

# LM Managed Performance Fund

## ('the Fund' or 'the MPF')

10 May 2021 | Update 23

This is the Trustee's twenty third (23<sup>rd</sup>) update to Unitholders.

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All values in this document are in Australian Dollars.

## 1 Overview

### 1.1 Purpose of this update

The purpose of this update is to provide information to Unitholders in relation to developments in the winding up of the MPF, including:

- the process by which Unitholders may update their contact and bank account details in the unitholder register prior to the Trustee processing a distribution payment
- the outcome of the Trustee's application seeking directions from the Supreme Court of Queensland on a number of matters concerning the distribution payment
- a summary of the recovery actions undertaken by the Trustee over the course of the winding up and receipts and payments of the Trustee
- an update on the estimated return to Unitholders in the winding up
- fund management matters.

### 1.2 Prior update reports

This update to Unitholders should be read in conjunction with prior update reports issued by the Trustee. Should you wish to obtain a copy of any previous update reports, please contact the Trustee at [linvestors@kordamentha.com](mailto:linvestors@kordamentha.com).

### 1.3 Summary of work undertaken and key developments

Key developments since the Trustee's last update to Unitholders are outlined below:

- The Trustee has been working with Link Market Services to establish the procedure by which Unitholders will be able to make changes to their contact and bank account details as held on the unitholder register. This process will be necessary to ensure that distribution payments are made using accurate information regarding current unit holder details.
- The Trustee has received directions from the Supreme Court of Queensland regarding several matters concerning distribution to Unitholders. A summary of these directions is set out in Section 2 of this report.
- The Trustee has been working with a third-party payment provider to establish the procedure for distribution payments to be made to Unitholders. This process is complex given the multiple jurisdictions involved in the distribution process.
- The Trustee is continuing to oversee the realisation of a property located in Fiji by the Bankruptcy Trustees of the bankrupt estate of Peter Drake. This is the sole remaining avenue for recovery being pursued by the Trustee.

## 2 Unitholder register update process

The Trustee has previously advised Unitholders that prior to making any distribution payment, Unitholders will be given the opportunity to update certain personal details and to transfer unit holdings. Link Market Services ('Link') have now been engaged by the Trustee to facilitate the unitholder register update process.



In the coming weeks, a Distribution Notice will be sent to all Unitholders by Link. This Distribution Notice will:

- inform Unitholders of the Trustee's intention to make a distribution
- invite Unitholders to verify, and if necessary request an amendment to, their recorded contact and banking details contained on the unitholder register
- provide an overview of the process the Trustee proposes to follow for the updating of the unitholder register
- provide Unitholders with instructions on how to access a secure website which the Trustee proposes to establish to enable Unitholders to electronically review and request amendments to the contact and banking details held in the unitholder register ('the Secure Unitholder Website')

Once established, the Secure Unitholder Website will be able to be accessed by Unitholders using their unitholder ID and account number. Unitholders will be able to review the details currently recorded in respect to their unit holdings and update their details using the forms available on the Secure Unitholder Website. Changes to bank account details and unit transfers will require supporting documentation to be provided.

## 3 Court directions

### 3.1 Background

As outlined in previous update reports, prior to any distribution being made to Unitholders, the Trustee considered it necessary to seek directions from the court in relation to several matters. Those matters included:

- The identification of the correct version of the unitholder register of the Fund.
- The treatment of liability accounts reflected in the records of the Fund.
- The treatment of Unitholders whose accounts may have matured prior to closure of the Fund but who did not have their redemption processed.
- The appropriate characterisation and treatment of the ATO refund amount.
- The appropriate apportionment and calculation of the distribution amount amongst Unitholders.

On 19 March 2021, the Trustee received directions from the Supreme Court of Queensland in relation to these matters. These directions are summarised below. A full copy of the directions is available on the Trustee's website at <https://www.kordamentha.com/creditors/lm-managed-performance-fund>.

### 3.2 Unitholder register

Following appointment, the Trustee was provided with five versions of the unitholder register for the Fund which contain minor inconsistencies. One of these versions of the unitholder register was provided by the former Investment Services Manager of the former trustee, LM Investment Management Pty Ltd ('LMIM'), by email on 4 October 2013 ('Register 1').

The Trustee undertook detailed analysis of the five versions of the unitholder register together with a ledger which contained transaction data for each account of the Fund ('the Unitholder Transaction Ledger'). Based on this analysis the Trustee formed the view that Register 1 was the most accurate and complete register of the Fund. Further detail regarding the five separate versions of the unitholder register and the analysis undertaken by the Trustee is contained in paragraphs 64 to 81 of the affidavit of Jarrod Villani sworn on 4 December 2020 ('the Affidavit') which is available on the Trustee's website at <https://www.kordamentha.com/creditors/lm-managed-performance-fund>.

