

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: EQUITITRUST LIMITED ACN 061 383 944

AND

Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729

AFFIDAVIT

I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Registered Liquidator, say on oath:

1. I am a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand and a professional member of the Australian Restructuring Insolvency and Turnaround Association.
2. By Orders of this Honourable Court made on 21 November 2011 and 23 November 2011 (the **Orders**) I was appointed:
  - (a) pursuant to sections 1101B(1) and 601NF(2) of the *Corporations Act 2001* (Cth) (the **Act**) as the receiver of the property of the Equititrust Income Fund ARSN 089 079 854 (**EIF**) and the property of the Equititrust Priority Class Income Fund ARSN 089 079 729 (**EPCIF**) (collectively, the **Funds**); and
  - (b) pursuant to section 601NF(1) of the Act, to take responsibility for ensuring that the Funds are wound up in accordance with the Funds' constitutions.
3. Now produced and shown to me and marked "**DW-1**" is a true and correct copy of the Orders under which I was appointed and the Reasons for Judgment of Justice Applegarth dated 23 November 2011.

**Background - Summary of the Responsible Entity and the Funds**

*Equititrust Limited*

4. Equititrust Limited ACN 061 383 944 (In Liquidation) (Receivers and Managers Appointed) (**EL**) is the Responsible Entity (**RE**) of the Funds.

*The EIF*

5. The EIF is a first mortgage fund, meaning that EL as RE of the EIF pooled investors' funds and loaned them to third parties. Usually EL as RE of the EIF took first mortgages over real property as security for these loans.

Signed by: \_\_\_\_\_

Taken by: \_\_\_\_\_

Affidavit  
Filed on behalf of the Court Appointed Receiver  
Form 46 R.431

GADENS LAWYERS  
Level 11, 111 Eagle Street  
BRISBANE QLD 4000  
Tel No.: 07 3231 1666  
Fax No: 07 3229 5850  
SZC:JSO:201804017

6. There are approximately 1,600 investors in the EIF. As at the date of my appointment, the written down balance of the 29 loans that remained outstanding was \$127 million (that is, the written down value of the loans after provisions for loss). Upon my appointment I became aware that only one loan, for approximately \$300,000, was being serviced by its borrower. The remainder of the loans had been in default for some time.
7. The EIF had provided the majority of these 29 loans in relation to the acquisition and/or development of residential land in Queensland, New South Wales and South Australia, although two of these loans also had trading businesses associated with them.
8. Now produced and shown to me and marked "DW-2" is a true and correct copy of the Consolidated Constitution for the EIF dated 3 June 2011 that I obtained following my appointment.

*The EPCIF*

9. The EPCIF has five members. Those investors invested a total amount of \$4.6 million. Its only asset is units that it holds in the EPF. My investigations reveal that the anticipated current value of this asset is nil.
10. Now produced and shown to me and marked "DW-3" is a true and correct copy of the replacement constitution for the EPCIF dated 30 November 2010 and Deed Poll dated 13 December 2010 (which varies the constitution) that I obtained following my appointment.
11. Given the EPCIF has only five members and relatively minimal assets, the majority of my role has been as receiver of the property of the EIF and overseeing the winding up of the EIF.

*The EPF*

12. EL is also the manager of the Equititrust Premium Fund (EPF), which is an unregistered managed investment scheme. I have not been appointed in any capacity to the EPF or its property.

*Appointment of Voluntary Administrators and Receivers to EL*

13. On Wednesday, 15 February 2012, Blair Pleash, Richard Albarran and Glen Oldham of the firm Hall Chadwick (the **administrators**) were appointed administrators of EL.
14. On Thursday, 16 February 2012, the National Australia Bank Ltd (NAB) appointed William Colwell (**Mr Colwell**) and Greg Moloney (**Mr Moloney**) of the firm Ferrier Hodgson receivers and managers of EL. This appointment was in respect of EL only, not in respect of the EIF or the EPCIF. Mr Maloney ceased being a receiver of EL on 11 May 2018. Mr Colwell remains appointed as receiver and manager of EL.
15. After the appointment of the administrators and Mr Colwell and Mr Maloney to EL, I sought and obtained an order from this Honourable Court (with the consent of the then administrators and Mr Colwell and Mr Maloney) which (without derogating from my appointment or my powers pursuant to the Orders) authorised me to *inter alia*:
  - (a) take all steps necessary to ensure the realisation of property of the EIF held by EL as RE of the EIF, by exercising any legal right of EL as RE of the EIF in relation to the property of the EIF;
  - (b) bring, defend or maintain any proceedings on behalf of the EIF in the name of EL as is necessary for the winding up of the EIF in accordance with clause 9 of EIF's constitution; and

