

**SUPREME COURT OF QUEENSLAND**

**Registry: Brisbane  
Number: BS3383/2013**

**Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**

**AND**

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

**AND**

**Second Respondent: THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

**AFFIDAVIT**

I, **GEORGINA ELSPETH HAYDEN** of Level 5, 100 Market Street, Sydney, in the State of New South Wales, Solicitor, say on oath:

1. I hold the position of Special Counsel in the Chief Legal Office of the Australian Securities and Investments Commission (ASIC).
2. Unless otherwise stated, where I depose to conversations in this affidavit, what is said in those conversations is, to the best of my knowledge and belief, words to the effect of what was said in those conversations.

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Deponent: 

Witness: 

**AFFIDAVIT**

Filed on behalf of the Australian Securities and Investments Commission  
Form 46, Version 1  
Uniform Civil Procedure Rules 1999  
Rule 431

Australian Securities and Investments Commission  
Level 20, 240 Queen Street  
BRISBANE, QLD, 4000  
Phone No: (07) 3867 4700  
Fax No: (07) 3867 4790  
Ref: 13-40003

### **The Applicants' Originating Application in this Proceeding**

3. On 19 April 2013 my ASIC colleague Ms Anne Gubbins, lawyer (**Ms Gubbins**) provided me with a copy of an Originating Application, dated 15 April 2013 (the **Applicants' Application**), which sought the appointment of Trilogy Funds Management Ltd (**Trilogy**) as temporary responsibility entity to the LM First Mortgage Income Fund (the **FMIF**), in place of the First Respondent to this Proceeding.
4. At that time, ASIC was concerned about the impact the Applicants' Application could have on the efficient resolution of the future of the various funds in respect to which the First Respondent was the responsible entity and on future returns to unitholders in those funds – principally, unitholders in the FMIF..
5. Consequently, I with some of my ASIC colleagues formulated an enforceable undertaking (**EU**) solution (which I will elaborate on, below) that seemingly had potential to go some way to achieving the aim of an efficient resolution of the various funds' future and the optimisation of returns to unitholders.
6. Central to the practical utility of this EU solution was not only the First Respondent's willingness to enter into such an EU, but also whether – in light of the Administrators relatively recent appointment to the First Respondent – the First Respondent could achieve the decision and action points required within a timeframe of significantly less than three months: three months being the maximum time pursuant to s601FQ of the *Corporations Act 2001* (**the Act**) that Trilogy could act as temporary responsible entity to the FMIF before it would be obliged to call a meeting of unitholders of the FMIF.
7. Consequently, on or about 22 April 2013, I directed Ms Gubbins to contact Ginette Muller, one of the administrators of the First Respondent and a senior managing director of FTI Consulting (**Ms Muller**) to request a meeting with Ms Muller, for the purpose of ascertaining from Ms Muller whether she and her colleague were in a position to provide an indication as to when they might be likely to know and, as appropriate, make recommendations to the unitholders about the future of the funds to which the First Respondent was appointed the responsible entity. ASIC did not request

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the meeting to enquire about other matters related to the administration or the financial position of the First Respondent or the funds, nor to provide any direction or instruction to the First Respondent.

**Meeting on 23 April 2013**

8. On 23 April 2013 I attended a meeting at ASIC's Brisbane office (**the 23 April Meeting**). The following people were also in attendance at the 23 April Meeting:
- (a) Ms Gubbins;
  - (b) Anthony Ham, an ASIC employee,
  - (c) Ms Muller;
  - (d) Stephen Russell, from Russells, the law firm acting on behalf of the administrators of the First Respondent;
  - (e) Ilenna Copley, from Russells; and
  - (f) Another woman who accompanied Ms Muller, Mr Russell and Ms Copley but whose name I cannot now recall.
9. At the commencement of the 23 April Meeting Mr Russell asked that the meeting be considered "without prejudice". I did not agree to that and said to Mr Russell that it was unnecessary as ASIC was not seeking "without prejudice" information and as the regulator, ASIC was careful to ensure that its actions were transparent. I then led the discussion that took place during the 23 April Meeting.

**The Applicants' Application, intervention by ASIC and potential conflict of interest for the Administrators**

10. We discussed the Applicants' Application.. Mr Russell asked whether ASIC intended to intervene in the Proceeding. I said that ASIC would intervene. I said that it appeared to ASIC there were two issues raised by the Applicants' Application: First,

  
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whether the First Respondent's Australian Financial Services Licence (AFSL) worked as it needed to; and secondly, whether the Administrators had a conflict of interest vis-a-vis fulfilling their role as administrators of the First Respondent and the First Respondent's role as responsible entity of the various funds.

11. In relation to those issues, I said:

- (a) that it was ASIC's view that there was no problem with the AFSL as ASIC's notice under s 915H of the Act had the effect of deeming the suspension of the First Respondent's AFSL as not having occurred for the specified purposes set out in that Notice; and
- (b) that while ASIC was not currently aware of any conflict of interest, there was a possibility that in the future a conflict could arise for the Administrators as between their duties to the creditors of the First Respondent and their duties to the unitholders of the funds if the funds were subsequently wound up. Mr Russell expressed his disagreement with me on this point and said that we would "have to agree to disagree".

12. Mr Russell then suggested that if a conflict arose, the Administrators would elect to manage the winding up of the funds rather than remain as liquidator of the First Respondent. I responded by saying that it may not be a matter of choice and indeed it was possible they could find themselves in a position where there was a conflict which prevented them winding up either the First Respondent or the funds.

13. Mr Russell then began to talk about Trilogy and he queried their motivation for applying for an order appointing Trilogy as temporary responsible entity of the FMIF. I said that ASIC was not interested in discussing those issues, that ASIC was assuming that all current parties were acting properly, and that ASIC's only concern at that stage was to proceed in the most efficient and cost effective way to provide the best chance of achieving the maximum return for the unitholders of the funds.

**Potential unitholders(s) meeting(s) – Winding-up or change of Responsible Entity**

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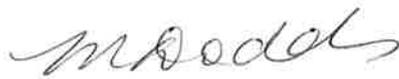
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14. Speaking in reference to the Applicants' Application, Mr Russell then suggested that the Administrators could call a meeting of unitholders to consider the appointment of a new responsible entity. He stated that he could have the notices out within a week and that he was confident that if a meeting was called and unitholders were given a choice between the First Respondent and Trilogy, the First Respondent would win. I said that the Administrators should do whatever the Administrators determined to be in the best interests of the unitholders.
15. I also said to Mr Russell that the First Respondent's AFSL only allowed the First Respondent to take steps to have a new responsible entity appointed and/or to wind up the funds, but it did not allow the First Respondent to continue as the responsible entity to operate the funds if they were a going concern. Mr Russell initially expressed some disagreement with my position and opined that the First Respondent's AFSL entitled it to run the funds. I rejected his position and said that, in order for the First Respondent to be able to operate the funds as a going concern, it would need to apply for a variation to its AFSL.
16. I then asked Ms Muller what was the position with the funds for which the First Respondent was appointed responsible entity and whether she was in a position to have a sense of their likely future. Ms Muller said that it was almost certain that the funds would be wound up. I asked her when she thought she would reach a final view on whether the funds should be wound up or not. Ms Muller volunteered that she would be able to give a final view within two weeks. I asked her to confirm whether she was referring to having a concluded view for all funds within two weeks.
17. Ms Muller responded by saying she was only referring to the FMIF. I asked Ms Muller if she was able to estimate how long it would be before she was able to reach a view with respect to all of the funds. Ms Muller said that task would involve significantly more work but again volunteered that she believed she could form an opinion on the other funds within the same two week period.
18. I asked Ms Muller how long, after that two week period, she would require before she could put the future of the funds to the unitholders. I indicated that ASIC was keen to

  
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explore whether there was a way to efficiently and cost effectively resolve the present situation in the best interests of all unitholders of the funds. I said that ASIC was looking for a solution, if there was one, that might achieve that purpose and preferably one that did not involve legal proceedings because of the negative impact legal proceedings would have on unitholder returns.

