oath:-

1. I am an Official Liquidator and a Partner of the firm BDO. I am the Respondent to this  
Proceeding.

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Signed:

Witnessed by:

AFFIDAVIT:  
Form 46, R.431

Filed on behalf of the Respondent

TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

**My appointment as the receiver of the FMIF**

2. By Order of Justice Dalton of this Honourable Court made on 8 August 2013, and later embodied in Orders dated 21 August 2013, I was appointed:-

- (a) Pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) ("the Act") to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 ("the FMIF") is wound up in accordance with its constitution; and
- (b) Pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.

I will refer below to my appointment to those roles as "my Appointment."

3. A copy of the Orders of Justice Dalton dated 21 August 2013 is exhibited hereto and marked "DW-39".

4. I make this affidavit:-

- (a) in connection with my response to an application filed by the Applicants in this proceeding, on 20 May 2016 ("Indemnity Application"); and
- (b) in support of my Application for directions filed 15 March 2017 ("Directions Application"), which seeks directions concerning my response to the Indemnity Application.

**References to other affidavits filed in this proceeding**

5. I have previously made affidavits filed in this proceeding, relevantly:-

- (a) My affidavit sworn and filed on 12 June 2015, with exhibit "DW-1" ("my 2015 Affidavit");
- (b) My affidavit sworn and filed on 19 February 2016, with exhibits "DW-2" to "DW-34" ("my February 2016 Affidavit"); and
- (c) My affidavit sworn and filed on 11 March 2016, with exhibits "DW-36" to "DW-38" ("my March 2016 Affidavit").

6. I have seen and read the following affidavits by Mr John Richard Park (one of the first Applicants) which have been filed in this proceeding:-

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Witnessed by:

- (a) The affidavit of John Richard Park ("**Mr Park**") sworn and filed on 28 January 2016, with exhibit "JRP-1" ("**Mr Park's January Affidavit**");
  - (b) An affidavit of Mr Park sworn and filed on 22 February 2016, with exhibit "JRP-2" ("**Mr Park's February Affidavit**");
  - (c) An affidavit by Mr Park sworn and filed on 8 March 2016, with exhibit "JRP-3" ("**Mr Park's March 2016 Affidavit**");
  - (d) The affidavit of Mr Park sworn on 18 October 2016, and served on me, by my solicitors on 8 November 2016, with exhibit "JRP-5" ("**Mr Park's October Affidavit**"); and
  - (e) The affidavit of Mr Park sworn 8 March 2017, with exhibit "JRP-6" ("**Mr Park's March 2017 Affidavit**").
7. I have also seen and read the following Affidavits by Mr David Heiner Schwarz ("**Mr Schwarz**"), a Principal at Tucker & Cowen Solicitors (my solicitors in this proceeding) which have been filed in this proceeding:-
- (a) The affidavit of Mr Schwarz sworn and filed on 16 February 2017, with exhibits "DHS-1" to "DHS-22" ("**the first Schwarz Affidavit**"); and
  - (b) The affidavit of Mr Schwarz sworn and filed on 7 April 2017, with exhibits "DHS-23" and "DHS-24" ("**the second Schwarz Affidavit**").

**Use of the books and records of the FMIF**

8. In the performance of my duties, I have had, and continue to have, access to books and records of the FMIF subject to certain undertakings given by me in accordance with the Order of Justice Daubney dated 29 January 2015 in proceeding 3383 of 2013 of this Honourable Court; certain of my staff also have access to the books and records of the FMIF, subject also to certain undertakings provided by them.
9. Insofar as I make statements in this affidavit concerning the FMIF and its affairs, they are matters known to me from my inspection and knowledge of those books and records, or on the basis of information provided to me by members of my staff who have access to the books and records of the FMIF.

**The LM First Mortgage Income Fund ("FMIF") and Relevant Entities**

10. The FMIF was registered as a managed investment scheme on 28 September 1999.

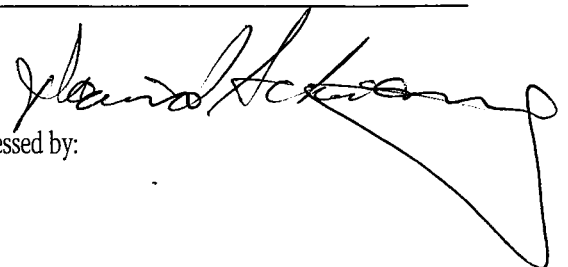
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11. The members of the FMIF subscribed capital for investment purposes. The FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of (mainly) first registered mortgages. The assets of the FMIF primarily consist of its rights against borrowers under these loan agreements and mortgages.
12. On or about March 2009, the FMIF was closed for new investments; the redemption of units was suspended in about October 2009.
13. The FMIF is governed by a Constitution, which has been amended at various times since the registration of the FMIF as a managed investment scheme. The current Constitution of the FMIF, being a "Replacement Constitution" dated 11 April 2008, as amended by supplemental deeds dated 16 May 2012 and 26 October 2012 ("the Constitution"), is exhibited to my 2015 Affidavit at pages 346 to 409 of exhibit "DW-1" to that affidavit; for the sake of completeness, and given its relevance to the matters mentioned in further detail below, a copy of the Constitution and amendments is exhibited hereto and marked "DW-40".

*LMIM and PTAL*

14. LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM"), the Second Applicant, is the responsible entity ("RE") of the FMIF, and has been since the FMIF's inception.
15. The Trust Company (PTAL) Ltd ("PTAL") has at all times relevant to this application been, and remains, the custodian of the FMIF, pursuant to the terms of a Custody Agreement between PTAL and LMIM dated 4 February 1999 ("Custody Agreement"). A copy of the Custody Agreement (and amendments) was exhibited to Mr Park's January 2016 Affidavit, at pages 71 – 166 of exhibit 'JRP-1' to that Affidavit; for the sake of completeness, and given its relevance to the matters mentioned in further detail below, a copy of the Custody Agreement and amendments is exhibited hereto and marked "DW-41".
16. LMIM issued a Product Disclosure Statement ("PDS") for investments in the FMIF from time to time. Exhibited hereto and marked "DW-42" is a copy of the PDS for the FMIF dated 10 April 2008 (containing the Supplementary Product Disclosure Statements dated 28 November 2008, 3 March 2009 and 30 October 2009), being the PDS covering the period relevant to the matters mentioned below.

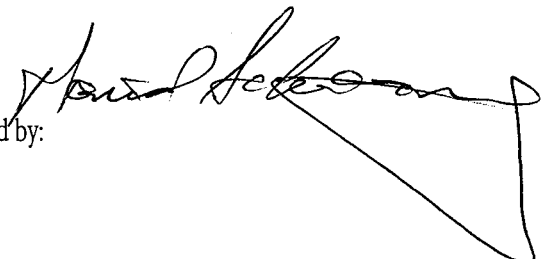
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Witnessed by:



*Other funds*

17. LMIM has been and in some cases continues to be the RE (and thus also the trustee), or the trustee of a number of other managed investment schemes or trusts (apart from the FMIF) to which I have not been appointed, including:-
- (a) the LM Managed Performance Fund ("MPF"), of which it was the trustee until 12 April 2013. LMIM was removed as the trustee of the MPF by order of this Honourable Court on 12 April 2013, and replaced by KordaMentha Pty Ltd ACN 100 169 391 ("KordaMentha") and Calibre Capital Limited ACN 108 318 985; Calibre Capital Limited has since retired, and since 3 January 2015 KordaMentha has been the sole trustee of the MPF;
  - (b) the LM Australian Income Fund, of which it is the RE;
  - (c) the LM Australian Structured Products Fund, of which it is the RE;
  - (d) the LM Cash Performance Fund, of which it is the RE;
  - (e) the LM Currency Protected Australian Income Fund, of which it is the RE; and
  - (f) the LM Institutional Currency Protected Australian Income Fund, of which it is the RE; and
  - (g) LM Wholesale First Mortgage Income Fund, of which it was the RE until 16 November 2012, when it was replaced by Trilogy Funds Management Limited.
18. The LM Currency Protected Australian Income Fund (the fund described in sub-paragraph (e) above), the LM Institutional Currency Protected Australian Income Fund (the fund described in sub-paragraph (f) above) and the LM Wholesale First Mortgage Income Fund (the fund described in sub-paragraph (g) above) are known as "feeder funds" that invested in the FMIF ("Feeder Funds").
19. The property of each of the Feeder Funds predominantly comprised units in the FMIF.

*LMA and the LM Administration Trust*

20. LM Administration Pty Ltd ACN 055 691 426 ("LMA") was incorporated in 1992.

21. LMA was the trustee of the LM Administration Trust ("LMA Trust"), a discretionary trust established on 30 June 2003. I have received from Mr Clout, who is the liquidator of LMA, copies of the following documents which are exhibited hereto and marked "DW-43":-
- (a) A deed establishing the LMA Trust, dated 30 June 2003;
  - (b) A Deed of Variation with respect to the LMA Trust, dated May 2012.
22. For many years (I understand from at least 2003), LMA as trustee for the LMA Trust was a service company providing services for LMIM's funds management operations under a series of services agreements that I refer to further below, and from about 21 March 2013, LMA provided services to LMIM (in its own capacity and in its role as RE or trustee) under a Resources Agreement that I refer to further below.
23. I note that:-
- (a) The judgment of Edelman J (as His Honour then was) in *Australian Securities and Investments Commission v Drake (No 2)*[2016] FCA 1552 ("ASIC v Drake") (which I have reviewed, and of which I have read the relevant passages mentioned below in detail) in relation to proceedings in the Federal Court of Australia number QUD596 of 2014 ("the ASIC proceeding") concerns LMIM and certain transactions involving the MPF;
  - (b) In ASIC v Drake, Edelman J refers to LMA and the LMA Trust and describes LMA's role at (relevantly) paragraphs 36 to 41; His Honour made a finding at paragraph 39 that the personnel who assisted LMIM were employed by LMA, not LMIM; and
  - (c) Mr Park's January 2016 Affidavit refers to the role of LMA during the period after the appointment of administrators to LMA and LMIM, and (at paragraph 10) describes LMA as a "service company".
24. Further, from the information available to me including the books of LMIM (insofar as they relate to the FMIF), I believe that:-
- (a) LMA did employ all of the personnel who performed the work involved in the conduct of the business operations of LMIM (at least so far as concerned its role as RE of the FMIF) prior to the appointment of administrators to LMIM;
  - (b) LMA employed the directors of LMIM;

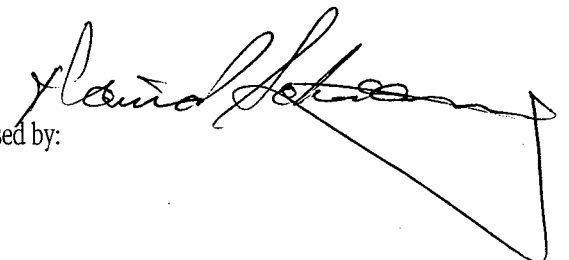
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- (c) The sole business activity of LMA during the period of some years prior to my Appointment was, as trustee of the LMA Trust, as a service provider to the funds management operations of LMIM (including in respect of LMIM's role as RE of the FMIF);
- (d) I understand that it was also the trustee of at least one other trust and owned certain assets (including at least the lease for the place of business of both LMIM and LMA), but I do not believe that it conducted any other business activities; it did not do so at the time that my Appointment commenced; and
- (e) During the period prior to my Appointment in which LMA provided services to LMIM LMA shared the same place of business as LMIM.

*Winding up of LMIM and LMA*

- 25. On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of each of LMIM and LMA.
- 26. An historical company extract with respect to LMIM, obtained from the records maintained by the Australian Securities and Investments Commission ("ASIC") is exhibited hereto and marked "DW-44".
- 27. An historical company extract with respect to LMA, obtained from the ASIC records is exhibited hereto and marked "DW-45".
- 28. On 11 July 2013, Deutsche Bank AG ("DB"), a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol ("the DB Receivers") as receivers and managers of the assets and undertaking of the FMIF.
- 29. On 26 July 2013, LMA was placed into liquidation, and David Clout and Lorraine Smith were appointed as its liquidators.
- 30. On 1 August 2013, Mr Park and Ms Muller were appointed liquidators of LMIM. They have remained the liquidators of LMIM, although I note from the company extract that Ms Ginette Muller ceased to be one of the liquidators of LMIM on 17 May 2017.
- 31. ASIC has suspended the Australian Financial Services Licence ("AFSL") of LMIM; ASIC has issued notices of suspension of LMIM's AFSL:-
  - (a) dated 9 April 2013 for a period expiring on 9 April 2015;

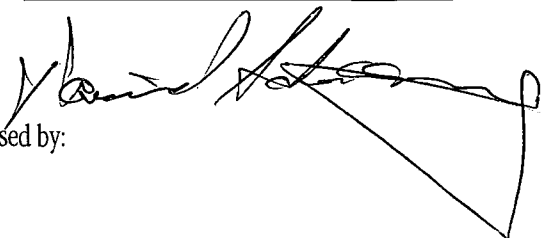
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Witnessed by:



- (b) dated 2 April 2015 for a period expiring on 2 April 2017; and
  - (c) most recently, dated 31 March 2017 for a period expiring on 2 October 2018.
32. A copy of the notice of suspension of LMIM's AFSL, dated 31 March 2017, is exhibited hereto and marked "DW-46".
33. By ASIC Instrument 16-0959 dated 29 September 2016 ("the ASIC Instrument"), ASIC granted an exemption to LMIM from the financial reporting obligations otherwise imposed on it as RE of the FMIF, subject to certain conditions including that the "Responsible Person" appointed to the FMIF (who is me within the meaning of the ASIC Instrument) publish and make available to members of the FMIF certain information concerning the FMIF, including financial information. Exhibited hereto and marked "DW-47" is a copy of the ASIC Instrument.

*Annual financial reports of the FMIF*

34. I have obtained from the books of the FMIF copies of its annual financial reports for the financial years ended 30 June 2011 to 30 June 2012. Exhibited hereto and marked "DW-48" are copies of the Annual Financial Reports of the FMIF for the financial years ended:-
- (a) 30 June 2011; and
  - (b) 30 June 2012.
35. Since my appointment, I have caused to be prepared (with the assistance of the BDO Audit team), unaudited financial statements for the FMIF, for each half-year, and each financial year.
36. Exhibited hereto and marked "DW-49" is a copy of the most recent end of year FMIF financial statements, for the year ended 30 June 2016, prepared by BDO.
37. Exhibited hereto and marked "DW-50" is a copy of the most recent half-year FMIF financial statements, for the half year ended 31 December 2016, prepared by BDO.
38. I have also caused reports to be provided to members of the FMIF from time to time throughout the course of my appointment under the Order dated 21 August 2013. Exhibited hereto and marked "DW-51" is a copy of my most recent report to members dated 31 March 2017; that report is my 17<sup>th</sup> report to members since my appointment.



### Brief history of this proceeding

39. This proceeding was commenced by Originating Application on 8 April 2015. The Originating Application sought various orders relating to the winding up of the FMIF, including directions as to (in brief summary) the allocation of certain responsibilities as between the Applicants and the Respondent in connection with the winding up of the FMIF, and its interaction with the winding up of LMIM.
40. On 20 July 2015, Justice Jackson heard the Originating Application insofar as it concerned the allocation of certain responsibilities between the parties. His Honour delivered judgment in respect of that aspect of the application on 15 October 2015, at which time His Honour published his reasons.
41. On 17 December 2015, His Honour made orders (defined below as “the Residual Powers Orders”) to give effect to His Honour’s judgment delivered on 15 October 2015.
42. On 12 November 2015, Justice Jackson made orders for the progress of one of the remaining aspects of the Originating Application, concerning a claim by the Applicants for remuneration, costs or expenses to be paid out of the property of the funds and trusts of which LMIM was the RE or trustee (including the FMIF).
43. On 16 December 2015, the Applicants filed a Further Amended Originating Application, in which the Applicants sought orders concerning the payment of remuneration from the property of funds and trusts of which LMIM was the RE or trustee, including the FMIF (“the Remuneration Application”).
44. Justice Jackson heard the Remuneration Application over two days, on 22 February 2016 and 14 March 2016. His Honour has reserved judgment in respect of the Remuneration Application.

### Background to the Indemnity Application and Directions Application

45. On 17 December 2015, Justice Jackson of this Honourable Court made Orders (“the Residual Powers Orders”) in this proceeding which (among other things) established a regime for dealing with claims by the Second Applicant, LMIM, for indemnity from the property of the FMIF. As the Residual Powers Orders were made in this proceeding, I do not exhibit a copy to this affidavit.
46. The Application filed 20 May 2016 (“the Indemnity Application”) seeks indemnity from the FMIF, pursuant to the Residual Powers Orders, in respect of certain costs said to have been incurred by LMIM as RE of the FMIF.

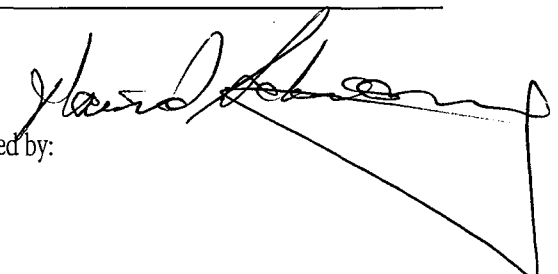
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47. Mr Park's October Affidavit, filed by the Applicants in support of their Indemnity Application, contains a general explanation of the background to the Indemnity Application.

*Appeal Costs Indemnity Claim*

48. On 10 February 2016, Russells (solicitors for the Applicants) wrote to Gadens (a firm of solicitors who advise and act for me in relation to certain aspects of my Appointment) making a claim pursuant to the indemnity regime established by the Residual Powers Orders, for certain costs related to an appeal from the Orders of Justice Dalton to which I have referred at paragraph 2 above ("**Appeal Costs Indemnity Claim**").
49. On 24 February 2016, I then requested certain additional information in relation to the indemnity claim (through my solicitors, Gadens), and on 11 March 2016 certain information was provided to me in response to that request.
50. On 14 April 2016, Gadens Lawyers (on my instructions) wrote to Russells (for the Applicants) giving them notice that I had rejected the claim for indemnity in respect of the expenses of the appeal, and my reasons for doing so were later provided in correspondence from Gadens to Russells dated 21 April 2016.
51. A copy of the abovementioned correspondence between Russells and Gadens dated 10 February, 24 February, 11 March, 14 April and 21 April 2016 relating to the Appeal Costs Indemnity Claim (but without the other documents supporting the claim, which were provided with the correspondence), is exhibited to Mr Park's October Affidavit at pages 48 to 50, 59 to 61, 84 to 87, 98 and 99 to 101 of exhibit JRP-5.

*Second Indemnity Claim*

52. On 15 February 2016, I received from FTI Consulting a letter from Mr Park (one of the Applicants) notifying me of additional "**Eligible Claims**" within the meaning of paragraph 5 of the Residual Powers Orders ("**Second Indemnity Claim**").
53. On 29 February 2016, I then requested certain additional information in relation to each of those indemnity claims (either directly, or through my solicitors), and on 24 March 2016 certain information was provided to me in response to those requests.
54. I sought advice from Tucker & Cowen Solicitors (the privilege in which I do not waive) in relation to that Second Indemnity Claim.

55. I note that the Applicants either deferred or withdrew certain of the claims, and reduced the amounts of other claims, in the Second Indemnity Claim, so that the total amount of the Second Indemnity Claim falling for my decision was reduced from an amount of \$375,499.78 (inclusive of GST) to an amount of \$262,693.11 (inclusive of GST).
56. On 22 April 2016, I sent a letter to Mr Park (one of the First Applicants) giving him notice that I:-
- (a) accepted certain of the claims, either in whole or in part ("Accepted Claims"); and
  - (b) rejected the balance of the claims ("Rejected Claims").
57. The amount which I accepted as being amounts "*to which LMIM has a right to be indemnified from the property of the FMIF*" (within the meaning of paragraph 8(b)(i) of the Residual Powers Orders) was \$84,954.41. I caused that amount to be paid to Russells Solicitors Law Practice Trust Account as requested by the Applicants' solicitors, on or about 30 May 2016. That payment was made in circumstances which are further explained below.
58. On 27 April 2016, I sent a letter to Mr Park providing my reasons for rejecting the Rejected Claims.
59. A copy of the abovementioned correspondence between Mr Park and me dated 15 February, 29 February, 24 March, 22 April and 27 April 2016 relating to the Second Indemnity Claim (but without the other documents supporting the claim, which were provided with the correspondence), is exhibited to Mr Park's October Affidavit at pages 51 to 57, 64 to 75, 88 to 96, 102 to 104 and 105 to 111 of exhibit JRP-5.

*Application filed 20 May 2016 – the Indemnity Application*

60. Following my rejection of the Appeal Costs Indemnity Claim, and part of the Second Indemnity Claim, the Indemnity Application was filed on 20 May 2016, to be heard on a date to be fixed, seeking orders including declarations that particular claims which had been rejected were in fact 'Eligible Claims' within the meaning of the order 8(b) of the Residual Powers Order..
61. On 16 February 2017, Justice Jackson made orders concerning the conduct of the Indemnity Application, including an order that I file Points of Claim identifying any alleged ground giving rise to an objection to the indemnity named in the application by reason of the clear accounts rule.
62. For various reasons, explained in the second Schwarz Affidavit, I encountered difficulties in complying with the Order made on 16 February 2017.

63. On 7 April 2017, Justice Jackson made further orders concerning the conduct of the Indemnity Application, including again an order that I file and serve Points of Claim identifying any alleged ground giving rise to an objection to the indemnity named in the application by reason of the clear accounts rule.
64. On 24 April 2017, I filed Points of Claim in this proceeding as contemplated by the Order dated 7 April 2017. I will refer below to those Points of Claim.
65. On 10 May 2017, I filed Amended Points of Claim in this proceeding, in which certain minor amendments were made.
66. The Amended Points of Claim annexes a draft Amended Statement of Claim ("ASOC") to be filed in another proceeding in this Honourable Court, namely proceeding 11560 of 2016 ("**the Breach of Trust Proceeding**"). I will refer to the Breach of Trust Proceeding and the ASOC below.
67. On 12 May 2017, the Applicants filed Points of Defence to the Amended Points of Claim.
68. The ASOC refers to "Consolidated Particulars" to be filed in the Breach of Trust Proceeding as particulars of certain allegations made in the ASOC. Exhibited hereto and marked "DW-52" is a copy of the Consolidated Particulars which, I am informed by Mr David Schwarz of Tucker & Cowen Solicitors, and believe, were sent to Russells (solicitors for the Applicants) together with the Amended Points of Claim (which was, at that time, not yet filed, but had been signed in final form) on 9 May 2017.
69. The ASOC has not yet been filed in the Breach of Trust Proceeding (at the time of making this affidavit) although I expect it to be filed before the hearing of the Indemnity Application.
70. The Indemnity Application is listed for hearing before the Honourable Justice Jackson on 19 and 20 June 2017.

*Intention to rely on the clear accounts rule and the Directions Application*

71. On 11 May 2016, Tucker & Cowen Solicitors sent a letter to Russells, upon my instructions. That letter referred to concerns that I had raised during the course of the Remuneration Application in relation to certain payments which LMIM caused to be made from the property of the FMIF to LMA for "loan management fees" in the period from March to July 2013, raised the potential application of the "clear accounts" rule, and proposed that any payment from the FMIF in respect of the indemnity claim be deferred until after delivery of judgment by the Honourable Justice Jackson in respect of the Remuneration Application and consideration of His Honour's reasons for judgment.

72. In response to that correspondence, Tucker & Cowen Solicitors received from Russells a letter dated 11 May 2016 which (among other things) said the following:-

*“So that your client is on fair notice at the earliest possible opportunity, if he presses the claims in your letter and is unsuccessful, our clients will seek an order that he personally pay the costs of the necessary application on a full indemnity basis and potentially also that your firm be jointly liable for those costs (as it must be on your advice that these positions are being advanced).”*

73. In those circumstances, and as I have stated above, I caused the amount of the Second Indemnity Claim that I had accepted, to be paid. I did so because I did not consider that it would be in the interests of the members of the FMIF to expend substantial sums of money (to be paid from the property of the FMIF) to engage in a dispute about whether an amount of less than \$100,000 (which I had accepted as being amounts for which LMIM would otherwise be entitled to an indemnity from the FMIF) should be paid from the property of the FMIF to the Second Applicant.
74. Subsequently, after I had commenced the process of procuring payment of the Accepted Claims, the Indemnity Application was filed on 20 May 2016 and was served on my solicitors, Tucker & Cowen, on 25 May 2016.
75. Then, in correspondence dated 13 December 2013, after Tucker & Cowen had on my instructions confirmed that I would rely on the clear accounts rule in response to the Indemnity Application, Russells again refer to an intention on the part of the Applicants to seek an order that I personally pay the Applicants' costs of the Indemnity Application on the indemnity basis without recourse to the assets of the FMIF.
76. Exhibited hereto and marked “DW-53” is a bundle containing copies of the following correspondence, concerning my intention to raise the clear accounts rule in response to the Indemnity Application:-
- (a) The abovementioned letter from Tucker & Cowen Solicitors to Russells Lawyers dated 11 May 2016 (also at pages 112 to 113 of Mr Park's October Affidavit);
  - (b) The abovementioned letter from Russells to Tucker & Cowen Solicitors dated 11 May 2016 (also at pages 114 to 118 of Mr Park's October Affidavit);
  - (c) A letter from Tucker & Cowen Solicitors to Russells dated 13 May 2016, containing an initial response to the abovementioned letter from Russells to Tucker & Cowen Solicitors dated 11 May 2016 (also at pages 119 to 120 of Mr Park's October Affidavit);

- (d) A letter from Tucker & Cowen Solicitors to Russells dated 23 November 2016, in which they confirmed on my instructions that I still intended to rely on the clear accounts rule in response to the Indemnity Application (also at Exhibit DHS-10 of the first Schwarz Affidavit);
  - (e) The abovementioned letter from Russells to Tucker & Cowen dated 13 December 2016 (also at Exhibit DHS-11 of the first Schwarz Affidavit); and
  - (f) A letter from Tucker & Cowen to Russells dated 3 February 2017 responding to Russells' letter dated 13 December 2016 (also at Exhibit DHS-16 of the first Schwarz Affidavit).
77. In light of that correspondence, and in particular the Applicants' expressed intention to seek an order that I personally pay the Applicants' costs of the Indemnity Application on the indemnity basis without recourse to the assets of the FMIF, I sought legal advice (the privilege in which I do not waive) concerning the steps I should properly take in connection with my response to the Indemnity Application.
78. Having had the benefit of such advice (including from Queens' Counsel), I consider it appropriate that I seek direction from this Honourable Court in terms of the Directions Application.

*Estoppel or waiver*

79. In the letter from Russells to Tucker & Cowen dated 13 December 2016, referred to above, Russells also asserts (among other things) that I am estopped from raising the "clear accounts" rule as a ground of opposition to the Indemnity Application, because I have not (it is said) sufficiently raised grounds of objection to payment under LMIM's indemnity, by reason of the "clear account" rule, previously.
80. I note that no allegation of issue estoppel has been raised in the Points of Defence filed by the Applicants in connection with the Indemnity Application.
81. However, in those circumstances, while there may be no allegation of estoppel made against me on this occasion at the hearing of the Indemnity Application, I consider it appropriate that I raise grounds of objection to the Indemnity Application by reason of the "clear accounts" rule, so that it cannot be said later that I did not raise them sufficiently, and I respectfully seek direction from the Court as to whether I am justified in doing so.

**Breach of Trust Proceeding – Loan Management Fee Claims**

82. The ASOC and the Consolidated Particulars to which I have referred above raise a number of causes of action against LMIM as RE of the FMIF, relating to (in general terms):-
- (a) the management of the FMIF before the appointment of the First Applicants as administrators of LMIM;
  - (b) work performed by staff employed by LMA in connection with the operations of the FMIF; and
  - (c) the management of the FMIF (including work performed by LMA) during the period after the appointment of the First Applicants as administrators of LMA, until the time at which the First Applicants (Mr Park and Ms Muller) ceased to be administrators of LMA and, later, became the liquidators of LMIM.
83. For the purposes of the Indemnity Application, and of the Directions Application, I intend to focus on the “Loan Management Fees” paid out of the property of the FMIF, and in particular those Loan Management Fees that were paid after the appointment of administrators to LMIM and to LMA. These are the “Loan Management Fee Claims” referred to in paragraph 19(b)(i) and (ii) of the Amended Points of Claim.
84. However, I note that the Loan Management Fees were only one of a number of different types of fees paid out of the property of the FMIF by Mr Park and Ms Muller as administrators of LMIM and LMA (until they ceased to be administrators of LMA). Mr Park (one of the First Applicants) has referred to the various fees paid from the assets of the FMIF after the appointment of administrators to LMIM, in his January Affidavit, his February Affidavit, and his March 2016 Affidavit. I have also referred to the various fees charged to the FMIF during that period, in my February 2016 Affidavit and in my March 2016 Affidavit (in particular, at paragraphs 16 to 30).

*Services Agreements*

85. As I have explained above, LMA as trustee for the LMA Trust was a service company providing services for LMIM's funds management operations under a series of services agreements.
86. Paragraph 25 of the ASOC refers to Services Agreements to which LMIM and LMA were parties.

87. Exhibited hereto and marked:-

- (a) "DW-54" is a copy of the Services Agreement dated 1 July 2003 to which reference is made in paragraph 25 of the ASOC;
  - (b) "DW-55" is a copy of the Services Agreement dated 1 July 2009; and
  - (c) "DW-56" is a copy of the Services Agreement dated 1 July 2010,
- each of which is mentioned in the Particulars to paragraph 25 of the ASOC.

88. The effect of the terms of the Services Agreements included that:

- (a) LMA supplied "all services necessary for the efficient management and administration of LMIM's funds management business"; and
- (b) the entirety of LMIM's entitlement to a management fee under the Constitution of the FMIF was passed on to LMA, and LMA was also entitled to recover a proportion of its expenses incurred in delivering the services contracted for.

*Resources Agreement*

89. Paragraph 26 of the ASOC then refers to a further services agreement (defined as a "Resources Agreement") entered into between LMIM and LMA on or about 21 March 2013, following the appointment of the First Applicants in this proceeding, as administrators to both LMIM and LMA.
90. Exhibited hereto and marked "DW-57" is a copy of that Resources Agreement; that document is exhibited to Mr Park's January Affidavit, commencing at page 54 of Exhibit "JRP-1" to that Affidavit. The document exhibited to this Affidavit is a copy of the document exhibited to Mr Park's January Affidavit. I make the observation that, while each of the Services Agreements mentioned in paragraph 87 above named LMA in its capacity as trustee for the LM Administration Trust as the "service provider", the Resources Agreement does not refer in any way to the LM Administration Trust, and simply names LMA as the "ServiceCo."
91. LMA then continued under the Resources Agreement to supply 'Resources' for LMIM to carry out its 'Functions' (as defined in the Resources Agreement).
92. All of LMA's running costs after the appointment of Mr Park and Ms Muller as administrators of LMIM were met by payment of the Resources Fee. In that regard, I refer to paragraph 43 of Mr Park's February Affidavit and to paragraphs 43 to 52 of Mr Park's March 2016 Affidavit.