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- (c) take all steps necessary to effect the implementation of a NAB bank guarantee facility and the replacement of the existing bank guarantee facilities with the Commonwealth Bank.
16. Now produced and shown to me and marked "DW-4" is a true and correct copy of the Order of Justice Dalton dated 29 February 2012.
17. Subsequently, at the second meeting of creditors of EL, which was held on Friday 20 April 2012, the creditors of EL resolved that EL should be wound up and further resolved to appoint Blair Pleash, Richard Albarran and Glen Oldham liquidators of EL. Glen Oldham ceased being a liquidator of EL on 17 July 2013. Mr Pleash and Mr Albarran (the **liquidators**) remain appointed as liquidators of EL.
18. Now produced and shown to me and marked "DW-5" is a true and correct copy of an historical company search of EL conducted on 1 August 2018, which shows the appointment of the various insolvency practitioners to EL.

### **Conduct of the winding up of the EIF**

19. By way of background, upon my appointment as receiver of the property of the EIF and as appointee under section 601NF(1) of the Act I reviewed the books and records of the EIF, met with the staff and senior management of EL, gathered information about the assets and liabilities of the EIF and took steps to ensure that EL put in place a strategy for the orderly winding up of the EIF.
20. Since my appointment, I have caused 46 properties to be realised, with a total gross realisation of approximately \$59.26 million.
21. There are no more properties remaining to be sold.
22. Since my appointment, I have also progressed legal claims/proceedings in relation to the following matters:
- (a) three claims against valuers seeking damages for negligence. All of the claims have now settled, which achieved gross recoveries of approximately \$7.075 million.
  - (b) a claim against a bankrupt borrower and related parties to recover an interest in surplus proceeds from the sale of a property, which achieved gross recoveries of approximately \$2.08 million;
  - (c) a claim against a guarantor in respect of an interest in a property to recover monies owing to the EIF, which achieved gross recoveries of approximately \$1.75 million;
  - (d) various claims involving the EPF, which achieved gross recoveries of approximately \$1.28 million.
23. From the date of my appointment on 21 November 2011 to 30 June 2018 there have been receipts totalling \$78.346 million.
24. Cash at bank as at 30 June 2018 is approximately \$8.094 million.
25. To date, I have made three interim distributions to investors totalling approximately \$20.554 million, being 10.6 cents per unit on the units held at the date of my appointment. The total return to investors is estimated at between 12.6 cents and 12.8 cents per unit, being a further 2.0 to 2.2 cents per unit. This estimate excludes further potential legal recoveries but includes the estimated costs of the receivership to finalisation.

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Signed by: 

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## Claim for indemnity

### *Claim for indemnity from the EIF*

26. Since in or about March 2012, I (or my solicitors, on my instructions) have been corresponding with the liquidators (or their solicitors) in respect of their claim for an indemnity from the EIF.
27. That correspondence has included the following:
- (a) Letter from BDO to Gadens dated 19 March 2012;
  - (b) Letter from Hall Chadwick to BDO dated 3 April 2012;
  - (c) Letter from the Liquidators' then solicitors, Thomsons Lawyers, to my solicitors, Gadens Lawyers, dated 13 April 2012;
  - (d) Letter from Gadens Lawyers to Thomsons Lawyers dated 17 April 2012;
  - (e) Letter from BDO to Hall Chadwick dated 17 April 2012;
  - (f) Letter from Thomsons Lawyers to Gadens Lawyers dated 31 August 2012;
  - (g) Letter from Gadens Lawyers to Thomson Geer Lawyers dated 19 September 2012.
28. Now produced and shown to me and marked "DW-6" is a true and correct copy of each of the letters referred to in paragraph 27(a) to (g) above.
29. Subsequently, on 25 October 2012, the liquidators made an application in these proceedings for directions:
- (a) as to the manner in which, and the extent to which, they may seek to recover their remuneration and expenses in respect of the administration of EL out of the assets of the EIF;
  - (b) that I, as receiver of the EIF, cause \$202,388.99 to be paid from the EIF to EL so as to reimburse and indemnify EL for liabilities incurred by EL under an agreement entitled "Services Agreement" entered into on or about 20 December 2011.
30. Now produced and shown to me and marked "DW-7" is a true and correct copy of the liquidators' application filed 25 October 2012.
31. The liquidators' application has not been set down for hearing and otherwise has not been progressed by the liquidators.
32. Given there were no more properties to be sold at the time and there remained only legal proceedings to be finalised in the winding up of the EIF, on 31 August 2016 I instructed my solicitors to write to the then solicitors for the liquidators of EL, Thomson Geer Lawyers, regarding the outstanding matters which I considered would need to be finalised in order for the winding up of the EIF to be completed.
33. Those matters included:
- (a) the liquidators' claim to an indemnity from the EIF in respect of their remuneration as administrators and liquidators of EL;
  - (b) determining an appropriate process as between the liquidators and me by which:

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- (i) any outstanding debts payable by, and the claims against, EL can be ascertained;
- (ii) those debts and claims can be adjudicated upon (in accordance with the *Corporations Act 2001*);
- (iii) any claim for an indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which if admitted can be identified;
- (iv) I am notified of any such claim for an indemnity from the property of the EIF and can have the opportunity to seek further information in relation to any claim and then accept or reject any claim (or accept or reject any part of it),

(referred to herein as the **proof of debt process**).

- 34. In that correspondence, my solicitors foreshadowed that I intended to make an application to the Court to resolve these matters and, for the purposes of that application, sought from the liquidators further information regarding their claim to an indemnity from the assets of the EIF for their remuneration as administrators and liquidators of EL.
- 35. Now produced and shown to me and marked “**DW-8**” is a true and correct copy of the letter sent by my solicitors to the liquidators’ solicitors dated 31 August 2016.
- 36. On 23 September 2016 my solicitors received from the solicitors for the liquidators a letter which sought an indemnity for:
  - (a) their remuneration as liquidators of EL (to 29 February 2016) in the amount of \$1,228,325.00; and
  - (b) their disbursements in the amount of \$929,640.16.

That letter enclosed spreadsheets detailing the various time entries for which an indemnity is sought.

- 37. Now produced and shown to me and marked “**DW-9**” is a true and correct copy of the letter received from the solicitors for the liquidators dated 23 September 2016, including a sample of the spreadsheets enclosed with that letter (the complete copy is very large and so has not been included for convenience – but could be produced if that would assist).
- 38. On 1 November 2016, I caused my solicitors to write to the then solicitors for the liquidators of EL, Thomson Geer Lawyers, to seek:
  - (a) clarification of the periods for which fees already paid relate to;
  - (b) copies of any documents evidencing the fixing and/or approval of the liquidators’ remuneration, including, but not limited to, a copy of the orders made on or about 30 October 2013, referred to in the liquidators’ report dated 15 November 2013; and
  - (c) clarification of the basis of the liquidators’ claim for an indemnity for their remuneration of \$1,228,325.00 (for the period until 29 February 2016), given it appears they have already been paid remuneration for the same period now being claimed;
  - (d) copies of the invoices for the disbursements sought to be paid;
  - (e) clarification of the amounts already paid to the liquidators by way of disbursements; and
  - (f) clarification of the basis for the liquidators’ claim for disbursements of \$929,640.16, given

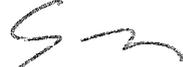
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it appears they have already been paid the amount of \$751,920.73 for disbursements for the same period now being claimed.