### **An Enforceable Undertaking**

19. I said that, in view of the two week timeframe within which Ms Muller advised she would be able to determine whether or not the funds should be wound up or continue, a solution may be achieved through an EU. I explained that EUs were not confined to situations where ASIC believed there had been some breach of the law.
20. I also said that if the First Respondent was willing to enter into an EU with ASIC, which provided a timeframe within which it would call a meeting of unitholders to vote on resolutions for the appointment of a new responsible entity or that the funds be wound up; then depending on the timeframe within which that could be done by the First Respondent, an EU of this kind might be accepted by the Court as an efficient and cost effective outcome in the best interests of all unitholders.
21. There was some discussion among Mr Russell, Ms Muller, Ms Gubbins and me as to the necessity and timing for getting a notice of meeting prepared and the calling of a meeting in terms of the EU. I believe it was Ms Gubbins who reminded everyone of the 21 day minimum period requirement between providing the notice of meeting and holding the meeting. Ms Muller said a notice of meeting could be prepared within two weeks.
22. I asked Ms Muller whether she was referring to the same two week period within which she needed to form a view about whether or not the funds ought to be wound up or she was referring to an additional period of time. Ms Muller confirmed it was the same two week period because it involved the same work. Then either Mr Russell or Ms Muller volunteered the unitholder meeting could be held by the end of May, and I believe someone, I cannot recall who, whether it was Mr Russell, Ms Muller or Ms Gubbins,

  
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said by the 31<sup>st</sup> of May.

23. I said if that was the case and if the First Respondent was willing to enter into an EU which provided those timeframes, then - from ASIC's perspective - that was the preferred course as it appeared to be the most efficient and effective solution in terms of time and cost for the unitholders as a whole. I explained that while ASIC otherwise had no preference as between Trilogy and the First Respondent as responsible entity for the funds, any appointment of Trilogy pursuant to the Applicants' Application was only temporary, being for a maximum period of three months after which there would have to be a further meeting of unitholders and so there would be at further additional cost to those unitholders.
24. I said that if Ms Muller needed longer than the two weeks to form her concluded view as to whether the funds should or should not be wound up, this could be achieved by way of a variation to the EU, but that ASIC would not want to see the timing blow out as this would defeat the purpose of the EU.
25. I added that the benefit of EU was that it was a public document and would go on ASIC's public register and it might go some way to resolving the Applicants' Application without litigation.
26. I also said that if the hearing of the Applicant's Application proceeded, ASIC would draw the EU to the Court's attention and submit that - in light of the matters provided for in the EU - it was ASIC's position that it was preferable for the First Respondent to remain as responsible entity.
27. Ms Muller indicated she was willing to enter into an appropriate EU along the lines discussed. I said that if there was going to be an EU it would need to be agreed as soon as possible before the next Court hearing in the Proceeding and probably by Friday, 26 April 2013. I understood, at that time, that the next court hearing was scheduled for 29 April 2013.

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Deponent:

Witness: 

28. It was agreed that ASIC would prepare a draft EU and forward it to Mr Russell. The 23 April Meeting concluded shortly thereafter.

**Events Subsequent to the 23 April Meeting**

29. On 24 April 2013, Ms Gubbins sent an email to Mr Russell, copied to me, which attached a copy of a draft EU consistent with ASIC's position as discussed at the 23 April Meeting. A copy of Ms Gubbins' email attaching a copy of the draft EU is exhibited hereto and marked **GEH-1**.

30. On 26 April 2013, ASIC filed a Notice of Intervention in this Proceeding.

31. On 29 April 2013:

(a) Ms Gubbins informed me that Mr Russell had just telephoned her and advised the Administrators were no longer willing to enter into an EU;

(b) subsequent to the events referred to in sub-paragraph (a) above, Ms Gubbins informed me she had spoken to either Ms Muller or one of Ms Muller's lawyers, I cannot now recall which, who had told Ms Gubbins: she and/or the First Respondent

i. does not want to sign an EU due to the negative connotations, but is willing to sign a public undertaking in some other form;

ii. does not think it appropriate to seek a resolution whether to wind-up the FMIF at this time, but that she may consider doing it after the outcome of the unit holders' vote on 30 May;

iii. is not currently comfortable signing an undertaking including the other funds as she needs time to consider whether it is appropriate to hold a meeting for those funds and in any event she does not wish to include a resolution to wind up the other funds.



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- (c) subsequent to the events referred to in sub-paragraph (b) above, Ms Gubbins subsequently informed me that the Administrators of the First Respondent had called a meeting of the FMIF unitholders, for 30 May 2013, and that the only matter put to the unitholders was whether to appoint Trilogy as responsible entity of the FMIF.
- (d) Ms Gubbins provided me with a copy of a letter date 26 April 2013 from Ms Muller and her co-administrator Mr John Park, to FMIF unitholders, which referred to and attached a Notice of Meeting (**the Notice of Meeting**). A copy of the 26 April letter together with the attached Notice of Meeting is exhibited hereto and marked **GEH-2**.

32. Immediately, ASIC identified a number of concerning matters which arose out of its review of the Notice of Meeting and the First Respondent's actions in calling the meeting of FMIF unitholders on 30 May 2013 (**the Proposed Meeting**), including:

- (a) The resolutions sought by this Notice of Meeting were not consistent with the terms of the resolutions in the draft EU. The Notice of Meeting made no reference to the future of the FMIF including the potential winding-up of the FMIF.
- (b) The Notice of Meeting put only one matter to unitholders – whether Trilogy should be appointed as responsible entity to the FMIF in place of the First Respondent.
- (c) ASIC was concerned as to whether the best interests of the FMIF unitholders were being appropriately safeguarded. This was because of the statements of Ms Muller and her advisors during the 23 April Meeting, including, in particular Ms Muller's advice to ASIC that the FMIF would almost certainly be wound up and that she would have reached a concluded view on that issue within less than two weeks, unless there had been a substantial change in the funds circumstances, there appeared to be little, if any, utility in putting the FMIF to the expense of calling the Proposed Meeting.