93. I also note that certain time spent by Mr Park and Ms Muller, and their staff, in acting as administrators of LMA was charged at hourly rates to LMIM as an "additional resources fee" under clause 4.2(b) of the Resources Agreement and that a proportion of that has been claimed, in the Remuneration Application, to be payable from the property of the FMIF. As to that, I refer to paragraph 101 of Mr Park's January Affidavit and to paragraphs 45 and 46 of Mr Park's February Affidavit.

*Agent Appointments and Agents' Indemnities*

94. Paragraphs 63 and 66 of the ASOC and paragraph 63 of the Consolidated Particulars, refer to a series of documents described as "Agent Appointments" and "Agents' Indemnities", by which PTAL purportedly appointed LMIM as its agent to exercise rights, powers, privileges, benefits, discretions and authorities conferred on PTAL under securities held by PTAL as custodian for the FMIF.
95. The Consolidated Particulars refers to 29 sets of such instruments (that is, in respect of 29 security providers). At paragraph 23 of Mr Park's January Affidavit, reference is made to 22 sets of such documents, and copies of the 22 sets of Appointments of Agent and Deeds of Indemnity are exhibited to Mr Park's January Affidavit, from pages 167 to 279 of Exhibit "JRP-1".
96. Given the volume of documents, and given that the documents appear to me to be (subject to what I say at paragraph 97 below) in materially similar form (although not identical), I do not propose to exhibit to this Affidavit all of the Agent Appointments and Agents' Indemnities referred to in paragraph 63 and 66 of the ASOC and paragraph 63 of the Consolidated Particulars; rather, exhibited hereto and marked "DW-58" is a copy of an example Agent Appointment and Agents' Indemnity, namely:-
- (a) an Appointment of Agent with respect to Redland Bay Leisure Life Pty Ltd, dated 9 February 2011; and
  - (b) an "Agents' Indemnity" with respect to Redland Bay Leisure Life Pty Ltd, dated 9 February 2011,

each of which has been obtained from the books of the FMIF to which I have access.

Signed:

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Witnessed by:

97. Further to the previous paragraph, the only differences that I am aware of that might be material, are that some of the Agent Appointments contain a clause entitling the Mortgagee (PTAL), without prejudice to any other rights or remedies available to it under the deed or applicable law, to terminate the Agent Appointment by giving seven days' written notice to the Agent (LMIM); while some of the Agent Appointments contain such a clause, most do not.

*Management Services Agreements*

98. Paragraph 70 of the ASOC refers to a series of "Management Services Agreements" that were entered into between PTAL (as "Mortgagee"), LMIM (as "Responsible Entity") and LMA (as "Manager"), by which LMA was engaged by PTAL to perform services including as an agent exercising powers under securities held by PTAL as custodian for the FMIF.
99. An example of such a Management Services Agreement is exhibited to my February 2016 Affidavit, at exhibit "DW-18", commencing at page 371 of the bundle of exhibits; that agreement relates to the borrower, Cameo Estates Lifestyle Villages (Launceston) Pty Ltd.
100. I have not exhibited all of the Management Services Agreements which are referred to in paragraph 70 of the ASOC (further particulars of which are contained in paragraph 70 of the Consolidated Particulars) due to the volume of documentation and because, from my review of the documents and subject to what I say below, they appear to me to be in materially similar form.
101. The only material differences that I am aware of are variations as to the types of fees which could be charged, and the rates to be charged, identified in Schedule 1 to each agreement. They are as follows:
- (a) *General administration fees.* All of the agreements provided for such a fee to be charged on an hourly rate basis, with the applicable hourly rate varying according to the title of the person whose time is charged.
  - (b) *Development Management Services fees.* Some but not all agreements allowed for such a fee, and they varied between 2.5% and 3% of the 'total development build cost'.
  - (c) *Marketing and Sales Management fees.* Some but not all agreements allowed for such a fee, but where allowed the rate was 2% of gross sales proceeds (incl GST) where LMA undertakes the sale, otherwise 1% where an external real estate agent is appointed.

*The payment of Loan Management Fees*

102. Loan Management Fees were paid from and including the financial year ended 30 June 2011. They were separate to and in addition to fees paid under the Services Agreements and the Resources Agreement.
103. However, although the Loan Management Fees were all ultimately paid to LMA, neither I nor my staff assisting me have been able to determine whether the 'Loan Management Fees' paid from the property of the FMIF were paid (first) under the Agents' Indemnities, or directly under the Management Services Agreements.
104. As to the amount of such fees in the financial years ended 30 June 2011 and 30 June 2012, I refer to the audited financial reports for each year from and including that financial year, referred to in paragraph 34 above, as follows:
  - (a) On page 32 of the audited financial report for the financial year ended 30 June 2011, the sum of \$5,381,516 is disclosed as "Loan management fees paid to the Responsible Entity for loan management and controllership services provided by the Responsible Entity on behalf of the Scheme in replacement of appointing external receivers. These fees are charged directly to borrowers to facilitate possible future recovery." That is the same (rounded) amount as the sum of the unadjusted amounts set out in paragraphs 73(a)(i) and (ii) of the Consolidated Particulars.
  - (b) On page 29 of the audited financial report for the financial year ended 30 June 2012, the sum of \$4,817,414 is disclosed with the same description. That is the same (rounded) amount as the sum of the unadjusted amounts set out in paragraphs 73(a)(i), (ii) and (iii) of the Consolidated Particulars.
105. Subsequently, Loan Management Fees continued to be charged throughout the 2012-13 financial year, both before and after the appointment of administrators in March 2013.
106. Mr Eric Leeuwendal, an accountant and an executive director of BDO, with BDO staff assisting him, has under my supervision carried out further accounting investigations as to the payments of loan management fees, with reference to the books and records of LMIM, and also to other records of LMA made available to BDO by Mr David Clout, the liquidator of LMA.
107. The Consolidated Particulars reflect the results of the abovementioned investigations. Mr Leeuwendal will swear an affidavit setting out the results of those investigations, focused on the period after the appointment of the First Applicants as administrators of LMIM.

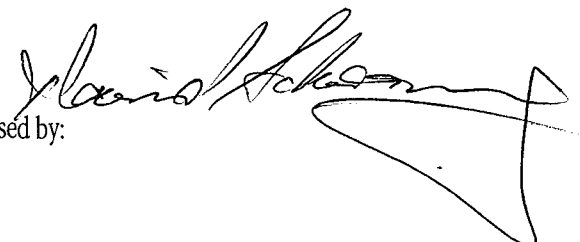
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Witnessed by:



108. In relation to the period from 1 July to 25 July 2013, LMA issued a further invoice number 8973Inv005 to PTAL for Loan Management Fees for \$252,310.87 (including GST), which has not to date been paid from the assets of the FMIF. Exhibited hereto and marked "DW-59" is a copy of that invoice.

*Payments in respect of loan management fees*

109. In my affidavits filed for the purposes of the Remuneration Application, I referred to the investigations that I had undertaken to that time in relation to the payments made from the property of the FMIF for loan management fees during the period after the appointment of the First Applicants as administrators of LMIM.
110. The Supplementary Submissions on behalf of the Respondent handed to the Court by Counsel appearing for me on 14 March 2016, annexed a schedule titled "Summary of Fees Invoices by LMA & LMIM" which, in turn, annexed Table C which summarised my understanding of the amounts that had been charged and paid in the relevant period in respect of Loan Management Fees. That understanding was based on invoices which had been issued by LMA to PTAL for Loan Management Fees.
111. However, since the hearing on 14 March 2016, and as I say above, my staff and I have undertaken further investigations in relation to the Loan Management Fees charged to, and those paid from, the FMIF including during the period after the appointment of administrators to LMIM.
112. As a result of those investigations, which Mr Leeuwendal will explain in more detail in his affidavit, my staff and I have determined that the amounts in fact charged and paid in the relevant period are different to the amounts identified in the Supplementary Submissions. We have now verified that the following cash payments were made in respect of loan management fees from the property of the FMIF:-
- (a) on about 9 May 2013, the sum of \$128,242.79 was paid from a Suncorp bank account in the name of the FMIF (referred to as the "FMIF Working Unrestricted – Business Everyday" account);
  - (b) on about 14 June 2013, the sum of \$276,441.22 was paid from the "FMIF Working Unrestricted – Business Everyday" account; and
  - (c) on about 8 July 2013, the sum of \$214,426.40 was paid from the FMIF Working Unrestricted – Business Everyday" account.

*The "loan management" work & LMA staff*

113. In the context of the Remuneration Application, I addressed my concerns about the reasonableness of charging such "Loan Management Fees" during the period in which Mr Park and Ms Muller were appointed as the administrators of both LMA and LMIM, in the following passages of my earlier affidavits:-
- (a) Paragraphs 97 to 102, and 110 to 114 of my February 2016 Affidavit; and
  - (b) Paragraphs 28, 29 and 30 of my March 2016 Affidavit.
114. So far as I have been able to ascertain from my investigations, the wages of the staff at LMA (including those whose time had been charged as Loan Management Fees) were charged to LMIM as RE of the FMIF by way of the Resource Fee charged under the Resources Agreement.
115. In other words, as I understand it, there was no exclusion from charging by LMA to LMIM under the Resources Agreement for the cost of staff engaged in performing work under the Management Services Agreements; rather, in addition to the costs of employing those staff performing such work being charged under the Resources Agreement, their time was also charged under the Management Services Agreements.
116. My staff and I have reviewed the records available to me with respect to the recoveries from borrowers and security providers in respect of loans where loan management fees were charged to the borrowers. There was a shortfall in recoveries for each of those loans, and accordingly there has been no recovery from any borrower in respect of loan management fees.

**LMA costs after LMA liquidation**

117. As explained at paragraph 88 to 91 of my February 2016 Affidavit, during the initial period of my Appointment in and from August 2013, LMA (at that time controlled by Mr David Clout and Ms Lorraine Smith, its liquidators) entered into an arrangement with the DB Receivers whereby LMA would be paid the expenses incurred in any given month as a result of LMA maintaining operations and answering queries as required, plus a 10% "uplift" on those costs and expenses.
118. The amounts of LMA's costs and expenses, together with the uplift, have been paid by the DB Receivers from the property of the FMIF. Some of those amounts relate to work performed for the benefit of LMIM itself, or of other funds of which LMIM is the RE or trustee, relating to requests or queries by staff of Mr Park and Ms Muller.

119. On 11 May 2016, I wrote to Mr Park concerning an amount calculated as being payable by LMIM in respect of work performed by LMA for the benefit of LMIM other than in its capacity as RE of the FMIF. Subsequently, the First Applicants raised certain questions about the calculation, and I obtained further information from Mr Clout (the liquidator of LMA) as a result of which I sent Mr Park a revised calculation in correspondence on 5 April 2017, a copy of which is exhibited hereto and marked "DW-60".
120. I have subsequently received a letter from Mr Park dated 11 April 2017, a copy of which is exhibited hereto and marked "DW-61". There has been further correspondence between the Applicants and me about this issue.

**Other relevant claims and proceedings against LMIM for breach of trust or duty**

121. I have caused the following proceedings to be commenced on behalf of LMIM as responsible entity for the FMIF, in which relief is sought against LMIM:-
- (a) Proceeding number 12317/14 in this Honourable Court ("MPF Proceeding");
  - (b) the Breach of Trust Proceeding; and
  - (c) Proceeding 13534/16 in this Honourable Court ("Feeder Fund Claim").

*The MPF Proceeding*

122. The MPF Proceeding was commenced by Claim filed on 19 December 2014. Exhibited hereto and marked "DW-62" is a copy of the current Claim and Statement of Claim filed in that proceeding.
123. The MPF Proceeding includes allegations that LMIM as RE of the FMIF acted in breach of trust and duty by executing a settlement deed, to settle a dispute with a purchaser of a security property over which the FMIF had a first registered mortgage and the MPF had a third registered mortgage, which provided for the settlement proceeds to be split between the FMIF and the MPF.
124. The sum of \$15,546,147.85 was received by LMIM as trustee of the MPF from the settlement proceeds, and that amount plus interest is the amount of the claim against LMIM in the MPF Proceeding including under section 1317H of the Act.
125. The MPF Proceeding is still ongoing, and remains at the pleading stage.

*The Breach of Trust Proceeding*

126. The Breach of Trust Proceeding, referred to above, was commenced by Claim filed on 9 November 2016. It makes allegations of breach of trust and duty against LMIM not only in respect of the payment of Loan Management, but also alleges that LMIM acted in breach of trust and duty by:
- (a) causing to be paid, at its direction, management fees from the assets of the FMIF in advance of performing its duties to the FMIF, and did not pay interest to the FMIF in respect of the management fees which were prepaid;
  - (b) causing to be paid, at its direction, management fees from the assets of the FMIF in amounts which exceeded its entitlement, given the true net fund value for the periods referable to those management fees;
  - (c) directing payments from the MPF to the FMIF to be paid to the Feeder Funds, in the absence of any liability due and payable on any other basis.
127. The quantum of each of the above claims have not yet been finally determined, although in relation to the claims pertaining to the payments to the Feeder Funds the claim has been quantified in the amount of approximately \$12,931,836 plus interest.
128. The ASOC, referred to above, is the amended pleading which has been prepared for the purpose of filing in the Breach of Trust Proceeding. However, the ASOC has not yet been filed, and the Breach of Trust Proceeding has not yet been served.

*The Feeder Fund Claim*

129. The Feeder Fund Claim was commenced by Claim filed in the Brisbane registry of this Honourable Court on 23 December 2016. Exhibited hereto and marked "DW-63" is a copy of the Claim and Statement of Claim filed in that proceeding.
130. The Feeder Fund Claim alleges breaches of trust and duty against LMIM in respect of payments from the assets of the FMIF by LMIM, following requests by LMIM as RE of the Feeder Funds to redeem Class B units in the FMIF at a time when the FMIF was not liquid. The payments in question occurred between 1 May 2009 and 31 January 2013, prior to the appointment of Mr Park and Ms Muller, and were in the total aggregate amount of \$55,059,318.12 plus interest.
131. There is an overlap between the loss in this proceeding and the Breach of Trust Proceedings, as some of the redemption liabilities were treated as being satisfied from receivables which are

alleged in Proceedings 8032/14 and 8034/14 (mentioned below) to have arisen by reason of payments from the MPF allegedly to the FMIF having been directed to the Feeder Funds.

132. The Feeder Fund Claim has not yet been served.

**Proceedings seeking relief against the property of the FMIF**

133. There are a number of proceedings in which relief is sought against LMIM, including orders to the effect that the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of an alleged liability of LMIM to the plaintiff. They include, relevantly:-

- (a) Proceeding 8032 of 2014 in this Honourable Court, in which KordaMentha Pty Ltd in its capacity as trustee of the MPF is the plaintiff, LMIM is the first defendant and I am named (in my capacity as Court-appointed Receiver of the property of the FMIF) as the second defendant ("proceeding 8032/14");
- (b) Proceeding 8034 of 2014 in this Honourable Court, in which KordaMentha Pty Ltd in its capacity as trustee of the MPF is the plaintiff, LMIM is the first defendant and I am named (in my capacity as Court-appointed Receiver of the property of the FMIF) as the second defendant ("proceeding 8034/14"); and
- (c) Proceeding 12716 of 2015 in this Honourable Court, in which KordaMentha Pty Ltd in its capacity as trustee of the MPF is the plaintiff, and LMIM as is the defendant ("AIIS claim").

*Proceedings 8032/14 and 8034/14*

134. Proceedings 8032/14 and 8034/14 are on the Commercial List of this Honourable Court, being supervised by Justice Jackson. While no formal order has been made that the proceedings be conducted or heard together, they have in fact been progressed in parallel.

135. Exhibited hereto and marked:-

- (a) "DW-64" is a copy of the Third Further Amended Statement of Claim in proceeding 8032/14; and
- (b) "DW-65" is a copy of the Third Further Amended Statement of Claim in proceeding 8034/14.

136. In very general summary, the claims made in Proceedings 8032/14 and 8034/14 concern the assignment from the FMIF to the MPF of certain loans, for which KordaMentha as the current



trustee of the MPF says that the MPF overpaid. KordaMentha's claim is that in agreeing to the assignments, LMIM acted in breach of trust. However, it also alleges that because LMIM acted both in its capacity as trustee of the MPF, and also in its capacity as RE of the FMIF, LMIM's indemnity against the property of the FMIF ought to respond to the claim.

137. The claims made in Proceedings 8032/14 and 8034/14 relate to both the Breach of Trust Proceedings and to the Feeder Fund Proceedings (in very general summary) because some of the amounts that are alleged to have been paid for the benefit of the FMIF, but which were not in fact received by LMIM as RE of the FMIF (or by PTAL as custodian for the FMIF), were in fact paid elsewhere, for example to LMA or to LMIM as RE of a Feeder Fund. KordaMentha's claim in relation to these payment relies, I believe, on the treatment of those transactions in the accounts of the MPF and of the FMIF.
138. However, in circumstances where I am not convinced that the treatment of those transactions in the accounts of the MPF and of the FMIF is accurate, certain of the claims made in the Breach of Trust Proceeding are made on the alternative bases that either the transactions are correctly characterised in the relevant accounts, or they are not. The interconnection of allegations that I mention in the previous paragraph is the reason for the pleading at paragraph 36 of the ASOC.
139. Relevantly, the quantum of the loss suffered by the FMIF by reason of the breaches of trust and duty alleged in the Breach of Trust Proceedings will be substantially reduced in the event that the payments from the MPF were not correctly recorded.

#### *AIIS Claim*

140. The AIIS Claim was commenced by Claim filed on 16 December 2015. Exhibited hereto and marked "DW-66" is a copy of the Claim and Statement of Claim filed in the proceeding.
141. Relevantly, I note that the AIIS Claim seeks (among other things) declarations:-
- (a) that the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of LMIM's alleged liability to the plaintiff, in the amount of \$3,905,721.81;
  - (b) of a lien or charge over the assets of the FMIF in respect of that alleged liability of LMIM to the plaintiff; and
  - (c) that the plaintiff is entitled to be subrogated to LMIM's right of indemnity in respect of the assets of the FMIF.
142. The Claim has been served on LMIM as the Defendant, but no defence has yet been filed.

143. On 22 November 2016, Justice Daubney made orders in terms that (among other things) the defendant is not required to file a defence and any counterclaim until 28 days after the plaintiff gives written notice to the defendant's solicitors, Clayton Utz, and to Tucker & Cowen as my solicitors, that a defence and any counterclaim is required to be filed. I am informed by Mr David Schwarz of Tucker & Cowen, and believe, that at the time of making this affidavit, no such notice has been received.

**Claims by LMIM against the FMIF**

144. In addition to the indemnity claims the subject of the Indemnity Application, additional claims have previously been made by LMIM, which I do not understand to have been abandoned.

*Summary - Claims made against the FMIF*

145. In summary, in addition to the indemnity claims the subject of the Indemnity Application, I have received during my Appointment actual claims (whether formally made or not) for payment from the property of the FMIF in relation to the following:-

- (a) remuneration and some expenses of the First Applicants, for the period to 30 September 2015 (which was the subject of the Remuneration Application);
- (b) the claims made in Proceedings 8032/14 and 8034/14 and the AIIS Claim;
- (c) an unpaid invoice for Loan Management Fees; and
- (d) invoices issued by Norton Rose Fulbright.

146. I have addressed the claims made in Proceedings 8032/14 and 8034/14 and the AIIS Claim in some detail above. I will briefly address the other claims that have been made, below.

*Remuneration Application*

147. I have mentioned above the Remuneration Application. By that application, the Applicants sought remuneration to be paid to them from the property of the FMIF in the total amount of \$3,408,077.01 (inclusive of GST).
148. Although the Applicants' claim was primarily a direct claim by the First Applicants as administrators and liquidators (i.e. not as trustees pursuant to a right of indemnity), the potential application of the 'clear accounts' rule to a trustee's indemnity claim, at least in certain respects, was raised during the course of the Remuneration Application.

149. However, I do not propose to go into those issues again here. Those issues will be determined by Justice Jackson when judgment is delivered on the Remuneration Application.

*Unpaid Loan management fees invoice*

150. I have referred at paragraph 108 above to invoice 8973Inv005 dated 25 July 2013, from LMA to PTAL for "loan management fees" for the period of 1 – 25 July 2013, in the amount of \$229,373.52 plus GST (being an amount of \$252,310.87 inclusive of GST), which has not been yet paid from the property of the FMIF.
151. On 23 July 2015, Mr Glenn O’Kearney of FTI Consulting sent an email to Mr Murray Daniel, who was an employee of BDO working under my supervision, in which he provided details of amounts claimed by the Applicants to be payable from the property of the FMIF to them in respect of remuneration and outlays, operational costs, legal advisors and loan recovery costs as at 30 June 2015. A copy of that email is exhibited hereto and marked "DW-67".
152. I note that the "loan recovery costs" mentioned in that email, is the amount of Invoice 8973Inv005, for loan management fees, and I understand the email to be referring to that invoice.
153. Mr Murray Daniel received further correspondence from Mr O’Kearney of FTI Consulting on 14 January 2016, providing updated information in relation to the amounts said to be outstanding for those costs; a copy of that email from Mr O’Kearney (which was copied to me) is exhibited hereto and marked "DW-68".
154. That email again referred to the GST-exclusive amount of 8973Inv005, for "loan recovery costs (LM Administration Pty Ltd)". That invoice has not yet, though, been the subject of an Administration Indemnity Claim or a Recoupment Indemnity Claim pursuant to the Residual Powers Orders.
155. On 27 May 2016, I received an email from Mr O’Kearney of FTI Consulting, a copy of which is exhibited hereto and marked "DW-69". I note that, in that email, Mr O’Kearney says that the Applicants propose to "*hold off submitting any further Administration Indemnity Claims or Administration Recoupment Claims on the basis that those claims will likely fall within existing categories that are before the Court.*"

*Norton Rose Fulbright invoices*

156. As explained at paragraph 43(a) of my 2015 Affidavit, the law firm of Norton Rose Fulbright has advised me of a claim of \$315,601.21 for professional costs and outlays for work done for LMIM in

its own right and (to an unstated extent) for the FMIF and to "feeder funds" to the FMIF, between November 2012 and February 2013. Copies of a letter from that firm to me, dated 30 September 2014, and the invoices in question appear at pages 408 to 476 of exhibit "DW-1" to my 2015 Affidavit.

157. I replied to the letter from Norton Rose Fulbright to me, by letter dated 11 November 2014, a copy of which appears at pages 477 to 479 of exhibit "DW-1" to my 2015 Affidavit. In that letter, I explained that I did not consider that I was (in my role as the court appointed receiver of the FMIF) in a position to determine to pay the amount claimed by Norton Rose Fulbright (and after an explanation as to the reasons why I had formed that view) I suggested that the appropriate course would be for Norton Rose Fulbright to make its claim by lodging a proof of debt with the liquidators of LMIM, who would then be in a position to assess the claim and (if they thought it appropriate) make a claim on the indemnity from the assets of the FMIF.
158. Since sending that letter to Norton Rose Fulbright, I have not heard further either from Norton Rose Fulbright or from the Applicants regarding the Norton Rose Fulbright invoices.
159. The creditor claims to which I refer below do not include any amount claimed by Norton Rose Fulbright.

#### Potential claims against the FMIF

160. In addition to the indemnity claims the subject of the Indemnity Application, and the further claims referred to above, I apprehend that there will be further claims made by LMIM against the property of the FMIF.
161. In summary, I apprehend that the following claims may yet be made upon the FMIF, in addition to the claims mentioned above:-
  - (a) Creditor Indemnity Claims within the meaning of the Residual Powers Orders;
  - (b) Further Administration Indemnity Claims and Recoupment Indemnity Claims within the meaning of the Residual Powers Orders;
  - (c) Advisor commission claims (insofar as they are not Creditor Indemnity Claims);
  - (d) In the event that one or more of the purchasers of retirement village assets from LMIM as RE of the FMIF is unable at a future time to meet its liabilities for exit entitlements payable to residents of a retirement village, and if LMIM is then to be held liable as either having been an "operator" of the retirement village or as the party that entered

into the residence contracts with the relevant resident(s), then LMIM may be liable for those exit entitlements and may claim indemnity for those amounts from the FMIF; and

- (e) Claims by investors to whom distributions were approved to be paid (prior to my Appointment), but where the relevant payment transactions failed.

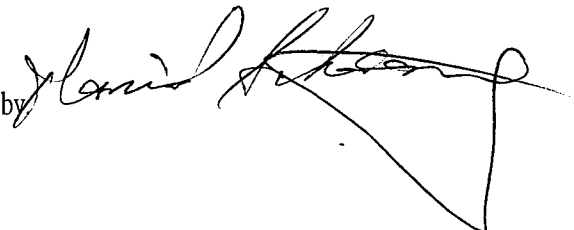
*Creditor Indemnity Claims*

162. I note that under paragraph 6(a) of the Residual Powers Orders, the First Applicants must notify me of a Creditor Indemnity Claim within 14 days after admitting any debt or claim in the winding up of LMIM in respect of which a Creditor Indemnity Claim is identified.
163. The First Applicants have not yet called for proofs of debt in the winding up of LMIM, and accordingly I have not yet received any Creditor Indemnity Claims from the First Applicants since the Residual Powers Orders were made.
164. Mr Park's January 2016 Affidavit exhibited, at pages 520 to 535 of exhibit JRP-1, a creditor listing which Mr Park explained (at paragraphs 43 and 44 of the affidavit) was a list of all the person who, as at 19 November 2015, had made a claim against LMIM or who Mr Park believed may have a claim against LMIM. At page 534 of exhibit JRP-1, a list of "Fund Creditors" is identified, and a total amount "Claimed" is recorded of \$24,250,609.96. I do not know what amount (if any) of that amount may relate to claims that might be made to the property of the FMIF.
165. Mr Park's January 2016 Affidavit exhibited, at pages 536 to 545 of exhibit JRP-1, a creditor listing as at 31 July 2013, which Mr Park explained (at paragraph 45 of the affidavit) identified those creditors in respect of whom he believed at the time LMIM would have a right of indemnity out of the funds or trusts of which LMIM was RE or trustee. I note that the total amount ascribed to the FMIF on page 545 of exhibit JRP-1 was \$598,875.09.
166. Exhibited hereto and marked "DW-70" is a copy of pages 534 and 536 to 545 of exhibit JRP-1 to which I refer in the previous paragraphs.
167. My staff and I have interrogated the accounting records of the FMIF which are available to me, for the purpose of identifying potential creditor claims (as at 19 March 2013) that might be made against the assets of the FMIF as identified in those records themselves, as a result of which an amount of \$242,908.14 has been identified as at that date as, in effect, third party creditor claims that may be made against the assets of the FMIF. I cannot presently say whether those amounts represent expenses to which LMIM would be entitled to an indemnity from the property of the FMIF (subject to the potential application of the 'clear accounts' rule).

168. I have not at this stage undertaken the task of comparing or reconciling the amounts mentioned in the creditor listings prepared by the First Applicants (to which I have referred at paragraphs 123 and 124 above) with the records available to me, since the identification of "Creditor Indemnity Claims" (within the meaning of the Residual Powers Orders) is a task to be undertaken by the First Applicants, following the process outlined in the Residual Powers Orders, and I therefore do not think it necessary to expend time and money in undertaking that task prematurely.

*Further Administration Indemnity Claims and Recoupment Indemnity Claims*

169. I have referred above, at paragraph 155 above, to correspondence from the Applicants proposing that they defer submitting any further remuneration claims, or Administration Indemnity Claims or Recoupment Indemnity Claims until after delivery of judgment by Justice Jackson in respect of the Remuneration Application. I expect that the Applicants will also wish to have the benefit of His Honour's judgment on the Indemnity Application before submitting further indemnity claims.
170. On the basis of information that has been provided to me by the Applicants previously, I have included a total amount of \$4,211,638 (inclusive of the remuneration the subject of the Remuneration Application) in the management accounts and financial statements of the FMIF as an amount for which payment might potentially be made to LMIM (subject to the determination by the Court of the Remuneration Application and of the Indemnity Application) for costs incurred by the Applicants in the period since the appointment of administrators to LMIM. A summary of those amounts is exhibited hereto and marked "DW-71".
171. On 17 October 2016, I received an email from Renee-Lobb of FTI Consulting, attaching a "*Schedule of expenses which the liquidators intend to claim from the FMIF pursuant to the indemnity regime set out by the Order of Jackson J dated 17 December, 2015*". Ms Lobb clarified that the email and attachment did not constitute formal notice of the claims pursuant to the Residual Powers Orders. A copy of the schedule of expenses I received from Ms Lobb, is exhibited to the first Schwarz affidavit at page 65 of the bundle of exhibits to that affidavit.
172. That schedule of expenses was the subject of an exchange of correspondence between Tucker & Cowen and Russells on 15 and 16 February 2017, copies of which appear at exhibits "DHS-18", "DHS-20", "DHS-21" and "DHS-22" to the first Schwarz Affidavit.



173. I understand, from the exchange of correspondence mentioned in the previous paragraph, that although the schedule of expenses received from FTI Consulting from Ms Lobb, to which I have referred in paragraph 171 above, identified claims totalling \$1,271,724.72, nonetheless:-

- (a) certain of those claims had been included in error; and
- (b) after excluding legal costs of the Remuneration Application and relating to the Indemnity Application, the amount to be claimed by the Applicants for costs mentioned in that schedule is only likely to be of the order of \$3,000.

*Advisor commission claims*

174. There are potential claims by financial advisors of investors in the FMIF, for commission arising out of their having procured persons to invest money in the FMIF and thereby become members. I had treated such claims as a contingent liability in the amount of \$4,762,674.00 as at 30 June 2013, and had referred to it as such in the unaudited financial statements for each period that I had (with the assistance of my staff) prepared thereafter up to and including for the period ended 30 June 2016. I did that for the reasons mentioned in note 13 (on page 20) to the unaudited financial statements of the FMIF for the year ended 30 June 2016.
175. On 5 April 2017, Tucker & Cowen sent a letter to Russells Lawyers upon my instructions, a copy of which is exhibited hereto and marked "DW-72".
176. Exhibited hereto and marked "DW-73" is a copy of an email from Mr Ashley Tiplady at Russells, to Mr David Schwarz at Tucker & Cowen dated 7 April 2017, responding to the letter from Tucker & Cowen, stating that "I am instructed that the liquidators of LM Investment Management Ltd (in liq) (receivers and managers appointed) have formed the view that the advisor commissions are an unsecured claim against LMIM and as such no claim will be sought as an indemnity against LM FMIF or the other funds".
177. As a result of the correspondence from Russells to Tucker & Cowen that I have referred to above, I removed the contingent liability for advisor commissions from the FMIF's unaudited financial statements for the half year ended 31 December 2016.
178. Notwithstanding the above, I have no way of knowing at the present time whether claims by advisors for commission claims will be pressed by the advisors as claims against the property of the FMIF once the liquidators of LMIM call for proofs of debt, particularly in circumstances where advisor commissions had been included in the annual financial reports for the FMIF before my Appointment as a liability of the FMIF.