Directions were received from the Supreme Court of Queensland that the Trustee is justified in adopting Register 1 as the unitholder register of the MPF for the purposes of making a distribution to members and finalising the winding up of the Fund.

### 3.3 Treatment of Unitholder liability accounts

The balance sheet of the Fund as at 12 April 2013 detailed several creditor accounts which related to Unitholder transactions. A summary of those accounts, and the directions received is provided below.

#### Returned Investment payments

Account 20003 - Returned Investor Payments was used historically by the former trustee to record instances where funds which had been paid to unitholders had been returned to the MPF. Account 20003 had a balance of (\$10,874.16) as at

12 April 2013. The Trustee undertook analysis of transactions recorded in the account for the period 1 July 2012 to 12 April 2013 which indicated that all amounts which were recorded in the account on or after 1 July 2012 had subsequently been paid out to investors and that the balance of (\$10,874.16) related to transactions which occurred prior to 1 July 2012.

Directions were received that the Trustee is justified in taking no further steps concerning the transactions recorded in Account 20003 that occurred prior to 1 July 2012.

### Funds awaiting investment

Account 20200 - Funds Awaiting Investment was used by the former trustee to record the receipt of investor funds prior to units being issued in the MPF. Account 20200 had a balance of \$1,327,937.43 as at 12 April 2013. Most of the balance of this account upon the Trustee's appointment related to the 18 transactions previously identified as having been received by the MPF but where no units had been issued prior to the closure of the Fund ('Quarantined Funds'). Where possible, all Quarantined Funds have been refunded to the impacted investors.

In addition to the Quarantined Funds, the Trustee has identified three transactions which it considers should be returned to the relevant investors on the basis that monies were received by the Fund, but no units were issued to the investors. Details of these transactions are contained in paragraphs 144 and 145 of the Affidavit.

Directions were received that the Trustee is justified in returning the amounts identified in paragraphs 144 and 145 of the Affidavit to the prospective investors who made the payments, or if the funds cannot be so returned, paying the balance to the Australian Securities and Investments Commission.

The Trustee will take steps to include any residual Quarantined Funds which have not yet been returned, and the payments referred to above, in the distribution process.

### Distributions payable

Account 20400 - Distributions Payable was used by LMIM to record distributions that were payable to unitholders. Distributions are accrued earnings in the Fund. Account 20400 had a balance of \$179,512.39 as at 12 April 2013. The Trustee undertook analysis of transactions recorded in the account for the period 1 July 2012 to 12 April 2013 which indicated that all distribution transactions recorded in the account on or after 1 July 2012 had a corresponding reinvestment or payment transaction (reflecting that the distribution transactions were completed) and that the balance of \$179,512.39 related to transactions which occurred prior to 1 July 2012.

Directions were received that the Trustee is justified in, having sent a notice to all members of the Fund requesting any Unitholder who believes they have not received a distribution for the period prior to 1 July 2012 to come forward and provide relevant supporting documentation, taking no further steps concerning the transactions recorded in Account 20400 that occurred prior to 1 July 2012, as identified in paragraph 148 of the Affidavit, apart from assessing claims received from members of the Fund in response to the Trustee's notice.

### Redemptions payable

Account 20401 - Investor Funds Payable was used by LMIM as a clearing account to process redemptions of units prior to payment. Redemption transactions in the Fund can be categorised as follows:

- full or partial redemption of units at the request of Unitholders either upon maturity or prior to maturity of the investment
- partial redemption of units reflective of a distribution of earnings rather than any return of invested capital.

Upon appointment of the Trustee, all Unitholder accounts (with the exception of one) had fluctuating unit prices to reflect earnings in the Fund. For those accounts where distributions were paid out periodically rather than re-invested in the Fund, distribution payments were processed by way of a partial redemption of units. Following this partial redemption, the number of units held by the Unitholder would be lower, however the value of their investment would be unchanged from their investment amount due to an increase in the unit price.

Account 20401 had a balance of \$851,375.73 as at 12 April 2013. The Trustee undertook analysis of transactions recorded in the account for the period 1 July 2012 to 12 April 2013 which indicated that there are 435 redemption transactions recorded in Account 20401 in respect of which unit holdings were reduced but no payment was made by the former Trustee to the applicable Unitholder.