Deponent: 

Witness: 

- (d) The proposed resolutions, the subject of the Notice of Meeting, were inconsistent with ASIC's overriding aim to place the future of the FMIF in the hands of its unit holders as soon as practicable and to maximise returns to investors, as discussed at the 23 April Meeting. The resolutions in the Notice of Meeting provided only for the potential replacement of the responsible entity of the FMIF in circumstances where the current responsible entity was advocating strongly against the proposed resolutions.
- (e) In ASIC's opinion, the Notice of Meeting included statements which were or were likely to be misleading.
33. On 30 April 2013 as a result of ASIC's concerns arising out of the First Respondent's actions in connection with the calling of the Proposed Meeting, Ms Gubbins, acting under my instructions, sent an email to the First Respondent, copied to me, serving a notice under s 912C of the Act (**the 912C Notice**) to the First Respondent seeking information, including information relating to:
- (a) whether the purpose of the funds, including the FMIF, for which the First Respondent was the registered entity, could be accomplished or if they should be wound up;
- (b) whether a new permanent responsible entity should be appointed to the various funds;
- (c) by reference to her statements during the 23 April Meeting, the change, if any, in Ms Muller's position as when she would be in a position to determine whether or not the various funds, including FMIF, should be wound up; and
- (d) the basis for calling the Proposed Meeting.
34. A copy of the 30 April email and its attachment is exhibited hereto and marked **GEH-3**.
35. On 1 May 2013, Mr Russell sent by email addressed to Ms Gubbins, a letter providing a partial response to the s912 Notice. That response related to only the FMIF and Mr

Deponent: 

Witness: 

Russell foreshadowed a further response addressing the other funds in the LM group. In particular, Mr Russell informed ASIC:

- (a) the Administrators were not in a position to determine whether the FMIF should be wound-up and that it would be difficult to say when they would be in such a position and this was so because while the Administrators did not believe it was necessary to value all of the FMIF assets before they could decide if the FMIF should be wound up, it was in fact necessary to do so "*before such a decision can responsibly be made*";
- (b) that while the Administrators "hoped and expected" to be able to form a view before the Proposed Meeting, which was four week away, that "was not certain";
- (c) even if prior to the Proposed Meeting the Administrators formed the view that the FIMF should be wound up they would take no action to do so until after the Proposed Meeting had been held;
- (d) following the 23 April Meeting and after intensive consultations with their advisors, the Administrators had changed their mind in relation to the EU as they had "now decided" the unitholders' best interests were best served by holding a meeting to vote on whether Trilogy or the First Respondent be the responsible entity of FMIF;
- (e) if Trilogy did not succeed in replacing the First Respondent at the Proposed Meeting and if the Administrators decided the FMIF should be would up then the Administrators would call a second meeting of FMIF unitholders, or allow others to do so, to approve that decision.

A copy of the 1 May email and its attachment "SCR\_20130471\_081.pdf" is exhibited hereto and marked **GEH-4**.

Deponent: 

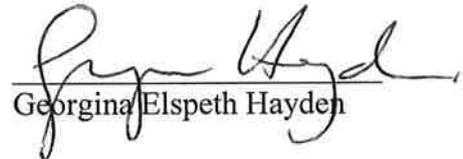
Witness: 

36. All the facts and circumstances deposed to in this affidavit are within my own knowledge save and except those deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

Sworn by **GEORGINA ELSPETH HAYDEN** at )  
Sydney in the State of New South Wales )  
this 12<sup>th</sup> day of July 2013 )  
Before me:



Meredith Florence Dodds  
Solicitor  
Australian Securities & Investments Commission  
Level 5, 100 Market Street  
Sydney NSW 2000



Georgina Elspeth Hayden

**Certificate under section 34 (1) (c) of Oaths Act 1900**

I, Meredith Florence Dodds, Solicitor, certify the following matters concerning the making of this affidavit by the person who made it:

- 1 I saw the face of the person; and
- 2 I have known the person for at least 12 months.



Meredith Florence Dodds  
Solicitor  
Australian Securities & Investments Commission  
Level 5, 100 Market Street,  
Sydney, NSW, 2000  
Date: 12 July 2013

**SUPREME COURT OF QUEENSLAND**

**Registry: Brisbane**

**Number: BS3383/2013**

**Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**

**AND**

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

**AND**

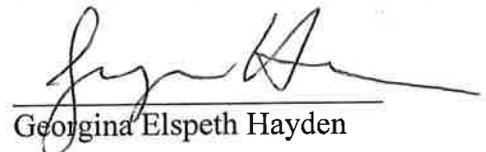
**Second Respondent: THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

Bound and marked "GEH-1" to "GEH-4" are the exhibits to the affidavit of **GEORGINA ELSPETH HAYDEN** sworn 12 July 2013.

<b>Exhibit</b>	<b>Description</b>	<b>Pages</b>
<b>GEH-1</b>	Email from ASIC to Russells dated 24 April 2013	1 – 6
<b>GEH-2</b>	Letter from FTI with Notice of Meeting dated 26 April 2013	7 – 19
<b>GEH-3</b>	Email from ASIC to the First Respondent dated 30 April 2013	20 – 29
<b>GEH-4</b>	Email from Russells to ASIC dated 1 May 2013	30 – 38



Before me: Meredith Florence Dodds  
Solicitor  
Australian Securities & Investments Commission  
Level 5, 100 Market Street  
Sydney NSW 2000



Georgina Elspeth Hayden

"GEH-1"



LM Investment Management Limited (Administrators Appointed)  
[SEC=UNCLASSIFIED]

t  
Anne Gubbins o Stephen Russell

24/04/2013 05:51 PM

:  
Cc: Hugh Copley, Georgina Hayden

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Dear Stephen,

Attached is a draft Enforceable Undertaking we've prepared for discussion purposes. Please let me know your clients' comments and proposed amendments. It may be that we think of some additional amendments from our end as well as we consider it further over the public holiday.

Regards,

**Anne Gubbins** | Senior Lawyer | Financial Services Enforcement | ASIC | ☎ +61 7 3867 4871 |  
☎ +61 7 3867 4800 | ✉ [Anne.Gubbins@asic.gov.au](mailto:Anne.Gubbins@asic.gov.au)



Enforceable Undertaking s93A.doc

## ENFORCEABLE UNDERTAKING

*Australian Securities and Investments Commission Act 2001*

Section 93A

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

*Ginette Muller and John Park as Administrators of  
LM Investment Management Limited (Administrators Appointed)  
ACN 077 208 461  
C/-FTI Consulting (Australia) Pty Limited  
22 Market Street, BRISBANE QLD 4000*

### 1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

**Administrators** means Ginette Muller and John Park of FTI Consulting (Australia) Pty Ltd as administrators of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 and LM Administration Pty Ltd (Administrators Appointed) ACN 055 691 426

**AFSL** means Australian Financial Services Licence

**ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth)

**Corporations Act** means the *Corporations Act 2001* (Cth)

**FMIF** means the LM First Mortgage Income Fund ARSN 089 343 288

**LMA** means LM Administration Pty Ltd (Administrators Appointed) ACN 055 691 426

**LM Funds** means the following registered managed investment schemes collectively:

- (a) The LM First Mortgage Income Fund;
- (a) The LM Currency Protected Australian Income Fund;
- (b) The LM Institutional Currency Protected Australian Income Fund;
- (c) The LM Cash Performance Fund;
- (d) The Australian Retirement Living Fund,
- (e) The LM Australian Income Fund; and

(f) The LM Australian Structured Products Fund.

