

Statement pursuant to s.96 of the *Trusts Act 1973*

1. The applicants are the Court-appointed trustees of a trust named the LM Managed Performance Fund (“**the Fund**”).

History of the Fund and the appointment of the New Trustees

2. The second respondent, LMIM (“**the Former Trustee**”) established the Fund in approximately 2001.
3. Pursuant to Recital A and clause 1.1 of the trust deed, the Former Trustee was the trustee of the Fund, although styled as “Manager”.
4. The Former Trustee is also the responsible entity of seven managed investment schemes (“**the Other Schemes**”), which were registered managed investment schemes under Part 5C of the *Corporations Act 2001*.
5. Pursuant to clause 23.1(b) of the Trust Deed, the Former Trustee was required to resign if, being a corporation, it became an externally-administered body corporate as defined in the *Corporations Act 2001*.
6. On 19 March 2013 the first respondents were appointed voluntary administrators of LMIM (“**the Administrators**”). Accordingly the Former Trustee was required to resign as trustee of the Fund.
7. Also on 19 March 2013 the Administrators were appointed voluntary administrators of a related entity, LM Administration Pty Ltd (“**LMA**”).
8. Mr. Park, one of the Administrators, has sworn that the Former Trustee effectively had no employees of its own, that all of the employees who managed and operated the business of the Fund were employed by LMA, and that this had been the case for many years. He has sworn that LMA provided staff, premises and equipment and fund management services to the Fund and to the Other Schemes.
9. On 12 April 2013 the Chief Justice made orders removing the Former Trustee as trustee of the Fund, and appointing the applicants new trustees of the Fund in its place (“**the New Trustees**”).
10. Subsequently, two applications were filed in respect of the New Trustees’ appointment:

- (a) on 19 April 2013 the New Trustees filed an application seeking orders that certain property of the Fund vest in them, pursuant to sections 82 and 90 of the *Trusts Act 1973*;
 - (b) on 30 April 2013 the Administrators and the Former Trustee filed an application seeking orders that the orders of the Chief Justice dated 12 April 2013 appointing the New Trustees be set aside.
- 11. On 13 May 2013 the Chief Justice dismissed the Administrators and the Former Trustee's application, and granted the relief sought in the New Trustees' application.
- 12. On 23 May 2013 the Chief Justice made orders consequent upon his reasons for judgment dated 13 May 2013. His Honour ordered that:
 - (a) certain property of the Fund vest in the New Trustees, upon certain undertakings given by the New Trustees, including an undertaking to hold the amount of \$1,364,299 on account of the liens claimed by the Former Trustee and the Administrators, without prejudice to the quantum and priority of those claims; and
 - (b) the Former Trustee and the Administrators pay the New Trustees' costs of and incidental to their application filed 30 April 2013 on the indemnity basis, and that such costs not be recoverable from the assets of the Fund.
- 13. On 1 August 2013 the Administrators were appointed liquidators of the Former Trustee.

Claim by the Administrators

- 14. The Administrators' final claim for indemnity from the assets of the Trust totalled \$2,124,871.
- 15. This claim included the following costs and expenses which the Administrators alleged related to the Fund:
 - (a) expenses totalling \$617,478 that the Administrators incurred under two service agreements with LMA;
 - (b) legal expenses totalling \$754,013;

- (c) the Administrators' professional fees totalling \$406,522, which the Administrators claim related to the preservation and protection of the assets of the Fund;
 - (d) the Administrators' professional fees totalling \$302,968, which the Administrators claim were general professional fees they incurred in administering the Former Trustee, of which they had apportioned a percentage to the Fund; and
 - (e) out of pocket expenses totalling \$18,822.
16. The Administrators had apportioned the amounts listed in paragraphs 15(a), 15(d) and 15(e) above between the Fund, and the Other Schemes. The principal dispute between the parties was how this apportionment should have been carried out.
17. The Administrators contended that it had been reasonable for them to apportion these expenses by comparing the total funds under management of the Fund with the total funds under management of the Other Schemes.
18. The New Trustees contended that these expenses should have been apportioned by comparing the value of the assets of the Fund with the value of the assets of the Other Schemes. Although the Fund has approximately \$402 million in funds under management, the New Trustees estimate that assets of the Fund (once realised) will only total between \$11.2 to \$12.3 million.
19. The Administrators acknowledge that the New Trustees have already paid the amount of \$110,246 to them, on account of items in their claim that were not in dispute.

Proposed settlement of the Administrators' claim

20. Following a mediation of the dispute, the New Trustees and the Administrators have agreed to settle the Administrators' claim on the following basis. This agreement is conditional upon New Trustees obtaining directions pursuant to s.96 of the *Trusts Act 1973* that they are justified in entering into this settlement:
- (a) that the New Trustees pay to the Administrators the amount of \$1,679,000.00, in full and final settlement of their claim to be indemnified for any existing or future fees, expenses and other liabilities from the Fund;

- (b) this figure of \$1,679,000.00 includes the amount of \$110,246.00 that was not in dispute, and which has already been paid to the Administrators. Accordingly the actual amount of money to be paid to the Administrators is \$1,568,754.00;
 - (c) the Administrators have agreed to pay the amount of \$244,000.00 to the New Trustee, on account of the indemnity costs order referred to in paragraph 12(b) above.
21. The New Trustees consider that the proposed settlement is reasonable, for the following reasons (which the New Trustees took into account in agreeing to the proposed settlement):
- (a) their review and assessment of the merit and value of the Administrators' Indemnity Claim, including the material provided by the Administrators in support of their claim;
 - (b) the Administrators' explanation that certain costs and expenses they had claimed did relate to the Fund, which had not initially been apparent;
 - (c) the Administrators' explanation that the legal costs claimed did not include their costs of the application referred to in paragraph 10(b) above;
 - (d) the risk and expense to the members of the Fund in defending the Administrators' Indemnity Claim to a final hearing, if it could not be settled;
 - (e) that the Administrators would ordinarily be entitled to be indemnified from the assets of the Fund in respect of their reasonable costs of enforcing their right to indemnity, and so the amount of the Administrators' indemnity claim would continue to grow if it was not settled; and
 - (f) the risk that a Court could determine:
 - (i) that given the difficulty in assessing the true value of the Fund and the Other Schemes before the assets of each fund had been realised or valued, it was reasonable for the Administrators' expense claims to be apportioned on the basis of funds under management (as contended by the Former Trustee), as opposed to the value of the Funds (as contended by the New Trustees). On this basis the value of the Fund would only become apparent following the

realisation of Fund assets, which would only occur at some point after the Administrators had carried out their apportionment; or

- (ii) that even if the true value of the assets of the Fund was less than had been allowed in the Administrators' apportionment, the management of the affairs of the Fund had in fact taken up a disproportionate amount of the Administrators' time and effort, (for instance in communicating with investors in the Fund and managing its assets), and that the true value of the Fund did not accurately reflect the time and effort that had been required.

- 22. The settlement amount of \$1,679,000.00 reflects an overall reduction of \$445,871.00 (21%) from the Administrators' total claim of \$2,124,871.00.
- 23. In particular, the settlement amount reflects a reduction in the Administrators' claims for the items listed in paragraphs 15(a), 15(d) and 15(e) above of approximately \$330,000.00, or 35% of the amounts originally claimed.