*Potential Retirement Village Liabilities*

179. On 25 September 2014, Andrew Fielding (a Partner at BDO) and I were appointed as agents of PTAL as mortgagee in possession, in lieu of LMIM, in respect of the securities PTAL held (as custodian for the FMIF) from the following companies:-
- (a) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296;
  - (b) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 786;
  - (c) OVST Pty Ltd (Controllers Appointed) (In Liquidation) ACN 103 216 771;
  - (d) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916;
  - (e) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383;
  - (f) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780.
180. Pursuant to those appointments, I effected the sale of certain retirement village assets.
181. However, LMIM had previously (as agent of PTAL as mortgagee in possession) entered into a number of resident contracts under which "ingoing contributions" were received by LMIM from residents.
182. Under the retirement village legislation in the relevant state jurisdictions in which the retirement village assets are located, there is an ongoing potential for liability on the part of LMIM to repay the ingoing contributions (or some proportion of them) which have been received by LMIM from residents, in the circumstances prescribed by the legislation.
183. I have therefore accounted for a contingent liability on the part of the FMIF for payments of the "exit entitlements" of retirement village residents (reflecting a portion of the ingoing contributions paid, which diminishes over time) in the event that a purchaser of a retirement village asset is unable to meet that payment, or in the event that a claim by a resident is made for some other reason against LMIM.

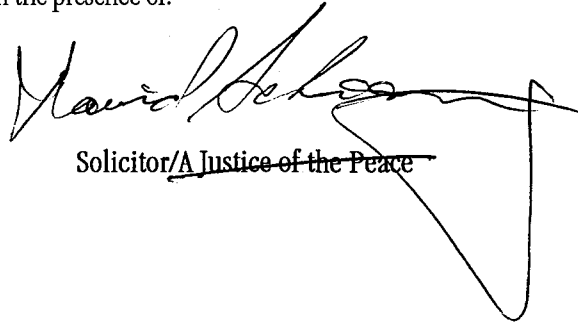


184. I emphasise that it may be (and I expect that it will be) that no claims are made against LMIM or the property of the FMIF in respect of such exit entitlements and that the contingent liability will, in due course, be reduced to zero. I cannot presently say that is the case.
185. All the facts and circumstances above 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 **DAVID WHYTE** on the 29<sup>th</sup> day of May 2017 at Brisbane in the presence of:

A handwritten signature in black ink, appearing to read 'David Whyte', with a long horizontal flourish extending to the left.

Deponent

A handwritten signature in black ink, appearing to read 'David Whyte', with a long horizontal flourish extending to the right.

Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS  
OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE  
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089  
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT  
2001

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SUPREME COURT OF QUEENSLAND

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IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
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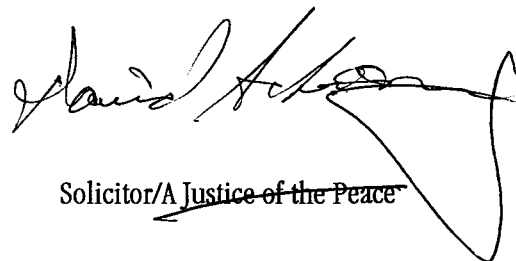
Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE  
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343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT  
2001

CERTIFICATE OF EXHIBIT  
Volume 1 of 4

Bound and marked "DW-39" to "DW-41" is a bundle of exhibits to the Affidavit of DAVID WHYTE sworn  
this 29<sup>th</sup> day of May 2017



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:  
Form 47, R.435

Filed on behalf of the Respondent,  
Mr David Whyte

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TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS  
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**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
**NUMBER: 3383/13**

**Applicants:**  
**PATRICIA BRUCE**

**RAYMOND EDWARD BRUCE AND VICKI**

**AND**

**First Respondent:**  
**CAPACITY**  
**MORTGAGE**

**LM INVESTMENT MANAGEMENT LIMITED**  
**(IN LIQUIDATION) ACN 077 208 461 IN ITS**  
**AS RESPONSIBLE ENTITY OF THE LM FIRST**  
**INCOME FUND**

**AND**

**Second Respondent:**  
**MORTGAGE**

**THE MEMBERS OF THE LM FIRST**  
**INCOME FUND ARSN 089 343 288**

**AND**

**Third Respondent:**

**ROGER SHOTTON**

**AND**

**Intervener:**  
**COMMISSION**

**AUSTRALIAN SECURITIES & INVESTMENTS**

**ORDER**

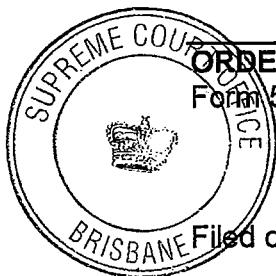
**Before: Justice Dalton**

**Date: 21 August, 2013**

**Initiating document: Application filed 29 April, 2013 by Roger Shotton and**  
**Application filed 3 May 2013 by Australian Securities**  
**and Investments Commission ("Applications").**

**THE ORDER OF THE COURT IS THAT:**

1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators



**ORDER**  
**Form 59 R.661**

**Filed on behalf of the Third Respondent**

**TUCKER & COWEN**  
**Solicitors**  
**Level 15**  
**15 Adelaide Street**  
**Brisbane, Qld, 4000.**  
**Fax: (07) 300 300 33**

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").
3. Pursuant to section 601NF(2), that Mr Whyte:-
  - (a) have access to the books and records of LMIM which concern the FMIF;
  - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.
4. Nothing in this Order prejudices the rights of:
  - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
  - (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.
6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.
7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:
  - (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:



- (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
  - (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
  - (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;
  - (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
  - (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and
- (b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.
8. The First Respondent must, within 2 business days of the date of this Order:
- (a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and
  - (b) make a copy of this order available, in PDF form, on:
    - (i) its website [www.lmaustralia.com](http://www.lmaustralia.com), together with a link to the [www.bdo.com.au](http://www.bdo.com.au) website;
    - (ii) its website [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com), together with a link to the [www.bdo.com.au](http://www.bdo.com.au) website.
9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.
10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

**IT IS DIRECTED THAT:**

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMI~~<sup>FMI</sup> in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.
12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: *nee*

**LM INVESTMENT MANAGEMENT LIMITED**

ABN 68 077 208 461

Australian Financial Services Licensee 220281

AND

**THE MEMBERS AS THEY ARE CONSTITUTED**

**FROM TIME TO TIME OF THE**

**LM FIRST MORTGAGE INCOME FUND**

ARSN 089 343 288

**REPLACEMENT  
CONSTITUTION**

DEED made this 10 day of April 2008

**BETWEEN:** LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

**AND:** All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

**WHEREAS:**

- A. The RE holds a responsible entity's licence from the ASIC.
- B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.
- C. By applying to invest in this Scheme through a PDS a person will become a Member and be bound by this Constitution.
- D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.
- E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.
- F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

**IT IS AGREED:**

**1. DICTIONARY AND INTERPRETATION**

**1.1 Dictionary of Terms**

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Unit/s applied for in accordance with the PDS;

"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

- (a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or
- (b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

- (a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank, or similar instrument accepted and endorsed by a Bank;
- (b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;
- (c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;
- (d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;
- (e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;
- (f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;
- (g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

- (h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and
- (i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

**"Bank"** has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

**"Borrower"** any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

**"Business Day"** any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

**"Class"** means a class of Units, being Units which have the same rights.

**"Commencement Date"** means the date of registration of the Scheme;

**"Compliance Committee"** the Compliance Committee of the RE.

**"Compliance Plan"** means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

**"Constitution"** this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

**"Custodian"** Permanent Trustee Australia Limited ACN 008 412 913;

**"Custody Agreement"** an agreement dated the 4th day of February, 1999 and any further amendments entered into between the Custodian and the RE;

**"Development Loan"** a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

**"Differential Fee Arrangement"** means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

**"Distributable Income"** has the meaning given in clause 11.3;

**"Distribution Period"** is the relevant period referred to in clause 12.1;

**"Dollars", "A\$" and "\$"** mean the lawful currency of the Commonwealth of Australia;

**"Extraordinary Resolution"** means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed 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);  
"Financial Year" means the period of 12 months ending on the 30<sup>th</sup> day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30<sup>th</sup> day of June and any period between the 30<sup>th</sup> day of June last occurring before the termination of the trust and the termination of the trust;

"FICS" means the Financial Industry Complaints Service Limited;

"GST" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"Income" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"Issue Price" means the price at which a Unit is issued calculated in accordance with clause 6.

"Investment Term" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"Law" means the Corporations Act 2001 and the Corporations Regulations.

"Lender" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"Lending Rules" means the rules detailed in clauses 13.2 and 13.3;

"Liabilities" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

- (a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"Liquid Scheme" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"LMM" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"LVR" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"Member" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"Minimum Investment" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"Minimum Subscription" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"Mortgagee" in all mortgages held by the Scheme the Mortgagee will be the Custodian as agent for the RE;

"Mortgage Lending Valuation Policy" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"Net Fund Value" at any time, means the value of the Scheme Property less the Liabilities at that time.

"Power" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"Promoter" for the purpose of the Law the promoter of this Scheme is the RE;

"PDS" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"Register" means the register of Members maintained by the RE under clause 22;

"Responsible Entity" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"Savings Plan Investment" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"Scheme" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"Scheme Property" means assets of the Scheme including but not limited to:

- (a) contributions of money or money's worth to the Scheme; and
- (b) money that forms part of the Scheme assets under the provisions of the Law; and



- (c) money borrowed or raised by the RE for the purposes of the Scheme;  
and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

**"Scheme Valuation Policy"** means the scheme valuation policy as detailed in the Compliance Plan;

**"Security Property"** means any property offered by a Borrower as security for a Mortgage in the Scheme;

**"Special Resolution"** means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

**"Subscription Account"** an account opened and maintained by the RE into which is deposited all Application Moneys;

**"Tax"** includes, but is not limited to:

- (a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;
- (b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;
- (c) taxes imposed or assessed upon:
  - (i) any Application Money;
  - (ii) distributions of income to Members, capital gains, profits or any other amounts in respect of the Scheme; or
  - (iii) the RE in respect of its capacity as responsible entity of the Scheme;
- (d) imposts, financial institutions duties, debits tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

**"Tax Act"** means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

**"Trustee"** means the RE;

**"Uncontrolled Event"** means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,

embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event;

"Unit" means an undivided interest in the Scheme Property created and issued under this Constitution;

"Unit Holder Liability" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"Unit Holding" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"Unit Holding Statement" means a statement issued by the RE to a Member pursuant to clause 5.9;

"Valuation Date" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"Withdrawal Notice" means:

- (a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;
- (c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

**"Withdrawal Notice Period"** means:

- (a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan investment;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or
- (c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an Investment Term is created by the rollover of an existing investment, means the period commencing 5 Business Days before the expiry of that subsequent Investment Term); or
- (d) any other time period as determined by the RE.

**"Withdrawal Price"** means the price at which a Unit is redeemed calculated in accordance with Clause 8.

## 1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing a gender include any gender;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;
- (e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (f) a reference to any thing includes a part of that thing;
- (g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;
- (h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (i) a reference to a document includes all amendments or supplements to,

or replacements or novations of, that document;

- (j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;
- (k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;
- (m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:
  - (i) which ceases to exist; or
  - (ii) whose powers or functions are transferred to another body;  
is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and
- (o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

### 1.3 Accounting Standards

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

- (a) the accounting standards required under the Law; and
- (b) if no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

## 2. ESTABLISHMENT OF TRUST

### 2.1 Trustee

The RE continues to act as trustee of the Scheme.

### s601FC(2) 2.2 Role of Trustee

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

### s601FB(2) 2.3 Appointment of Custodian

- (a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

- (b) The Custodian holds the Scheme Property as agent of the RE for the term of the Scheme on terms and conditions as detailed in the Custody Agreement.

**2.4 Name of Trust**

The name of the trust and Scheme is the LM First Mortgage Income Fund or any other name that the RE may determine from time to time.

**2.5 Initial Issue**

The Scheme commenced at such time after the Commencement Date when LMM or its nominee paid \$100.00 to the RE to establish the Scheme Property. The RE issued to LMM or its nominee 100 Units in return for that payment.

**3. UNITS AND MEMBERS**

**3.1 Units**

The beneficial interest in Scheme Property is divided into Units. Unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Members under this Constitution.

**3.2 Classes**

Different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units. Without limitation, the RE may distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the RE treats the different Classes fairly.

**3.3 Fractions**

Fractions of a Unit may not be issued. When any calculations under this Constitution would result in the issue of a fraction of a Unit, the number of Units to be issued must be rounded down to the nearest whole Unit.

**3.4 Equal value**

At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.

**3.5 Interest**

A Unit confers an interest in the Scheme Property as a whole. No Unit confers any interest in any particular asset of the Scheme Property.

**3.6 Consolidation and re-division**

- (a) Subject to clause 3.6(b) the RE may at any time divide the Scheme Property into any number of Units other than the number into which the Scheme Property is for the time being divided.
- (b) A division of a kind referred to in clause 3.6(a) must not change the ratio of Units in a Class registered in the name of any Member to the Units on issue in the Class.

**3.7 Rights attaching to Units**

- (a) A Member holds a Unit subject to the rights and obligations attaching to that Unit and (if applicable) pursuant to any Differential Fee Arrangement.
- (b) Each Member agrees not to:
  - (i) interfere with any rights or powers of the RE under this Constitution;
  - (ii) purport to exercise a right in respect of the Scheme Property or claim any interest in an asset of the Scheme Property (for example, by lodging a caveat affecting an asset of the Scheme Property); or
  - (iii) require an asset of the Scheme Property to be transferred to the Member.

**3.8 Conditions**

The RE may impose such conditions on the issue of Units as it determines including that the Member may not give effect to any mortgage, charge, lien, or other encumbrances other than as expressly permitted by the RE.

**3.9 Rollover of Investments**

If the Member has invested for an Investment Term, and fails to complete and return a Withdrawal Notice before the start of the relevant Withdrawal Notice period that applies to the Investment Term, the Member will be deemed to have elected to renew their investment in the Scheme as specified in the PDS. Units issued in respect of such reinvestment must be issued at an Issue Price equal to the Current Unit Value.

**4. BINDING ON ALL PARTIES**

s601GB

- 4.1 This Constitution is binding on the RE and on all Members of the Scheme as they are constituted from time to time.
- 4.2 By executing the Application Form attached to the PDS the Members as are constituted from time to time agree to be bound by the terms and conditions of this Constitution.

**5. ISSUE OF UNITS**

s601GA(a)

**5.1 Offer and minimum investment**

- (a) The RE may at any time offer Units for subscription or sale.

- (b) The Minimum Investment must be lodged with an Application for Units.
- (c) The RE may invite persons to make offers to subscribe for or buy Units.

**5.2 Minimum subscription**

- (a) The RE may set a Minimum Subscription for the pool of funds of any one currency for the Scheme at its discretion.
- (b) The RE will hold Application Money in a Subscription Account until the Minimum Subscription for the pool of funds is received, subject to clause 5.3.

**5.3 Insufficient Application Money received**

The RE will return or cause to be returned all Application Money to the persons who paid such Application Money, less any taxes and bank charges payable if:

- (a) insufficient Application Money to meet the Minimum Subscription stipulated in Clause 5.2 is received within a period reasonably determined by the RE, or
- (b) the RE withdraws a PDS (which the RE is entitled to do) before sufficient Application Money is received, or
- (c) the RE does not believe there will be sufficient funds available to achieve the aims of the Scheme contemplated in this Constitution or the PDS.

**5.4 Form of Application**

- (a) Subject to clause 5.10, each Application for Units must be:
  - (i) made by Application Form attached to a PDS (or as otherwise permitted by the Law); and
  - (ii) be accompanied by Application Moneys as required by any relevant PDS.
- (b) If the Application Form is signed pursuant to a power of attorney, then if requested by the RE, a certified copy of the relevant power of attorney and a declaration that the power of attorney has not been revoked as at the date the Application Form is signed must be provided.

**5.5 Acceptance or rejection**

The RE may, without giving any reason:

- (a) accept an Application;
- (b) reject an Application; or

(c) reject part of the Application.

**5.6 Uncleared funds**

Units issued against Application Money in the form of a cheque or other payment order (other than in cleared funds) are void if the cheque or payment order is not subsequently cleared.

**5.7 Issue of Units**

Units are taken to be issued when:

- (a) the Application Money for the Issue Price is received by the RE; and
- (b) the RE accepts the Application and the Units are entered in the Register, or at such other time as the RE determines.

**5.8 Number of Units issued**

Subject to Minimum Investment, the number of Units issued at any time in respect of an Application for Units will be calculated as follows:

- (a) by dividing the Application Moneys paid by the applicable Issue Price at that time;
- (b) by rounding down to two decimal places.

**5.9 Unit Holding Statement**

The evidence of a Member's holding in the Scheme will be the latest extract from the Register as provided from time to time to a Member by the RE in a Unit Holding Statement.

**5.10 Additional Applications**

Additional Applications for investment in the Scheme by existing Members, not made on an Application Form may be accepted in an Australian dollar investment:

- (a) from a Member;
- (b) as a result of an Application;
- (c) in accordance with an Arrangement for as long as and on condition that it complies with the requirements of the RE and the law or ASIC's policy including any relief granted to the RE from time to time; and
- (d) are in multiples of \$500 each unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment or agrees to accept an amount that is not a multiple of \$500.

**5.11 Holding Application Money**

All Application Money must be held by the RE (or its agent, the Custodian) on trust for the relevant Applicant in the Subscription Account.

**5.12 Interest on Application Money**

The RE is not required to account to any Member for any interest earned on Application Money held in the Subscription Account.



**5.13 Responsible Entity to return Application Money**

Where the RE has rejected (in full or in part) an Application, the relevant Application Money (without interest) must be returned to the Applicant within 14 days.

**5.14 Incomplete Application Form**

The RE will, on receipt of any Application Money which is not accompanied by a completed Application Form, as soon as practicable return the Application Money to the relevant Applicant, or:

- (a) attempt to obtain the Application Form from the Applicant; and
- (b) bank the Application Money.

**5.15 No Application Form received**

- (a) If the RE gives any Application Money to the Custodian pursuant to clause 5.11, then the Custodian will hold such Application Money in an account, as custodian for the Applicant in accordance with the Law until the Application Form is received.
- (b) If the RE has not received the Application Form by the time the offer is closed, then the RE must use its best endeavours to return the Application Money, less any taxes and bank charges payable, to the Applicant as soon as practicable.

**6. ISSUE PRICE**

The issue price of a Unit shall be calculated as follows:

$$\frac{\text{Net Fund Value}}{\text{number of Units on issue}}$$

calculated on the last Valuation Date prior to the date of issue.

**7. WITHDRAWAL OF UNITS - WHILE THE SCHEME IS LIQUID**

**7.1 Withdrawal request - while the Scheme is liquid**

- (a) While the Scheme is liquid as defined in S601KA (4) of the Law, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice).

**7.2 Withdrawal**

- (a) (i) Within 365 days after the end of the Member's Investment Term (where the Member's investment is held for an Investment Term and the Member has given a valid Withdrawal Notice in respect of the Units) or within 365 days after receiving a valid Withdrawal

Notice from the Member (if the Member's investment is not held for an Investment Term or is a Savings Plan Investment), the RE must redeem the relevant Units out of the Scheme Property for the Withdrawal Price.

- (ii) However, the RE must redeem the Units within 180 days after the relevant date (instead of 365 days) where it determines that none of the circumstances referred to in Clause 7.2(b)(i) to (iv) below exist at the time of withdrawal. This Clause 7.2(a) does not limit the independent operation of Clause 7.2(b).
  - (iii) To the extent that the Law does not allow more than one period to be specified in this Constitution for satisfying withdrawal requests while the Scheme is liquid, that one period will be 365 days after the RE receives a valid Withdrawal Notice. Paragraph (ii) above will also apply to the extent permitted by the Law.
  - (iv) The RE may allow redemption of Units within a shorter period than the 365 (or 180) days referred to above, in its absolute discretion, subject to its obligations under the Law.
- (b) The RE may suspend the withdrawal offer as detailed in clause 7.2(a) above for such periods as it determines where:
- (i) the Scheme's cash reserves fall and remain below 5% for ten (10) consecutive Business Days; or
  - (ii) if in any period of (90) days, the RE receives valid net Withdrawal Notices equal to 10% or more of the Scheme's issued Units and, during the period of (10) consecutive days falling within the 90 day period, the Scheme's cash reserves are less than 10% of the total assets; or
  - (iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
  - (iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme.
- (c) The RE is not required to process Withdrawal Notices where:
- (i) the person seeking to redeem the Units cannot provide satisfactory evidence of the Member's title or authority to deal with the Units; or
  - (ii) the withdrawal would cause the Member's Unit Holding to fall below the Minimum Investment.

- (d) If the RE allows a Member to withdraw an investment from the Scheme before the end of an Investment Term, the RE is also entitled to require the Member to pay an early withdrawal charge equal to the last three months interest distributions paid or payable on the amount being withdrawn (or if the investment has been for less than three months, the RE's estimate of what that amount would have been if the investment had been in place for the last three months), and where an Adviser has been paid an upfront commission in respect of the investment being withdrawn, the RE will also be entitled to require the Member to pay a further early withdrawal charge equal to the upfront commission paid, calculated on a pro-rata basis for the length of time remaining to the end of the Investment Term. The RE will also be entitled to require the Member to pay an amount equal to any other fees or charges arising from the early withdrawal (including fees and charges that may be payable to the financial institution which has organised the investment in the relevant currency). These early withdrawal charges will be deducted from the investment being withdrawn, and paid at the time of withdrawal. Such charges will become part of the Scheme Property.
- (e) If the RE allows a Member to withdraw an investment, and that investment has been held for a period in respect of which no Distributable Income has been calculated in respect of that investment, the RE may pay to the Member the amount of Distributable Income that the RE estimates is payable to the member for that period, rather than delay payment to the member until the actual Distributable Income has been calculated.

### 7.3 Cancellation

- (a) The RE must cancel the number of Units which have been redeemed under clause 7.2 and must not reissue them. Upon cancellation, the RE must immediately:
  - (i) remove the name of the Member from the Register in respect of the redeemed Units; and
  - (ii) provide the Member with a new Unit Holding Statement for any unredeemed Units.
- (b) A Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

## 8. WITHDRAWAL PRICE

The Withdrawal Price of each Unit pursuant to clause 7 shall be calculated as follows:

( Net Fund Value )

(number of Units issued)

calculated on the last Valuation Date prior to the date of withdrawal.

**9. TRANSFER OF UNITS**

**9.1 Transferability of Units**

- (a) Subject to this Constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves.
- (b) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.

**9.2 Registration of Transfers**

- (a) The following documents must be lodged for registration on the Register at the registered office of the RE or the location of this Register:
  - (i) the instrument of transfer; and
  - (ii) any other information that the RE may require to establish the transferor's right to transfer the Units.
- (b) On compliance with clause 9.2(a), the RE will, subject to the powers of the RE to refuse registration, record on the Register the transferee as a Member.

**9.3 Where registration may be refused**

Where permitted to do so by Law or this Constitution, the RE may refuse to register any transfer of Units.

**9.4 Where registration must be refused**

- (a) Registration must be refused if:
  - (i) the RE has notice that the transferor of Units has entered into any borrowing or other form of financial accommodation to provide all or part of the funds to subscribe for or acquire a Unit and has not received confirmation from the financier that the financier consents to the transfer of those Units; or
  - (ii) the transferor has given a power of attorney in favour of the RE and the Custodian in the form set out in an application form accompanying a PDS and the transferee has not executed and provided to the RE a similar form of power of attorney (with such adaptations as are necessary) in favour of the RE and the Custodian;
- (b) In the case of (i) or (ii) above, the RE must refuse to register same and must continue to treat the seller or transferor as the case may be

as the registered holder for all purposes and the purported sale, purchase, disposal or transfer shall be of no effect.

- (c) If the transferee is not a Member the RE must not consent to the registration until the RE is satisfied that the transferee has agreed to be bound by the Constitution.

**9.5 Notice of non-registration**

If the RE declines to register any transfer of Units, the RE must within 5 Business Days after the transfer was lodged with the RE give to the person who lodged the transfer written notice of, and the reasons for, the decision to decline registration of the transfer.

**9.6 Suspension of transfers**

The registration of transfers of Units may be suspended at any time and for any period as the RE from time to time decide. However, the aggregate of those periods must not exceed 30 days in any calendar year.

**10. TRANSMISSION OF UNITS**

**10.1 Entitlement to Units on death**

- (a) If a Member dies:
  - (i) the survivor or survivors, where the Member was a joint holder; and
  - (ii) the legal personal representatives of the deceased, where the Member was a sole holder,will be the only persons recognised by the RE as having any title to the Member's interest in the Units.
- (b) The RE may require evidence of a Member's death as it thinks fit.
- (c) This clause does not release the estate of the deceased joint Member from any liability in respect of a Unit that had been jointly held by the Member with other persons.

**10.2 Registration of persons entitled**

- (a) Subject to the Bankruptcy Act 1966 and to the production of any information that is properly required by the RE, a person becoming entitled to a Unit in consequence of the death or bankruptcy (or other legal disability) of a Member may elect to:
  - (i) be registered personally as a Member; or
  - (ii) have another person registered as the Member.
- (b) All the limitations, restrictions and provisions of this Constitution relating to:
  - (i) the right to transfer; and
  - (ii) the registration of a transfer;

for Units apply to any relevant transfer as if the death or bankruptcy or legal disability of the Unit Member had not occurred and the notice or transfer were a transfer signed by that Member.

**10.3 Distributions and other rights**

- (a) If a Member dies or suffers a legal disability, the Member's legal personal representative or the trustee of the Member's estate (as the case may be) is, on the production of all information as is properly required by the RE, entitled to the same distributions, entitlements and other advantages and to the same rights (whether in relation to meetings of the Scheme or to voting or otherwise) as the Member would have been entitled to if the Member had not died or suffered a legal disability.
- (b) Where two or more persons are jointly entitled to any Unit as a result of the death of a Member, they will, for the purposes of this Constitution, be taken to be joint holders of the Unit.

**11. DISTRIBUTABLE INCOME**

**11.1 Income of the Scheme**

The Income of the Scheme for each Financial Year will be determined in accordance with applicable Accounting Standards.

**11.2 Expenses and provisions of the Scheme**

For each Financial Year:

- (a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and
- (b) provisions or other transfers to or from reserves may be made in relation to such items as the RE considers appropriate in accordance with the applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

**11.3 Distributable Income**

The Distributable Income of the Scheme for a month, a Financial Year or any other period will be such amount as the RE determines. Distributable Income is paid to Members after taking into account any Adviser fees or costs associated with individual Members' investments, to the extent those fees or costs have not otherwise been taken into account.

**12. DISTRIBUTIONS**

**12.1 Distribution Period**

- (a) The Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute

discretion.

- (b) The Distribution Period is the Investment Term of the investment for non-Australian dollar investments or as otherwise determined by the RE in its absolute discretion.

#### **12.2 Distributions**

The RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period.

#### **12.3 Present entitlement**

Unless otherwise agreed by the RE and subject to the rights, restrictions and obligations attaching to any particular Unit or Class, the Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period.

#### **12.4 Capital distributions**

The RE may distribute capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the RE divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units.

#### **12.5 Grossed up Tax amounts**

Subject to any rights, obligations and restrictions attaching to any particular Unit or Class, the grossed up amount under the Tax Act in relation to Tax credits or franking rebates is taken to be distributed to Unit Members in proportion to the Distributable Income for a Distribution Period as the case may be, which is referable to a dividend or other income to which they are presently entitled.

#### **12.6 Reinvestment of Distributable Income**

- (a) The RE may invite Members to reinvest any or all of their distributable income entitlement by way of application for additional Units in the Scheme.
- (b) The terms of any such offer of reinvestment will be determined by the RE in its discretion and may be withdrawn or varied by the RE at any time.
- (c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer.
- (d) The Units issued as a result of an offer to reinvest will be deemed to have been issued on the first day of the next Distribution Period immediately following the Distribution Period in respect of which the distributable income being reinvested was payable.

### 13. NATURE OF RE POWERS

- s601GA(1)(b) 13.1 The RE has all the powers:
- (a) of a natural person to invest and borrow on security of the Scheme Property;
  - (b) in respect of the Scheme and the Scheme Property that it is possible under the Law to confer on a RE and on a Trustee;
  - (c) as though it were the absolute owner of the Scheme Property and acting in its personal capacity; or
  - (d) necessary for fulfilling its obligations under this Constitution and under the Law.
- s601GA(3) 13.2 The RE must only invest Members' funds in:
- (a) subject to clause 13.3 and 13.3A, mortgage investments provided that:
    - (i) all mortgages are secured over property and the amount which may be advanced to a Borrower does not exceed an LVR of 75% of the value of the security property on initial settlement.
    - (ii) the type of real estate offered for security is acceptable to the RE;
    - (iii) the value of the property offered as security has been established in accordance with the Mortgage Lending Valuation Policy of the RE ;
  - (b) other mortgage backed schemes in accordance with this clause and the RE's compliance standards;
  - (c) a range of interest bearing investments backed by Australian Banks, building societies, State or Federal governments, or foreign banks as approved by the RE.
  - (d) Authorised Investments.
- s601GA(3) 13.3 Notwithstanding the provisions of clause 13.2(a), after a loan has settled and where the RE considers it is in the best interests of the Members of the Scheme, the RE may approve an LVR not to exceed 85% of the value of the security property.
- 13.3A Notwithstanding any other provision of this Constitution, the LVR of a loan that is in default may exceed 85%
- s601GA(3) 13.4 Whenever a loan of Scheme funds involves a Development Loan, the RE shall ensure it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind.
- s601GA(3) 13.5 To the extent allowed by law:



- (a) any restriction or prohibition imposed upon the RE in relation to the investment from time to time of the Scheme Property or any part thereof is hereby excluded from the obligations imposed.
- (b) without derogating from the generality of the foregoing this exclusion specifically applies to any "Prudent Person Rule" or the like which may be implied by any future enactment of legislation.

s601GA(3) 13.6 To the extent allowed by law:

- (a) the RE may borrow or raise money with or without security over the Scheme Property or any part of it on any terms, including any rate of interest and any fees and expenses as the RE thinks fit;
- (b) the RE may deal with any property to exercise all the powers of a mortgagee pursuant to the mortgage terms and conditions.

s601GA(3) 13.7 The RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution.

#### 14. COMPLAINTS PROCEDURES

s601GA(1)(c) 14.1 If a Member has a complaint they should generally first contact their Adviser. If the Adviser is unavailable, unwilling, or unable to assist, or if the Member wishes to directly contact the RE, and the complaint relates to the Fund or the RE, then the Member should contact the RE at the registered office of the RE. Complaints may be made in writing or by telephone.

14.2 The RE may (if applicable) contact the Adviser for further background information and attempt to mediate a satisfactory resolution of the complaint or escalate as necessary. The RE has 30 days to respond to the complaint once it is received. The RE must attempt to resolve the complaint within a satisfactory time period as determined by the nature of the complaint and the Member's response.

