

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS1146 / 20

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

AND

First Respondent: **PETER CHARLES DRAKE AND ORS**

AND

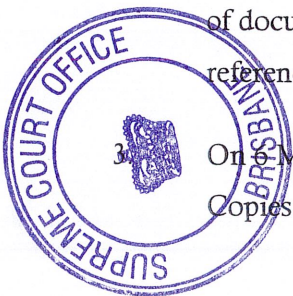
First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875 AND ANOR**

AFFIDAVIT

I, **MILLICENT KATHRYN RUSSELL** of Level 18, 300 Queen Street, Brisbane in the State of Queensland, solicitor, state on oath:

1. I am a solicitor of this Honourable Court, employed by Russells, solicitors for the first third party and the second third party. I have the day to day conduct of this matter under the supervision of Mr Stephen Russell, Managing Partner of Russells.
2. Now produced and shown to me and marked "MKR-01" is an indexed, paginated bundle of documents which I shall refer to in my affidavit. References in square brackets are references to page numbers in "MKR-01".

On 6 May 2020, my firm sent two emails to Gadens Lawyers, solicitors for the Applicant. Copies of those letters are at exhibits SC-23, pages 108 to 109, and SC-24, pages 110 to



Page 1

Deponent

Taken by *Malcolm Cairns*

AFFIDAVIT
Filed on behalf of the First Third Party and the
Second Third Party
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Russells
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: SCR:MKR:20200035

112, of Mr Couper's affidavit sworn 8 May 2020 [CFI-22].

4. On 8 May 2020, Gadens Lawyers sent a preliminary response to our firm's letters dated 6 May 2020. A copy of that letter is at exhibit SC-25 at page 113 of Mr Couper's affidavit sworn 8 May 2020 [CFI-22].
5. On 14 May 2020, Mr Russell sent an email letter to Gadens Lawyers, copied to me. A true copy of the email and letter is at pages [1] to [3] of "MKR-01".
6. On 15 May 2020, I received an email from Mr Couper attaching two letters in response to our firm's letters dated 6 May 2020. True copies of that email and those letters appear at pages [4] to [7] of "MKR-01".
7. On 15 May 2020, I received an email letter from Mr Couper responding to our firm's letter dated 14 May 2020. A true copy of that email and letter is at pages [8] to [10] of "MKR-01".
8. Pages [11] to [50] of "MKR-01" are a true copy of the Constitution of the LM First Mortgage Income Fund dated 10 April 2008.
9. All the facts and circumstances herein 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 in this my affidavit.

Sworn by ~~MILLICENT KATHRYN RUSSELL~~ on 21 May 2020 at Brisbane in the presence of:

.....
Millicent Kathryn Russell
Deponent


.....
Name:
Lawyer/Commissioner for Declarations/JP

MALISA MARGARET VI CRAIG
SOLICITOR

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS1146 / 20

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AND

First Respondent: **PETER CHARLES DRAKE AND ORS**

AND

First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
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CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875 AND ANOR**

CERTIFICATE OF EXHIBIT

Exhibit "**MKR-01**" to the affidavit of **MILLICENT KATHRYN RUSSELL** sworn on 21 May 2020.

.....
Millicent Kathryn Russell
Deponent

.....
Name:
Lawyer

**MALISA MARGARET V CRAIG
SOLICITOR**

CERTIFICATE OF EXHIBIT
Filed on behalf of the First Third Party and the
Second Third Party
Form 47, Version 2
Uniform Civil Procedure Rules 1999
Rule 435

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Ref: MKR:20200035

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

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ARSN 110 247 875 AND ANOR**

**INDEX OF EXHIBITS
TO AFFIDAVIT OF MILLICENT KATHRYN RUSSELL**

EXHIBIT NO.	DESCRIPTION	DATE	PAGE NOS
1.	Email and letter from Russells to Gadens Lawyers	14.05.2020	1 – 3
2.	Email attaching two letters from Gadens Lawyers to Russells	15.05.2020	4 – 7
3.	Email and letter from Gadens Lawyers to Russells	15.05.2020	8 – 10
4.	Constitution of the LM First Mortgage Income Fund	10.04.2008	11 – 50

INDEX OF EXHIBITS

Filed on behalf of the First Third Party and the
Second Third Party
Uniform Civil Procedure Rules 1999