These 435 transactions had a combined AUD value at the time of transaction of \$566,620 and the majority of the transactions (around 96%) occurred on or after 16 February 2013 being approximately one month prior to closure of the Fund. The majority of these transactions had also been separately identified in a schedule provided to the Trustee by the Administrators of LMIM

on 1 July 2013 and a schedule provided by former Investment Services Manager of LMIM on 16 September 2013. These transactions all related to partial redemption of units reflective of a distribution of earnings. A listing of these redemption transactions (referred to as the 'Trustee Redemption Schedule') is contained in Exhibit JV-19 to the Affidavit which is available on the Trustee's website at <https://www.kordamentha.com/creditors/lm-managed-performance-fund>.

As these redemptions had already been processed in the unitholder register and unit balances had been reduced on account of the redemption transactions, the Trustee sought directions that it is justified in paying these amounts to the Unitholders identified as having been impacted.

Directions were received that the Trustee is justified in paying the amounts identified in paragraph 156.3 of the Affidavit to the members identified in the Trustee Redemption Schedule.

### Accrued earnings

Account 20402 - Accrued Interest was used by the former Trustee to record accrued distribution entitlements prior to the distribution being formally processed. Account 20402 had a balance of \$1,578,257.96 as at 12 April 2013. Following review of the transactions recorded in the account for the period 1 July 2012 to 12 April 2013, it was apparent to the Trustee that there were a number of accrued distributions which had not been processed at the date of the Trustee's appointment.

However, except in the case of one unitholder (discussed below), it is not necessary for any adjustment to be made in respect of these accrual transactions because the unit prices had already been increased to reflect accrued but unpaid distributions and so the accrued earnings were already reflected in the value of the units.

The one exception relates to a single unitholder account with a unit price which remained consistent at GBP £1.00. The Trustee's analysis indicates that there are accrued but unpaid earnings relating to this unit holding which total GBP £2,795.12. The Trustee sought directions that it is justified in paying this amount to the member identified as having been impacted.

Directions were received that the Trustee is justified in making the payment identified in paragraph 169 of the Affidavit and otherwise taking no further steps concerning the transactions recorded in Account 20402.

## 3.4 Unitholder accounts past maturity

Investments in the Fund were ordinarily made for a fixed term of between one and five years, with Unitholders able to elect to automatically roll over their investment to a new term upon maturity or otherwise redeem their investment. The Trustee understands that due to liquidity issues experienced by the Fund in the period leading up to its closure, Unitholder redemptions were delayed in many cases.

The Trustee is aware that there were a number of instances where a Unitholder's account may have matured prior to closure of the Fund, but a redemption was not processed or reflected in the Unitholder's account, these are referred to as the 'Matured Accounts'. Based on analysis undertaken by the Trustee, there appears to be up to around 600 potential Matured Accounts.

As the units of the Matured Accounts were not redeemed as at the date of the Trustee's appointment, the Trustee sought directions that it is justified in taking no further steps with respect to these members. i.e. that unit holdings which might have matured prior to closure of the Fund will not receive any priority over other unit holdings.

Directions were received that the Trustee is justified in not taking any steps in relation to members of the Fund whose investments expired prior to the closure of the Fund on 19 March 2013, but whose units in the Fund were not redeemed.

## 3.5 Nominal Unitholding Accounts

There are three accounts with a unit balance of less than 40 units (the Nominal Unitholding Accounts) and an AUD value of less than \$50. The Trustee sought directions that it is justified in removing the Nominal Unitholding Accounts from the unitholder register and otherwise excluding those accounts from the distribution process.

Directions were received that the Trustee is justified in not taking any steps in relation to those members of the Fund who have a unit balance of less than 40 units.

## 3.6 Returned withholding tax

During the period 2008 to 2013, the financial statements of the Fund recorded a profit, and former trustee LMIM paid distributions to unitholders on that basis. LMIM paid withholding tax on behalf of Unitholders on the profit distributed. In the period 2008 to 2013, and prior to the Trustee's appointment, LMIM remitted \$7.9 million of withholding tax to the ATO in

respect of the MPF. Between 2017 and 2018, the Trustee was successful in recovering this \$7.9 million of withholding tax remitted to the ATO. The net proceeds from the recovery total approximately \$6.5 million (the 'Returned Withholding Tax') after fees and disbursements. These proceeds have been held in a high interest account pending distribution.