14.3 The Complaints Officer of the RE will take responsibility for formal complaints and record them in the Complaints Register. In acknowledging or resolving formal complaints, the RE must make or cause to be made, a written response including:-

- (a) the name, title and contact details of the person actually handling the complaint;
- (b) a summary of the RE's understanding of the complaint;
- (c) details of the RE's offer for resolution of the complaint and relevant time frame;
- (d) where the complaint is not fully dealt with in the letter an estimate of time required for the RE to resolve the complaint.

14.4 Full details of each formal complaint and resolution thereof must be recorded in

the Complaints Register including:-

- (a) the person responsible for resolving the complaint;
- (b) the name of the Member making the complaint;
- (c) the nature of the complaint;
- (d) the product service or department in respect of which the complaint was made;
- (e) the actual time required to resolve the complaint;
- (f) the actual resolution of the complaint;
- (g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

- (a) stage 1: initial opportunity for Member to resolve complaints;
- (b) stage 2: complaints review, investigation and conciliation;
- (c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

- (a) refer the matter to arbitration or the courts; or
- (b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

## 15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

- (a) the date which is eighty years from the Commencement Date; and
- (b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

## 16. WINDING UP THE SCHEME

s601GA(1)(d) 16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

- 16.2 The RE must wind up the Scheme in the following circumstances:-
- s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;
  - s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;
  - s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;
  - s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;
- s601NC(1) 16.3 (a) If the RE considers that the purpose of the Scheme:
- (i) has been accomplished; or
  - (ii) cannot be accomplished,
- it may take steps to wind up the Scheme.
- (b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;
- (i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
  - (ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and
  - (iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;
- (c) if no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.
- s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under S601NF(2) of the Law if the RE is permitted by S601NC(3) of the Law to wind up the Scheme.
- s601NF (3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

- (i) the RE; or
- (ii) a director of the RE; or
- (iii) a Member of the Scheme; or
- (iv) the ASIC.

- s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.
- 16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.
- 16.7 Subject to the provisions of this clause 16 upon winding up of the Scheme the RE must:
- (a) realise the assets of the Scheme Property;
  - (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
  - (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;
  - (d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion specified in clause 12.4.
  - (e) The RE may postpone the realisation of the Scheme Property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement.
  - (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.
  - (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.
- s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

ASIC to be dealt with pursuant to Part 9.7 of the Law.

s601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:

- (a) The ASIC
- (b) The RE
- (c) A Member of the Scheme

16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.

17. **VALUE OF THE SCHEME FUND**

17.1 **Valuation of the Scheme Property**

The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.

17.2 **Valuation if required**

The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.

17.3 **Determination of Net Fund Value**

The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.

18. **FEES, TAXES, COSTS AND EXPENSES**

s601GA(2) 18.1 **Taxes:**

The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:

- (a) this Constitution;
- (b) any amount incurred or payable by the RE;
- (c) a gift or settlement effected by this Constitution;
- (d) the exercise by the RE of any Power; or
- (e) money or investments held by or on behalf of the RE under this Constitution.

s601GA(2) 18.2 **Payment of Debts:**

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

s601GA(2) 18.3 **Fees:**

The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

- s601GA(2) 18.4 The RE shall be entitled to fees in relation to the following duties:
- (a) the subscription and withdrawal of units;
  - (b) the transfer or transmission of Units;
  - (c) the establishment/loan application fees;
  - (d) the structuring or packaging of loan proposals;
  - (e) loan management;
  - (f) the rollover of a loan facility;
  - (g) due diligence enquiries generally;
  - (h) the sale of real estate or assets of the Scheme Property;
  - (i) the promotion and management of the Scheme;
  - (j) the appointment of the Custodian pursuant to the Custody Agreement;
  - (k) the winding-up of the Scheme;
  - (l) the performance of its duties and obligations pursuant to the Law and this Constitution.

s601GA(2) 18.5 **Costs and Expenses**

The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties; including:

- (a) Auditor's fees;
- (b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans
- (c) barrister/QC - legal counsel fees;
- (d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;
- (e) valuation fees;
- (f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;
- (g) property report/property consultant fees;
- (h) process servers' fees;
- (i) private investigator fees;
- (j) fees in relation to the marketing and packaging of security properties for sale;
- (k) real estate agent's sales commissions;
- (l) costs of maintenance of mortgage securities;
- (m) outstanding accounts relating to mortgage securities such as council rates;

- (n) locksmith for changing locks of mortgage securities as appropriate;
- (o) insurance (property and contents);
- (p) removalists for removal of borrower's property as appropriate;
- (q) security guards to attend mortgage securities as appropriate;
- (r) building and/or property inspection report fees - i.e. building, town planning experts and the like;
- (s) all ASIC charges;
- (t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;
- (u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;
- (v) reasonable costs incurred in protecting or preserving all assets offered as security;
- s601FB(2) (w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by any agent appointed pursuant to s601FB(2) of the Law;
- (x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;
- (y) fees and expenses of any agent or delegate appointed by the RE;
- (z) bank and government duties and charges on the operation of bank accounts;
- (aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;
- (bb) insurances directly or indirectly protecting the Scheme Property;
- (cc) fees and charges of any regulatory or statutory authority;
- (dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax ("GST")] which are payable by the RE on its own account;
- (ee) costs of printing and postage of cheques, advices, reports, notices and other documents produced during the management of the Scheme;
- (ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;
- (gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;
- (hh) costs of convening and holding meetings of Members;
- (ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

- (jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;
- (kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601JD of the Law;
- (ll) costs of advertising the availability of funds for lending;
- (mm) brokerage and underwriting fees;
- (nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;
- (oo) If there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property.

- s601GA(2) 18.6 In the event that the RE has not performed its duties, the lack of entitlement to payment of fees pursuant to 18.3 is only in respect of that part of the payment which relates to the specific lack of proper performance on any given matter. Nothing in this clause shall be interpreted to mean that the RE is not entitled to be paid fees and expenses for work properly performed.
- s601GA(2) 18.7 In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment.
- 18.8 The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution.
- 18.9 The RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under this clause.
- 18.10 Despite any other provision of this Constitution, the RE may pay a Member's Adviser a fee or fees as directed by the Adviser from time to time. These fees are to be paid out of Scheme Property, as an expense of the Scheme. Where income of the Scheme is not sufficient to pay in full an Adviser's fee and the relevant Member's expected income distribution, the RE may reduce the Adviser's fee and/or the expected income distribution on a pro rata basis, or on any other basis agreed with the Adviser.



19. **INDEMNITY AND LIABILITY**

s601GA(2) 19.1 The following clauses apply to the extent permitted by law:

- (a) The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:
  - (i) otherwise than in accordance with this Constitution and its duties; and
  - (ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

In any case the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.

- (b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
  - (i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;
  - (ii) it acted as required by Law; or
  - (iii) it relied in good faith upon any signature, marking or documents.
- (c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust.
- (d) The RE is not liable to account to any Member for any payments made by the RE in good faith to any duly authorised authority of the Commonwealth of Australia or any State or Territory of Australia for taxes or other statutory charges.

20. **POWERS OF ATTORNEY**

20.1 Each Member by execution of the Application Form or the transfer by which he/she/it acquires Units in the Scheme appoints the RE and the Custodian and any director officer attorney or substitute nominated by either the RE or the Custodian severally for this purpose as its attorney and agent with the right:

- (a) at any time to:
  - (i) sign any document in relation to any subscription and withdrawal agreement;
  - (ii) sign any document in relation to the transfer or transmission of Units;
  - (iii) sign any variation of this Constitution;

- (iv) sign any document required by ASIC to be executed by a Member in respect of the Scheme.
  - (b) at the request in writing of either the RE or the Custodian the Member must execute separate Powers of Attorney in a form reasonably required by the RE or the Custodian appointing the RE and/or the Custodian as its attorney for the purpose of this clause.
  - (c) any attorney may exercise its rights notwithstanding that the exercise of the right constitutes a conflict of interest or duty;
- 20.2 each Member indemnifies and shall keep indemnified any attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under the Power of Attorney.
- 21. **TITLE TO SCHEME FUND**
  - 21.1 **Custodian to hold as agent of RE**

The Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.
- 22. **THE REGISTER**
  - 22.1 **Keeping registers**

The RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.
  - 22.2 **Information in registers**

To the extent applicable, the Register must be kept in accordance with, and contain the information required by the Law. Otherwise, the RE may decide what information is included in the Register. If the Law applies, the RE has the powers conferred under the Law in relation to the Register.
  - 22.3 **Changes**

Every Member must promptly notify the RE of any change of name or address and the RE must alter the Register accordingly.
- 23. **NOTICES**
  - 23.1 A notice or other communication connected with this Constitution has no legal effect unless it is in writing.
  - 23.2 In addition to any other method of service provided by law, the notice must be:
    - (a) sent by post, postage prepaid, to the address for the Member in the RE's register of interests;
    - (b) sent by facsimile to the facsimile number of the Member; or
    - (c) otherwise delivered including via email, at the address of the addressee of the Member as is subsequently notified.
  - 23.3 A notice must be treated as given and received:
    - (a) if sent by post, on the 2nd Business Day (at the address to which it is

posted) after posting;

- (b) if sent by facsimile or electronically before 5.00 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of delivery.

23.4 Despite clause 23.3(ii) a facsimile is not treated as given or received unless at the conclusion of the transmission the sender's facsimile machine issues a transmission report which indicates that the relevant number of pages comprised in the notice have been sent.

23.5 A notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:

- (a) the addressee has been liquidated or deregistered or is absent from the place at which the notice is delivered or to which it is sent; or
- (b) the notice is returned unclaimed.

23.6 Any notice by a party may be given and may be signed by the solicitor for the party.

23.7 Any notice to a party may be given to the solicitor for the party by any of the means listed in clause 23.2 to the solicitor's business address or facsimile number as the case may be.

#### 24. LIABILITY OF MEMBERS

- (a) The liability of each Member, whether actual, contingent or prospective, is limited to the unpaid Issue Price of his/her/its Units except if the RE and the relevant Member agree otherwise in writing that the liability of a Member may be further limited or waived.
- (b) A creditor or other person claiming against the RE as trustee of the Scheme has no recourse against a Member and no Member is personally liable to indemnify the RE, any creditor of the RE or any person claiming against the RE in respect of any actual, contingent, prospective or other liability of the RE in relation to the Scheme.

#### 25. RETIREMENT AND APPOINTMENT OF RE

- s601FL 25.1 The RE may retire as RE as permitted by s601FM of the Law.
- s601FM 25.2 The RE must retire when required by s601FM of the Law.
- s601FR 25.3 If the RE changes the former RE must comply with s601FR of the Law.
- s601FS 25.4 The rights, obligations and liabilities of a former RE are as detailed in s601FS of the Law.

#### 26. CHANGING THE CONSTITUTION

- s601GC(1) 26.1 This Constitution may be modified or repealed or replaced with a new Constitution:
  - (a) by special resolution of the Members of the Scheme;

or

- (b) by the RE if the RE reasonably considers the change will not adversely affect Members' rights.

26.2 In the event the RE wishes to change the Constitution the RE must:

- s601GC(2) (a) lodge with the ASIC a copy of the modification or the new Constitution;
- (b) the modification, or repeal and replacement, cannot take effect until the copy has been lodged;
- s601GC(3) (c) the RE must lodge with the ASIC a consolidated copy of the Scheme's Constitution if the ASIC directs it to do so;

s601GC(4) 26.3 The RE must send a copy of the Scheme's Constitution to a Member of the Scheme within seven (7) days if the Member:

- (a) asks the RE in writing for the copy; and
- (b) pays any fee (up to the prescribed amount) required by the RE.

## 27. STATEMENTS, ACCOUNTS AND AUDIT

### 27.1 Appointment of auditors

- (a) The RE must appoint an Auditor to regularly audit the accounts in relation to the Scheme and perform the other duties required of the Scheme's auditors under this Constitution and the Law.
- (b) The RE must appoint an Auditor of the Compliance Plan (as defined in section 601HG of the Law).

### 27.2 Retirement of auditors

The Scheme Auditor and the Compliance Plan Auditor may each retire or be removed in accordance with the Law.

### 27.3 Remuneration of Auditor

The remuneration of the Scheme Auditor and Compliance Plan Auditor will each be fixed by the RE.

### 27.4 Accounts and reports

- (a) The accounts of the Scheme must be kept and prepared by the RE in accordance with applicable Accounting Standards and the Law.
- (b) The RE must report to Members concerning the affairs of the Scheme and their holdings as required by the Law. Subject to the Law, the person preparing a report may determine the form, content and timing of it.

### 27.5 Audit

The RE will cause:

- (a) the Scheme Auditor to audit and report on the Scheme's accounts;
- (b) the Compliance Plan Auditor to audit and report on the Compliance Plan,

each in the manner required by the Law.

**28. MEETINGS OF MEMBERS**

**28.1 Convening Meetings**

The RE may at any time call and convene a meeting of Members and must call and convene a meeting of Members when required to do so by the Law.

**28.2 Calling and holding meetings**

- s252G(4) (a) A notice of meeting sent by post is taken to be given the day after it is delivered.
- s252R(2) (b) If, at any time, there is only 1 Member of the Scheme, the quorum for a meeting is 1 in all other cases the quorum for a meeting is 2.
- s252R(3) (c) If an individual is attending a meeting as a Member and as a body corporate representative, the RE may in determining whether a quorum is present, count the individual more than once.
- s252W(2) (d) A proxy is not entitled to vote on a show of hands.
- s252W(3) (e) A proxy is entitled to speak and vote for a Member (to the extent allowed by the appointment) even if the Member is present (but only so long as the Member does not speak or vote, as the case may be).
- s252Y(2) (f) An appointment of proxy:
  - (i) is valid even if it does not specify the Member's address; and
  - (ii) may be a standing one.
- s252Z(5) (g) The RE may determine, in relation to a particular meeting or generally, that proxy documents may be received up to any shorter period before the meeting.
- s253K(2) (h) A poll cannot be demanded on any resolution concerning:
  - (i) the election of the chair of a meeting; or
  - (ii) the adjournment of a meeting.

**29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE**

29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:

- (a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);
- (b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or
- (c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

30. **GOVERNING LAW**

This Deed is governed by the laws of the State of Queensland. The RE and the Members submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

31. **ASIC INSTRUMENT**

If relief from the provisions of the Law granted by an ASIC Instrument requires that this Constitution contain certain provisions, then those provisions are taken to be incorporated into this Constitution at all times at which they are required to be included and prevail over any other provisions of this Constitution to the extent of any inconsistency. However, if the relief is granted by Class Order (rather than specifically in relation to the Scheme) then the ASIC Instrument (and the provisions it requires) will only be taken to be incorporated if the RE declares in writing that this is the case.

32. **UNCONTROLLED EVENTS**

To the extent permitted by law, if the RE is prevented from performing its duties under this Constitution or the law due to the occurrence of an Uncontrolled Event then the RE is not liable to the Members and nor is the RE liable for any loss or decrease in value of the Scheme Property.

EXECUTED AS A DEED at the Gold Coast, Queensland:

GIVEN under the Common Seal of LM )

INVESTMENT MANAGEMENT LIMITED ACN 077 )

208 461 by authority of a resolution of the Board of ) Director

Directors under the hands of two Directors who )

certify that they are the proper officers to affix this )

seal and in the presence of: )

) Director

A Justice of the Peace/Solicitor

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Australian Securities &  
Investments Commission



Form 5101  
Corporations Act 2001  
601GC

## Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

### Scheme details

Managed investment scheme name

LM FIRST MORTGAGE INCOME FUND

ARSN

089 343 288

Responsible entity name

LM INVESTMENT MANAGEMENT LTD

ACN

071 208 461

### Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation

LM INVESTMENT MANAGEMENT LTD

Contact name/position description

BRUCE MACKENZIE - COMPLIANCE

ASIC registered agent number (if applicable)

220281 - (22583)

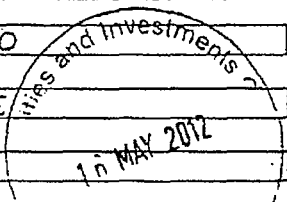
Telephone number

07 5584 4500

Postal address or DX address

PO Box 485

SURFERS PARADISE QLD 4217



### 1 Details of change

☒ Modification of constitution authorised by special resolution of members

Date of resolution

16/05/12  
(D) (D) (M) (M) (Y) (Y)

ASIC form code

B

☐ Replacement of constitution authorised by special resolution of members

Date of resolution

16/05/12  
(D) (D) (M) (M) (Y) (Y)

C

☐ Modification of constitution authorised by responsible entity

Date authorised

16/05/12  
(D) (D) (M) (M) (Y) (Y)

B

☐ Replacement of constitution authorised by responsible entity

Date of replacement

16/05/12  
(D) (D) (M) (M) (Y) (Y)

C

☐ Consolidated constitution

Date of consolidation

16/05/12  
(D) (D) (M) (M) (Y) (Y)

D

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## SUPPLEMENTAL DEED POLL

DATE

16 MAY 2012

PARTIES

LM Investment Management Limited ACN 077 208 461 of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217 (Responsible Entity)

### BACKGROUND

- (A) The LM First Mortgage Income Fund ARSN 089 343 288 (Trust) was established under a constitution dated 24 August 1999 made by the Responsible Entity, as amended.
- (B) The Responsible Entity is the responsible entity of the Trust.
- (C) Clause 26 of the constitution of the Trust (Constitution) provides that the Responsible Entity may modify the Constitution by special resolution of the Members of the Trust, subject to law (including the Corporations Act 2001 (Cth) (Corporations Act)).
- (D) On 16 May 2012 the Members of the Trust resolved by special resolution to modify the Constitution in accordance with the provisions of this deed.
- (E) The Responsible Entity may give effect to the amendments by executing a supplemental deed. Pursuant to section 601GC(2) of the Corporations Act, the amendments to the Constitution do not take effect until a copy of this deed is lodged with ASIC.

### OPERATIVE PROVISIONS

#### 1. INTERPRETATION

A term defined in the Constitution has the same meaning in this deed unless it is defined differently in this deed.

#### 2. AMENDMENTS TO THE CONSTITUTION

The Constitution is modified in the manner set out in Schedule 1 to this deed.

#### 3. EFFECTIVE DATE

The amendments to the Constitution set out in Schedule 1 to this deed will take effect on the later of:

- (a) the date that a copy of this deed is lodged with ASIC, and
- (b) the date that the Members of the Trust resolve by special resolution to confirm the special resolution passed on 16 May 2012 to modify the Constitution in accordance with the provisions of this deed

(such date being the Effective Date).

#### 4. BINDING PROVISIONS

The provisions of this deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

5. **NO RESETTLEMENT**

Other than as expressly amended by this document, the Constitution is unchanged and the amendments to the Constitution made under this deed do not constitute a resettlement of the trust which has been established under the Constitution.

6. **GENERAL**

6.1 **Governing law and jurisdiction**

- (a) This deed is governed by the laws of New South Wales.
- (b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales.


6.2 **Further actions**

The Responsible Entity must do all things and execute all further documents necessary to give full effect to this deed.

**EXECUTED** as a deed poll.

**EXECUTED** by LM Investment  
Management Limited ACN 077 208 461

in accordance with section 127(1) of the  
Corporations Act 2001 (Cth):

  
\_\_\_\_\_  
Signature of director

SIMON TICKNER  
\_\_\_\_\_  
Name

  
\_\_\_\_\_  
Signature of director/~~secretary~~

ELHARD VAN DER HOVEN  
\_\_\_\_\_  
Name

## SCHEDULE 1

### Amendments to the Constitution

#### 1. NEW CLAUSE 9A

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 9A (Transfer Facility) as follows:

#### "9A TRANSFER FACILITY

##### Definitions

9A.1 In this clause 9A, unless the context indicates otherwise:

**Actual Unit Sale Price** means, as at any Trigger Date for a Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP) + NID - SD}{(BV)}$$

where:

**NP** means the amount in the Net Proceeds Account as at that Trigger Date,

**BV** means the Book Value of the Sale Assets whose sale contributed to the Net Proceeds held in the Net Proceeds Account as at the Invitation Date of that Unit Sale Program,

**BP** means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program,

**NID** means the Net Income Distributions as at that Trigger Date divided by the number of Sale Units (where that number is as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23),

**SD** means the duty (if any) payable to any Office of State Revenue on the transfer of a Unit under the Transfer Facility as at the Liquidity Date for that Trigger Date;

**Asset Sale Program** means the program for sales of Assets of the Scheme determined by the RE from time to time;

**Assets of the Scheme** means all assets of the Scheme including the properties over which the RE holds a mortgage or other security for the loans that are assets of the Scheme but (for the avoidance of doubt) excluding all Held Cash and all amounts held on trust for Buying Members under clause 9A.18(a);

**Available Hold Income Reserve** has the meaning given to that expression in clause 9A.14;

**Available Sale Income Reserve** has the meaning given to that expression in clause 9A.13;

**Base Unit Sale Price** means, for any Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP)}{(BV)}$$

where:

**NP** means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Unit Sale Program,

**BV** means the Book Value of those Sale Assets as at the Invitation Date of that Unit Sale Program,

**BP** means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program;

**Book Price of a Unit** means, as at any date ("Calculation Date"), the price calculated in accordance with the following formula as at the last Valuation Date prior to that Calculation Date:

$$\frac{NFV}{NOU}$$

where:

**NFV** means the Net Fund Value as at that Valuation Date,

**NOU** means the number of Units on Issue as at that Calculation Date;

**Book Value** means, for any Sale Assets as at any date ("Calculation Date"), the value of those Sale Assets as recorded in the books of the Scheme as at the date of the most recent audited accounts of the Scheme issued before that Calculation Date, taking into account any provision made in relation to those assets;

**Buying Member** has the meaning given to that expression in clause 9A.7;

**Buying Member's Proportion of the Sale Units** has the meaning, for any Buying Member, given to that expression in clause 9A.24;

**Deutsche Bank Facility Agreement** means the facility agreement dated 1 July 2010 made between LM Investment Management Limited in its capacity as responsible entity for the Scheme and Deutsche Bank AG, Sydney Branch;

**Disposal Units** has the meaning, for any Unit Sale Program, given to that expression in clause 9A.20;

**Distributable Net Proceeds** has the meaning, given to that expression in clause 9A.11;

**Distribution Date** means, for any Trigger Date in a Unit Sale Program, the Business Day immediately following the Liquidity Date for that Trigger Date;

**Expected Net Proceeds** means the net cash proceeds that the RE expects to receive from the sale of the Sale Assets under the Asset Sale Program, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

**Expected Sale Discount** means, for any Investment Allocation Request, the fraction (expressed as a percentage) calculated in accordance with the following formula:

$$\frac{BV - NP}{BV}$$

where:

**NP** means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Investment Allocation Request,

**BV** means the Book Value of those Sale Assets as at the Invitation Date of that Investment Allocation Request;

**Facility Accounts** means the Net Proceeds Account, Sale Asset Income Account and Hold Asset Income Account;



**Final Completion Date** means, in relation to any Unit Sale Program, the date on which the sale of all of the Sale Assets relating to that Unit Sale Program has been completed;

**Held Cash** has the meaning, as at any Trigger Date, given to that expression in clause 9A.26(d);

**Hold Assets** means all Assets of the Scheme that are not Sale Assets;

**Hold Asset Income** means, for any Unit Sale Program, the net income received by the RE from the Hold Assets after the Invitation Date for that Unit Sale Program;

**Hold Asset Income Account** means the account into which the Hold Asset Income is credited under clause 9A.10;

**Invitation Date** means, in relation to any Unit Sale Program and any Investment Allocation Request, the date of the Investment Allocation Request that initiated that Unit Sale Program;

**Investment Allocation Request** has the meaning given to that expression in clause 9A.2;

**Liquidity Date** means, for any Trigger Date in a Unit Sale Program, the 5th Business Day after that Trigger Date;

**Member Election** has the meaning given to that expression in clause 9A.3;

**Net Income Distributions** means, as at any date, the amount held as at that date in the Available Sale Income Reserve *plus* the amount held by the RE as at that date in accordance with the directions under clauses 9A.17 and 9A.18 in respect of distributions out of the Available Sale Income Reserve to Members;

**Net Proceeds** means the net cash proceeds received by the RE from the sale of the Sale Assets, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

**Net Proceeds Account** means the account into which the Net Proceeds are credited under clause 9A.10;

**Offer Closing Date** has the meaning, in relation to any Investment Allocation Request, given to that expression in clause 9A.3;

**Office of State Revenue** means the Office of State Revenue of Queensland and any similar office in any other State or Territory of Australia;

**Pro Rata Buyer Proportion** has the meaning given to that expression in clause 9A.20;

**Pro Rata Seller Proportion** has the meaning given to that expression in clause 9A.20;

**Release Date** means the third anniversary of the date on which this clause 9A comes into effect or such earlier date (if any) as the RE determines;

**Sale and Purchase Notice** has the meaning given to that expression in clause 9A.20;

**Sale Assets** means, for any Unit Sale Program and any Investment Allocation Request, the assets identified in that Investment Allocation Request as the Assets of the Scheme that will be sold for the purposes of that Unit Sale Program under the Asset Sale Program (as adjusted under clause 9A.9);

**Sale Asset Income** means, for any Unit Sale Program, the net income received by the RE from the Sale Assets after the Invitation Date for that Unit Sale Program;

**Sale Asset Income Account** means the account into which the Sale Asset Income is credited under clause 9A.10;

**Selling Member** has the meaning given to that expression in clause 9A.6;

**Selling Member's Disposal Units** means, for any Selling Member and any Unit Sale Program, the Disposal Units for that Unit Sale Program that are held by that Selling Member;

**Selling Member's Sale Units** has the meaning, for any Selling Member and any Unit Sale Program, given to that expression in clause 9A.22;

**Transfer Facility** means the process for the sale and purchase of Units set out in this Clause 9A;

**Trigger Date** has the meaning, for any Units Sale Program, given to that expression in clause 9A.20;

**Unit Sale Program** means a program for the sale and purchase of Units under the Transfer Facility that is initiated by the issue by the RE of an Investment Allocation Request under this clause 9A.

*Member Election*

9A.2 At any time the RE may give a notice to the Members (**Investment Allocation Request**) inviting each Member to notify the RE:

- (a) whether it wishes to sell its Units under the Transfer Facility or to continue to hold them, and
- (b) If it wishes to sell its Units, the percentage of its Unit Holding that it wishes to sell (which may be 100% or such lesser percentage as the Member notifies the RE).

9A.3 The RE must specify in the Investment Allocation Request:

- (a) the date (**Offer Closing Date**) by which the Member's notice (**Member Election**) must be received, which must not be less than [20] Business Days after the Invitation Date;
- (b) the Sale Assets;
- (c) the Base Unit Sale Price; and
- (d) the Expected Sale Discount.

9A.4 Notwithstanding any other provision of this clause 9A:

- (a) a Member is not entitled to indicate in its Member Election that it wishes to sell less than 1,000 Units or an integral multiple of 1,000 Units, except that it may indicate that it wishes to sell all of its Unit Holding even where its total Unit Holding is less than 1,000 Units or is not an integral multiple of 1,000 Units; and
- (b) the RE may at any time reject a Member Election in which the Member notifies the RE it wishes to sell all or some of its Units, and deem the Member Election to be a notice that the Member wishes to hold all of its Units and deem the Member to be a

Buying Member, if the Member cannot provide satisfactory evidence of the Member's title or authority to deal with the Units which it wishes to sell.

- 9A.5 If a Member does not give the RE a Member Election by the Offer Closing Date it will be deemed to wish to hold all of its Units for the purposes of the Transfer Facility.
- 9A.6 A Member which notifies the RE in its Member Election that it wishes to dispose of all or any of its Units is a **Selling Member** in respect of those of its Units which it has elected to dispose of (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23).
- 9A.7 A Member which notifies the RE in its Member Election that it wishes to hold all or any of its Units (or which is otherwise deemed under this clause 9A to wish to hold its Units) is a **Buying Member** in respect of those of its Units:
- (a) which it wishes to hold (or is deemed under clause 9A.4 to wish to hold), or
  - (b) which are otherwise not transferred under this clause 9A due to any adjustments under clauses 9A.21, 9A.22 and 9A.23.
- 9A.8 A Member Election:
- (a) will be taken to be an offer by that Member to the other Members to sell the Units confirmed for sale in its Member Election on the terms and in accordance with the procedures (including adjustments) of this clause 9A,
  - (b) will be taken to have been accepted by the Buying Members on the terms and in accordance with the procedures (including adjustments) of this clause 9A (and in the case of each Buying Member in respect of the Sale Units which the RE determines under clause 9A.23 are to be transferred to it) when the RE issues a Sale and Purchase Notice in respect of that Member's Sale Units, and
  - (c) will be binding on that Member in relation to the number of its Units that it elects to sell in its Member Election (as adjusted under clauses 9A.4, 9A.21, 9A.22, 9A.23 and 9A.43).
- 9A.9 After the Offer Closing Date specified in an Investment Allocation Request the RE may exclude one or more assets from the Sale Assets identified in that Investment Allocation Request if the RE considers that the net sale proceeds from the remaining Sale Assets are likely to be sufficient to fund the payment in full of the Base Unit Sale Price for the Units that are confirmed for sale in the Member Elections (taking into account the adjustments noted in this clause 9A).

*Net Proceeds and Income Accounts*

9A.10 The RE will:

- (a) establish a separate account in its books for each Unit Sale Program for each of (1) the Net Proceeds, (2) the Sale Asset Income, and (3) the Hold Asset Income relating to that Unit Sale Program;
- (b) credit amounts received in respect of the Net Proceeds, the Sale Asset Income, and the Hold Asset Income for a Unit Sale Program to their respective accounts for that Unit Sale Program as and when those amounts are received; and
- (c) apply the amounts held in those accounts consistently with the requirements of this clause 9A.

*Allocation of Net Proceeds*

9A.11 The RE may at any time and from time to time as it considers fit allocate the balance at that time in the Net Proceeds Account to the following reserves:

- (a) all amounts then payable or repayable under the Deutsche Bank Facility Agreement in relation to the Sale Assets from which the Net Proceeds then held in the Net Proceeds Account have been derived,
- (b) the amount required for redemption of Units permitted by ASIC on "hardship" grounds,
- (c) the amount required to pay distributions to Members previously determined by the RE but not yet paid,
- (d) the amount required for feeder fund payments for distributions and expenses allowed under the Deutsche Bank Facility Agreement,
- (e) the amount that in the RE's opinion should be held in cash reserve for any Liabilities (including operational costs, provisions and contingencies) or other purposes, and
- (f) the amount of the Net Proceeds that is available (after deducting the amounts referred to in paragraphs (a) to (e) above) for distribution to Members (**Distributable Net Proceeds**).

9A.12 The RE may at any time and from time to time as it considers fit apply out of the Net Proceeds Account any amount credited to a reserve referred to in paragraphs 9A.11(a) to (e) above towards the payments contemplated by that reserve.

*Allocation of Income*

9A.13 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

- (a) allocate the balance at that time in the Sale Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,
- (b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,
- (c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Sale Income Reserve**), and
- (d) distribute to Members out of the Available Sale Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Sale Asset Income.

9A.14 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

- (a) allocate the balance at that time in the Hold Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,
- (b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,
- (c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Hold Income Reserve**), and

- (d) distribute to Members out of the Available Hold Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Hold Asset Income.