Russells

Level 18, 300 Queen Street
Brisbane Qld 4000
Phone: 07 3004 8888
Fax: 07 3004 8899
Ref: MKR:20200035

From: [Linda Ellis on behalf of Stephen Russell](#)
To: [scott.solomon@gadens.com](#); [Claudia.tennison@gadens.com](#)
Cc: [Minnie Russell](#); [Pamela Maeves](#)
Subject: LMIM as responsible entity of the LM First Mortgage Income Fund v Drake & Ors - BS1146/2020 - Matter: 20200035
Date: Thursday, 14 May 2020 8:54:33 AM
Attachments: [letter to Gadens.pdf](#)
[mage001.jpg](#)
[mage002.jpg](#)
[mage003.png](#)

Dear Colleagues

Please see the attached correspondence.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au



Liability limited by a scheme approved under professional standards legislation.

Brisbane
Postal: GPO Box 1400, Brisbane QLD 4001 / Street: Level 18, 100 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABLN 18 180 182 584
RussellsLaw.com.au

14 May 2020

Our Ref: SCR:MKR:20200035

Gadens Lawyers
GPO Box 129
BRISBANE 4001

By Email: scott.couper@gadens.com
By Email: claudia.dennison@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund (“FMIF”) v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020

We refer to our letter dated 6 May 2020 and note that we are awaiting your reply.

In the meantime, it has occurred to our client that there may be a way of substantially reducing the scope of matters in dispute. This relates to the form of relief sought by the Applicant, LMIM.

For the purposes of this letter, we shall assume that LMIM succeeds in obtaining judicial advice from the court, pursuant to s 96 of the *Trusts Act 1973* (Old):-

LM Investment Management Limited, as responsible entity for the LM First Mortgage Income Fund would be justified in prosecuting the appeal the subject of the Notice of Appeal CA 14528 of 2019.

In the event that judicial advice were to be obtained in those terms, will you please advise whether Mr Whyte and LMIM (as RE of the FMIF) would be prepared to give an undertaking to our client in the following terms:-

We, David Whyte and LM Investment Management Limited as responsible entity of the LM First Mortgage Income Fund undertake not to contend, in any subsequent proceedings, that the direction of the Supreme Court of Queensland made on [insert date] operates, by force of s 97 of the Trusts Act 1973 (Qld), so as to deem LMIM to have discharged its duty as responsible entity and as trustee in respect of any of the following matters:-

1. *The institution of the proceedings in the Supreme Court of Queensland number BS 12317 of 2014 (“the Proceedings”);*
2. *The prosecution of the Proceeding to trial; or*
3. *The institution of the Appeal.*

We note that we have raised our client's concerns about the primary proceedings in correspondence regarding the judicial advice the subject of the present application (including in our letter dated 6 May 2020) and that your clients (Mr Whyte and LMIM as RE of the FMIF) have not responded to those concerns. Nonetheless, in the absence of any such response, we are instructed to seek your clients' response to the proposal above.

We are also instructed that if Mr Whyte and LMIM are willing to give such an undertaking, then our client would not see any remaining utility in seeking to make any submissions against judicial advice in the modified form set out above and would proceed with the matter on that basis. Our client would also seek an order that its costs, calculated on the indemnity basis, of and incidental to the application be paid out of the scheme property of the FMIF.

Would you kindly let us have your clients' response to this proposal as soon as convenient?

Yours faithfully

A handwritten signature in black ink, appearing to read 'Stephen Russell', enclosed within a hand-drawn oval shape.

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

20200035/2734123

From: [Scott Couper](#)
To: [Stephan Russell](#); [Mina Russe](#)
Cc: [Claudia Dentison](#)
Subject: LMIM as RE of the LM First Mortgage Income Fund v Drake & Ors - BS1146/2020 [GQ-BD.FID1006751]
Date: Friday, 15 May 2020 4:45:55 PM
Attachments: [made001.jpg](#)
[IGA 15 5 2020 14 45 25 000.pdf](#)
[IGA 15 5 2020 14 45 27 400.pdf](#)

Dear Colleagues,

Please see **attached** letters in response to your two letters dated 6 May 2020.