The Trustee was successful in recovery of the Returned Withholding Tax on the basis that, when correctly calculated, during the 2008 to 2013 financial years the Fund did not generate profits sufficient to permit or enable distributions to be paid to Unitholders. When correctly calculated, the Fund made a loss during the 2009 to 2013 financial years and a lower profit during the 2008 financial year. Consequently no liability to pay withholding tax should have arisen as no distributions should have been paid to Unitholders during the period.

The Trustee sought directions that it was justified to include the Returned Withholding Tax in the funds available for distribution to the current Unitholders of the Fund, instead of attempting to pay the Returned Withholding Tax to those current and former unitholders on whose account LMIM withheld withholding tax from distributions and paid it to the ATO.

Directions were received that the Trustee is justified in including the Returned Withholding Tax in the funds available for distribution to current members of the Fund.

### 3.7 Foreign currency and calculation of distributions

The basis for calculation of the distribution to Unitholders in a winding up is set out in the constitution of the Fund. In accordance with clause 11.5 of the constitution *'The Manager may distribute capital of the Scheme to Members subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the Manager divided by the number of Units on the Register on that date'*.

The Trustee considers a distribution in accordance with the constitution based solely on number of units held would be inequitable. Calculation of the distribution amounts based solely on number of units held does not give any regard to the difference in unit prices between the various unit classes and also does not give any regard to the various holding currencies and number of units held by each Unitholder being directly impacted by the value of the holding currency comparative to AUD.

Rather than calculate the distribution amounts based on number of units held, the Trustee intends to calculate distribution amounts based on the AUD value of unit holdings as at 19 March 2013 as recorded in the unitholder register ('AUD Value of Investment').

Directions were received that the Trustee is justified in calculating distributions to be made to members of the Fund who invested via currencies other than AUD based on their AUD Value of Investment.

The Trustee will also calculate distributions to be made to members of the Fund who invested in AUD based on the AUD Value of Investment. The Trustee confirms that AUD investors will not be disadvantaged by this calculation methodology.

## 4 Summary of recovery actions

The following provides a summary of the recovery actions undertaken by the Trustee over the course of the winding up. Detailed information regarding these recovery actions is contained in the Trustee's previous update reports.

### 4.1 Cash at appointment

Cash held in bank accounts of the Fund at appointment totalled approximately \$9.2 million. However, the Trustee assessed at the time that the Fund had net 'clear' cash available of only \$3.7 million due to existing claims against the cash held by various parties.

Of the \$9.2 million cash at appointment:

- \$1.5 million was returned to investors as it related to funds which had been received by the MPF but where no units had been issued prior to the closure of the Fund ('Quarantined Funds')
- \$1.2 million was paid to LMIM as responsible entity for the Australian Income Fund ('AIF'). These funds related to realisations made in relation to a loan to Barly Wood Pty Ltd and were required to be returned to AIF due to a Security Trust agreement which was entered in to by the Fund prior to the appointment of the Trustee.
- \$1.3 million was paid to LMIM as responsible entity for the First Mortgage Income Fund ('FMIF') to satisfy a loan from FMIF to MPF for the purchase of property known as the Bushland Beach land. This loan was secured by a fixed and floating charge over the entirety of the MPF.

- \$1.5 million was paid to LMIM on account of a lien against the assets of the Fund for the Administrators remuneration, expenses and costs during their time as trustee for the Fund from 19 March 2013 to 12 April 2013 and in assisting the fund since 12 April 2013 as required.

### Western Union account

Prior to the appointment of the Trustee, the Fund engaged in foreign currency hedging through services provided by three foreign currency exchange houses, HiFX, AFEX and Western Union. Prior to the appointment of the Trustee, proceeds held by AFEX and HiFX were returned to the MPF and are included in the cash at appointment.

At the time of appointment of the Trustee, Western Union remained the only party to hold foreign currency proceeds on behalf of the Fund. Western Union asserted that the \$1.2 million held by them ought to be set-off against the debts owed to Western Union by the LM Funds. The Trustee did not agree with this assertion.

Following negotiation a settlement was reached with Western Union and a substantial portion of the funds held by Western Union were returned to the Fund.

## 4.2 Other assets

Prior to the appointment of the Trustee, the Fund held 20 assets being 19 loan facilities predominately secured against real property developments across residential, commercial, and industrial sectors and one direct property investment.

### Loan accounts

The total balance of the 19 loan accounts of the MPF at 19 March 2013 was \$454.6 million.

The majority of loan facilities were advanced to fund real property developments and were secured by property mortgages. However, the majority of these property mortgages were second or third ranking securities, with first ranking securities being held in most cases by a separate LM fund (often either FMIF or AIF). This meant that when the security property (i.e. land development) was sold, the sale proceeds were first paid to the first ranking security holder, then if the first ranking security holder's loan was repaid in full, residual funds would have been available for distribution to the second ranking security holder and so on.