**LMIM** means LM Investment Management Limited (Administrators Appointed) ACN 077 208 461

**LMIM's AFSL** means AFSL number 220281

## **2. ASIC's role**

2.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

## **3. Background**

### ***The LM Funds***

3.1 LMIM is the responsible entity for the LM Funds.

3.2 LMIM had also previously been the responsible entity of the LM Wholesale First Mortgage Income Fund. LMIM was replaced as the responsible entity on 16 November 2012 by Trilogy Funds Management Limited.

### ***The LM Companies***

3.3 On 19 March 2013, the Administrators were appointed as voluntary administrators of:

- (a) LMIM; and
- (b) LMA,

by resolution of the board of directors of each of those companies, pursuant to section 436A(1) of the Corporations Act.

### ***The AFSL***

3.4 LMIM's AFSL authorised it to, among other things, operate managed investment schemes and provide financial and life insurance products.

3.5 On 9 April 2013, ASIC suspended LMIM's AFSL for two years.

3.6 Pursuant to section 915H of the Corporations Act, ASIC permitted the LMIM's AFSL to continue on specific terms so as to allow the Administrators to provide limited financial services such as transfer to a new responsible entity, investigating or preserving the assets or winding up the registered funds managed by LMIM.

3.7 Annexed and marked "A" is a copy of the Notice of Suspension of AFSL for LMIM's AFSL dated 9 April 2013.

3.8 ASIC holds the power to vary or revoke LMIM's AFSL should circumstances change.

### ***The Application***

3.9 On 15 April 2013, an Originating Application was filed by two unitholders of the FMIF (Queensland Supreme Court proceeding number 3383 of 2013). This application is currently scheduled to be heard on 29 April 2013. The primary orders sought are:

- (a) An order pursuant to sections 601FN and 601FP of the Corporations Act, that Trilogy Funds Management Limited (or such other company as the court determines appropriate) is appointed temporary responsible entity of the FMIF.
- (b) Further or in the alternative, an order pursuant to regulation 5C.2.02 of the Corporations Regulations 2001 (Cth) that Trilogy Funds Management Limited (or such other company as the court determines appropriate) is appointed temporary responsible entity of the FMIF.
- (c) In the alternative, an order pursuant to section 80 of the Trusts Act 1973 (Qld), that Trilogy Funds Management Limited (or such other company as the court determines appropriate) be appointed responsible entity/trustee of the FMIF until further order of the court or an extraordinary resolution of the FMIF's members providing for an alternative appointment.

3.10 If the applicants are successful in the pending application, Trilogy Funds Management Limited (or such other company as the court determines appropriate) will be appointed as a temporary responsible entity. The entity so appointed will then be obliged to call a meeting of unitholders of FMIF to determine the future of the FMIF.

## **4. ASIC's Concerns**

4.1 ASIC is concerned about ensuring clarity and certainty for unitholders in relation to the future of the LM Funds.

4.2 Consistent with their obligations as administrators of LMIM and the suspension terms of LMIM's AFSL, the Administrators have offered to cause LMIM to convene meetings of unitholders of all of the LM Funds in a timely manner. This is to provide unitholders with the opportunity to determine the future of the LM Funds quickly, efficiently and with the minimum of expense to the LM Funds.

## **5. Undertakings**

5.1 Under section 93A of the ASIC Act, the Administrators have offered, and ASIC has agreed to accept the following undertakings.

- (a) The Administrators will convene a meeting of the unitholders of each of the LM Funds to be held on or before **[insert date]**.
- (b) The meeting of unitholders of FMIF is to be held at least seven days after the holding of the meetings of unitholders of all the other LM Funds.
- (c) At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:
  - (1) the appointment of a responsible entity over each of the funds; and
  - (2) whether the fund should be wound-up and, if so, by whom.

**6. Acknowledgements**

6.1 The parties acknowledge that:

- (a) the parties may, by mutual agreement, vary this undertaking in the future should the need arise;
- (b) either party may issue a media release on execution of this undertaking referring to its terms;
- (c) either party may from time to time publicly refer to this undertaking; and
- (d) ASIC will make this undertaking available for public inspection.

**EXECUTED** by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 in accordance with section 437A of the *Corporations Act 2001*

..... Administrator

..... Administrator

**Accepted by the Australian Securities and Investments Commission under section 93A of the ASIC Act by its duly authorised delegate:**

.....

<<INSERT Name of Delegate>>

Delegate of Australian Securities and Investments Commission

<<INSERT Date>>

"GEH-2"



26 April 2013

Dear Investor,

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

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

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

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

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

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

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

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

Yours faithfully  
FTI Consulting

**Ginette Muller**  
Voluntary Administrator  
\*Attach.

**John Park**  
Voluntary Administrator

FTI Consulting (Australia) Pty Limited  
ABN 49 160 397 811 | ACN 160 397 811  
22 Market Street | Brisbane QLD 4000 | Australia  
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**LM FIRST MORTGAGE INCOME FUND**  
**ARSN 089 343 288**

**NOTICE OF MEETING**  
**&**  
**EXPLANATORY INFORMATION**

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

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

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**Important**

**This Booklet contains important information and requires your immediate attention.**

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

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

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

## CONTENTS

THIS BOOKLET CONTAINS THE FOLLOWING:

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

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

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

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

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

**SECTION 1 – NOTICE OF MEETING FOR LM FIRST MORTGAGE INCOME FUND**

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

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

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

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

**BUSINESS OF MEETING**

**Resolution 1 – Extraordinary Resolution to remove current responsible entity**

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

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

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

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

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

**PROXIES**

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

**RECOMMENDATION**

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

Dated 26 April 2013



Ginette Muller  
Voluntary Administrator  
LM Investment Management Limited (Administrators Appointed)



John Park  
Voluntary Administrator

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## SECTION 2 – EXPLANATORY INFORMATION

### 2.1 GENERAL BACKGROUND TO THE RESOLUTIONS

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

Each of the Resolutions is considered below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **2.4 WHY LM?**

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

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

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

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

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

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

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

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

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

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

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

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

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

## **2.7 TRILOGY – THE PROPOSED NEW MANAGER**

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

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

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

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

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

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

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

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

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

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

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

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

### **Financing Consequences**

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

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

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

### **Clawback Provisions under the *Corporations Act***

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

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

## 2.9 LM or TRILOGY?

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

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

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

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

## **2.10 ONGOING INFORMATION**

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

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

### SECTION 3 – GLOSSARY

The following terms are used in this Booklet:

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



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

These notes form part of the Notice of Meeting.

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

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

### **Quorum**

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

### **Chairperson**

LM will appoint an individual to chair the Meeting.