Yours faithfully,

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scott.couper@gadens.com | T +61 7 3231 1651 | F +61 7 3229 5850 | M +61 421 585 810
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[gadens.com](#)

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Our Reference Scott Couper 201401822
Direct Line 3231 1688
Email claudia.dennison@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

15 May 2020

ONE ONE ONE
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Australia

Russells Law
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BRISBANE QLD 4000

GPO Box 129
Brisbane QLD 4001

Attention: Mr Stephen Russell / Ms Millie Russell

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F +61 7 3229 5850

By email: SRussell@RussellsLaw.com.au / MRussell@RussellsLaw.com.au

gadens.com

Dear Colleagues

LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020

We refer to your letter dated 6 May 2020 sent via email at 6:24pm, which raised a number of issues said to relate to the facts underpinning the application for judicial advice.

That letter suggested that certain matters should be addressed by evidence in reply, which was due to be filed by 8 May 2020. We wrote to you on 8 May 2020 indicating that a further response to your letter of 6 May 2020 would follow in due course.

Much of what is raised in your letter has been the subject of previous correspondence.

Our client's position in relation to sharing privileged legal advices with some, but not other, members of the FMIF has already been stated.

As to the numbered paragraphs of your letter:

1. Your client is aware that Mr Whyte did not seek judicial advice prior to commencing Supreme Court of Queensland Proceeding Number 12317 or 2014. However, as your client is also aware, an application was made for leave *nunc pro tunc* to proceed against LMIM as the Seventh Defendant in that proceeding. Your client consented to that leave. Further, whether judicial advice was sought in relation to the proceeding at first instance is an historical matter which is not relevant to an application for judicial advice in respect of a proposed, future, appeal;
2. As to remuneration, details of Mr Whyte's remuneration claims are available at www.lmfimif.com. The first section on the homepage of that site includes the application for remuneration with respect to the period 1 November 2019 to 30 April 2020;
3. Again, questions as to conduct prior to the commencement of the proceeding at first instance is an historical matter which is not relevant to the present application for judicial advice with respect to an appeal;
4. You asked whether Mr Whyte obtained legal advice in relation to the prospects of the appeal. We refer you to paragraph 15 of the Affidavit of Mr Whyte which is Court Document 8. The advice was provided by our client's counsel who appeared at trial;
5. You asked what amount of insurance will be available to the defendant directors to meet any judgment. We refer you to paragraphs 26 to 28 of the Affidavit of Mr Whyte which is Court Document 8.
6. The above response also addresses numbered paragraph 6 of your letter.


Your letter refers to the prospect of a subpoena being issued to Mr Whyte. Your letter stated that the questions were framed so as not to infringe legal professional privilege and so as not to request production of documents. Please therefore identify the basis for such a subpoena to be issued for the production of documents.

Your letter refers to the prospect of your client filing further, supplementary, voluminous material. Before doing so, please identify the issue or issues to which that material relates.

Your letter raises the prospect of an adjournment of the hearing of the application for judicial advice. That should be avoided, because of the potential prejudice of the respondents to the proposed appeal of an extension to the existing timetable.

Your letter refers to a potential submission that Mr Whyte has not disclosed substantial matters of fact. Please identify the said matters of fact which your client contends should be disclosed.

Yours faithfully



Claudia Dennison
Senior Associate

Our Reference Scott Couper 201401822
Direct Line 3231 1688
Email claudia.dennison@gadens.com
Partner Responsible Scott Couper

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ABN 30 326 150 968

15 May 2020

ONE ONE ONE
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Level 18, 300 Queen Street
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Brisbane QLD 4001

Attention: Mr Stephen Russell / Ms Millie Russell

T +61 7 3231 1666
F +61 7 3229 5850

By email: SRussell@RussellsLaw.com.au / MRussell@RussellsLaw.com.au

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Dear Colleagues

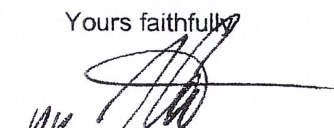
LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020

We refer to your letter dated 6 May 2020 sent via email at 2:18pm, which raised a number of issues concerning the jurisdiction of the court to entertain the Originating Application in this proceeding.

We have asked counsel to consider the matters raised in preparing submissions to be filed on 22 May 2020.

It is unlikely that correspondence back and forth in relation to those issues will be productive. Rather, if your client wishes to resist the application on the basis of lack of jurisdiction, that would seem to be a matter for submissions.