9A.15 No amount credited to the Sale Asset Income Account or the Hold Asset Income Account or distributed under clauses 9A.13 and 9A.14 will constitute Distributable Income until it is determined to be Distributable Income under clause 11.3.

9A.16 Where an amount is distributed to Members under this clause 9A, the determination of whether that distribution is a distribution of capital or income will not be affected by the crediting of that amount to or distribution out of any of the accounts referred to in clause 9A.10 or any of the reserves referred to in clause 9A.11.

#### *Distribution Directions*

9A.17 Each Selling Member irrevocably directs the RE:

- (a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve or the Available Hold Income Reserve (other than cash amounts distributed under clauses 9A.13 or 9A.14) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Selling Member; and
- (b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of its Sale Units in accordance with the directions in clause 9A.28.

9A.18 Each Buying Member irrevocably directs the RE:

- (a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve (other than cash amounts distributed under clause 9A.13) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Buying Member;
- (b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of Sale Units to it in accordance with the directions in clause 9A.28;
- (c) to reinvest all distributions made to it out of the Available Hold Income Reserve before the Release Date (other than cash amounts distributed under clause 9A.14) by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer; and
- (d) to pay or apply all distributions made to it out of the Available Hold Income Reserve on or after the Release Date in accordance with clauses 11 and 12 as applying at that time.

9A.19 Each Member irrevocably directs the RE to distribute on each Distribution Date the Distributable Net Proceeds as at that date to the Members in accordance with this clause 9A pro rata to their Unit Holdings as at that Distribution Date.

#### *Sale and Purchase of Units*

9A.20 On the 5th Business Day after the Final Completion Date for a Unit Sale Program, and on such other earlier date or dates as the RE considers appropriate, (each a **Trigger Date**) the RE must give a notice (**Sale and Purchase Notice**) to Members setting out:

- (a) the number of Units that have been confirmed for sale in Member Elections (as adjusted under clause 9A.43) that have not previously been transferred under the Transfer Facility or otherwise since the Invitation Date for that Unit Sale Program (and excluding Member Elections rejected under clause 9A.4) (**Disposal Units**),
  - (b) the amount of the Distributable Net Proceeds as at the Trigger Date,
  - (c) the number of Units to be sold and purchased (as whole Units) under this clause 9A in relation to those Member Elections as at that Trigger Date (**Sale Units**), where that number is calculated (subject to clauses 9A.4, 9A.21, 9A.22 and 9A.23) by dividing the amount of the Distributable Net Proceeds as at that Trigger Date by the Actual Unit Sale Price as at that Trigger Date, rounded down to the nearest whole Unit,
  - (d) the proportion of each Selling Member's Disposal Units as at that Trigger Date that will be sold under this clause 9A (subject to rounding down to whole Units under clause 9A.22), where that proportion (**Pro Rata Seller Proportion**) is the fraction calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21 and 9A.23 but before adjustment for rounding down under clause 9A.22) by the number of Disposal Units as at that Trigger Date, expressed as a percentage,
  - (e) the number of Sale Units to be bought by each Buying Member under this clause 9A as at that Trigger Date, expressed as a number per Unit held by a Buying Member (**Pro Rata Buyer Proportion**), where that number is calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) by the number of all Units held by Buying Members as at that Trigger Date, rounded down to two decimal points,
  - (d) the Liquidity Date for that Trigger Date, and
  - (e) the Distribution Date for that Trigger Date.
- 9A.21 If the number of Sale Units calculated under clause 9A.20(c) for a Trigger Date plus the aggregate number of Sale Units calculated under clause 9A.20(c) for each previous Trigger Date in the same Unit Sale Program is greater than or equal to the number of Disposal Units for that Unit Sale Program:
- (a) the number of Sale Units as at that Trigger Date will be deemed to be the number equal to the balance of the Disposal Units for that Unit Sale Program then remaining unsold (whether under the Unit Sale Program or otherwise);
  - (b) the Pro Rata Seller Proportion will be deemed to be 100%; and
  - (c) the amount of the Distributable Net Proceeds that is attributable to the number of Sale Units that is greater than the number of Disposal Units will be reallocated to the cash reserve referred to in clause 9A.11(d).
- 9A.22 The number of a Selling Member's Disposal Units that will be sold under this clause 9A in relation to a Trigger Date (**Selling Member's Sale Units**) will be the number calculated by multiplying the number of that Selling Member's Disposal Units remaining unsold as at that Trigger Date (whether under the Unit Sale Program or otherwise) by the Pro Rata Seller Proportion, adjusted (where applicable) under clause 9A.23, and rounded down to the nearest whole Unit. The number of Sale Units calculated under clause 9A.20(c) will be reduced to reflect any such adjustment and rounding down so that the total number of Sale Units equals the sum of all of the Selling Members Sale Units.
- 9A.23 In addition to the adjustment under clauses 9A.21 and any rounding down under clause 9A.22, and without limiting clauses 9A.34 and 9A.37, the RE may reduce the number of a

Selling Member's Sale Units for a Trigger Date by any number (including to zero) if the RE considers that such reduction is necessary to ensure that the implementation of the Transfer Facility does not have a material adverse financial effect on the Scheme. In determining whether to make any such reduction and, if so, how to apply it to a Selling Member's Sale Units for a Trigger Date, the RE may take into account:

- (a) the implications of the sale of the Selling Member's Sale Units for that Trigger Date under the Transfer Facility on the tax treatment of the Scheme (including in relation to the trading history of Units and the change in the members of the Scheme during relevant periods),
- (b) the principle that priority should be given to Member Elections in terms of the chronological order in which they have been received by the RE, and
- (c) such other factors as in the RE's opinion are relevant to the potential material adverse financial effect on the Scheme in relation to which such reduction is necessary.

9A.24 The number of the Sale Units (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) to be bought by a Buying Member under this clause 9A as at any Trigger Date (**Buying Member's Proportion of the Sale Units**) will be the number calculated by multiplying the number of Units held by the Buying Member as at the Trigger Date by the Pro Rata Buyer Proportion, rounded down to two decimal points .

9A.25 The amount of the Distributable Net Proceeds that is attributable through the calculations in clause 9A.20 to:

- (a) any fraction of the Selling Member's Disposal Units that is excluded from the Selling Member's Sale Units by the rounding down in clause 9A.22,
  - (b) any fraction of a Unit that is excluded from the Sale Units by the rounding down in clause 9A.20(c), or
  - (c) any Unit that is excluded from the Sale Units by a reduction under clause 9A.23,
- will be reallocated to the cash reserve referred to in clause 9A.11(e).

9A.26 On each Trigger Date in a Unit Sale Program a binding agreement will be deemed to have come into effect between the Members under which:

- (a) each Selling Member agrees to sell its Selling Member's Sale Units as at that Trigger Date to the Buying Members for that Unit Sale Program, allocated between them in accordance with the Pro Rata Buyer Proportion for that Trigger Date, and
- (b) each Buying Member agrees to buy from the Selling Members its Buying Member's Proportion of the Sale Units as at that Trigger Date,

in each case:

- (c) at a price per Unit equal to the Actual Unit Sale Price as at that Trigger Date,
- (d) on the basis that:
  - (i) at Completion all amounts held for Selling Members in accordance with their direction in clause 9A.17 in respect of the Sale Units as at that Trigger Date (**Held Cash**) will be applied in accordance with the directions in clause 9A.28, and

- (ii) the transfer of any Sale Units includes all rights to distributions of capital and income in respect of the Sale Units paid on or after that Trigger Date (irrespective of when the distribution was determined by the RE),
- (e) with completion of the transfer of the Sale Units to occur on the Liquidity Date for that Trigger Date but on the basis that payment of the price for the Units will be paid on the Distribution Date for that Trigger Date ,
- (f) on the basis that each Member appoints the RE its attorney to complete the sale and purchase on its behalf with full authority to do so as more specifically described in clause 9A.30,
- (g) on the basis that each Selling Member warrants to each Buying Member and to the RE that, at the time of completion of the transfer under this clause 9A:
  - (i) the Selling Member's Sale Units will be fully paid and free from all mortgages, charges, liens, encumbrances, pledges, security interests and other interests of third parties of any kind, whether legal or otherwise, and restrictions of any kind, and
  - (ii) it has full power and capacity to sell and transfer its Selling Member's Sale Units (together with any rights and entitlements attaching to those Units) to the Buying Members under the Transfer Facility, and
- (h) otherwise on the terms and conditions of this clause 9A.

*Completion of Sale and Purchase*

9A.27 Each Member directs the RE to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member, that the RE considers necessary or desirable to confirm and complete any sale and purchase of Units that is referred to in clause 9A.26.

9A.28 Without limiting clause 9A.27:

- (a) each Selling Member directs the RE to pay to the Buying Members (or as they direct) all of the Held Cash attributable to its Sale Units as at the relevant Trigger Date; and
- (b) each Buying Member directs the RE to apply the Distributable Net Proceeds that are distributed to it on a Distribution Date under clause 9A.19 (including any amount distributed to it in respect of its Buying Member's Proportion of the Sale Units) and the amount held for it in relation to its Units in accordance with its directions in clause 9A.18 and all Held Cash distributed to it in accordance with the Selling Members' directions under clause 9A.28(a) towards:
  - (i) payment on that date of the price payable by it under clause 9A.26 for those Units until that price is paid in full, and
  - (ii) payment on that date to the relevant Office of State Revenue of any duty payable by it on the transfer of those Units,

and to reinvest any remaining surplus by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer.

These directions are irrevocable.



9A.29 The RE must register each transfer of Units completed in accordance with clause 9A.26 on the Liquidity Date for the relevant Trigger Date.

*Appointment of RE as attorney*

9A.30 Without limiting clause 20, each Member appoints the RE and any director, officer, attorney or substitute nominated by the RE severally for this purpose as its attorney and agent with the right and authority to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member to confirm and complete any sale and purchase of Units under this clause 9A, including (without limitation):

- (a) to determine as it sees fit (consistently with the agreement set out in clause 9A.26) the particular Sale Units that are to be transferred on completion by a particular Selling Member to a particular Buying Member,
- (b) to execute and deliver on the Liquidity Date on behalf of the both the relevant Selling Member and the relevant Buying Member all instruments of transfer of Units necessary or desirable to give effect to that determination;
- (c) to pay to a Selling Member on the Distribution Date the price payable to that Selling Member under clause 9A.26 out of the distributions that it is directed by the Buying Members to apply towards that purpose under clause 9A.28;
- (d) to pay to each relevant Office of State Revenue on behalf of the relevant Buying Member any duty payable by that Buying Member on the transfer of Units to it under the Transfer Facility; and
- (e) to enforce on behalf of any Member at the cost of the Scheme any of its rights under the Transfer Facility (including in relation to any breach of the warranty set out in clause 9A.26(g)).

9A.31 At the request in writing of the RE a Member must execute separate powers of attorney in a form reasonably required by the RE appointing the RE as its attorney for the purposes of this clause.

9A.32 Any attorney may exercise its rights under clause 9A.30 or any power of attorney executed under clause 9A.31 notwithstanding that the exercise of the right constitutes a conflict of interest or duty.

9A.33 Each Member indemnifies and shall keep indemnified each attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under clause 9A.30 or any power of attorney executed under clause 9A.31.

*Termination of Unit Sale Program*

9A.34 Notwithstanding the other provisions of this clause 9A, if at any time the RE considers that it is not in the best interests of Members to continue to implement the Transfer Facility in relation to a particular Investment Allocation Request issued under this clause, the RE may terminate the Unit Sale Program initiated by that Investment Allocation Request by a determination to that effect.

9A.35 Upon making any such determination under clause 9A.34:

- (a) all notices, elections, agreements and other steps taken or deemed to have occurred under this clause 9A in relation to that Unit Sale Program will cease to have effect except for steps relating to transfers of Units which have been completed under this clause before the determination was made, and

- (b) the RE must take all steps necessary (including in relation to allocations in, and distributions out of, the Facility Accounts) to put the Members back into the same position in relation to the Units they continue to hold that that they would have been in if the Unit Sale Program had not been initiated.

9A.36 A determination in relation to a Unit Sale Program under clause 9A.34 does not affect the implementation of any other Unit Sale Program. For the avoidance of doubt, any determination under clause 9A.34 does not affect any determinations made by the RE under clauses 11.3 or 12.1 in relation to the Distributable Income of the Scheme for a Distribution Period and does not affect Members present entitlement to that Distributable Income under clause 12.3.

*Acknowledgements and authorities*

9A.37 Without limiting any of its rights, powers, discretions, authorities and indemnities under this clause 9A, it is expressly acknowledged and the RE is expressly instructed that it is authorised to initiate and implement any Unit Sale Program, including the issue of Investment Allocation Requests and Sale and Purchase Notices, notwithstanding that doing so may or will result in a material adverse financial effect on the Scheme (whether in relation to the tax treatment of the Scheme or otherwise).

9A.38 The Buying Members authorise the RE to appoint itself or the Custodian or such other person as the RE determines as their nominee to hold the Sale Units transferred to the Buying Members under any Unit Sale Program on their behalf in the name of the nominee on such terms as the RE considers appropriate.

9A.39 The Buying Members acknowledge that all administrative options selected by a Buying Member in relation to its Units (including as to currency conversion, investment term and distribution reinvestment directions) will be deemed to apply also to all Units transferred to the Buying Member under this clause 9A, and that any costs incurred in providing and administering those options are expenses of the Scheme.

*Further Unit Sale Programs*

9A.40 The RE may from time to time Issue a further Investment Allocation Request under clause 9A before the Final Completion Date for an earlier Investment Allocation Request provided that:

- (a) the assets identified for sale in the further Investment Allocation Request do not include assets that comprise Sale Assets in any earlier Investment Allocation Request;
- (b) a Member is not entitled to elect to dispose in its Member Election in response to a further Investment Allocation Request any Units that it has confirmed for disposal in its Member Election in response to an earlier Investment Allocation Request (other than Units that it continues to hold due to the rejection of its Member Election under clause 9A.4 or due to any adjustment under clauses 9A.21, 9A.22, 9A.23 or 9A.43);
- (c) the sale and purchase of Units resulting from that further Investment Allocation Request (and all steps relating to it) will be taken to be a separate Unit Sale Program under this clause 9A;
- (d) the RE must establish separate Facility Accounts for each Unit Sale Program; and
- (e) each of the definitions in clause 9A.1 will apply separately in relation to each Unit Sale Program by reference to the Investment Allocation Request, Sale Assets,

Member Elections Trigger Dates and other elements of and steps in that Unit Sale Program.

*Withdrawal Notices*

- 9A.41 All Withdrawal Notices given by Members to the RE which remain unprocessed as the date on which this clause 9A comes into effect (other than Withdrawal Notices permitted by ASIC on hardship grounds) are deemed to be of no effect.
- 9A.42 Unless the RE determines otherwise and notifies the Members accordingly, a Member may not give a Withdrawal Notice in relation to any of its Units before the Release Date (other than a Withdrawal Notice permitted by ASIC on hardship grounds).

*Adjustment of Member Elections*

- 9A.43 A Member may at any time by notice to the RE ask the RE to adjust its Member Election for a Unit Sale Program by increasing or reducing (as set out in the Member's notice) the percentage of the Member's Unit Holding that it wishes to sell.
- (a) The RE may accept (in whole or in part) or reject any such request in its absolute discretion.
  - (b) If the RE decides to accept the request (in whole or in part) it may only do so in accordance with and to the extent permitted by this clause 9A.43.
  - (c) The RE may not reduce the Member's Election in a way that would affect the sale of any Units that have already, as at the date of the RE's decision (**Adjustment Date**), been sold under that Unit Sale Program or that are included in the Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.
  - (d) The RE may not increase the Member's Election in a way that would increase the number of Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.
  - (e) Where a Member wishes to increase the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Sell Units**):
    - (i) the Actual Unit Sale Price for that Member's Sale Units in that Unit Sale Program must be reduced to the extent necessary to ensure that the RE is able to implement the Transfer Facility for other Members in accordance with the principles on Unit value and cash payments on Completion set out in the other clauses of this clause 9A as if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and
    - (ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.
  - (f) Where a Member wishes to reduce the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the

Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would cease to be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Hold Units**):

- (i) the RE must deal (or adjust its dealings) with those distributions as necessary to ensure that they are held or reinvested as they would have been under this clause 9A (including the directions in clauses 9A.17 and 9A.18) if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and
- (ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.

*Facilitating Implementation*

9A.44 Notwithstanding any other provision of this clause 9A, if the RE encounters any administrative difficulty when it implements the Transfer Facility (whether due to lack of express guidance in this clause 9A, or inconsistency between provisions or any other factor) the Members authorise the RE to take all steps the RE considers necessary or desirable (including making adjustments to the number or allocation of Disposal Units and Sale Units, or the calculations of the Actual Unit Sale Price, or to allocations in, and distributions out of, the Facility Accounts) to enable the RE to implement the Transfer Facility for Members in a way that in the RE's opinion is most consistent with the principles in this clause 9A."

**2. NEW CLAUSE 3.3A**

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 3.3A as follows:

"3.3A Notwithstanding clause 3.3, a fraction of a Unit up to two decimal places may be transferred under clauses 9 or 9A. Without limiting clause 9A, where a sale and purchase under clause 9A would result in the transfer of a fraction of a Unit, the number of Units to be transferred must be rounded down to the nearest two decimal points."

**3. NEW CLAUSE 5.1A**

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 5.1A as follows:

"5.1A Notwithstanding clause 5.1(a), the RE does not have power to, and must not, issue any Unit between the last Business Day of a Sale Period and the Distribution Date for that Sale Period."

**4. MODIFY CLAUSE 9.1**

With effect on and from the Effective Date, the Constitution is amended by modifying clause 9.1(a) to read as follows:

"9.1(a) Subject to this Constitution, a Unit (including a fraction of a Unit up to two decimal places) may be transferred by instrument in writing, in any form authorised by Law or in any other form that the RE approves. In this Constitution any reference to the transfer or transmission of a Unit will be taken to include a reference to a fraction of a Unit up to two

decimal places, and the interest of a Member will include any interest represented by any such fraction of a Unit that the Member holds."

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Australian Securities &  
Investments Commission



Form 5101  
Corporations Act 2001  
601GC

## Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

### Scheme details

Managed investment scheme name

LM First Mortgage Income Fund

ARSN

089 343 288

Responsible entity name

LM Investment Management Limited

ACN

077 208 461

### Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation

Norton Rose Australia

Contact name/position description

Peter Schmidt - Partner

ASIC registered agent number (if applicable)

27628 (Brisbane)

Telephone number

(07) 3414 2888

Postal address or DX address

GPO Box 407, Brisbane, QLD 4001

### 1 Details of change

ASIC form code

☐ Modification of constitution authorised by special resolution of members

Date of resolution

[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

B

☐ Replacement of constitution authorised by special resolution of members

Date of resolution

[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

C

☒ Modification of constitution authorised by responsible entity

Date authorised

2 6 / 1 0 / 1 2  
(D) (D) (M) (M) (Y) (Y)

B

☐ Replacement of constitution authorised by responsible entity

Date of replacement

[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

C

☐ Consolidated constitution

Date of consolidation

[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

D

## 2 Documents to be attached

- A copy of the modification or the new constitution.  
The modification, or repeal and replacement, cannot take effect until the copy has been lodged.
- OR
- A consolidated copy of the scheme's constitution if directed to do so by ASIC.

## Signature

This form must be signed by a director or secretary of the responsible entity

I certify that the information in this form is true and complete.

Name

Francene Mulder

Capacity

- ☒ Director of responsible entity  
☐ Secretary of responsible entity

Signature

*Francene Mulder*

Date signed

2 6 / 1 0 / 1 2  
[D] [D] [M] [M] [Y] [Y]

## Lodgement

Send completed and signed forms to:  
Australian Securities and Investments Commission,  
GPO Box 9827 in your capital city.

### 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

 **NORTON ROSE**

Dated

26 OCTOBER 2012

## **Supplemental Deed**

**LM First Mortgage Income Fund**  
ARSN 089 343 288

**LM Investment Management Limited**  
ACN 077 208 461

John Moutsopoulos  
Norton Rose Australia  
Level 18, Grosvenor Place, 225 George Street  
Sydney NSW 2000  
Telephone: +61 2 9330 8166  
[www.nortonrose.com](http://www.nortonrose.com)  
Our ref: 2789191



Supplemental Deed dated 26 OCTOBER 2012

**Parties** LM Investment Management Limited ACN 077 208 461  
of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217  
(Responsible Entity)

### Introduction

- A By a replacement constitution lodged with the Australian Securities & Investments Commission dated 10 April 2008, as amended (**Constitution**), the scheme currently known as LM First Mortgage Income Fund ARSN 089 343 288 (**Scheme**) is registered as a managed investment scheme and the Responsible Entity is appointed as the responsible entity of the Scheme.
- B Pursuant to clause 26.1(b) of the Constitution and section 601GC(1)(b) of the Law, the Constitution may be modified by the Responsible Entity if it reasonably considers the change will not adversely affect Members' rights.
- C At the request of the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the Constitution of the Scheme is to be amended to recognise and acknowledge the intent of See Through Voting provisions which have been inserted into their respective constitutions.
- D The Responsible Entity reasonably considers that the modifications to the Constitution proposed to be made by this supplemental deed will not adversely affect Members' rights.

### Operative provisions

#### 1 Interpretation

Except to the extent that it is given a special meaning in this supplemental deed, any word or expression which has a particular meaning in the Constitution must, when used in this supplemental deed, be given the same meaning as it has in the Constitution.

#### 2 Operation of this deed

This deed takes effect as a supplemental deed to the Constitution on the day it is lodged with ASIC pursuant to section 601GC(2) of the Law.

#### 3 Amendments to the Constitution

##### 3.1 Subject to clause 2, the Constitution is modified by including the following:

(a) Insert new definition into the Directory of Terms at clause 1.1:

"Feeder Funds" means the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (each a "Feeder Fund").

(b) Insert new clause 33 into the Constitution:

**"33. See Through Voting Covenants**

The Scheme's RE recognises and acknowledges the intent and effect of the See Through Voting provisions contained within Schedule 1 of the respective Feeder Funds' constitution."

3.2 The provisions of the Constitution are not otherwise affected.

**4 Binding provisions**

The provisions of this supplemental deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

**5 No resettlement**

Nothing in this deed constitutes a resettlement or redeclaration of the Scheme.

**6 Governing law**


This deed is governed by and is to be construed according to the laws of Queensland.

**Executed** as a deed and delivered on the date shown on the first page

Executed by LM Investment  
Management Limited ACN 077 208 461  
in accordance with section 127 of the  
Corporations Act 2001:

  
\_\_\_\_\_  
Director/company secretary

*Francene Maree Mulder*  
\_\_\_\_\_  
Name of director/company secretary  
(BLOCK LETTERS)

  
\_\_\_\_\_  
Director

*PETER CHARLES DRAKE*  
\_\_\_\_\_  
Name of director  
(BLOCK LETTERS)

"DW-41"

**PERMANENT TRUSTEE AUSTRALIA LIMITED**

**and**

**LM INVESTMENT MANAGEMENT LTD**

---

**CUSTODY AGREEMENT**

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**PERMANENT TRUSTEE AUSTRALIA LIMITED**

23-25 O'Connell Street  
SYDNEY NSW 2000  
DX 383 SYDNEY  
Tel: (02) 9321 1600  
Fax: (02) 9321 1659  
#140216/v2

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## CUSTODY AGREEMENT

THIS AGREEMENT is made the 4 day of February 1999

**BETWEEN:** PERMANENT TRUSTEE AUSTRALIA LIMITED (ACN 008 412 913) a company duly incorporated in New South Wales having its registered office at 23-25 O'Connell Street, Sydney, in the said State, and an office at Level 8, 410 Queen St, Brisbane, Queensland ('Permanent')

**AND:** LM INVESTMENT MANAGEMENT LTD (ACN 077 208 461) a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 44A Cavill Avenue Surfers Paradise in the State of Queensland (the 'Client')

### OPERATIVE PROVISIONS:

#### 1. INTERPRETATION

1.1 In this agreement, unless the context otherwise requires:

'Austraclear' means the system operated by Austraclear Limited performing the role of central depository for securities traded in the Australian financial market, and which provides a real-time system for clearing and settling corporate and semi-government debt securities and financial derivatives.

'ASIC' means the Australian Securities and Investments Commission or such other government authority that performs the role undertaken by ASIC in relation to managed investment schemes at the date of this agreement.

'Authorised Person' means the persons nominated by each of the Client and Permanent respectively who are authorised to make any written communication or take action on behalf of the Client or Permanent respectively in relation to the performance of the relevant party under this agreement. The Client may nominate as its Authorised Persons any officers or employees of a Manager employed by the Client. A party may impose restrictions on the authority of any Authorised Person by written notice to the other party. The Authorised Persons and any restrictions on authority as at the date of this agreement are specified in schedule 1 and may be varied upon written notice by the respective party to the other party.

'Business Day' means a day on which banks are open for business in Brisbane, but excludes Saturdays, Sundays, public holidays and bank holidays.

'CHESS' stands for 'Clearing House Electronic Subregister System' and means the clearing house established and operated by Securities Clearing House ('SCH') for the clearing, settlement, transfer and registration of securities approved by SCH.

'Custodially Held', in relation to an asset of a Scheme held by or on behalf of Permanent under this agreement means that Permanent or the person holding the asset on Permanent's behalf has one or more of the following:-

- (i) legal title to the asset;
- (ii) physical possession of the asset;
- (iii) direct control of the asset;

- (iv) is designated as mortgagee of the asset; or
- (v) physical possession or direct control of the essential elements of title of the asset,

where in all the circumstances this results in Permanent or the person holding the asset on Permanent's behalf having effective control of the asset for the purpose of its safekeeping (whether or not Permanent or the person holding the asset on Permanent's behalf, as the case may be, also performs other services in relation to the asset).

'Instructions' has the meaning set out in clause 5.

'Law' means the Corporations Law.

'Manager' means a person appointed by the Client to provide management services in respect of all or part of the Portfolio.

'Portfolio' means property of a Scheme Custodially Held from time to time by Permanent or a Sub-custodian pursuant to this agreement.

'RITS' stands for 'Reserve Bank Information and Transfer System' and means the real time computerised settlement and information system established by the Reserve Bank of Australia for settlements, electronic trading and bidding, and cash transfers for parties with Reserve Bank accounts.

'SCO' means the Client's Senior Compliance Officer.

'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between Permanent and the Client.

'Sub-custodian' means any person engaged pursuant to clause 6.1 to Custodially Hold some part or all of the Portfolio on behalf of Permanent.

'SWIFT' stands for 'Society for Worldwide Interbank Financial Telecommunications' and means the international store and forward network system which processes a range of financial transactions relating to, inter alia, bank transfers, foreign exchange, loans, deposits and securities.

'Taxes' means all taxes of whatever nature lawfully imposed, including income tax, recoupment tax, land tax, sales tax, fringe benefits tax, group tax, capital gains tax, profit tax, interest tax, tax on the provision of goods or services, property tax, undistributed profits tax, withholding tax, municipal rates, financial institutions duty, bank account debit tax, stamp duties and other taxes, charges and liens assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, Territory or municipal taxation or excise governmental agency, including any interest or fee imposed in connection with any such tax, rates, duties, charges or liens.

'Title Documents' means the written evidence of title to or interest in any of the assets forming part of the Portfolio.

1.2 In this agreement, unless the context otherwise requires:

- (a) words importing one gender include the other genders;
- (b) the singular includes the plural and vice versa;
- (c) a reference to a party is a reference also to that party's respective successors or assigns;
- (d) a reference to a *person* includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality) and reference to a *company* includes a person;
- (e) a reference to an *agent* does not include any pricing service or supplier of pricing information used by Permanent for valuation or pricing purposes;
- (f) headings are for convenience only and shall not affect interpretation;
- (g) mentioning anything after, *include*, *includes* or *including* does not limit what else may be included;
- (h) references to sections, clauses and schedules are references to sections, clauses and schedules of this agreement;
- (i) a reference to Permanent or the Client includes, where the context permits a reference to their respective officers, employees and agents or any of them;
- (j) a reference to the *knowledge, belief or awareness* of any person in relation to a matter means the knowledge, belief or awareness that the person would have if they had made all reasonable enquiries of others who could reasonably be expected to have information relevant to the matter and, where those enquiries would have prompted a reasonable person to make further enquiries, made those further enquiries;
- (k) a reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued relating to it;
- (l) references to dollar and '\$' refer to amounts in Australian currency; and
- (m) the schedules to this agreement form part of this agreement.

## 2. APPOINTMENT OF PERMANENT

- 2.1 The Client appoints Permanent to provide custodial services on the terms of this agreement.
- 2.2 Permanent accepts its appointment and agrees to provide custodial services to the Client on the terms of this agreement.
- 2.3 Permanent acknowledges that the Client will assess Permanent's performance on a regular basis in accordance with the methods and standards identified in schedule 3.

**3. FUNCTION AND POWERS OF PERMANENT**

- 3.1 Subject to the provisions of this agreement, Permanent agrees to custodially hold the Portfolio and Title Documents as agent for the Client in relation to each Scheme.
- 3.2 The Client authorises Permanent to:
- (a) purchase, acquire, issue, release, sell or dispose of property to form or forming part or all of any Portfolio on receipt of Instructions from the Client and execute all transfers, releases, and assurances and other documents necessary for any such purpose;
  - (b) receive and hold or procure the receipt and holding of any property so purchased or acquired and any interest, dividend, rent or other income accruing in respect of it and any document of title to it in safe custody;
  - (c) procure safe custody of property of the Portfolio in bearer form;
  - (d) procure registration in the name of Permanent or of a Sub-custodian, as the case requires, of property of the Portfolio in a registrable form unless it is otherwise impractical or inconsistent with market practice or otherwise permitted with the consent of the Client; and
  - (e) provide the custody services and other administrative services as set out in this agreement or as agreed from time to time between Permanent and the Client. In such circumstances Permanent is entitled to receive additional fees as agreed between the parties.
- 3.3 Permanent may establish an account in the name of the Client designating a Scheme or, if otherwise instructed by the Client, some other name, with any bank or company approved by the Client and operate on the account in accordance with Instructions from the Client.
- 3.4 Permanent may refuse to purchase, acquire, issue, release, sell, accept the deposit or transfer of a security, document or other property, and the Client must accept a return of the document or transfer of the security or other property at the request of Permanent. In particular, Permanent has no obligation to accept into the Portfolio or acquire any partly paid investment unless the Client has made arrangements satisfactory to Permanent to set aside in the name of Permanent money or other property sufficient to provide for payment of the investment in full.
- 3.5 The Client agrees that, in relation to property held on a pooled basis or in an omnibus account, the transfer or delivery of property in accordance with this agreement of the same type and number as the property so held will constitute a proper performance by Permanent of its obligations under this agreement.
- 3.6 Permanent may execute or make on behalf of the Client any certificates, declarations or affidavits which are required to receive into or transfer out of its custody any property of or for any Portfolio.
- 3.7 The Client agrees that Permanent or any Sub-custodian may hold any property included in a Portfolio on a pooled basis or in an omnibus account in accordance with any class order issued by ASIC or any specific relief from the requirements of section 601FC(1)(i) of the Law granted by ASIC in relation to the relevant Scheme.