### **Voting**

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

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

### **Approvals required**

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

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

### **Entitlement to vote**

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

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

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

### **Corporations**

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

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

### **Jointly held units**

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

### **Appointment of proxy**

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

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

### **Voting directions to your proxy**

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

### **Signing instructions**

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

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

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

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

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



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

**Postal address for return of proxies:**

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

**Hand delivery address:**

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

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

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

Alternatively, the documents may be **scanned and emailed** to:  
[quorum@computershare.com.au](mailto:quorum@computershare.com.au)

**Enquiries:**

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

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

"GEH-3"



**LM Investment Management Limited - notice issued pursuant to section 912C(1) of the Corporations Act 2001 (Cth) [SEC=UNCLASSIFIED]**

**Anne Gubbins** o ginette.muller, john.park

30/04/2013 05:00 PM

Bcc: Georgina Hayden

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Dear Ginette and John,

I **enclose** by way of service a notice issued to LM Investment Management Limited (Administrators Appointed) pursuant to section 912C(1) of the *Corporations Act 2001* (Cth).

Regards,

**Anne Gubbins** | Senior Lawyer | Financial Services Enforcement | ASIC | ☎ +61 7 3867 4871 |  
☎ +61 7 3867 4800 | ✉ [Anne.Gubbins@asic.gov.au](mailto:Anne.Gubbins@asic.gov.au)



- 20130430 - Letter to FTI (912C).pdf



**ASIC**

Australian Securities & Investments Commission

Our Ref: 13-40003

30 April 2013

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

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

LM Investment Management Limited (Administrators Appointed)  
c/- Ginette Muller and John Park  
FTI Consulting (Australia) Pty Ltd  
22 Market Street  
Brisbane Qld 4000  
Email: [ginette.muller@fticonsulting.com](mailto:ginette.muller@fticonsulting.com) & [john.park@fticonsulting.com](mailto:john.park@fticonsulting.com)

Dear Ms Muller and Mr Park

**Notice of Direction under s912C(1) of the *Corporations Act 2001***

I **enclose** a Notice of Direction (**Direction**) under section 912C(1) of the *Corporations Act 2001 (the Act)*.

You should read the Direction carefully. You will see that it requires LM Investment Management Limited (Administrators Appointed) (**the Licensee**) to give to the Australian Securities & Investments Commission (**ASIC**) a written statement containing certain information by 11:00am on 1 May 2013. Details are set out in the Direction.

The Licensee may comply with the Direction by emailing the written statement to [anne.gubbins@asic.gov.au](mailto:anne.gubbins@asic.gov.au).

The Licensee is entitled to consult with its legal adviser in relation to its obligations under the Direction.

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

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

If you have any questions about the Direction, please contact me on (07) 3867 4871.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Anne Gubbins', with a long horizontal flourish extending to the right.

Anne Gubbins  
Senior Lawyer



B00691059

**ASIC**

Australian Securities & Investments Commission

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  
SUBSECTION 912C(1) OF THE *CORPORATIONS ACT 2001***

**NOTICE OF DIRECTION TO GIVE A WRITTEN STATEMENT**

To: LM Investment Management Limited (Administrators Appointed)  
c/- Ginette Muller and John Park  
FTI Consulting (Australia) Pty Ltd  
22 Market Street  
Brisbane Qld 4000

Australian financial services licence number: 220281

You are notified under section 912C(1) of the *Corporations Act 2001 (the Act)* that you are directed to give:

to: Australian Securities & Investments Commission  
at: Level 20, 240 Queen Street, Brisbane, Queensland  
by: 1 May 2013  
on: 11:00am

a written statement containing the information about the financial services provided by you or your representatives specified in the Schedule to this Direction.

Date: 30 April 2013

Signed:

Anne Gubbins

a delegate of the Australian Securities & Investments Commission.

## SCHEDULE

This is the Schedule referred to in the section 912C Direction to LM Investment Management Limited (Administrators Appointed) dated 30 April 2013.

For the purpose of this Schedule:

**“Administrators”** means Ginette Muller and John Park of FTI Consulting (Australia) Pty Ltd as administrators of LM Investment Management Limited (Administrators Appointed)

**“FMIF”** means the LM First Mortgage Income Fund

**“LM Funds”** means the following registered managed investment schemes collectively:

- (a) The LM First Mortgage Income Fund;
- (b) The LM Currency Protected Australian Income Fund;
- (c) The LM Institutional Currency Protected Australian Income Fund;
- (d) The LM Cash Performance Fund;
- (e) The Australian Retirement Living Fund,
- (f) The LM Australian Income Fund; and
- (g) The LM Australian Structured Products Fund.

**“LMIM”** means LM Investment Management Limited (Administrators Appointed) ACN 077 208 461

LMIM is required to provide a written statement containing the following information about the financial services provided by it or its representatives:

1. In relation to each of the LM Funds:
  - a. Does LMIM consider that the purpose of the fund cannot be accomplished and/or should otherwise be wound up?
  - b. If LMIM cannot currently answer the question in subparagraph (a) above, provide an estimate as to when it will be in a position to make such a determination.
  - c. Does LMIM believe that a new, permanent, responsible entity (independent of the Administrators and LMIM) should be appointed to the fund?
  - d. If the answer to subparagraph (c) is yes, when does LMIM consider this should occur and explain the bases for this view?

- e. If the answer to subparagraph (c) is no, explain why not. Please also explain how this will not result in conflicts of interest between the responsible entity and the fund.
2. On 23 April 2013, at a meeting with ASIC representatives, Ms Muller advised that she considered she would be in a position to make a determination on whether the LM Funds should be wound up within two weeks of that date.
  - a. Has this position changed?
  - b. If so, please explain what has changed and why this has affected LMIM's ability to make such a determination?
3. Explain the basis for calling the meeting of unit holders of the FMIF scheduled to be held on 20 May 2013.
4. Explain why LMIM considers it to be in the best interests of unit holders of the FMIF not to include an alternate resolution for the winding up of the FMIF in the meeting of unit holders of the FMIF scheduled to be held on 20 May 2013.

## INFORMATION ABOUT THE NOTICE OF DIRECTION

### Relevant Statutory Provisions

[All section references are to the *Corporations Act 2001* (the Act) unless otherwise indicated]

Subsection 912C(1) provides that the Australian Securities & Investments Commission (ASIC) may, by giving written notice to a financial services licensee, direct the licensee to give to ASIC a written statement containing the specified information about:

- (a) the financial services provided by the licensee or its representatives; or
- (b) the financial services business carried on by the licensee.

Under s912C(3), the licensee must comply with a direction given under s912C:

- (a) within the time specified in the direction if that is a reasonable time; or
- (b) in any other case, within a reasonable time.

ASIC may extend the time within which the licensee must comply with the direction by giving written notice to the licensee: s912C(3).

ASIC may suspend or cancel a licence under s915C(1)(a) of the Act if the licensee has not complied with its obligations under s912A. Among the list of obligations under s912A, is the obligation to comply with the financial services laws: s912A(1)(c).

Non-compliance with a direction that ASIC gives under s912C(1), within the time set out in s912C(3), may constitute a failure to comply with a financial services law.

ASIC may only suspend or cancel a licence if it first gives the licensee an opportunity:

- (a) to appear or be represented at a hearing before ASIC. The hearing is conducted in private: s915C(4); and
- (b) to make submissions to ASIC on the matter: s915C(4).