Due in part to declining property values at the time of the collapse of LM and over-leverage (i.e. debt funding equal to or exceeding the value of underlying security property), in most cases proceeds from realisation of the security property for each of the loans was insufficient to even repay the first ranking mortgagee in full. As a result, there have been minimal direct recoveries on the loan accounts. Direct recoveries against loan accounts (net of further advances and associated payments) over the course of the winding up have totalled \$7 million, being approximately 1.5% of the outstanding loan balances.

The poor security position of the MPF loan accounts is a significant contributor to the ultimate outcome for Unitholders in the MPF.

### Real property

In addition to the 19 loan accounts, the MPF had one direct property investment being the Bushland Beach land. Proceeds from realisation of this property were \$800,000 (before statutory costs).

## 4.3 Legal recovery actions

During the Trustee's investigations into the Fund, a number of potential claims were identified relating to transactions occurring prior to the appointment of the Trustee and which we consider resulted in the interests of other LM funds being preferred over the interests of the MPF. The pursuit of these claims was complicated and challenging given the limited resources of the MPF.

The below provides a summary of legal recovery actions taken by the Trustee. Further information regarding these recovery actions has been contained in the Trustee's previous update reports. We have attempted to provide a high-level summary of these actions, however note that many of the details surrounding these actions are highly complex.

## Loan to Peter Drake

In 2007, the MPF agreed to loan \$12 million to Peter Drake who was a director of LMIM. Over time, this loan increased and at the time of the Trustee's appointment the loan balance was approximately \$17 million. After taking action to recover this loan amount, including issuing notices of default to both Mr Drake and the guarantor of the loan, the Trustee caused proceedings to be commenced against Mr Drake in the Supreme Court of Queensland.

Following the success of the summary judgement proceedings, the Trustee took steps to issue a Bankruptcy Notice against Mr Drake which resulted in his bankruptcy on 9 January 2015 and the appointment of Raj Khatri and Jason Bettles of Worrells as Trustees of the Bankrupt Estate of Peter Drake ('the Bankrupt Estate'). Mr Drake was discharged from bankruptcy on 10 January 2018.

The final remaining matter in the administration of the Bankrupt Estate is the realisation of a property located at Savasavu in Fiji. The Trustees of the Bankrupt Estate have entered into an agreement to sell the Fijian property to a US citizen. The contract is subject to a six-month settlement period as in order for a non-Fijian citizen to purchase a freehold property in Fiji they need consent from the Fijian Government Minister for Lands. We have been advised that this consent has now been granted to the purchaser and the Trustees of the Bankrupt Estate are preparing for settlement.

Based on current estimates by the Trustees of the Bankrupt Estate, it is anticipated that return to the Fund will be in the range of approximately \$13,500 to \$85,000 plus \$27,500 funding which was provided to the Trustees of the Bankrupt Estate.

## Peregian Beach

In June 2010, the Fund provided initial project funding for a property development known as Peregian Beach. In 2012, a Deed of Priority and Subordination was entered into which ultimately subordinated MPF's security interest. The Trustee had reason to believe that this deed may have had the effect of breach of trust by LMIM against the Fund.

The Fund commenced proceedings against LMIM in this matter after receiving directions from the Supreme Court of Queensland that it was justified in doing so on 23 January 2015. In conjunction with the legal proceedings, the Trustee had also been in discussions with the Liquidators of LMIM regarding a potential settlement of the matter. Following negotiations, the Trustee and LMIM reached a formal agreement to settle the proceedings at an amount of \$675,000. Directions that the Trustee was justified in settling the matter were obtained from the Supreme Court of Queensland on 24 November 2015.

## Pre-paid management fees

At the time of the Trustee's appointment, the accounts of the Fund indicated that an amount of \$12.3 million had been prepaid by MPF to LM Administration Pty Ltd ('LMA') for management fees. Further investigations were undertaken by the Trustee to confirm this balance. The Trustee considered that this prepayment or overpayment of management fees to LMA constituted a breach of trust by LMIM.

A statement of claim was prepared and filed in the Supreme Court of Queensland on 6 February 2017. The statement of claim was served on LMIM after leave to proceed was granted following a hearing on 1 February 2018. Leave to proceed was granted on the condition that a notice to the defendant's solicitors that a defence and any counterclaim is required to be filed were given by 31 January 2019. The risk to the fund of providing this notice to the defendant's solicitors was that LMIM may start to incur significant costs in defending the action, a portion of which, the Fund could become liable for if it were unsuccessful in the action.