- 3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.
- 3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.
- 3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.
- 3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.
- 3.12 Permanent is authorised to comply with any obligations imposed on it by law.
- 3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.
- 3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.

#### **4. DUTIES OF PERMANENT**

- 4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.
- 4.2 Permanent must promptly forward to or notify the Client or the relevant Manager of all forms of proxy, notices of meetings and other material letters, notices or announcements received by Permanent relating to the assets of a Portfolio.
- 4.3 Permanent is not responsible for reviewing or advising the Client on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by the Client.
- 4.4 Permanent disclaims any knowledge of the terms on which securities are issued or the constituent documents of the issuer and the Client undertakes to investigate and satisfy itself as to those matters and to ensure that any Instructions to Permanent are in conformity and reasonable having regard to them.

- 4.5 Permanent is not responsible for the accuracy or completeness of any information received from third parties and passed to or assessed by the Client or a Manager.
- 4.6 Permanent is not obliged to institute or defend legal proceedings unless requested by the Client and indemnified by the Client to its satisfaction.
- 4.7 The services of Permanent under this agreement are not exclusive. Permanent is free to provide similar services to others, and is not obliged to disclose to the Client anything which comes to its notice in the course of providing services to others or otherwise than in the performance of this agreement.
- 4.8 Permanent is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.
- 4.9 To the extent required by section 60IFC(1)(i) of the Law as modified by any relief granted by ASIC, Permanent shall ensure that the assets of each Portfolio are:
- (a) clearly identified as property of the respective Scheme; and
  - (b) held separately from Permanent's own assets, the assets of any other Scheme or any other assets held by Permanent in any other capacity whatsoever.
- 4.10 Permanent is not responsible for checking or ascertaining the value of any property or whether the price to be paid for any property is proper or reasonable or whether any transaction which it is instructed to effect accords with the constitution, compliance requirements, prospectus, investment policy or limit for the time being established for or in force in relation to the Scheme.
- 4.11 Permanent must notify the Client in writing immediately if Permanent becomes aware that it no longer satisfies the requirements of ASIC Policy Statement 131 or 133.
- 4.12 Permanent must provide to the Client at least annually at a time as agreed between the parties a certificate signed by two directors stating that Permanent has met the requirements of ASIC Policy Statements 131 and 133 during that financial year and must (if the Client reasonably requires such certificate) also provide annually at a time as agreed between the parties a certificate signed by Permanent's external auditor confirming that, in the auditor's opinion, Permanent continues to meet the financial requirements of ASIC Policy Statements 131 and 133.
- 4.13 Subject to clause 4.15, Permanent must not take a charge, mortgage, lien or other encumbrance over, or in relation to, the assets of a Scheme other than in respect of expenses and outlays made within the terms of this agreement.
- 4.14 Permanent must not exercise any right in the nature of a charge, mortgage, lien, or other encumbrance over or in relation to assets of the Scheme in relation to unpaid custodian fees pursuant to clause 8.1, but otherwise Permanent is entitled to exercise any rights in relation to the assets of the Scheme available to it at law in the nature of a charge, mortgage, lien or other encumbrance and is additionally granted by this agreement rights of lien and set off as against the assets of a Portfolio in relation to any liability, loss, cost, claim or expense incurred or arising on account of the Scheme in the proper performance of Permanent's powers or duties under this agreement. In the exercise of rights pursuant to this clause Permanent may sell any

asset from the relevant Portfolio and enforce its rights under this agreement against the proceeds of such sale.

- 4.15 If Permanent receives Instructions to take a charge, mortgage, lien or other encumbrance over or in relation to any assets in a Portfolio, Permanent need only act on those Instructions if it is satisfied that its liability pursuant to such charge, mortgage, lien or encumbrance is limited to the assets available to it pursuant to this agreement.
- 4.16 If the Client instructs Permanent to Custodially Hold any real property pursuant to this agreement, Permanent need not agree to do so unless Permanent is satisfied that its liabilities in relation to the holding of such real property are limited to the assets available to it pursuant to this agreement. In this regard, Permanent may require the Client to effect and maintain insurances identified by Permanent in Permanent's name or to provide additional indemnities to Permanent.
- 4.17 In the event that Permanent has breached a term of this agreement which entitles the Client to exercise rights against Permanent, the existence of such rights does not entitle the Client to prevent Permanent from relying on the provisions of this agreement to seek indemnification or other rights in order to meet or satisfy any claim or demand made by a third party on Permanent.
- 4.18 Permanent agrees to compensate a Scheme by making a payment to that Scheme in the event of Permanent being required by law to make such payment if there is a loss to a Scheme as a result of Permanent failing in its obligations under this agreement.

## **5. INSTRUCTIONS**

- 5.1 Permanent is authorised to act, or to cause any other person to act, on any Instructions given to it in accordance with this clause 5.
- 5.2 Permanent is authorised to act on Instructions in writing which bear or purport to bear the signature or a facsimile of the signature of any of the Client's Authorised Persons or Instructions provided by electronic means using security codes or procedures agreed between Permanent and the Client.
- 5.3 Permanent is not liable for acting on any Instructions which appear to it to have been properly and regularly signed or given and is under no duty to inquire whether any such Instructions have been so signed or given. However, Permanent may require written confirmation from the Client before acting on any Instructions.
- 5.4 Permanent is not liable for acting on any Instructions given in accordance with this clause 5 which contain any error or ambiguity.
- 5.5 Nothing in this clause 5 obliges Permanent to obtain Instructions where the other provisions of this agreement do not impose any such obligation.
- 5.6 Permanent may record electronically telephonic discussions relating to this agreement or any transaction effected under it with the prior consent of the Client for each discussion intended to be recorded.

**6. SUB-CUSTODIANS**

- 6.1 Permanent may, where it considers their appointment necessary or desirable for the purpose of exercising its powers or performing its duties under this agreement, appoint Sub-custodians (including any person related to or associated with Permanent) to perform any of its duties under this agreement with any or all of its powers under this agreement, including this power of delegation, and any delegate appointed by the exercise of such power shall be included in the term Sub-custodian. Any appointment of a Sub-custodian by Permanent is not an assignment of Permanent's rights or obligations under this agreement.
- 6.2 Permanent must supply to the Client on request a description of property included in the Portfolio which is held by or registered in the name of a Sub-custodian, together with the name and address of the Sub-custodian.
- 6.3 Permanent shall be responsible for the actions and omissions of its Sub-custodian appointed by Permanent pursuant to clause 6.1.

**7. BOOKS, RECORDS AND STATEMENTS**

Permanent must:

- (a) properly maintain adequate books and records, accounts of all receipts, disbursements and other transactions relating to the Portfolio in accordance with generally accepted accounting principles to the extent such principles are relevant;
- (b) provide the Client with the reports and statements relating to the Portfolio described in schedule 4 at the intervals mentioned in schedule 4; and
- (c) provide any auditor of the Client with any reasonably available information in Permanent's possession about the Portfolio which the auditor requires to enable it to perform any audit or investigation involving the Portfolio.

**8. FEES AND EXPENSES**

- 8.1 The Client agrees to pay to Permanent during the continuance of this agreement fees in the amounts described and at the time set out in schedule 5.
- 8.2 Permanent is entitled to recover from the Client the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs (including fees and other amounts payable to Sub-custodians) in connection with the performance of its duties and the exercise of its powers under this agreement including, without limitation, settlement, delivery, registration and transaction charges and foreign currency costs and charges including any reasonable expenses incurred as a result of the Client requesting a certificate pursuant to clause 4.1.
- 8.3 The Client agrees that Permanent may deduct from any part of a Portfolio any amount payable to Permanent under this clause 8 or any other provision of this agreement and with the consent of the Client, the amounts payable under clause 8.1. The Client authorises Permanent in the name of the Client or Permanent to do any thing (including, but not limited to, executing any document) that is required for that purpose. Permanent agrees to record any such deduction in the records maintained under clause 8.

8.4 All monies owing to Permanent including fees under this agreement accrues from day-to-day.

## **9. INDEMNITIES AND LIMITATIONS OF LIABILITY**

9.1 Without limiting any other indemnity or limitation of liability in this agreement, and without prejudice to any indemnity allowed by law, but subject to this agreement and to any law to the contrary, and to the maximum extent permitted by law, it is agreed and declared that:

- (a) the Client indemnifies Permanent against any liability, demand, loss, costs, Taxes charges and expenses which may be incurred by Permanent in connection with:
  - (i) this agreement and the acts and omissions of Permanent in performing services pursuant to this agreement, except those attributable to the negligence or fraud of Permanent.
  - (ii) all actions, suits, claims and demands which may be brought or threatened against or suffer or sustained by Permanent by reason of Permanent complying with any Instruction by an Authorised Person; and
  - (iii) neglect or fraud on the part of the Client, any Manager or any of their employees, servants or agents.
- (b) Permanent does not incur any liability in respect of any thing done or not done in reliance on any Instruction, notice, resolution, direction, consent, certificate, receipt, affidavit, statement, holding out, certificate for stock, shares or other security, plan or reorganisation, or other document or information which Permanent reasonably believed to be genuine or to have been passed, signed or endorsed by the proper parties, where liability but for this provision would attach because that document or matter was not in fact genuine or so passed, signed or endorsed.
- (c) Permanent does not incur any liability in respect of any failure to do any thing which, because of any present or future law or of any order or judgement of any court, it is hindered, prevented or forbidden from doing.
- (d) Permanent will not be responsible or have any liability for any obligations imposed on the Client, a Scheme or Permanent as custodian of the Portfolio or any transaction under this agreement by the tax law of Australia or any State or Territory of Australia. Permanent will be kept indemnified by and be without liability to the Client for any such obligations including Taxes (but excluding any income taxes assessable in respect of compensation paid to Permanent pursuant to this agreement), withholding, certification and reporting requirements, claims for exemption or refund, additions for late payment, interest, penalties and other expenses (including legal expenses) that may be assessed against the Client, a Scheme or Permanent as custodian of the Portfolio except those attributable to the negligence or fraud of Permanent.
- (e) Permanent may act on the opinion or advice of, statements of or information obtained from barristers, solicitors, bankers, accountants, brokers or other persons believed by it in good faith and on reasonable grounds to be expert in relation to the matters on which they are consulted (whether they are instructed by the Client, Permanent or a third party), and Permanent is not liable for anything done or not done by it in good faith in reliance on that opinion, advice, statements or information.

- (f) where Permanent relies in good faith on any opinion, advice, statements or information from any barrister, solicitor or other expert it is not responsible for any misconduct, mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such barrister, solicitor or other expert;
- (g) in the event of the liquidation, dissolution or bankruptcy of any person, or if for any other reason it becomes impossible or impracticable to carry out the provisions of this agreement in respect of that person or otherwise, Permanent is not liable for anything done or not done by Permanent, where Permanent has acted in good faith;
- (h) Permanent is entitled to rely on statements or information from the Client or Manager as to the validity of any signature on any transfer, form of application, request or other document which Permanent reasonably believed to be genuine;
- (i) Permanent is not responsible for the loss of any property during transmission between the Client or a Manager and Permanent or Permanent and a third party or fraud on the Client by a third party, nor for the corruption or loss of any data that is transmitted electronically or to which access is given by Permanent to the Client or a Manager or vice versa;
- (j) Permanent is not liable for any act or omission that is believed by Permanent to be in accordance with local market practice;
- (k) Permanent is not liable for the failure of any person to carry out any agreement or obligation on that person's part;
- (l) Notwithstanding any other provision of this agreement, Permanent's liability is limited to the property for the time being comprised in the Portfolio except for a liability arising as a result of Permanent's own negligence or fraud; and
- (m) Permanent, is not liable for any loss, damage or expense suffered or incurred as a result of any delay in executing an Instruction where the delay has occurred as a result of Permanent waiting for the receipt of the written confirmation from the Client pursuant to clause 5.3.

9.2 Permanent is not responsible for insuring the Portfolio or any part of it.

## 10. WARRANTIES AND UNDERTAKINGS BY CLIENT

10.1 The Client represents and warrants to Permanent that:

- (a) it has the power to enter into and perform this agreement and has obtained all necessary consents to enable it to do so;
- (b) the entry into and performance of this agreement by the Client does not constitute a breach of any obligation (including, but not limited to, any statutory, contractual or fiduciary obligation) or default under any agreement or undertaking by which the Client is bound;
- (c) property transferred or delivered by the Client to Permanent from time to time to form part of a Portfolio will be the property of a Scheme the subject of this agreement and, unless the consent of Permanent is obtained prior to the transfer, free from any mortgage, charge, lien, pledge, encumbrance or other security interest;

- (d) the Client will, at all times during the term of this agreement, hold any licences or approvals required to be held by it under any law governing its activities relating to this agreement and comply with all conditions of any such licence or approval;
- (e) it is the only responsible entity for each Scheme and no action has been taken or is proposed to remove it as responsible entity of any Scheme;
- (f) the copy of each Scheme constitution provided by the Client to Permanent discloses all the terms of each Scheme and it is not in default under the terms of any Scheme constitution or the Law in relation to any Scheme; and
- (g) it has a right to be fully indemnified out of the relevant Scheme's assets in respect of all obligations and liabilities which it incurs under this agreement.

**10.2 The Client undertakes:**

- (a) to notify Permanent promptly if the Client appoints or terminates the appointment of a Manager;
- (b) to provide Permanent on request with any documents, information or Instructions reasonably required by Permanent to enable it to perform obligations imposed on Permanent under this agreement or by law;
- (c) to perform its obligations pursuant to this agreement as soon as reasonably practicable and in accordance with the requirements of any relevant Scheme's constitution and the Law;
- (d) to give Permanent notice of any communication from any person including ASIC forthwith upon receipt which relates to the possibility or likelihood of the Client being suspended or removed in relation to a Scheme or that affects or might affect Permanent or any of its Sub-custodians in relation to the performance of their obligations or exercise of their powers under this agreement or otherwise;
- (e) to give Permanent prompt notice of any alteration to a Scheme's constitution.

**10.3 The Client undertakes on request to provide and certify to Permanent any information in relation to the Client's status or assessability for taxation purposes in any country which is relevant to the performance of this agreement.**

**10.4 The Client acknowledges that it enters into this agreement both in its individual capacity and in its capacity as responsible entity for each Scheme and all agreements, warranties and obligations of the Client in this agreement bind the Client in both capacities.**

**10.5 The Client agrees to inform Permanent promptly if:**

- (a) the terms of a Scheme are varied;
- (b) there is any change of responsible entity of a Scheme;
- (c) there is any change of status for taxation purposes of a Scheme; or
- (d) when a Scheme is terminated.

## 11. TERMINATION OF AGREEMENT

11.1 Subject to clauses 11.2, 11.3 and 11.4, this agreement shall continue for the minimum term specified in schedule 6 and after the expiry of the minimum term shall continue on the same terms unless terminated by either party upon giving to the other party notice for no less than the notice period specified in schedule 6.

11.2 A party may terminate this agreement by notice to the other party: -

- (a) if a receiver or a receiver and manager of the undertaking (or any part) of the other party is appointed either in relation to the capacity in which it acts pursuant to this agreement or where such receiver or receiver and manager is reasonably likely to affect materially such other party's performance pursuant to this agreement, or
- (b) if the other party:-
  - (i) goes into liquidation (other than for the purposes of a reconstruction or amalgamation on terms previously approved in writing by the other party) either in relation to the capacity in which it acts pursuant to this agreement or where such liquidation is reasonably likely to affect such other party's performance pursuant to this agreement;
  - (ii) is subject to a scheme of compromise or arrangement with its creditors or has an administrator appointed to its affairs either in relation to the capacity in which it acts pursuant to this agreement or where such scheme or administration is reasonably likely to affect such other party's performance pursuant to this agreement;
  - (iii) ceases to carry on business in relation to its activities as responsible entity in relation to a Scheme in the case of the Client (in which case Permanent may terminate this agreement in relation to a Scheme) or as a provider of custodial services in the case of Permanent;
  - (iv) breaches any provision of this agreement in a material respect or fails to observe or perform any representation, warranty, indemnity or undertaking pursuant to this agreement in a material respect **PROVIDED THAT** if the breach or failure is capable of remedy in the reasonable opinion of the party not in default, this agreement may not be terminated unless the party in default is given a period of no less than 14 days within which to remedy the breach or failure and if not remedied within such period the party not in default may terminate this agreement;
  - (v) sells or transfers or makes any agreement for the sale or transfer of its principal business and undertaking, or of a beneficial interest therein, other than to a related body corporate for the purposes of a corporate reconstruction upon at least 7 days' notice to the other party; or
- (c) by Permanent if ASIC or a Court having jurisdiction makes a written order vesting any property of the Client in relation to any Scheme in ASIC or some other body other than the Client.

11.3 The termination of this agreement does not affect any claim which either party may have against the other.



- 11.4 If after two (2) years from the date of execution of this agreement, the Law and/or ASIC Policy Statements are such that the Client is no longer required to engage the services of a custodian for the Schemes, then the Client may terminate this agreement on not less than three (3) months notice in writing to Permanent.
- 11.5 Subject to this agreement, on termination of this agreement Permanent must, at the expense of the Client, promptly transfer, or cause any Sub-custodian to transfer, the assets of the Portfolio, to or according to the Instructions of the Client (subject to any contrary direction given to Permanent which has the lawful effect of overriding this provision), and the Client agrees promptly to accept the transfer or give the necessary Instructions for the transfer of those assets. Permanent must also, at the expense of the Client, promptly deliver or cause any Sub-custodian to deliver, any documents evidencing title to those assets which it is holding, to or according to the Instructions of the Client. Notwithstanding the provisions of this clause, Permanent may retain any assets which it is lawfully permitted to retain in the exercise of its rights under this agreement.
- 11.6 Upon termination of this agreement pursuant to clause 11.2(c), Permanent shall act upon the instructions of ASIC or an entity properly appointed in relation to a Scheme to the exclusion of the rights of the Client and shall deal with the Portfolio and all books, records, or other material held by it in relation thereto in accordance with the instructions of ASIC or such other entity to the exclusion of any orders, requests or directions from the Client.
- 11.7 Notwithstanding any other provision of this agreement, if ASIC or a Court having jurisdiction has made a written order vesting the property of the Client in relation to a Scheme in another person, Permanent may, upon the receipt of notice of such vesting order, disregard any future Instructions of the Client in relation to a Scheme and any existing Instructions of the Client in relation to a Scheme which have not been fully performed and take instructions in relation to any matter affecting a Scheme from ASIC or such other person.

## 12. COSTS AND STAMP DUTY

- 12.1 The Client shall pay Permanent's reasonable professional costs, including external legal expenses in connection with the preparation, execution and completion of this agreement and of other documentation related to this agreement.
- 12.2 The Client agrees to bear any stamp duty payable or assessed in connection with this agreement and the transfer of any property to Permanent to form part of the Portfolio. The Client must indemnify Permanent on demand against any liability for that stamp duty (including fines and penalties).

## 13. NOTICES

Any notice under this agreement shall be in writing and:-

- (a) may be sent to the address, or facsimile number set out in schedule 7 or to any other address or facsimile number that either party may specify in writing to the other;
- (b) is taken to have been given or made:-
  - (i) (in the case of delivery in person) when delivered to the address set out in schedule 7;
  - (ii) (in the case of delivery by post) on the second Business Day after posting; or

- (iii) (in the case of delivery by facsimile) on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the correct number,

but if the notice is taken to have been given or made on a day which is not a Business Day or is later than 5.00pm (local time) it will be taken to have been duly given at the commencement of the next Business Day.

**14. EXERCISE OF RIGHTS**

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

**15. NO WAIVER**

No failure to exercise or any delay in exercising any right, power or remedy under this agreement operates as a waiver. No single or partial exercise of any right, power or remedy precludes any other or further exercise of that right or any other right, power or remedy.

**16. SURVIVAL OF INDEMNITIES**

Each indemnity in this agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this agreement.

**17. ENFORCEMENT OF INDEMNITIES**

It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this agreement.

**18. ASSIGNMENT**

A party may not assign any of its rights or obligations under this agreement without the prior written consent of the other party.

**19. CONFIDENTIALITY**

- 19.1 All information exchanged between the parties under this agreement or during the negotiations preceding this agreement is confidential to the party supplying the information and may not be disclosed to any person except:-

- (a) to employees, legal advisers, auditors and other consultants of either party or its related bodies corporate requiring the information for the purposes of this agreement;
- (b) with the consent of the party who supplied the information;
- (c) if the information is, at the date this agreement is entered into, lawfully in the possession of the recipient of the information through sources other than the party who supplied the information;
- (d) if required for the purposes of implementing transaction, dealing or matter pursuant to this agreement or by law or a stock exchange;

- (e) if required in connection with legal proceedings relating to this agreement; or
- (f) if the information is generally and publicly available other than as a result of breach of confidence by the person receiving the information.

19.2 A party disclosing information under clause 19.1(a) or clause 19.1(b) must use all reasonable endeavours to ensure that persons receiving confidential information from it do not disclose the information except in the circumstances permitted in clause 19.1.

## **20. FURTHER ASSURANCES**

Each party agrees on the request of the other party to do everything reasonably necessary to give effect to this agreement and the transactions contemplated by it (including the execution of documents) and to use all reasonable endeavours to cause relevant third parties to do likewise.

## **21. FORCE MAJEURE**

Where a party is unable, wholly or in part, because of any thing which is not reasonably within its control other than lack of funds ('force majeure') to carry out any obligation under this agreement, and it:

- (a) gives the other party prompt notice of that force majeure with reasonably full particulars and, in so far as known, the probable extent to which it will be unable to perform or be delayed in performing that obligation; and
- (b) uses all reasonable endeavours to remove that force majeure as quickly as possible,

that obligation is suspended so far as it is affected by the continuance of that force majeure. Any obligation to pay money is not excused by force majeure, save for any obligation of Permanent to pay money where Permanent is entitled to an indemnity from the Client under this agreement in relation to the Portfolio and there is insufficient money in the relevant Portfolio to pay such money.

## **22. ENTIRE AGREEMENT**

This agreement contains the entire agreement between the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by them or prior agreement between them with respect to its subject matter.

## **23. AMENDMENT**

This agreement may be amended only by another document signed by both the parties.

## **24. DISPUTES OR CONFLICTING CLAIMS**

24.1 Where there is a dispute between Permanent and the Client in relation to any matter under this agreement, then any party may refer the matter for decision to an independent expert agreed to by the parties, and failing agreement, an independent expert nominated by the President of the Queensland Law Society. The costs incurred in the determination of the matter by the expert (including the costs of the appointment of the expert) shall be borne by the party or parties as determined by the expert. The decision of the expert shall be final and binding on the parties.

24.2 If any dispute or conflicting claim is made by any person or persons with respect of any asset Custodially Held, Permanent shall be entitled to refuse to act in respect of that asset until either:

- (a) such dispute or conflicting claim has been finally determined by a court of competent jurisdiction or settled by agreement between conflicting parties, and Permanent has received written evidence satisfactory to it of such determination or agreement; or
- (b) Permanent has received an indemnity, reasonably satisfactory to it, to hold it harmless from and against any and all loss, liability and expense which Permanent may incur as a result of its actions.

**25. SEVERABILITY**

Each part of this agreement is severable from the balance of this agreement. If any part of this agreement is illegal, void, invalid or unenforceable, then that will not affect the legality, effectiveness, validity or enforceability of the balance of this agreement.

**26. GOVERNING LAW AND JURISDICTION**

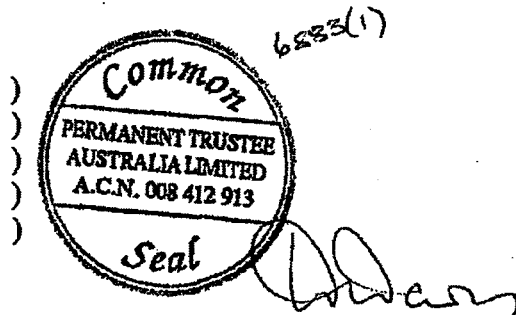
This agreement is governed by the laws of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of Queensland and courts of appeal from them in relation to any matter or dispute concerning this agreement or the transactions contemplated by this agreement.

**27. COUNTERPARTS**

This agreement may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

EXECUTED as an agreement.

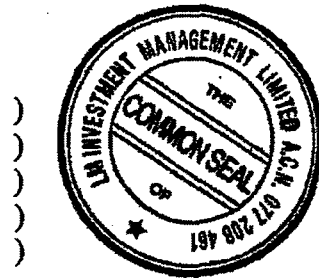
THE COMMON SEAL of  
PERMANENT TRUSTEE AUSTRALIA  
LIMITED ACN 008 412 913  
is affixed in accordance with  
its articles of association in the presence of:

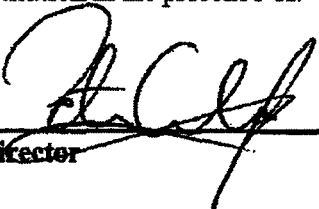



  
A ~~Director~~ Secretary  
Raelene Harrison

A ~~Secretary or appointed person~~ Director  
David Davis

THE COMMON SEAL of  
LM INVESTMENT MANAGEMENT  
LTD ACN 077 208 461  
is affixed in accordance with  
its constitution in the presence of:



  
A Director

  
A Secretary  
Director

## **SCHEDULE 1**

### **Authorised Persons (Clause 1.1)**

#### **Client**

The Client's Authorised Persons are each of the group "A" signatories and the group "B" signatories appearing on the attached authorised signatories list dated 18 January 1999 and marked "AA" or such later corresponding lists as may be forwarded by the Client to Permanent from time to time.

The Client will clearly identify instructions to Permanent as either Level 1 or Level 2 instructions.

Level 1 - any "A" signatory together with any "B" signatory are authorised to give Level 1 instructions.

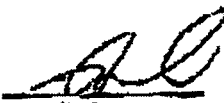

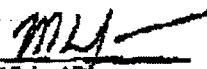

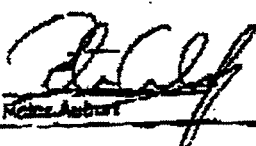

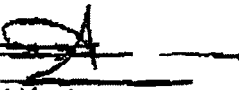

Level 2 - any "B" signatory together with any other "B" signatory are authorised to give Level 2 instructions.

#### **Permanent**

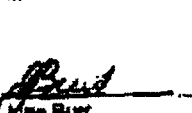



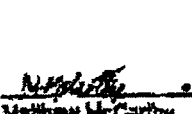

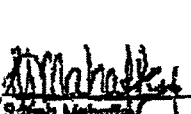

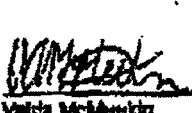



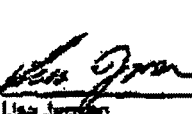

Permanent's Authorised Persons are each of the group "A" attorneys and the group "B" attorneys appearing on the attached specimen signature list dated 23 September 1998 and marked "BB" or such later corresponding lists as may be forwarded by Permanent to the Client from time to time.

AA

Group "A" Signatories

 Peter Drake	 Initials	 Michael Dwyer	 Initials
 Robert Ashurst	 Initials	 Adrian Armes	 Initials

Group "B" Signatories

 Jane Burt	 Initials	 Shelley Chalmers	 Initials
 Matthew McCarthy	 Initials	 Sarah Mahaffey	 Initials
 Valda McMahon	 Initials	 John de Boer	 Initials
 Lisa Jordan	 Initials		



BB

**PERMANENT TRUSTEE COMPANY LIMITED**

A.C.N. 000 000 993

**Subsidiary Companies:**

Permanent Registry Limited A.C.N. 000 334 636

Permanent Custodians Limited A.C.N. 001 426 384

Permanent Depository Limited A.C.N. 003 278 831

Permanent Trustee Australia Limited A.C.N. 008 412 913

Permanent Nominees (Aust.) Limited A.C.N. 000 154 441

Superannuation Nominees Pty. Limited A.C.N. 000 305 233

Permanent Property Management Limited A.C.N. 002 232 573

Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387

Rental Housing Custodians Limited A.C.N. 003 284 437

**THIS LIST OF AUTHORISED SIGNATORIES  
IS FOR**

**A) Operation of Bank Accounts**

*Authority to operate on a bank account will be as specified in the Authority to Operate held by the bank for the account.*

**B) Dealings With Inscribed Stock**

*Any two "A" signatories jointly or any "A" signatory together with any "B" signatory are authorised to sign documentation and give instructions.*

**C) Signing As An Attorney**

*Pursuant to Power of Attorney dated 2 June 1993 any two "A" signatories jointly or any "A" signatory together with any "B" signatory, unless otherwise specified, may exercise the power and authorities given by the Power of Attorney.*

I, Peter Ham, Company Secretary, certify that this document is a true photographic copy of the specimen signatures of the persons designated pursuant to authority delegated by the Board on 20 October 1993 as signatories and attorneys of Permanent Trustee Company Limited and its subsidiary companies.