Yours faithfully


Claudia Dennison
Senior Associate

From: [Scott Couper](#)
To: [Stephan Russett](#); [Milla Russett](#)
Cc: [Claudia Dennison](#)
Subject: LMIM as RE of the LM First Mortgage Income Fund v Drake & Ors - BS1146/2020 [GQ-BD.FID1006751]
Date: Friday, 15 May 2020 4:46:50 PM
Attachments: [mace001.jpg](#)
[IGA 15 5 2020 14 46 47 369.pdf](#)

Dear Colleagues,

Please see **attached** letter in response to your letter dated 14 May 2020.

Yours faithfully,

Scott Couper | Partner | [gadens](#)
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15 May 2020

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By email: SRussell@RussellsLaw.com.au / MRussell@RussellsLaw.com.au

gadens.com

Dear Colleagues

**LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v
Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020**

We refer to your letter dated 14 May 2020.

That letter, and others, have sought to draw a distinction between Mr Whyte and LMIM for the purposes of the judicial advice application. Pursuant to the order of Justice Dalton made on 21 August 2013, Mr Whyte is the individual responsible for ensuring the winding up of the FMIF and his powers extend, among other things, to carrying on proceedings in the name of LMIM.

The judicial advice is sought in relation to a decision made by Mr Whyte and protection is sought for the benefit of Mr Whyte.

Any discussion as to how your client's involvement in the application can be resolved should be on the basis that judicial advice is given in the form set out at paragraph 5 of the Originating Application, namely that Mr Whyte is given the advice.

This application for judicial advice is concerned with the conduct of the appeal. That extends to the following matters:

1. considering the judgment at first instance;
2. taking advice as to the prospects of an appeal;
3. causing a notice of appeal to be filed to preserve the limitation date;
4. communications with the Court and the proposed Respondents to pause the appeal timetable pending this application for judicial advice;
5. this application for judicial advice itself; and
6. the conduct of the appeal, if judicial advice is given.

Each of those matters would be captured by the judicial advice.

There is no need for Mr Whyte (or LMIM as RE of the FMIF) to give the undertaking sought in your letter. It should be clear enough from the content of the application and this letter that Mr Whyte is not seeking judicial advice in respect of the first instance proceeding. However, considering the judgment, taking advice on an appeal and causing the notice of appeal to be filed are all part of an application for judicial advice in respect of an appeal.

It seems from your letter that your client's resistance to the judicial advice would fall away if it was confirmed that the judicial advice sought does not apply to the first instance proceeding. That confirmation was sought in the way of an undertaking, but no such undertaking is appropriate. To the extent there may have been any confusion about that, this letter should resolve that concern.

The final issue remaining is therefore costs.

As other correspondence in this matter has identified, our client does not consider that recent requests for information or complaints about the form of the judicial advice application had merit.

However, the primary consideration must be the interests of members of the FMIF. A contested application (including one which is required to canvass the various matters raised in your recent correspondence) would be time consuming. That could lead to substantial costs being claimed against the assets of the FMIF, whether or not your client also received an order for payment of his costs.

Mr Whyte's view is that it is in the best interests of the members of the FMIF if the aggregate costs expended on the judicial advice proceeding are minimised. His view is that those costs would likely be lower, on the whole, if your client's concerns around the application are resolved and the application is unopposed, even if that means a modest costs order being made in favour of your client. The aggregate costs which would be claimed against the FMIF would likely be less, on that approach, than the costs which the parties would incur in respect of a contested hearing.

However, one difficulty for Mr Whyte is that he does not know the quantum of the costs which your client seeks. There are two possible solutions. The first is that you identify the figure sought (with appropriate supporting documentation) and Mr Whyte will indicate whether he consents. A fixed figure might then be sought by consent order, if the figure is agreed and the application is otherwise unopposed. The second is that our respective clients agree that your client will not oppose the application for judicial advice and our client will not oppose a costs order being made in favour of your client, provided that the order is in a fixed amount to be determined by the judge.

We await your response.

Yours faithfully


Claudia Dennison
Senior Associate

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 30th 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 30th day of June and any period between the 30th 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:

$$\left(\frac{\text{Net Fund Value}}{\text{number of Units on issue}} \right)$$

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.

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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;

s601FB(2)

- (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;
- (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

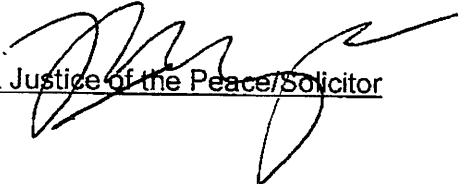

A Justice of the Peace/Solicitor

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