Prior to 31 January 2019, the Trustee determined that it had insufficient funds to prosecute this action and simultaneously defend an action being taken by the FMIF against the Fund and other parties ('the FMIF Receiver action'). The defence of this action was a priority of the Trustee as if the Trustee were wholly unsuccessful in its defence of this claim, it was possible that all remaining cash holdings of the MPF would be distributed to the FMIF resulting in a nil return to Unitholders. In addition, the Trustee considered that even if successful in pursuing this claim through the courts, material recovery was unlikely as both LMIM and LMA were in liquidation.

As a result, the Trustee applied to the Supreme Court of Queensland for a direction under section 96 of the Trusts Act that it would be justified in discontinuing this action. Notice of the application was served on Unitholders by email on 22 November 2018.

## Australian International Investment Services

In January 2005, LMIM as trustee for the MPF entered into a loan agreement with Australian International Investment Services Pty Ltd ('AIIS') where it took a first ranking security position. Subsequently, in or around November 2008, a deed of priority was

entered into where the first ranking security was in effect transferred to FMIF. Draw downs on the MPF loan, both before and after November 2008, included payments to FMIF in respect to interest accruing on FMIF loan to AIFS. The Trustee alleged that LMIM breached a number of duties it owed to the MPF and claimed equitable compensation against LMIM.

A statement of claim for this matter was filed in the Supreme Court of Queensland on 16 December 2015. Pursuant to an order made in the Supreme Court of Queensland on 22 November 2016, the defendant was not required to file a defence and any counterclaim until 28 days after the Trustee gives written notice to the defendant's solicitors and to the solicitors for the Receiver of the FMIF that a defence and any counterclaim is required to be filed.

After unsuccessful conclusion of settlement negotiations between MPF, FMIF and a number of other parties in early 2018, Mr David Whyte in his capacity as court appointed receiver of property of the FMIF, called upon the Trustee to either prosecute the action or discontinue. The Trustee determined at the time that it had insufficient funds to prosecute the action whilst simultaneously defending the FMIF Receiver action (discussed above). The Trustee considered it appropriate to apply to the Supreme Court of Queensland for a direction under section 96 of the Trusts Act that it would be justified in discontinuing the action. On 9 August 2018 an order was made that the Trustee would be justified in discontinuing the action.

## Barly Wood and Lifestyle

In August 2008, LMIM entered into an agreement with FMIF which involved the assignment of a number of loans from FMIF to LMIM. This transaction included the FMIF loans to Barly Wood Pty Ltd (Barly Wood) and The Lifestyle Investment Company Pty Ltd (Lifestyle). The Trustee claims that LMIM breached a number of duties owed to the MPF in the course of these transactions.

A statement of claim for this matter was filed in the Supreme Court of Queensland in August 2014. Due to the significant costs of litigation and demands on the cash reserves on the Fund. The Trustee entered into a litigation funding agreement for the Barly Wood and Lifestyle matters in with IMF Bentham Limited ('IMF') in 2015 to support litigation efforts and preserve the remaining assets of the Fund.

The proceedings were adjourned in 2016 to allow for the continuation of settlement negotiations between MPF, FMIF and a number of other parties following mediation of the FMIF Receiver action on 12 July 2016, however it became apparent in early 2018 that settlement negotiations would not be successful.

On 17 April 2018, IMF gave 14 days' notice of termination of the funding agreement for the Barly Wood and Lifestyle claims. This left the Trustee with the options to either continue to pursue the claims with ongoing costs being paid by the Fund or to discontinue the actions. Due to the financial position of the Fund, the Trustee considered that the Fund could not afford to continue to pursue the claims and that the most appropriate course of action would be to discontinue the proceedings. Directions under section 96 of the Trusts Act were given by the Supreme Court of Queensland on 7 June 2018 that the Trustee was justified in discontinuing these actions.

## Auditor claim

Williams Partners Independent Audit Specialists ('WPIAS') provided audit services to the Fund in 2011 and 2012. The Trustee has undertaken substantive investigations regarding a possible claim against WPIAS in relation to audit services provided to the MPF. Based on its assessment of likely costs to pursue the action further and likely recoveries if successful, the Trustee has determined that it would not be in the best interests of unitholders to pursue an action against WPIAS.