Peter Ham, Company Secretary Dated 23 September 1998







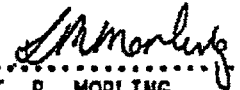


**PERMANENT TRUSTEE COMPANY LIMITED**

A.C.N. 000 000 993

**Subsidiary Companies:**

Permanent Registry Limited A.C.N. 000 334 626  
Permanent Custodians Limited A.C.N. 001 436 384  
Permanent Depository Limited A.C.N. 003 378 831  
Permanent Trustee Australia Limited A.C.N. 008 412 913  
Permanent Nominees (Aust.) Limited A.C.N. 000 154 441  
Superannuation Nominees Pty. Limited A.C.N. 000 305 233  
Permanent Property Management Limited A.C.N. 002 232 573  
Permanent Trustee Company (Canberra) Limited A.C.N. 006 390 387  
Rental Housing Custodians Limited A.C.N. 003 284 437

**GROUP "A" SIGNATORIES**

 ..... GLUSKIE Laurence John	 ..... THAME John Michael
 ..... N.H. GRACE	 ..... C.C.J. STEWART
 ..... T. R. MORLING	 ..... R. B. WILLING
 ..... SAVILLE Duncan Paul	

**THE SIGNATORIES SET OUT IN THIS PAGE  
ARE APPLICABLE ONLY IN RESPECT  
OF THE COMPANIES' BANK ACCOUNTS**

**PERMANENT TRUSTEE COMPANY LIMITED**

A.C.N. 000 000 993

**Subsidiary Companies:**

Permanent Registry Limited A.C.N. 000 334 836

Permanent Custodians Limited A.C.N. 001 426 384

Permanent Depository Limited A.C.N. 003 378 831

Permanent Trustee Australia Limited A.C.N. 008 412 913

Permanent Nominees (Aust.) Limited A.C.N. 000 154 441

Superannuation Nominees Pty. Limited A.C.N. 000 365 233

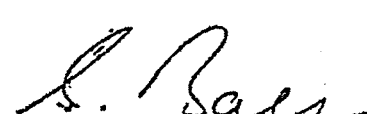
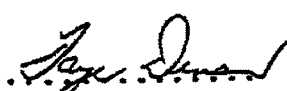
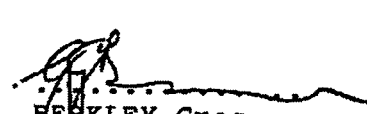
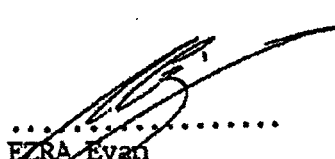
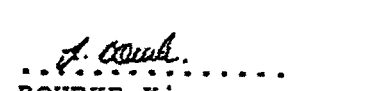



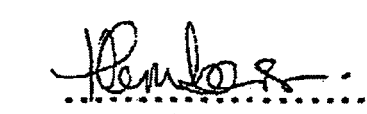
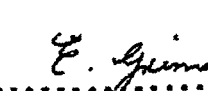




Permanent Property Management Limited A.C.N. 002 232 973

Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387

Rental Housing Custodians Limited A.C.N. 003 284 437



**GROUP "A" SIGNATORIES**

 ..... S.B. .... BALL Steven INITIALS	 ..... D ..... DIXON Faye INITIALS
 ..... H ..... HESKLEY Greg INITIALS	 ..... E ..... EZRA Evan INITIALS
 ..... B ..... BOURKE Kim INITIALS	 ..... G ..... GAUNT David INITIALS
 ..... C ..... CAMERON Bruce INITIALS	 ..... G ..... GEORGE Sandra INITIALS
 ..... C ..... CUMBERS Helen INITIALS	 ..... G ..... GRIME Elaine INITIALS
 ..... T.K.D. .... DANIS Tania INITIALS	 ..... G ..... GUTHRIE Clive INITIALS
 ..... D ..... DAVIS David INITIALS	 ..... H ..... HALL John INITIALS



Subsidiary Companies:

Permanent Registry Limited A.C.N. 000 334 434  
Permanent Custodians Limited A.C.N. 001 436 384  
Permanent Depository Limited A.C.N. 003 278 831  
Permanent Trustee Australia Limited A.C.N. 008 412 913  
Permanent Nominees (Aust.) Limited A.C.N. 000 154 441  
Superannuation Nominees Pty. Limited A.C.N. 000 303 239  
Permanent Property Management Limited A.C.N. 003 282 373  
Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387  
Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "A" SIGNATORIES

 ..... MEYER Irene	 ..... INITIALS	 ..... OVERALL Wayne	 ..... INITIALS
 ..... MONAHAN Peter	 ..... INITIALS	 ..... PAGE Christine	 ..... INITIALS
 ..... MURPHY Sean	 ..... INITIALS	 ..... POLITO Giuseppe	 ..... INITIALS
 ..... NEWBY John	 ..... INITIALS	 ..... QUAN Garry	 ..... INITIALS
 ..... NILON Terence	 ..... INITIALS	 ..... RAJU Devi	 ..... INITIALS
 ..... O'CONNELL John	 ..... INITIALS		



## GROUP "A" SIGNATORIES




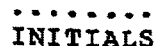

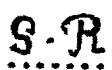

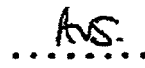






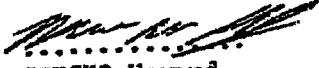

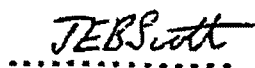

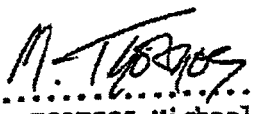


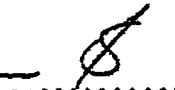
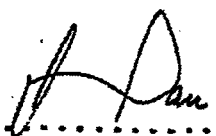
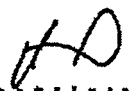
 ..... HAM Peter	 ..... INITIALS	 ..... KENNEDY Seamus	 ..... INITIALS
 ..... HEATHER David	 ..... INITIALS	 ..... LIM Seniwaty	 ..... INITIALS
 ..... HOGAN Andrew	 ..... INITIALS	 ..... MACKRELL Geoffrey	 ..... INITIALS
 ..... ISAACS Ashley	 ..... INITIALS	 ..... McINTOSH Pamela	 ..... INITIALS
 ..... JONES Suzanne	 ..... INITIALS	 ..... McKASKILL Grant	 ..... INITIALS
 ..... KENNEDY Paul	 ..... INITIALS	 ..... MEAGHER Mark Philip	 ..... INITIALS

**Subsidiary Companies:**

Permanent Registry Limited A.C.N. 000 334 636  
 Permanent Custodians Limited A.C.N. 001 424 384  
 Permanent Depository Limited A.C.N. 003 278 631  
 Permanent Trustee Australia Limited A.C.N. 008 412 913  
 Permanent Nominees (Asia) Limited A.C.N. 010 154 441  
 Superannuation Nominees Pty. Limited A.C.N. 000 305 235  
 Permanent Property Management Limited A.C.N. 002 232 373  
 Permanent Trustee Company (Canberra) Limited A.C.N. 008 290 387  
 Rental Moving Custodians Limited A.C.N. 003 284 437

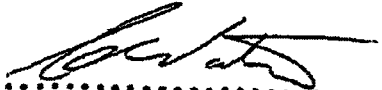



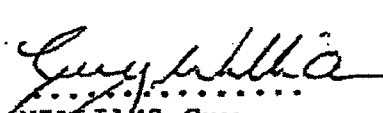

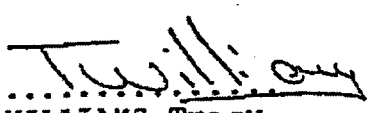



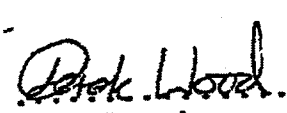
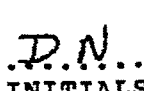


**GROUP "A" SIGNATORIES**

 ..... RAPHAEL Stephen	 ..... INITIALS	 ..... SILAVECKY Stenick	 ..... INITIALS
 ..... RAVI Sai	 ..... Initials	 ..... STEELE Anthony	 ..... INITIALS
 ..... SCOTT Edward	 ..... INITIALS	 ..... STEWART Rodney	 ..... INITIALS
 ..... SCOTT Janine	 ..... INITIALS	 ..... SZEGHO Howard	 ..... INITIALS
 ..... SCOTT Julia	 ..... INITIALS	 ..... TSOTSOS Michael	 ..... Initials
 ..... SHAW Graham Ian	 ..... INITIALS	 ..... WALL John	 ..... INITIALS



## GROUP "A" SIGNATORIES

 ..... WATSON Christopher Francis Int.	 ..... Int.
 ..... WELLENS Richard	 ..... INITIALS
 ..... WILLIAMS Guy	 ..... INITIALS
 ..... WILLIAMS Tracy	 ..... INITIALS
 ..... WONG Ivan	 ..... INITIALS
 ..... WOOD Derek	 ..... INITIALS

PERMANENT TRUSTEE COMPANY LIMITED

A.C.N. 000 000 993

Subsidiary Companies:

Permanent Registry Limited A.C.N. 000 334 436

Permanent Custodians Limited A.C.N. 001 426 384

Permanent Depository Limited A.C.N. 003 378 831

Permanent Trustee Australia Limited A.C.N. 008 413 913

Permanent Nominees (Aust.) Limited A.C.N. 000 154 441

Superannuation Nominees Pty. Limited A.C.N. 000 305 233




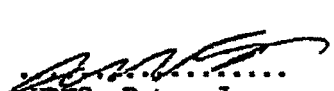

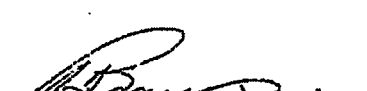
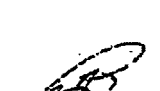
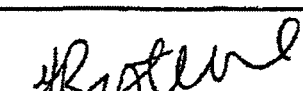



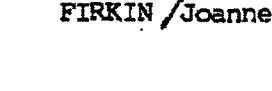
Permanent Property Management Limited A.C.N. 002 232 373

Permanent Trustee Company (Canberra) Limited A.C.N. 006 390 187

Rental Housing Custodians Limited A.C.N. 003 244 437



GROUP "B" SIGNATORIES

 ..... ANNETTA Michael	 ..... INITIALS	 ..... CARROLL Michael	 ..... INITIALS
 ..... ASSAF Richard	 ..... INITIALS	 ..... CASTLE Rachel Jane	 ..... Initials
 ..... AYRES, Peter James	 ..... INITIALS	 ..... CAUCHI Lucy	 ..... INITIALS
 ..... BEAVERS Jennie	 ..... Initial	 ..... DAVIS Phillip	 ..... INITIALS
 ..... BESTELINK TIM	 ..... INITIALS	 ..... FARRELL Sandra	 ..... INITIALS
 ..... BOYCE Kenneth	 ..... INITIALS	 ..... FIRKIN Joanne	 ..... Int.
 ..... BRADBURY Debra	 ..... INITIALS	 ..... FOULKES John	 ..... INITIALS



GROUP "B" SIGNATORIES

 ..... GLOVER Stephen	 ..... INITIALS	 ..... LU Mandy	 ..... INITIALS
 ..... HAYES Lindall	 ..... INITIALS	 ..... MACKIE Bruce	 ..... INITIALS
 ..... HYNARD Fiona	 ..... INITIALS	 ..... MARTIN Richard	 ..... INITIALS
 ..... JACKSON Noleen	 ..... INITIALS	 ..... McBEAN Julie	 ..... INITIALS
 ..... KERR Harry	 ..... Initials	 ..... McDONALD Martin	 ..... INITIALS
 ..... LAST Pauline	 ..... INITIALS	 ..... MENEGOTTO Frank	 ..... INITIALS
 ..... LYALL David	 ..... Int.	 ..... MEYER John	 ..... INITIALS

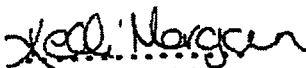
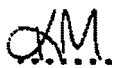


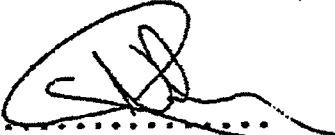






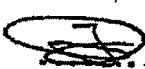
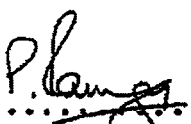





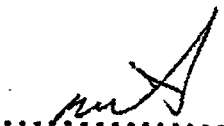





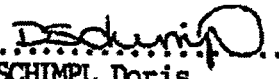



Subsidiary Companies:

Permanent Registry Limited A.C.N. 000 334 434  
 Permanent Custodians Limited A.C.N. 001 424 394  
 Permanent Depository Limited A.C.N. 003 278 331  
 Permanent Trustee Australia Limited A.C.N. 008 412 913  
 Permanent Nominees (Aust.) Limited A.C.N. 000 154 441  
 Superannuation Nominees Pty. Limited A.C.N. 000 503 233  
 Permanent Property Management Limited A.C.N. 002 232 573  
 Permanent Trustee Company (Custodians) Limited A.C.N. 008 390 347  
 Rental Housing Custodians Limited A.C.N. 003 284 437



## GROUP "B" SIGNATORIES

 ..... MORGAN Kelli	 ..... INITIALS	 ..... SEMMENS Ashley	 ..... Initials
 ..... NICHOLS Gregory	 ..... INITIALS	 ..... SIAMOIA Toula	 ..... INITIALS
 ..... OSBORNE Robert	 ..... INITIALS	 ..... TCHOPOURIAN Jean-Pierre	 ..... INITIALS
 ..... RANIGA Pratibha	 ..... INITIALS	 ..... WITTON Susan	 ..... INITIALS
 ..... RICHARDSON Michael	 ..... INITIALS	 ..... WRIGHT Mark Anthony	 ..... INITIALS
 ..... SCHEIBMAIER Michelle	 ..... INITIALS	 ..... WRIGHT Michael	 ..... INITIALS
 ..... SCHIMPL Doris	 ..... INITIALS		

**SCHEDULE 2**

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT  
(Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund

**SCHEDULE 3**

**METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE**

**(Clause 2.3)**

- (a) The Client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).
- (b) Any or all of the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.
- (c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a quarterly basis. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.
- (d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.
- (e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.
- (f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the Law.
- (g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

**SCHEDULE 4**

**REPORTS AND STATEMENTS**  
**(Clause 7(b))**

- |                                                 |                              |
|-------------------------------------------------|------------------------------|
| 1. (a) Bank reconciliation as at each month end | 10 days after month end      |
| (b) List of any cheques cancelled in the month  | 10 days after month end      |
| 2. Listing of all assets as at each month end   | 10 days after month end      |
| 3. Bank reconciliation as at each Friday        | The following Monday morning |
| 4. List of documents outstanding or intransit   | 10 days after month end      |
| 5. List of insurance policies due to expire     | 10 days after month end      |

**SCHEDULE 5**

**FEES**

**(Clause 8.1)**

**A Basic custody for mortgage Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**B Basic custody for property Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

Where:

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement Date of each Scheme.

**SCHEDULE 6**

**MINIMUM TERM AND NOTICE PERIOD**  
**(Clause 11.1)**

The minimum term is the period five (5) years from the date of execution of this agreement.

After expiry of the minimum term, termination may occur on not less than three (3) months notice by either party.

**SCHEDULE 7**

**ADDRESS AND FACSIMILE DETAILS**  
**(Clause 14)**

**Permanent's Address:** Level 8, 410 Queen St, BRISBANE QLD 4000

**Facsimile:** (07) 3842 7159

**Client's Address:** LM INVESTMENT MANAGEMENT LTD  
Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise QLD 4217

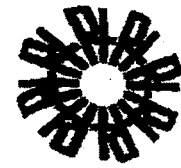
**Facsimile:** (07) 55 922 505

140216/v2

20 May 1999

*Private and confidential*

Peter Aubert  
LM Investment Management Limited  
PO Box 485  
SURFERS PARADISE Q 4217



Permanent Trustee  
Company Limited  
A.C.N. 009 000 493

8th Floor  
410 Queen Street  
Brisbane Qld. Australia 4000  
G.P.O. Box 667  
Brisbane Qld. 4001  
BX 286 Brisbane  
Telephone (07) 3842 7100  
Fax (07) 3842 7159

Dear Peter

**Re: LM Cash Performance Fund**

As you are aware, the relationship between LM Investment Management Limited (LMIM) and Permanent Trustee Australia Limited (Permanent) is governed by the Custody Agreement (the Agreement) dated 4 February 1999. At that time, the parties agreed that the Agreement would provide for LMIM's initial schemes (the LM Select Mortgage Income Fund & LM Mortgage Income Fund), and that any subsequent schemes would be provided for as and when required.

With the advent of the LM Cash Performance Fund (the LMCPP Scheme), we now need to provide for the terms and conditions of that Scheme. As such, Schedules 2 & 5 of the Agreement require amendment to include and reflect the changes in respect of:

- The List of Schemes Subject to the Agreement
- The Fees Payable in respect of the List of Schemes Subject to the Agreement.

Accordingly, these Schedules have been so amended and are attached for your review and signature.

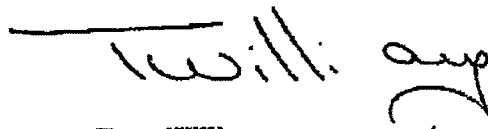
**Acceptance**

If all is in order, we would appreciate it if two authorized persons of LMIM would sign this letter confirming acceptance of the above and return the signed letter and the amended Schedules to the writer as soon as possible.


Sincerely

  
Paul Kennedy

Business Development Manager (Qld.)



Tracy Williams  
Manager - Corporate Services (Qld)

  
Authorized Person  
LM Investment Management Limited

  
Authorized Person  
LM Investment Management Limited



**Permanent Trustee Australia Limited  
Custody Agreement**

---

**SCHEDULE 2**

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT  
(Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund

**Permanent Trustee Australia Limited  
Custody Agreement**

**SCHEDULE 5**

**FEEs**

**(Clause 8.1)**

**A Basic custody for mortgage Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
  - (b) \$20,000 per Year (plus GST) for each Scheme,
- payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**B Basic custody for property Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
  - (b) \$15,000 per Year (plus GST) for each Scheme,
- payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**C Basic custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for amounts over \$500 million; or
  - (b) \$15,000 per Year (plus GST),
- payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

**Permanent Trustee Australia Limited  
Custody Agreement**

---

**Where:**

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement Date of each Scheme.

16 JUN 1999

**FAXED**  
15/06/99



**Permanent Trustee  
Company Limited**  
A.C.N. 000 060 993

14 June 1999

Our ref:tw:cor:lm

8th Floor  
410 Queen Street  
Brisbane Qld. Australia 4000  
G.P.O. Box 667  
Brisbane Qld. 4001  
DX 286 Brisbane  
Telephone (07) 3842 7100  
Fax (07) 3842 7139

Mr P. Aubert  
LM Investment Management Limited  
P.O. Box 485  
SURFERS PARADISE. QLD. 4217

Dear Peter,

**RE: CUSTODY AGREEMENT**

As you are aware, the relationship between LM Investment Management Limited (LMIM) and Permanent trustee Australia Limited (Permanent) is governed by the Custody Agreement (the Agreement) dated 4 February 1999, together with subsequent amendments as agreed.

Following discussions, the parties have agreed to amend the Agreement so as to authorise:

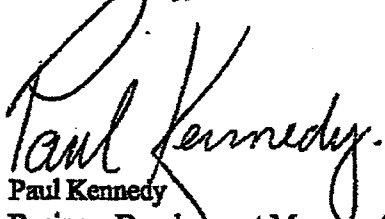
- Permanent to execute periodic debit documents and forms (as requested by LMIM); and
- LMIM to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio.

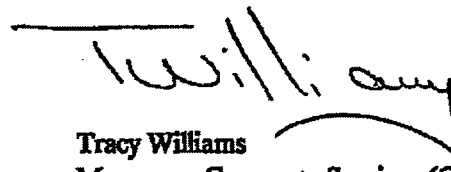
Accordingly, the Agreement requires amendments to include and reflect these changes. The proposed amendment is attached for your review (refer Clause 3.15 of the attached Agreement).

**Acceptance**


If all is in order, we would appreciate it if two authorised persons of LMIM would sign this letter confirming acceptance of the above. The signing of this letter by both parties will amend the Agreement under clause 23 of the Agreement. Please return the signed letter and the amended Agreement to the writers as soon as possible.

Yours sincerely,

  
Paul Kennedy  
Business Development Manager (Qld)

  
Tracy Williams  
Manager - Corporate Services (Qld)

  
Authorised person Peter Auer  
LM Investment Management Limited

  
Authorised person  
LM Investment Management Limited

- 3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.
- 3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.
- 3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.
- 3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.
- 3.12 Permanent is authorised to comply with any obligations imposed on it by law.
- 3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.
- 3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.
- 3.15 Permanent is authorised to execute periodic debit documents and third party bank account access forms, principal and third party on-line operation forms and similar forms or agreements (the "Forms"), as requested by the Client from time to time, which authorise and or allow the Client to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio. Notwithstanding Clause 3.3, Permanent may allow amounts to be deducted from accounts containing assets of the Portfolio pursuant to the Forms without obtaining Instructions from the client. Other than where Permanent is fraudulent the Client indemnifies Permanent for any indemnity, warranty or obligation given by or imposed on Permanent in or pursuant to any such Form or arrangement.

#### **4. DUTIES OF PERMANENT**

- 4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.

24 May 2000

Ms. V. Meekin  
LM Investment Management Limited  
P.O. Box 485  
SURFERS PARADISE, QLD. 4217



Permanent Trustee  
Company Limited  
A.C.N. 000 000 993

8th Floor  
410 Queen Street  
Brisbane Qld. Australia 4000  
G.P.O. Box 667  
Brisbane Qld. 4001  
DX 286 Brisbane  
Telephone (07) 3842 7100  
Fax (07) 3842 7159

Dear Valda,

**RE: LM Special Participation Fund**

As you are aware, the relationship between LM Investment Management Limited (LMIM) and Permanent Trustee Australia Limited (Permanent) is governed by the Custody Agreement (the Agreement dated 4 February 1999). At that time, the parties agreed that the Agreement would provide for LMIM's initial schemes (the LM Select Mortgage Income Fund and LM Mortgage Income Fund), and that any subsequent schemes would be provided for as and when required.

With the advent of the LM Special Participation Fund, we now need to provide for the terms and conditions of that Scheme. As such, Schedules 2 and 5 of the Agreement require amendment to include and reflect the changes in respect of:


- The List of Schemes Subject to the Agreement
- The Fees Payable in respect of the List of Schemes Subject to the Agreement.

Accordingly, these Schedules have been so amended and are attached for your review and signature.

**Acceptance**

If all is in order, we would appreciate it if two authorised persons of LMIM would sign this letter confirming acceptance of the above and return the signed letter and the amended Schedules to the writer as soon as possible.

Yours faithfully,  
**PERMANENT TRUSTEE AUSTRALIA LIMITED**  
ACN 008 412 913

  
Tracy Williams  
Manager - Client Services (Qld)

  
Authorised Person  
LM Investment Management Limited

  
Jennie Beavers  
Senior Portfolio Officer

  
Authorised Person  
LM Investment Management Limited

**Custody Agreement**

---

**SCHEDULE 2**

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT  
(Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Participation Fund



**Custody Agreement**

**SCHEDULE 5**

**FEES**

**(Clause 8.1)**

**A Basic custody for mortgage Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**B Basic custody for property Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

**PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**C Basic custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for amounts over \$500 million; or
- (b) \$15,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

**Custody Agreement**

**D Basic custody for the LM Special Participation Fund:**

(a) \$10,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

**Where:**

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement Date of each Scheme.

## **Deed of Amendment of Custody Agreement**

between

**Permanent Trustee Australia Limited  
(ACN 008 412 913)**

and

**LM Investment Management Ltd  
(ACN 077 208 461)**

**PERMANENT TRUSTEE AUSTRALIA LIMITED**

35 Clarence Street  
SYDNEY NSW 2000  
DX 383 SYDNEY  
Tel: (02) 8295 8100  
Fax: (02) 8295 8659

## Contents

Clause	Heading	Page
1.	Definitions and interpretation	2
1.1	Interpretation	2
2.	Amendments	2
3.	Effective Date	3
3.1	Effective Date	3
4.	Miscellaneous	3
4.1	Governing Law and jurisdiction	3
	Annexure A	5
	Annexure B	6

## Deed of Amendment

This deed is made on 18 March 2002.

### Between

Permanent Trustee Australia Limited (ACN 008 412 913) of 35 Clarence Street, Sydney, New South Wales ("Permanent")

### And

LM Investment Management Ltd (ACN 077 208 461 ) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, in the State of Queensland (the "Client").

### Recitals

- A. By Custody Agreement dated 4 February 1999 ("Custody Agreement"), the Client appointed Permanent its agent to provide certain custodial services defined in the Custody Agreement, as amended by letters dated 20 May 1999 and 24 May 2000 by which LM Cash Performance Fund and LM Special Participation Fund were added to Schedule 2 and the respective custodian fees were added to Schedule 5.
- B. Pursuant to clause 23 of the Custody Agreement, the Custody Agreement may be amended by another document signed by both parties.
- C. Permanent and the Client wish to amend the Custody Agreement in the manner set out in this Agreement.

### Operative provisions

---

## 1. Definitions and interpretation

---

### 1.1 Interpretation

In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.

Headings are for convenience only and do not affect interpretation.

---

## 2. Amendments

---

- 2.1 The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".
- 2.2 The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out in Annexure "B".

---

### **3. Effective Date**

---

#### **3.1 Effective Date**

The amendments set out in this Deed shall take effect on and from the date of this Deed.

---

### **4. Miscellaneous**

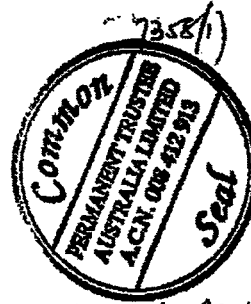
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#### **4.1 Governing Law and jurisdiction**

This Agreement is governed by the laws of the State of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of the State of Queensland.

Executed as a deed

THE COMMON SEAL of  
PERMANENT TRUSTEE AUSTRALIA  
LIMITED was affixed in accordance with its Constitution



Signature

Signature

[PRINT] name

[PRINT] name

Office held

Office held

The COMMON SEAL of  
LM INVESTMENT MANAGEMENT  
LTD was affixed in accordance with its  
Constitution

Signature of Director

Signature of director

Name of Director (please print)

Name of director (please print)

## **Annexure A**

### **SCHEDULE 2**

#### **LIST OF SCHEMES SUBJECT TO THIS AGREEMENT (Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Participation Fund
5. LM Wholesale Mortgage Income Fund



## **SCHEDULE 5**

### **FEES**

#### **(Clause 8.1)**

##### **A Basic custody for mortgage Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

##### **B Basic custody for property Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**C Basic custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for amounts over \$500 million; or

- (b) \$15,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

**D Basic custody for the LM Special Participation Fund:**

- (a) \$10,000 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

**E Basic custody for the LM Wholesale Mortgage Income Fund:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or

- (b) \$10,000 per Year (Plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

Where:

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement Date of each Scheme.

19/11/2002 14:29 PTCL → 00755922505

NO.430 003

19/11/2002 13:32 01 2 8395 8659

19-11-2002 14:33 PERMANENT → 7159

NO.261 006

## **Deed of Amendment of Custody Agreement**

between

**Permanent Trustee Australia Limited  
(ACN 008 412 913)**

and

**LM Investment Management Ltd  
(ACN 077 208 461)**

**PERMANENT TRUSTEE AUSTRALIA LIMITED**

35 Clarence Street  
SYDNEY NSW 2000  
DX 383 SYDNEY  
Tel: (02) 8295 8100  
Fax: (02) 8295 8659

## Contents

Clause	Heading	Page
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2.	Amendments	2
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## Deed of Amendment

This deed is made on *19th November 2002*

**Between**

Permanent Trustee Australia Limited (ACN 008 412 913) of 35 Clarence Street, Sydney, New South Wales ("Permanent")

**And**

LM Investment Management Ltd (ACN 077 208 461) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, in the State of Queensland (the "Client").

### Recitals

- A. By Custody Agreement dated 4 February 1999 ("Custody Agreement"), the Client appointed Permanent its agent to provide certain custodial services defined in the Custody Agreement, as amended by letters dated 20 May 1999 and 24 May 2000 by which LM Cash Performance Fund and LM Special Participation Fund were added to Schedule 2 and the respective custodian fees were added to Schedule 5.
- B. Pursuant to clause 23 of the Custody Agreement, the Custody Agreement may be amended by another document signed by both parties.
- C. Permanent and the Client wish to amend the Custody Agreement in the manner set out in this Agreement.

### Operative provisions

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## 1. Definitions and interpretation

---

### 1.1 Interpretation

In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.

Headings are for convenience only and do not affect interpretation.

---

## 2. Amendments

---

- 2.1 The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".
- 2.2 The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out in Annexure "B".

---

### **3. Effective Date**

---

#### **3.1 Effective Date**

The amendments set out in this Deed shall take effect on and from the date of this Deed.

---

### **4. Miscellaneous**

---

#### **4.1 Governing Law and jurisdiction**

This Agreement is governed by the laws of the State of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of the State of Queensland.

19/11/2002 14:29 PTCL + 00755922505  
19/11/2002 13:31 61 2 0295 0092  
19/11/2002 14:03 PERMANENT + 7159

NO. 430 027  
NO. 261 018



Executed as a deed

THE COMMON SEAL of  
PERMANENT TRUSTEE AUSTRALIA  
LIMITED was affixed in accordance with its Constitution

Signature

Signature

[PRINT] name

[PRINT] name

Office held

Office held

The COMMON SEAL of )  
LM INVESTMENT MANAGEMENT )  
LTD was affixed in accordance with its )  
Constitution )  
)  
)  
)

Signature of Director

Signature of director

Name of Director (please print)

Name of director (please print)

## **Annexure A**

### **SCHEDULE 2**

#### **LIST OF SCHEMES SUBJECT TO THIS AGREEMENT (Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Participation Fund
5. LM Wholesale Mortgage Income Fund
6. LM Property Performance Fund



## SCHEDULE 5

### FEES

#### (Clause 8.1)

#### A Basic custody for mortgage Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

### PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

#### B Basic custody for property Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

### PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

**C Basic custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for amounts over \$500 million; or
- (b) \$15,000 per Year (plus GST).

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

**D Basic custody for the LM Special Participation Fund:**

- (a) \$10,000 per Year (plus GST).

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

**E Basic custody for the LM Wholesale Mortgage Income Fund:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$10,000 per Year (Plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

Where:

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement Date of each Scheme.

## ***Amending Deed***

**Date:** 1<sup>st</sup> day of September 2004.

**Parties:** **PERMANENT TRUSTEE AUSTRALIA LIMITED** (ACN 008 412 913) of Level 4, 35 Clarence Street, Sydney NSW ("Permanent") and,

**LM INVESTMENT MANAGEMENT LTD** (ACN 004 027 749) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland ("Client").

### **Recitals:**

- A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").
- B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.
- C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002 and 19 November 2002.
- D. The Client wishes to appoint Permanent as custodian of an additional scheme not included in the Custody Agreement or subsequent amendments and the Custodian has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement
- E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

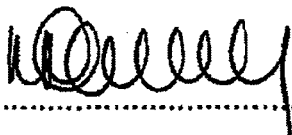
### **Terms:**

- 1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.
- 2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

3. The Custody Agreement is amended by deletion of Schedule 3 and its replacement with the Schedule 3 set out as Annexure "B".
4. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "C".
5. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.
6. Except as expressly stated in Clauses 2, 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

( ) EXECUTED BY LM INVESTMENT )  
MANAGEMENT LTD ACN 077 208 461 )  
in accordance with section 127 (i) of the )  
Corporation Act by the authority of its )  
directors: )  
)  
)  
)  
)



Signature of Secretary/Director



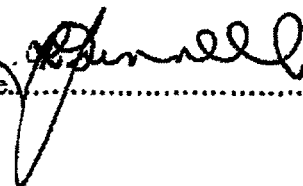
Signature of Director

( ) PERMANENT TRUSTEE AUSTRALIA LIMITED A.C.N. 008 412 913  
by its Attorneys who state that they have no notice of revocation of the  
Power of Attorney dated 2<sup>nd</sup> June 1993, whereby they execute this deed  
document or instrument.  
(

Power of Attorney No.....

Group A Attorney

Group A Attorney

Signature: 



**Annexure A**

**Schedule 2**

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Performance Fund
- ( ) 5. LM Wholesale Mortgage Income Fund
6. LM Property Performance Fund
7. LM Currency Protected Australian Income Fund

## **ANNEXURE B**

### **SCHEDULE 3**

#### **METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE**

- (a) The client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).
- (b) Any or all the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.
- (c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a yearly basis or more frequent as required. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.
- (d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.
- (e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.
- (f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the law.
- (g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

## **Annexure "C"**

### **Schedule 5**

#### **FEES:**

**(Clause 8.1)**

#### **A Basic Custody for mortgage Schemes;**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

#### **B Basic custody for property Schemes:**

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **PLUS**

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

#### **C Basic Custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for the amounts over \$500 million; or

- (b) \$15,000 per Year (plus GST),

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

**D Basic Custody for the LM Special Participation Fund**

- (a) \$10,000.00 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

**E Basic Custody for the LM Wholesale Mortgage Income Fund:**

The greater of either:

- (a) \$400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

- (b) \$10,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

**F Basic Custody for the LM Currency Protected Australian Income Fund:**

The greater of either:

- (a) \$400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

- (b) \$20,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

In making the calculation of 4 bps, the Total Assets of the Fund is to exclude funds invested in the LM Mortgage Income Fund, so as to avoid "double-counting" (as the Fund will only invest in the LM Mortgage Income Fund and cash). As such, the minimal annual fee of \$20,000 is likely to always apply.