### Legal Professional Privilege

For the purposes of your obligations arising from the Direction, legal professional privilege is a reasonable excuse for not providing information pursuant to the Direction. Accordingly, you are not obliged to provide under the Direction information that is covered by a valid claim of legal professional privilege.

A person who claims legal professional privilege must establish that the privilege exists. If you claim that any information that you are required to provide is subject to legal professional privilege, you must provide ASIC with sufficient information to allow its officers to make an informed decision about whether the claim for privilege can be supported.

For that purpose, if the information over which you claim legal professional privilege was or is currently, comprised in the whole or part of a document, you should prepare a list, in writing, which specifies for each document or part thereof you claim is privileged:

- (a) the time, date, type, author, recipient and subject matter of that document or part thereof, and whether it is an original or copy;
- (b) if the original or a copy of the document or part thereof has been provided to any person who is not the privilege holder or a legal representative of the privilege holder, the identity of the persons to whom the original or a copy of the document or part thereof has been provided and the basis on which it was provided to those persons;
- (c) the grounds on which legal professional privilege is claimed;
- (d) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the information was brought into existence.

You will be requested to specify whether an in-house legal counsel was involved in the preparation of that document or part thereof and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the preparation of that document or part thereof; and

- (e) the identity of the person in whose name the claim of legal professional privilege is made.

If the information over which you claim legal professional privilege was the subject of an oral communication, you should prepare a list, in writing, which specifies for each oral communication you claim is privileged:

- (i) the grounds on which legal professional privilege is claimed;
- (ii) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the communication was made.

You will be requested to specify whether an in-house legal counsel was involved in the communication and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the communication;

- (iii) the identity of the person in whose name the claim of legal professional privilege is made;
- (iv) the date and time of, and parties to, the communication; and
- (v) the subject matter of, location at, and means by which, the communication took place.

Unless ASIC otherwise agrees, you should provide the list(s) relating to your privilege claims to ASIC on or before the due date of the Direction.

## **Definitions**

"financial service" has the meaning given by Division 4 of Part 7.1: s761A. A person provides a financial service if they:

- (a) provide financial product advice (see section 766B); or
- (b) deal in a financial product (see section 766C); or
- (c) make a market for a financial product (see section 766D); or
- (d) operate a registered scheme; or
- (e) provide a custodial or depository service (see section 766E); or
- (f) engage in conduct of a kind prescribed by regulations made for the purpose of this paragraph.

[s766A(1)]

"financial services business" means a business providing financial services: s761A.

Note: The meaning of "carry on a financial services business" is affected by s761C of the Act.

"financial services licensee" means a person who holds an Australian financial services licence: s761A.

"representative" has the meaning given by s910A of the Act and includes:

- an authorised representative of the Licensee; or
- an employee or director of the Licensee; or
- an employee or director of a related body corporate of the Licensee; or
- any other person acting on behalf of the Licensee.

"financial services law" means:

- (a) a provision of Chapter 7 or of Chapter 5C, 6, 6A, 6B, 6C or 6D of the Corporations Act; or
- (b) a provision of Chapter 9 of the Corporations Act as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 of the ASIC Act; or
- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services.

[s761A]

## **Offences**

A person who, in a document required by or for the purposes of the Corporations Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence: s1308(2).

A person who, in a document required by or for the purposes of the Corporations Act or lodged:

- (a) makes or authorises the making of a statement that is false or misleading in a material particular; or
- (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence: s1308(4).

A person must not, without lawful excuse, obstruct or hinder ASIC, or any other person, in the performance or exercise of a function or power under the Corporations Act: s1310.

"GEH-4"



**Fw: LM Investment Management Limited (Administrators Appointed) as Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 [DLM=Sensitive]**

Anne Gubbins to: Georgina Hayden, Hugh Copley

01/05/2013 12:01 PM

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----- Forwarded by Anne Gubbins/Brisbane/QLD/ASIC on 01/05/2013 12:00 PM -----

**From:** Stephen Russell <[srussell@russellslaw.com.au](mailto:srussell@russellslaw.com.au)>  
**To:** Anne Gubbins <[Anne.Gubbins@asic.gov.au](mailto:Anne.Gubbins@asic.gov.au)>  
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**Date:** 01/05/2013 11:59 AM  
**Subject:** LM Investment Management Limited (Administrators Appointed) as Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288

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This email message has been processed by MIMESweeper

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Dear Ms Gubbins

Please find attached our letter dated 1 May, 2013 in response to ASIC's notice under section 912C of the Act, received just on 5.00 pm yesterday, with the attachments referred to in that letter.

Yours faithfully

**RUSSELLS**

**Stephen Russell**  
*Managing Partner*

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# RUSSELLS

1 May, 2013

Our Ref: Mr Russell  
Your Ref: Ms Gubbins

Ms Anne Gubbins  
Senior Lawyer, Financial Services Enforcement  
Australian Securities & Investments Commission  
Commonwealth Bank Building  
240 Queen Street  
BRISBANE QLD 4000

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Dear Ms Gubbins

**LM Investment Management Limited (Administrators Appointed) ("LMIM")  
as Responsible Entity for the LM First Mortgage Income Fund ("the FMI  
Fund")**

We are the solicitors for LMIM. Our client acknowledges receipt, yesterday evening, of a notice issued pursuant to section 912C of the *Corporations Act 2001* ("the Act").

LMIM responds to that notice by this letter.

In the light of time constraints, this response is confined to the FMI Fund. LMIM proposes to respond to the notice in relation to the other Funds by 4.00pm, Friday, 3 May, 2013 and, to the extent necessary, seeks an extension of time from ASIC pursuant to subsection 912C(3) of the Act, for that purpose.

## Preliminary

Firstly, section 912C of the Act empowers ASIC to direct licensees to give a written statement containing the specified information about the matters set out in subsection (1). The notice at hand requires LMIM to provide a written statement about its opinions and beliefs. The Administrators do not consider that section 912C obliges LMIM to express such opinions.

Nonetheless, the Administrators are concerned to continue to co-operate with ASIC in every aspect of the administration of the affairs of LMIM and the LM Funds the subject of your notice. Hence, they are happy to respond.

Secondly, the information provided below is current as of today. The affairs of LMIM and of the LM Funds are fluid and circumstances are changing rapidly on a daily basis – mainly because of litigation. The Administrators will also continue to monitor all of these matters and to respond appropriately to changing circumstances. The Administrators will continue to liaise with ASIC in

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relation to the affairs of LMIM and each of the LM Funds and inform you, when and if there is any substantial change to their views and opinions recorded below.

Thirdly, the Administrators are conscious of issues concerning the external administration of responsible entities and registered managed investment schemes in general. Our clients are, in particular, conscious of the issues canvassed in a CAMAC Discussion Paper for Managed Investment Schemes issues in June, 2011, and of ASIC's Submission to CAMAC made in September, 2011, particularly as those submissions relate to enterprise schemes. The Administrators are aware that each of the LM Funds are enterprise schemes, in the sense used by ASIC in its Submission to CAMAC.