The Trustee has previously advised Unitholders that on 10 April 2019 ASIC announced that the Companies Auditors Disciplinary Board ('CADB') had decided to cancel the registration of Reginald Lance Williams (formerly of WPIAS). ASIC successfully contended before the CADB that Mr Williams had failed to carry out or perform adequately and properly the duties of an auditor in relation to his audit of the financial report of the MPF for the year ended 30 June 2012.

## Bellpac

In June 2006, LMIM as trustee for the MPF entered into a loan agreement with Bellpac Pty Ltd ('Bellpac') where it took a third ranking registered mortgage over land known as 'Balgownie No 1 Colliery Wollongong ('the Wollongong Property').

Prior to entering into this loan agreement, in March 2003, LMIM as responsible entity for the FMIF had entered into a loan agreement with Bellpac. From around March 2006, Bellpac was in default under the FMIF Bellpac loan and on 6 May 2009, Permanent Trustee Australia Limited ('PTAL') as custodian of LMIM as responsible entity of the FMIF appointed receivers and managers to Bellpac. On 30 July 2009, voluntary administrators were appointed to Bellpac and on 3 September 2009 Bellpac was placed into liquidation following a resolution of its creditors.

After entering into a sale agreement for the Wollongong Property in September 2004, a dispute had arisen between Bellpac and one of the intended purchasers of the Wollongong Property, Gujarat NRE Coking Coal Limited ('Gujarat'). Settlement deeds were executed between Bellpac and Gujarat in 2007 and 2008, however a further dispute arose in 2009 and a number of legal proceedings were commenced between Bellpac, Gujarat, LMIM, PTAL and another of the intended purchasers of the Wollongong Property. In July 2009 it was determined that FMIF was not in a position to fund the proceedings and the MPF began to fund the proceedings.

In June 2011 a settlement was reached between the parties whereby Gujarat was obliged to pay PTAL as custodian of LMIM as responsible entity of the FMIF, a settlement sum of \$35.5 million. In addition to the settlement proceeds, Gujarat was to pay an additional \$10 million to purchase the Wollongong Property.

Also in June 2011, FMIF and MPF came to an arrangement regarding the split of the settlement proceeds in the ratio of 65% of the proceeds to FMIF and 35% of the proceeds to MPF. This agreement was entered in to on the basis that 'The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation'. As a result of this agreement, MPF received a sum of \$15.5 million from the proceeds of the settlement between the parties.

#### *FMIF Receivers Action*

On 23 December 2014, LMIM as responsible entity of the FMIF commenced proceedings in the Supreme Court of Queensland against six current or former directors ('the Directors') of LMIM, LMIM itself and the MPF. FMIF alleges that the Directors breached duties owed to LMIM and FMIF in relation to the distribution of the \$15.5 million to MPF. FMIF sought to recover from the Directors, LMIM and the MPF, \$15.5 million plus interest and legal costs.

Following mediation on 12 July 2016, settlement negotiations continued through 2017 however they were ultimately unsuccessful. Despite the many attempts by the Trustee to have this claim discontinued against the MPF, the Receiver of the FMIF insisted on continuing the pursue the claim which ultimately resulted in the Trustee in incurring significant legal fees in defending this claim. Legal costs incurred in defending this action totalled approximately \$1.75 million.

#### *Claim against Bellpac liquidator*

In addition to the funding provided by the MPF to Bellpac to fund the proceedings between various parties, MPF provided funding of \$678,336 to the liquidator of Bellpac to fund a separate litigation. The liquidator of Bellpac was successful in this litigation and the Trustee made a claim in respect to the \$678,336 being paid out of proceeds in priority to any other secured or unsecured creditor together with interest.

#### *Settlement*

Shortly prior to the commencement of the trial for the FMIF Receivers action, a settlement was negotiated between the Trustee and the Receiver of the FMIF to settle the matter between the two parties.

This settlement was executed on 26 March 2019 and extends to:

- the FMIF Receivers action
- the funding provided to the liquidator of Bellpac Pty Ltd by MPF
- any claim by FMIF against the ATO Funds
- any other claim between the FMIF and MPF which is known, or could reasonably have been known to the FMIF or the MPF as at the date of the deed.

Following execution of the settlement, MPF were discontinued from the FMIF Receivers action on 27 March 2019.

## **4.4 ATO withholding tax recovery**

In the period 2008 to 2013, and prior to the Trustee's appointment, LMIM remitted \$7.9 million of withholding tax to the ATO in respect of the MPF. These amounts were withheld from unitholder distributions (both cash distributions and reinvestments) on the basis that unitholder distributions were distributions of profits generated by the Fund.