Where:

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, variation of a mortgage or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement date of each Scheme.



## ***Amending Deed***

**Date:** 27<sup>th</sup> day of September 2006.

**Parties:** **PERMANENT TRUSTEE AUSTRALIA LIMITED** (ACN 008 412 913) of Level 4, 35 Clarence Street, Sydney NSW ("Permanent") and,

**LM INVESTMENT MANAGEMENT LTD** (ACN 004 027 749) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland ("Client").

### **Recitals:**

- A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").
- B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.
- C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002 and 1 September 2004.
- D. The Client wishes to appoint Permanent as custodian of an additional scheme not included in the Custody Agreement or subsequent amendments and the Custodian has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement.
- E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

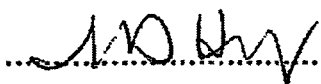
### **Terms:**

- 1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.
- 2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

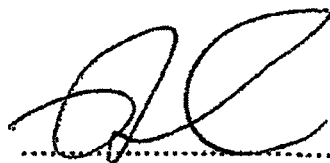
3. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "C".
4. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.
5. Except as expressly stated in Clauses 2, 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

EXECUTED BY LM INVESTMENT )  
MANAGEMENT LTD ACN 077 208 461 )  
in accordance with section 127 (i) of the )  
Corporation Act by the authority of its )  
directors: )  
)  
)  
)  
)

  
.....

Signature of Secretary/Director

  
.....

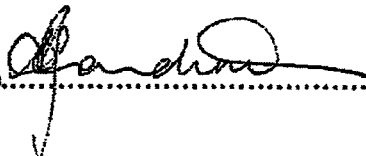

Signature of Director

PERMANENT TRUSTEE AUSTRALIA LIMITED A.C.N. 008 412 913  
by its Attorneys who state that they have no notice of revocation of the  
Power of Attorney dated 2<sup>nd</sup> June 1993, whereby they execute this deed  
document or instrument.

Power of Attorney No.....

Group A Attorney

Group A Attorney

Signature.    
.....

## **Annexure A**

### **Schedule 2**

#### **LIST OF SCHEMES SUBJECT TO THIS AGREEMENT**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Wholesale Mortgage Income Fund
5. LM Currency Protected Australian Income Fund
6. LM Institutional Currency Protected Australian Income Fund

## **Annexure "C"**

### **Schedule 5**

#### **FEES:**

**(Clause 8.1)**

#### **A Basic Custody for mortgage Schemes;**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **B Basic Custody for the LM Cash Performance Fund (LMCPF Scheme):**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$10,000 per Year (plus GST),

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

#### **C Basic Custody for the LM Wholesale Mortgage Income Fund:**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$8,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

**D Basic Custody for the LM Currency Protected Australian Income Fund:**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$12,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

In making the calculation as per above the Total Assets of the Fund is to exclude funds invested in the LM Mortgage Income Fund, so as to avoid "double-counting" (as the Fund will only invest in the LM Mortgage Income Fund and cash). As such, the minimal annual fee of \$12,000 is likely to always apply.

**E Basic Custody for the LM Institutional Currency Protected Australian Income Fund:**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$12,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

In making the calculation as per above the Total Assets of the Fund is to exclude funds invested in the LM Mortgage Income Fund, so as to avoid "double-counting" (as the Fund will only invest in the LM Mortgage Income Fund and cash). As such, the minimal annual fee of \$12,000 is likely to always apply.

Where:

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**Document** includes but is not limited to a mortgage, variation of a mortgage or a contract of sale;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement date of each Scheme.

**trust**

Your Ref:  
Our Ref: GF

TRUST COMPANY LIMITED  
ABN 69 004 027 749  
AFSL No. 235148

8 April 2008

Ms Carolyn Hodge  
Business Standards & Compliance Manager  
LM Investment Management Ltd  
PO Box 485  
SURFERS PARADISE QLD 4217

Fax: (07) 5592 2505  
Email: chodge@LMaustralia.com


Dear Ms Hodge

RE: LM Investment Management Limited (LMIM) &  
Permanent Trustee Australia Limited (PTAL)  
Resignation as Custodian

We confirm the resignation of PTAL as Custodian for the following LMIM Managed Investment Schemes as at 5pm on the 9 April 2008:

- LM Currency Protected Australian Income Fund;
- LM Institutional Currency Protected Australian Income Fund;
- LM Wholesale First Mortgage Income Fund; and
- LM Cash Performance Fund.

For and on behalf of Permanent Trustee Australia Limited

  
Geoff Funnell  
Manager - Corporate Services & Legal

  
Susan Gardiner  
Head of Estates and Trusts

Permanent Trustee Australia Limited ABN 21 000 000 993  
213-217 St Paul's Terrace PO Box 441 Brisbane, QLD 4001  
Telephone: (07) 3634 9750 Facsimile: (07) 3252 3513 www.trust.com.au

## **DEED OF ASSIGNMENT**

**LM INVESTMENT MANAGEMENT LIMITED  
ACN 077 208 461 AS RESPONSIBLE ENTITY FOR THE LM  
AUSTRALIAN INCOME FUND – CURRENCY PROTECTED**

**THE TRUST COMPANY (PTAL) LIMITED  
ACN 008 412 913**

**MONAGHAN LAWYERS**

**PO Box 315, Surfers Paradise Qld 4217  
Level 4, 9 Beach Road, Surfers Paradise Qld 4217  
P 5584 4550 F 5504 5167  
E [admin@monaghanlawyers.com.au](mailto:admin@monaghanlawyers.com.au)**



THIS DEED is made on 1 September

2011

## **PARTIES**

**LM Investment Management Limited**

ACN 077 208 461

of level 4 Beach Road Surfers Paradise, Queensland

as Responsible Entity for the LM Australian Income Fund – Currency Protected ARSN 133 497 917  
(LM)

and

**The Trust Company (PTAL) Limited**

ACN 008 412 913

of 213-217 St Paul's Terrace, Brisbane, Queensland

as Custodian of the LM Australian Income Fund – Currency Protected ARSN 133 497 917.  
(PTAL)

## **Background**

- A LM is the Responsible Entity of the Fund.
- B LM has provided the Loans to the Borrowers and holds the Securities as security for the Loans.
- C PTAL and LM have agreed that PTAL will assume the role and responsibilities of custodian of the Fund in accordance with the terms of the Custody Agreement.
- D PTAL and LM wish to enter into this document to record the basis upon which the Securities will be transferred or assigned to PTAL.

## **Operative provisions**

### **1 DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

In this document, unless the context otherwise requires:

**Business Day** means a day on which banks are open for general banking business in Brisbane, excluding Saturdays, Sundays and public holidays.

**Commencement Date** means the date described in Schedule 3 or such other date which LM and PTAL agree in writing.

**Constitution** means the constitution of the Fund dated 10 April 2008.

**Corporations Act** means the *Corporations Act 2001 (Cth)*.

**Custody Agreement** means the Agreement that is described in Schedule 3.

**Fund** means the LM Australian Income Fund – Currency Protected ARSN 133 497 917.

**GST** means any tax, levy, charge or impost implemented under the GST Act;

**GST Act** means A New Tax System (Goods and Services Tax) Act or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act

**Liabilities** means all liabilities of the Fund as at the Commencement Date.

**LM Capalaba Securities** means the securities, agreements and other documents described in Part 2 of Schedule 2.

**Loans** means the loans that have been provided pursuant to the loan agreements that are described in Schedule 2.

**Registrable Securities** means the fixed and floating charges and the mortgages that form part of the Securities.

**Responsible Entity** has the same meaning as in the Corporations Act.

**Schedule** means a Schedule to this Deed.

**Securities** means the Tall Trees Securities and the LM Capalaba Securities.

**Tall Trees Securities** means the securities, agreements and other documents described in Part 1 of Schedule 2.

## **1.2 Words and expressions**

In this document, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (c) a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this document;
- (d) a reference to this document includes any schedules or annexures;
- (e) headings are for convenience and do not affect interpretation;
- (f) a reference to any document or agreement includes a reference to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) a reference to "\$", "A\$" or "dollar" is a reference to Australian currency;
- (h) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns; and
- (i) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or any part of it.

## **2 CUSTODIAN**

### **2.1 Replacement**

With effect from the Commencement Date PTAL will become the legal owner of the Securities.

### **2.2 Release and indemnity of LM**

- (a) LM is discharged from the further performance of its obligations and duties the legal owner of the Securities from the Commencement Date.
- (b) To the extent that LM is entitled to be reimbursed from the assets of the Fund and subject to the limitations described in clause 7, PTAL:

- (i) indemnifies LM against all debts and liabilities that LM properly incurred whilst acting as the legal owner of the Securities and which are outstanding or unpaid as at the date of this document; and
- (ii) must pay and discharge those obligations only to the extent it is able to be reimbursed out of the assets of the Fund under the terms of credit or otherwise under which the obligations were incurred,

except to the extent that debts and liabilities arise as a result of a breach by LM of its express or implied obligations under the Corporations Act.

### **2.3 Transfer of title to securities**

LM agrees to:

- (a) do all things necessary to transfer legal title to the Securities to PTAL
- (b) sign all documents and do all things reasonably required to enable PTAL to assume and carry out its duties as custodian of the Fund.

## **3 WARRANTIES**

### **3.1 PTAL**

PTAL warrants for the benefit of LM that

- (a) it has the corporate power to enter into and perform its obligations under this document and to carry out the transactions contemplated by this document;
- (b) it has taken all necessary corporate action to authorise the entry into and performance of this document and to carry out the transactions contemplated in this document; and
- (c) its obligations under this document are valid and binding and enforceable against it in accordance with their terms.

### **3.2 LM**

LM warrants for the benefit of PTAL that

- (a) it has the corporate power to enter into and perform its obligations under this document and to carry out the transactions contemplated by this document;
- (b) it has taken all necessary corporate action to authorise the entry into and performance of this document and to carry out the transactions contemplated in this document; and
- (c) its obligations under this document are valid and binding and enforceable against it in accordance with their terms.

## **4 PROCEDURE**

### **4.1 Time and place for Completion**

Completion will take place at the Brisbane offices of PTAL on the Commencement Date, unless otherwise agreed by the parties.

### **4.2 Registrable Transfers**

- (a) Prior to the Commencement Date, LM will deliver to PTAL transfers of the Registrable Securities duly executed by LM together with such ancillary documents as PTAL may require, in a form to be approved by PTAL.
- (b) PTAL will promptly execute the transfers of the Registrable Securities as transferee and return the documents to LM.

- (c) At or as soon as practicable following Completion LM will lodge the transfers of the Registrable Securities for registration with the relevant authorities.

#### 4.3 Title

Legal title in and to the Securities will pass to PTAL on the Commencement Date.

#### 4.4 Reassignment

- (a) PTAL acknowledges that LM may require in some circumstances a retransfer to LM of the legal title to any one or more of the Securities and other assets of the Fund. PTAL cannot object to that retransfer.
- (b) LM must give notice of any such requirement together with all documents necessary to effect such the retransfer to LM at least ten (10) Business Days prior to the date on which the retransfer is to occur. The notice of assignment must specify those Securities and other assets of the Fund required to be retransferred to LM together with the date on which the retransfer is required to occur.
- (c) PTAL must sign all documents delivered by LM under clause 4.4(b) no later than the Business Day prior to the date on which the retransfer is required to occur.
- (d) LM must:
  - (i) pay PTAL's reasonable costs in relation to the retransfer; and
  - (ii) do all things reasonably necessary to ensure that the retransfer of such Securities and other assets of the Fund is effected as soon as reasonably practicable after the date specified in the notice and notify PTAL that the retransfer has occurred.
- (e) At any time after the retransfer has occurred, LM may require the Securities and other assets of the Fund transfers to LM to be transferred back to PTAL and PTAL must do all things reasonably required to ensure that this occurs, LM must pay PTAL's reasonable costs of doing so.

### 5 COSTS AND STAMP DUTY

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#### 5.1 Costs

LM will bear the costs (including the reasonable legal costs of PTAL), charges and expenses incurred by it in connection with the negotiation, preparation and execution of this document and all other documents to be executed in connection with this document.

#### 5.2 Stamp duty

- (a) LM must pay all stamp duty and other duty on this document and on any instrument or other document executed to give effect to any of the provisions of this document.
- (a) LM must pay any fine, penalty or other cost in respect of a failure to pay any such duty.

### 6 Notice

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- (a) LM will forthwith after the Completion Date give notice of the assignment of the LM Capalaba Securities to each borrower, mortgagor and guarantor that is a party to the LM Capalaba Securities substantially in the form of the notice that is contained in Schedule 1.
- (b) LM will forthwith after the Completion Date give notice of the assignment of the Tall Trees Securities to each borrower, mortgagor and guarantor that is a party to

the Tall Trees Securities substantially in the form of the notice that is contained in Schedule 1.

## **7 PTAL - LIMITATION OF LIABILITY**

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### **7.1 Custodian**

PTAL enters into this document, and LM acknowledges that it is aware that PTAL enters into this document only in its capacity as custodian of the Fund pursuant to the Custody Agreement and in no other capacity and LM is aware of the limited scope of PTAL's obligations and powers under the Custody Agreement.

### **7.2 Liability Limited**

A liability arising under or in connection with this document is limited to and can be enforced against PTAL only to the extent to which it can be satisfied out of the property of the Fund out of which PTAL is actually indemnified for the liability. This limitation of PTAL's liability applies despite any other provision of this document and extends to all liabilities and obligations of PTAL in any way connected with any representation, warranty, conduct, omission, deed or transaction related to this document.

### **7.3 No Right to Appoint or Prove**

LM may not sue PTAL personally or seek the appointment of a liquidator, administrator, receiver or similar person to PTAL or prove in any liquidation, administration or arrangement of, or affecting, PTAL.

### **7.4 Limit of Liability Not to Apply**

The provisions of this clause 7 do not apply to any obligation or liability of PTAL to the extent that it is not satisfied because under the Constitution, the Custody Agreement, or by operation of law there is a reduction in the extent of PTAL's indemnification out of the assets of the Fund, as a result of PTAL's fraud, negligence or wilful default.

### **7.5 Inconsistency with the Custody Agreement**

Any failure by PTAL to perform an obligation which it determines is either inconsistent with or beyond its powers and obligations under the Custody Agreement will not amount to a breach of or a default under this document. PTAL's determination as to whether an obligation otherwise imposed upon it under this document is inconsistent with or beyond the scope of its obligations and powers under the Custody Agreement is final and binding on LM.

### **7.6 Future Limitations**

PTAL is not obliged to do or refrain from doing anything under this document (including incur any liability) unless PTAL's liability is limited in the manner satisfactory to PTAL in its absolute discretion.

### **7.7 Agents**

No attorney, agent, receiver or receiver and manager appointed in accordance with this document and each other Security or otherwise has authority to act on behalf of PTAL in a way which exposes PTAL to any personal liability and no act or omission of any such person will be considered fraud, negligence or wilful default of PTAL for the purpose of clause 7.4.

### **7.8 Failure by PTAL**

A failure by PTAL to comply with, or a breach by PTAL of any of its obligations under this document will not be considered to be fraud, negligence or wilful default by PTAL if the relevant failure or breach:

- (a) arose as a result of a breach by a person other than PTAL where the performance of the action (the non-performance of which gave rise to such breach) is a precondition to PTAL performing the said obligation; or
- (b) was in accordance with a lawful court order or direction or otherwise required by law.

**7.9 Override Provision**

All of the terms, clauses and conditions of this document are subject to this clause 7.

**8 LM - LIMITATION OF LIABILITY**

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**8.1 Responsible Entity**

LM enters into this document and PTAL acknowledges that it is aware that LM enters into this document in its capacity as the Responsible Entity of the Fund, pursuant to the Constitution and PTAL is aware of the limited scope of LM's obligations and powers under the Constitution.

**8.2 Liability Limited**

A liability arising under or in connection with this document is limited to and can be enforced against LM only to the extent to which it can be satisfied out of the property of the Fund out of which LM is actually indemnified for the particular liability. This limitation of LM's liability applies despite any other provision of this document and extends to all liabilities and obligations of LM in any way connected with any representation, warranty, conduct, omission, deed or transaction related to this document.

**8.3 No Right to Appoint or Prove**

PTAL may not sue LM personally or seek the appointment of a liquidator, administrator, receiver or similar person to LM or prove in any liquidation, administration or arrangement of, or affecting, LM.

**8.4 Limit of Liability Not to Apply**

The provisions of this clause 8 do not apply to any obligation or liability of LM to the extent that it is not satisfied because under the Constitution or other constituent documents, or by operation of law, there is a reduction in the extent of LM's indemnification out of the assets of the Fund, as a result of LM's fraud, negligence or wilful default.

**8.5 Inconsistency with the Constitution**

Any failure by LM to perform an obligation which it determines is either inconsistent with or beyond its powers and obligations under the Constitution will not amount to a breach of or a default under this document. LM's determination as to whether an obligation otherwise imposed upon it under this document is inconsistent with or beyond the scope of its obligations and powers under the Constitution is final and binding on all parties.

**8.6 Future Limitations**

LM is not obliged to do or refrain from doing anything under this document (including incur any liability) unless LM's liability is limited in the manner satisfactory to LM in its absolute discretion.

**8.7 Agents**

No attorney, agent, receiver or receiver and manager appointed in accordance with this document or otherwise has authority to act on behalf of LM in a way which exposes LM to any personal liability and no act or omission of any such person will be considered fraud, negligence or wilful default of LM for the purpose of clause 8.4.

#### **8.8 Failures by LM**

A failure by LM to comply with, or a breach by LM of any of its obligations under this document, the Facility Agreement and each Security (if any) will not be considered to be fraud, negligence or wilful default by LM if the relevant failure or breach:

- (a) arose as a result of a breach by a person other than LM where the performance of the action (the non-performance of which gave rise to such breach) is a precondition to LM performing the said obligation; or
- (a) was in accordance with a lawful court order or direction or otherwise required by law.

#### **8.9 Override Provision**

All of the terms, clauses and conditions of this document are subject to this clause 8.

### **9 NOTICES**

#### **9.1 Method**

All notices, requests, demands, consents, approvals, offers, agreements or other communications (notices") given by a party under or in connection with this document must be:

- (a) in writing;
- (a) signed by a person duly authorised by the sender or, where transmitted by e-mail, sent by a person duly authorised by the sender;
- (b) directed to the intended recipient's address (as specified in clause 9.3 or as varied by any notice); and
- (c) hand delivered, sent by prepaid post or transmitted by e-mail or facsimile to that address.

#### **9.2 Receipt**

A notice given in accordance with this clause is taken as having been given and received:

- (a) if hand delivered, on delivery;
- (a) if sent by prepaid post:
  - (i) within Australia, on the second Business Day after the date of posting;
  - (ii) to or from a place outside Australia, on the seventh Business Day after the date of posting;
- (b) if transmitted by e-mail, on transmission; or
- (c) if transmitted by facsimile, at the time recorded on the transmission report indicating successful transmission of the entire notice,

but if the delivery or transmission is not on a Business Day or is after 5.00pm (recipient's time) on a Business Day, the Notice is taken to be received at 9.00am (recipient's time) on the next Business Day.

#### **9.3 Address of parties**

Unless varied by notice in accordance with this clause 9, the parties' addresses and other details are:

Party: The Trust Company (PTAL) Limited  
Attention: Geoffrey Funnell  
Address: 213-217 St Paul's Terrace, Brisbane, Queensland  
Facsimile: (07) 3252 3513  
E-mail:

Party: LM Investment Management Limited  
Attention: Caroline Hodge  
Address: Level 4, 9 Beach Road, Surfers Paradise Qld 4217  
Facsimile: (07) 5592 2505  
E-mail: mail@LMaustralia.com

## **10 GENERAL**

### **10.1 Entire agreement**

This document constitutes the entire agreement between the parties in relation to its subject matter. All prior discussions, undertakings, agreements, representations, warranties and indemnities in relation to that subject matter are replaced by this document and have no further effect.

### **10.2 Paramountcy of document**

If this document conflicts with any other document, agreement or arrangement, this document prevails to the extent of the inconsistency.

### **10.3 No merger**

The provisions of this document will not merge on completion of any transaction contemplated in this document and, to the extent any provision has not been fulfilled, will remain in force.

### **10.4 Amendment**

This document may not be amended or varied unless the amendment or variation is in writing signed by all parties.

### **10.5 GST**

If any payment made to a party pursuant to or relating to this document constitutes consideration for a taxable supply for the purposes of GST, the amount to be paid for the supply will be increased so that the net amount retained by that party after payment of that GST is the same as if that party was not liable to pay GST in respect of that supply.

### **10.6 Assignment**

No party may assign, transfer or otherwise deal with this document or any right or obligation under this document without the prior written consent of each other party.

### **10.7 Severability**

Part or all of any provision of this document that is illegal or unenforceable will be severed from this document and will not affect the continued operation of the remaining provisions of this document.

### **10.8 Waiver**

Waiver of any power or right under this document:

- (a) must be in writing signed by the party entitled to the benefit of that power or right; and
- (a) is effective only to the extent set out in that written waiver.

### **10.9 Further assurances**

Each party must do or cause to be done all things necessary or reasonably desirable to give full effect to this document and the transactions contemplated by it (including, but not limited to, the execution of documents).

### **10.10 Counterparts**

This document may be executed in any number of counterparts and all counterparts taken together will constitute one document.



**10.11 Recitals**

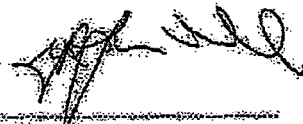
The recitals form part of this Deed and are binding on the parties.

**10.12 Governing law and jurisdiction**

This document will be governed by and construed in accordance with the laws in force in the State of Queensland and each party submits to the non-exclusive jurisdiction of the courts of that State.

**EXECUTED as a DEED**

THE TRUST COMPANY (PTAL) LIMITED ACN 008 )  
412 913 as Lender, by its Attorney who state that it )  
has had no notice of revocation of the Power of )  
Attorney dated 12 July 2010 registered in )  
Queensland as dealing number 713351029 )

  
Geoffrey Funnell  
State Manager – Corporate and Legal Services  
(Qld)

EXECUTED by LM INVESTMENT MANAGEMENT )  
LIMITED ACN 077 208 461 AS RESPONSIBLE )  
ENTITY FOR THE LM AUSTRALIAN INCOME )  
FUND – CURRENCY PROTECTED in accordance )  
with section 127 of the Corporations Act 2001 (Cth). )

Signature of Director/Secretary

  
Elizabeth Ann Der Hoven  
Full name of Director/Secretary

Signature of Director

  
Lisa Marie Darcy  
Full name of Director

**SCHEDULE 1  
NOTICE OF ASSIGNMENT**

To: **[BORROWER'S NAME] of [BORROWER'S ADDRESS]**

(Borrower)

AND

To: **[GUARANTOR/MORTGAGOR'S NAME] of [GUARANTOR/MORTGAGOR'S ADDRESS]**

(Guarantor/Mortgagor)

**LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 GIVES YOU NOTICE** that under a Deed of Assignment dated       day of 2011 between LM Investment Management Limited ACN 077 208 461 as Responsible Entity for the LM Australian Income Fund – Currency Protected ARSN 133 497 917 (Assignor) and The Trust Company (PTAL) Limited ACN 008 412 913 (Assignee) that the Assignor has assigned to the Assignee all of its legal right, title and interest that it held in the Securities referred to in Item 1 ("Security") of the Schedule below with effect from **[INSERT DATE]**

Accordingly LM irrevocably directs you to pay all moneys owing to it under or in connection with the Securities to PTAL at **[INSERT PAYMENT ACCOUNT DETAILS]** or as PTAL directs.

**Schedule 1**

Item 1

Security:

**[INSERT SECURITY DESCRIPTION]**

Dated:    /    /

**EXECUTED by LM INVESTMENT MANAGEMENT  
LIMITED ACN 077 208 461 AS RESPONSIBLE  
ENTITY FOR THE LM AUSTRALIAN INCOME  
FUND – CURRENCY PROTECTED in accordance  
with section 127 of the Corporations Act 2001 (Cth):**

.....  
Signature of Director

.....  
Signature of Director/Secretary

.....  
Full name of Director

.....  
Full name of Director/Secretary

**SCHEDULE 2**  
**SECURITIES**

**PART 1**

**Tall Trees Securities**

- (a) Loan Agreement dated 25 March 2011 between Erskine Landholdings Pty Ltd, LM Investment Management Limited as Responsible Entity for the LM Australian Income Fund – Currency Protected, Rebecca Anne Moore, Bradley Colin Moore, LM Investment Management as trustee for the LM Managed Performance Fund and Tall Trees Mandurah Pty Ltd.
- (b) First registered Mortgage number L586733.
- (c) Deed of Guarantee and Indemnity dated 25 March 2011 given by Bradley Colin Moore and Rebecca Anne Moore in favour of the Lender.
- (d) Deed of Guarantee and Indemnity dated 25 March 2011 given by LM Investment Management Limited ACN 077 208 461 as Responsible Entity for the LM Managed Performance Fund.
- (e) Deed of Guarantee and Indemnity dated 25 March 2011 given by Tall Trees Mandurah Pty Ltd ACN 134 323 890.
- (f) Fixed and Floating Charge dated 25 March 2011 registered with the Australian Securities and Investments Commission as charge number 2162675 given by Erskine Landholdings Pty Ltd ACN 114 185 303.
- (g) Fixed and Floating Charge dated 22 March 2011 registered with the Australian Securities and Investments Commission as charge number 2162677 given by Tall Trees Mandurah Pty Ltd ACN 134 323 890.
- (h) Any other document or security provided to LM in support of the loan to Erskine Landholdings Pty Ltd.

**PART 2**

**LM Capalaba Securities**

- (a) Loan Agreement dated 1 April 2011 between LM Investment Management Limited as Responsible Entity for the LM Australian Income Fund – Currency Protected, LM Capalaba Pty Ltd, Balmoral Commodities Pty Ltd and LM Investment Management Limited as trustee for the LM Managed Performance Fund.
- (b) Registered Mortgage number 713817705.
- (c) Priority Deed dated 4 April 2011 between LM Investment Management Limited as Responsible Entity for the LM Australian Income Fund – Currency Protected and LM Capalaba Pty Ltd, Balmoral Commodities Pty Ltd.
- (d) Deed of Guarantee and Indemnity dated 4 April 2011 given by LM Investment Management Limited as Responsible Entity for the Managed Performance Fund.
- (e) Fixed and floating charge dated 4 April registered with the Australian Securities and Investments Commission as charge number 2159644 given by LM Capalaba Pty Ltd.

- (f) Fixed and floating charge dated 4 April registered with the Australian Securities and Investments Commission as charge number 2158645 given by Balmoral Commodities Pty Ltd.
- (g) Any other document or security provided to LM in support of the loan to LM Capalaba Pty Ltd.

### **SCHEDULE 3**

**Commencement Date means**

**Custody Agreement** means an Agreement between PTAL and LM dated 4 February 1999 (as varied from time to time) under which PTAL agreed to become the custodian of a number of managed investment funds of which LM is the Responsible Entity.

## ***Amending Deed***

**Date:** 30th day of November 2011

**Parties:** **THE TRUST COMPANY (PTAL) LIMITED** (ACN 008 412 913) of 20 Bond Street, Sydney NSW ("**Permanent**") and,

**LM INVESTMENT MANAGEMENT LTD** (ACN 077 208 461) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland ("**Client**").

### **Recitals:**

- A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").
- B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.
- C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002, 1 September 2004, 26 September 2006, 1 September 2011 and 1 November 2011.
- D. The Client wishes to appoint Permanent as custodian for additional schemes not included in the Custody Agreement and to the removal of certain schemes or subsequent amendments and Permanent has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement.
- E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

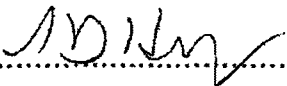
### **Terms:**

- 1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.
- 2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

3. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "B".
4. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.
5. Except as expressly stated in Clauses 2, 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

EXECUTED BY LM INVESTMENT )  
MANAGEMENT LTD ACN 077 208 461 )  
in accordance with section 127 (i) of the )  
Corporation Act by the authority of its )  
directors: )  
)  
)  
)  
)

.....

Signature of Secretary/Director

.....

Signature of Director

**THE TRUST COMPANY (PTAL) LIMITED A.C.N. 008 412 913**  
by its Attorney **GEOFFREY FUNNELL** who states that he has no notice of revocation of the  
Power of Attorney dated 12 July 2010, whereby he executes this deed document or instrument.

Signature.....

State Manager (Corporate & Legal Services) (Qld)

**Annexure "A"**

**Schedule 2**

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT**

1. LM First Mortgage Income Fund (formerly LM Mortgage Income Fund)
2. LM Australian Income Fund - Currency Protected
3. LM Managed Performance Fund
4. LM Cash Performance Fund
5. LM Wholesale First Mortgage Income Fund
6. LM Currency Protected Australian Income Fund
7. LM Institutional Currency Protected Australian Income Fund



## Annexure "B"

### Schedule 5

#### **FEES:**

(Clause 8.1)

#### **A Basic Custody for LM First Mortgage Income Fund;**

The greater of either:

(a)

On First \$750 million of GAV	2 basis points
On Next \$750 million of GAV	1.75 basis points
On Next \$500 million of GAV	1.5 basis points
On amounts over \$2.0 billion	1 basis points

or

(b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

#### **B Basic Custody for:**

**LM Australian Income Fund - Currency Protected**  
**LM Managed Performance Fund and**  
**LM Cash Performance Fund**

For each fund the greater of either:

(a) 2 basis points

or

(b) \$15,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

#### **C Basic Custody for:**

**LM Wholesale First Mortgage Income Fund**  
**LM Institutional Currency Protected Australian Income Fund**

For each fund:

\$10,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

The above funds are to be fully invested in the LM First Mortgage Income Fund. In the event that the funds are not fully invested in the LM First Mortgage Income Fund then the pricing for Paragraph B shall apply

**D Basic Custody for:**

**LM Currency Protected Australian Income Fund**

For this fund:

\$15,000 per Year (plus GST) which is subject to CPI adjustment annually in arrears (pro rated for the first year) with the first adjustment to be in the September quarter payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the scheme

The above fund is to be fully invested in the LM First Mortgage Income Fund. In the event that the fund is not fully invested in the LM First Mortgage Income Fund then the pricing for Paragraph B shall apply

**Definitions:**

**Commencement Date** means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

**GST** means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State, or Territory government agency; and

**Year** means twelve (12) months commencing on the Commencement date of each Scheme.

In addition to the above should extraordinary activity occur (outside those services set out in the Custody Agreement), we may charge additional fees of \$250 per hour for internal legal and or \$150 per hour for executive time (exclusive of GST).