The Administrators are, in particular, aware of and dealing with the following factors in relation to the FMI Fund and all LM Funds:-

1. The need to examine related party arrangements;
2. The need to examine and, if appropriate, modify the fee structures that subsist in relation to the LM Funds;
3. LMIM's Australian Financial Services Licence has been (appropriately) modified by ASIC to meet the circumstances that arose from the appointment of Administrators to LMIM. The Administrators understand that ASIC expects that the financial services that LMIM will provide will be limited to preserving the assets of the LM Funds, and making necessary investigations, ultimately for the purpose of either appointing a new Responsible Entity, or winding up the LM Funds. The Administrators believe that the conditions of the ASFL are appropriate to the circumstances of LMIM and the LM Funds.
4. There can be tensions between various aspects of the external administrations of a Responsible Entity and the ongoing administration of an enterprise scheme. The Administrators are conscious of the need to manage those tensions and the need to react appropriately to them.
5. There can be tensions between the interests of secured creditors (often represented by receivers and managers appointed by such creditor) and those broader interests of other stakeholders in an external administration. No such appointments have been made to date in relation to any of the LM Funds and, as currently advised, none are expected.
6. One feature of the industry that has grown up around registered managed investment schemes is that, when Responsible Entities enter into external administration, various interested parties propose the substitution of either temporary or permanent Responsible Entities to replace the Responsible Entity under external administration. Because Scheme members are the beneficial owners of the underlying assets, and because both the constitutions and the Act provide for mechanisms for members to be consulted about the replacement of a Responsible Entity to manage their assets, the Administrators are of the view that, save in exceptional circumstances – which do not obtain here – it should be the members who decide whether a new Responsible Entity should be appointed and, if so, who that should be.

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7. In deciding whether a new Responsible Entity should be appointed, one of the factors that is of considerable importance is that the candidate replacement Responsible Entity should hold an appropriate AFSL.

### **Specified Information in relation to the FMI Fund**

LMIM responds to your notice, in relation to the FMI Fund, adopting the paragraph numbering in the Notice, as follows:-

1. **In relation to the FMI Fund:-**
- (a) **LMIM has not yet been able to form a view as to whether the purpose of the FMI Fund can be accomplished, or whether it should otherwise be wound up.**
- (b) **It is difficult for LMIM to say exactly when the Administrators will be able to decide those matters. A number of factors are relevant.**

When the Administrators were appointed, the auditors of the FMI Fund, Ernst & Young, had not completed their analysis of the impairment of the FMI Fund, in the process of auditing the Fund's financial statements for the year ended 30 June, 2012. On their appointment, the Administrators understood that the indicative value of the underlying assets of the FMI Fund was 55c per unit (on a subscription price of \$1.00 per unit).

Attached to this letter is a document entitled "Briefing: FMIF Summary", which contains a reasonably accurate summary of the underlying assets in the FMI Fund. As appears from the summary, the assets in the FMI Fund are dominated by real estate projects, to the owners of which the FMI Fund has advanced loan funds predominantly on first mortgage security. Some assets are completed and generating income while, at the other end of the spectrum, there are other projects in respect of which construction is yet to commence.

Each of these underlying projects must be analysed and understood. Fortunately, LMIM has the benefit of a service agreement with LM Administration Pty Ltd, in respect of which the Administrators have also been appointed. That company employs staff who have had ongoing dealings with and are at least reasonably familiar with the details of the various projects.

Not only had Ernst & Young not completed their assessment of the impairment of the assets in the FMI Fund, but the underlying assets are not the subject of current valuations.

The Administrators understand that LMIM provided a schedule of valuations to ASIC in May, 2012 – attached.

Since then, valuations of properties have been undertaken on an *ad hoc* basis, when needed.

We also refer to the Briefing Summary which comprises a schedule that sets out indicative impairments, prepared by staff of LM Administration Pty Ltd. It seems to be a reasonable working document.

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The Administrators have not had an opportunity to commission any valuations of the underlying assets of the FMI Fund. The Administrators do not believe it is necessary that all such underlying assets need to be valued before LMIM can decide whether the purposes of the FMI Fund can be achieved or whether it should otherwise be wound up. However, they anticipate that valuations may be necessary before such a decision can responsibly be made – irrespective of who is the Responsible Entity.

Further, as ASIC is aware, two members of the FMI Fund have made an application to the Supreme Court for an order that Trilogy Funds Management Limited should replace LMIM, albeit only as temporary Responsible Entity. The Administrators took legal advice and consulted with ASIC, immediately that application was made. The Administrators decided, particularly in the light of the mechanisms in the constitutions and the Act, that it was appropriate that members be given an opportunity to consider whether they wish to have Trilogy has a permanent Responsible Entity, and accordingly, LMIM has convened a meeting of the members, to take place on 30 May, 2013, to consider and, if thought fit, to pass resolutions replacing LMIM with Trilogy as the Responsible Entity for the FMI Fund.

The Administrators hope and expect that they will be in a position to form a view as to whether the purposes of the Fund can be achieved, or whether it should otherwise be wound up prior to that meeting, although this is not certain. The Administrators appreciate that this is a topic on which reasonable minds might differ and, as presently advised, the Administrators do not propose to implement a decision to wind up the Fund, prior to the meeting of members on 30 May, 2013. If it is the view of the requisite body of members that Trilogy should be the Responsible Entity of the FMI Fund, then the responsibility will pass to it.

- (c) **LMIM has not yet decided whether, and so does not presently believe, that a new, permanent Responsible Entity, independent of the Administrators and LMIM, should be appointed to the Fund.**

The Administrators are presently of the view that there are two matters which will inform a decision that it is in the best interests of members that a new, permanent, Responsible Entity, independent of the Administrators and LMIM should be appointed to the Fund.

The first is whether the Fund is viable and should continue in operation, and not be wound up. The second is whether the Administrators or LMIM are subject to any conflicts of interest which render it undesirable, either that they or LMIM should continue in office as Administrators and Responsible Entity, respectively.

As you may be aware, various persons have made assertions to the effect that the appointment of the Administrators to LMIM has created conflicts of interest; and, inferentially, that such conflicts of interest are so acute that LMIM should not continue as Responsible Entity of the FMI Fund. However, we have not seen any evidence to support such assertions.

Our clients regard it as significant that de Jersey CJ removed LMIM as trustee of the LM Managed Performance Fund on 12 April, 2013. Accordingly, there is now no basis to suggest that there is any conflict of interest in relation to LMIM's status as Responsible Entity of the FMI Fund, in respect of its former status as trustee of the LM Managed Performance Fund.

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It has also been suggested that some conflict exists by reason of transactions with LM Administration Pty Ltd. The Administrators are also Administrators of that company. On our instructions, that company has never held any substantial assets. It is and has always been a service company. Its only creditors are employees, the ATO, and their various superannuation funds to whom superannuation is remitted. None of these are overdue.

The Administrators understand that some management fees that LMIM derived were passed through LM Administration Pty Ltd and that there are reasons to investigate those transactions. That investigation is underway. Assuming the investigation reveals either that LMIM or LM Administration Pty Ltd has a good claim to recover those funds or to take other action in respect of those transactions, then there is no reason why either LMIM or LM Administration Pty Ltd could not do so.