The Trustee determined throughout its investigations that proper assessment of carrying values of mortgage loans during this period should have resulted in additional provisions being raised which would have resulted in the Fund incurring losses for the period, rather than generating profits. This is due, in part, to the fact that the majority of income reflected in the accounts of

the MPF for the period was interest income being capitalised to loan accounts (i.e. interest income was not paid to MPF by borrowers, rather it increased the balance of borrower loan accounts).

The ATO agreed to refund the withholding tax paid by the MPF for the period 2008 to 2013 on the basis that no profits were made by the Fund for the period.

As outlined in Section 2.6 above, directions have been made in the Supreme Court of Queensland that the Trustee is justified in including the ATO withholding tax recovery amount in the funds available for distribution to current members of the Fund.

## 4.5 Receipts and payments

Enclosed as Appendix 1 is a summary of the receipts and payments of the Trustee for the period from 12 April 2013 to 25 March 2021.

## 5 Expected return to Unitholders

As outlined in the summary of receipts and payments, the Trustee currently holds cash of \$7.64 million.

Estimated future receipts are limited to GST receivable of approximately \$38,000 and potential recoveries from the Bankrupt Estate of Peter Drake estimated at between \$41,000 and \$112,500.

It is difficult to estimate future payments as these are largely contingent upon the costs of administering the update to the unitholder register, which in turn will depend upon the volume of changes requested by Unitholders and the quality of supporting documentation provided by Unitholders to substantiate these changes.

However, at this stage it is anticipated that the balance available for distribution may be in the range of approximately \$6 million to \$7 million.

As outlined in Section 3.3 of this report, directions have been obtained from the Supreme Court of Queensland that the Trustee is justified in making payment of certain unitholder liability account balances to the affected Unitholders in priority to the general distribution. The total value of these priority payments is approximately \$675,000 however is subject to change based on currency fluctuations.

After deducting the priority payment amounts, it is estimated that approximately \$5.33 million to \$6.33 million may be available for general distribution to Unitholders. The total AUD value of units held in the Fund is \$404.89 million which means that the return to Unitholders in the general distribution will be in the range of approximately 1.3 to 1.5 cents in the dollar, or 1.3% to 1.5% of AUD value.

## 6 Other fund management matters

### 6.1 Management fees

Earlier this year, the Trustee applied to the Supreme Court of Queensland for fee approval for the 14 month period of 2 September 2019 to 1 November 2020. Approval was granted for fees of \$254,663 (excl. GST), being a monthly average of \$18,190 for the period.

A summary of fees for the period from 2 November 2020 will be provided in the Trustee's next update report. Payment of fees for this period will be subject to court approval and Unitholders will be served with notice of any such application.

### 6.2 Next update

The Trustee does not expect there to be any significant updates following the distribution. It is likely that our next update will follow the distribution of fund monies.

Yours faithfully

KordaMentha  
Trustee of the MPF



## Appendix 1

### Summary of Receipts and Payments for the period 12 April 2013 to 31 March 2021

|                                                     | \$'000          |
|-----------------------------------------------------|-----------------|
| <b>Receipts</b>                                     |                 |
| Pre-appointment funds                               | 9,067           |
| Recovery of loan accounts                           | 7,045           |
| Land realisation (Bushland Beach)                   | 800             |
| Peregian Beach settlement proceeds                  | 675             |
| ATO withholding tax recovery                        | 7,900           |
| Other recovery proceeds                             | 1,963           |
| Bank interest                                       | 743             |
| Net foreign currency gain                           | 546             |
| Quarantined funds receipts                          | 2               |
| Other receipts                                      | 14              |
|                                                     | <b>28,754</b>   |
| <b>Payments</b>                                     |                 |
| Claims on pre-appointment funds                     |                 |
| Quarantined Funds payments                          | (1,483)         |
| Payment to AIF - Barly Wood                         | (1,248)         |
| Payment to LMIM - lien claim                        | (1,526)         |
| Repayment of secured creditor FMIF (Bushland Beach) | (1,335)         |
| Legal settlement costs and cost orders              | (250)           |
| Funding for Trustee of Peter Drake Bankrupt Estate  | (27)            |
| Legal fees and disbursements                        | (7,456)         |
| Trustee fees and disbursements                      | (5,461)         |
| Professional fees                                   | (1,195)         |
| Custodian fees                                      | (220)           |
| Forensic investigation fees and disbursements       | (101)           |
| Other asset realisation costs                       | (631)           |
| Other fund administration costs                     | (188)           |
|                                                     | <b>(21,121)</b> |
| <b>Net receipts</b>                                 | <b>7,634</b>    |