Naturally, if circumstances emerge which give rise to either a potential or actual conflict of interest, the Administrators will take appropriate action in respect of such circumstances.

The Administrators also note that any new permanent responsible entity will need to be appropriately licensed to deal in derivatives and foreign exchange contracts (as set out in LMIM's AFSL number 220281, clause 1(b)(ii)). We note that Trilogy's AFSL does not contain any provision.

- (d) **Although it is not necessary to answer this question, if LMIM decides that a new permanent Responsible Entity, other than LMIM, should be appointed, the Administrators will ensure that they immediately give notice to that effect to ASIC, and that appropriate action is taken to convene a meeting of members to the FMI Fund to consider a replacement.**
  
- (e) **Nor is it strictly necessary to answer this question, because our clients have not formed the view as to whether a new permanent Responsible Entity should be appointed to the FMI Fund.**

The Administrators are conscious of the potential for a conflict to arise consequent upon their appointment as external Administrators of LMIM. If LMIM is unviable as a stand-alone entity, it will either be wound up, or enter into a Deed of Company Arrangement ("DOCA"). No DOCA has been proposed and no person has suggested that a DOCA might be proposed. It is most unlikely that the Administration will end by LMIM being handed back to the directors.

There is a potential for a conflict to arise between the interest of creditors in a winding up (or perhaps a DOCA) and the interest of members of the FMI Fund. However, in the present circumstances, our clients are not aware of any actual conflict, and they will remain astute to look for those circumstances.

Conversely, it is at least hypothetically possible that a winding up might be in the interests of the members of the Fund. Although the matter is not free from doubt, it is at least possible that some of the claw back provisions in division 2 of Part 5.7 of the Act might be engaged for the benefit not only of the creditors of LMIM, but for the members of the FMI Fund.

For example, we can see no reason why an unreasonable director-related transaction could not be the subject of an action by LMIM (in liquidation) to

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recover from directors or associates of directors, the benefits of an unreasonable director-related transaction. We note that the property of LMIM is defined in section 9 of the Act as including any legal or equitable estate of interest in any property. So, *prima facie* property held by LMIM on trust would be caught by, for example, paragraph 588FDA(1)(a)(ii) of the Act.

Assuming – as our clients presently do – that there will be no proposal for a DOCA, it is likely that LMIM will be the subject of a creditors voluntary winding up. Again, if circumstances do give rise in the future to a conflict of interest, that may result in our clients forming the view that a new permanent Responsible Entity should be appointed and, when and if they do form that view, our clients will take appropriate action to consult the members.

2. **In our respectful view, Ms Muller did not make such an unqualified statement. We think you will agree that the discussion to which you refer had in the context of ASIC's proposal to seek from LMIM, through its Administrators, an Enforcement Undertaking, and that we were discussing minimum period the time within which the Administrators could respond to a requirement imposed by such an Enforceable Undertaking.**

At that time, the proceedings brought by Piper Alderman and Trilogy, through Mr and Mrs Bruce, had only recently been served. In particular, our clients had not, on 23 April, 2013, then decided the appropriate action to take in response to Trilogy's attempt have itself appointed temporary Responsible Entity of the FMI Fund.

As you know, our clients have now decided that it is in the best interests of members to have an opportunity to consider that proposal in a meeting, and our clients have convened such a meeting.

That decision followed two days of intensive consultation by our clients with their solicitors (our firm and Norton Rose) and other expert advisors.

Our clients are presently of the view that no action should be taken to wind up the Fund, until the meeting of members to consider replacing LMIM with Trilogy has been held.

Our clients also take the view that they should decide which, if any of the assets in the FMI Fund should be subject to a formal valuation or feasibility study, before they can decide, as Administrators, whether the FMI Fund should be wound up. Our clients presently expect to be able to form that view, and to obtain such valuations and undertake such feasibility studies, prior to 30 May, 2013 – the date of the meeting of members.

If our clients form the view, that the FMI Fund should be wound up, prior to the meeting on 30 May, 2013, they will inform ASIC. Our clients present intention is that they will not, however, take any action in that regard, pending the outcome of the meeting, since our clients do not wish to pre-empt the wishes of members in relation to whether Trilogy should be appointed as Responsible Entity in place of LMIM.

If Trilogy does not replace LMIM as Responsible Entity of the FMI Fund at the meeting of members on 30 May, 2013, and if our clients have decided that the FMI Fund should be wound up, our clients will promptly take steps either to convene a meeting, or to allow others to convene a meeting to consider and approve that decision.

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3. **Our clients decided that LMIM should convene a meeting of the members of the FMI Fund for a number of reasons:-**
- (a) Our clients do not believe that the court's power to appoint a temporary Responsible Entity under section 601FN has been engaged. That is, our clients do not believe that LMIM does not meet the requirements of Section 601 FA of the Act;
  - (b) There are well understood provisions, both in the Constitution of the FMI Fund and in the Act for members of the Fund to control who is their Responsible Entity;
  - (c) ASIC decided, on 9 April, 2013, in effect to modify LMIM's AFSL, to put in place a process by which members would soon be consulted about the fate of their Fund. The Administrators believe that ASIC acted appropriately in that regard.
  - (d) Only two members of the Fund (obviously hand-picked by Trilogy and its lawyers) have made the application to the Court.
  - (e) Trilogy is a member of the FMI Fund. Accordingly, it will have an opportunity to attend the meeting;
  - (f) The Administrators have convened the meeting on a date which also gives Trilogy an opportunity to send to members such material as it regards appropriate, to advance its case for election, by vote of members to the office of Responsible Entity;
  - (g) The Administrators also decided to provide an up to date copy of the Register of Members to Trilogy for that purpose, and they did so on 30 April, 2013;
  - (h) In all of these circumstances, the Administrators have formed the view that it was appropriate to convene this meeting to give members an opportunity to consider, discuss Trilogy's proposal, and vote on it; that it is appropriate that this should occur prior to the court's consideration of the application by Mr and Mrs Bruce; and indeed that the meeting will assist the Court in deciding their application.

4. **The reasons why LMIM did not include an alternative resolution that the LMIM Fund be wound up are:-**

- (a) When LMIM convened the meeting, the Administrators had not decided that it was in the best interests of unit holders that the FMI Fund be wound up and they have still not made any such decision.
- (b) In deference to the possibility that Trilogy might be elected as Responsible Entity, the Administrators thought it inappropriate to pre-empt its decision as to whether or not

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the Fund should be wound up, in case the members decide to elect it as Responsible Entity.

- (c) It also remains possible (depending on how events transpire) that if LMIM decides that the FMI Fund should be wound up, that that might be accomplished without a meeting. Trilogy may decide to proceed in that way. The Administrators do not presently intend to proceed in that way, should they decide that the FMI Fund should be wound up.

We trust that this letter answers your inquiries. If, however, there is any aspect of these matters which you wish to discuss, or if you require any further information, as always, please do not hesitate to contact us or the Administrators direct.

Yours faithfully



**Stephen Russell**  
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