39. Now produced and shown to me and marked "DW-10" is a true and correct copy of the letter sent by my solicitors to the liquidators' solicitors dated 1 November 2016.
40. On 24 January 2017, my solicitors received a letter from the solicitors for the liquidators wherein they:
- (a) enclosed a copy of the Short Minutes of Order agreed by the parties and entered by the Court on 1 November 2013, which relates to the liquidators' remuneration for the period of 20 April 2012 to 30 April 2013;
  - (b) advised that they are in the process of redacting the liquidators' invoices and will provide that shortly.
41. Now produced and shown to me and marked "DW-11" is a true and correct copy of the letter received from the solicitors for the liquidators dated 24 January 2017, including enclosures.
42. On 21 March 2017, I caused my solicitors to write to Thomson Geer Lawyers, to seek:
- (a) a copy of the redacted invoices of the legal costs summarised in the liquidators' solicitors letter of 23 September 2016;
  - (b) clarification as to whether the liquidators seek any indemnity for any remuneration or costs in their capacity as administrators of EL.
43. Now produced and shown to me and marked "DW-12" is a true and correct copy of the letter sent by my solicitors to the liquidators' solicitors dated 21 March 2017.
44. On 5 May 2017, my solicitors received a letter from the now solicitors for the liquidators, Hegarty Legal, wherein they:
- (a) enclosed a copy of the redacted invoices for legal costs and provided a further explanation of each file;
  - (b) confirmed that the liquidators do seek indemnity for remuneration in their capacity as administrators of EL, and advised that the details of the claims made were set out in the letter from Thomson Geer dated 31 August 2012 (referred to at paragraph 27(f) above and contained in exhibit DW-6 herein).
45. Now produced and shown to me and marked "DW-13" is a true and correct copy of the letter received from the solicitors for the liquidators dated 5 May 2017 (including enclosures).
46. On 23 June 2017, I caused my solicitors to write to the solicitors for the liquidators of EL. In that letter, my solicitors noted that the liquidators' claim for an indemnity for remuneration in their capacity as administrators of EL was contained in the letter from Thomson Geer Lawyers dated 31 August 2012. They referred to the response to that letter dated 19 September 2012 in which my solicitors advised the liquidators that the brief list of items provided as an explanation for their claim was insufficient to allow me to give proper consideration to the matters which they sought remuneration for. My solicitors reiterated the request, as set out in their letter of 19 September 2012, for the liquidators to provide narrations detailing:
- (a) the time spent on each category of work and the costs and remuneration attributable to each category;
  - (b) a breakdown of each individual who carried out each task, their charge out rate and the

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relevant narrative in support of each amount of remuneration claimed; and

- (c) an explanation as to why these tasks were carried out (including why they were proper and necessary) and in what way they were done by EL as responsible entity for the EIF and for the benefit of investors.
47. Now produced and shown to me and marked "DW-14" is a true and correct copy of the letter sent by my solicitors to the liquidators' solicitors dated 23 June 2017, including the enclosed letter dated 19 September 2012.
48. On 12 July 2017, I caused my solicitors to write to the solicitors for the liquidators of EL, seeking a response to the letter of 23 June 2017. Now produced and shown to me and marked "DW-15" is a true and correct copy of the email sent by my solicitors to the liquidators' solicitors dated 12 July 2017.
49. On 28 November 2017, I caused my solicitors to write to the solicitors for the liquidators of EL, in response to the liquidators' claim for indemnity in their capacity as administrators and liquidators of EL. In that correspondence, my solicitors, *inter alia*:
- (a) advised, in respect of the claim for indemnity for the period of the voluntary administration of EL, that:
- (i) while this claim was the subject of an application made by the liquidators in Supreme Court Proceedings numbered 10478 of 2011 on 25 October 2012, that claim has not been properly articulated or progressed;
- (ii) I was not in a position to consider the liquidators' claim for remuneration for the period of the administration because the liquidators had failed to provide a full explanation of the tasks undertaken, the remuneration incurred and how the tasks the subject of the claim for remuneration were performed on behalf of EL as responsible entity of the EIF;
- (iii) in the absence of a full breakdown of the disbursements incurred (in particular in relation to the claim of \$202,389.00, relating to the ECG Services Agreement), and an explanation as to what extent they relate to work undertaken by the liquidators on behalf of the EIF, I was not in a position to consider the liquidators' claim for disbursements;
- (b) advised, in respect of the claim for indemnity for the period of the liquidation of EL, that:
- (i) I had now reviewed the excel spreadsheet of time entries provided under cover of letter dated 23 September 2016 for the period of the liquidation, from 20 April 2012 to 29 February 2016;
- (ii) enclosed a spreadsheet with the letter which identified which entries I had accepted or rejected and, if rejected, the reasons for rejecting the claim;
- (iii) the total amount accepted was \$7,993.50.
- (iv) in respect of the disbursement invoices provided, the redactions were so extensive that it is not possible to determine whether the costs were reasonably incurred in the care, preservation and realisation of the property of the EIF or reasonably incurred in the administration of the property of the EIF. For that reason and in the absence of a proper explanation, these costs are rejected;
- (c) sought confirmation of whether the liquidators maintained their claim for indemnity for the full amount in respect of their remuneration and expenses during the period of the

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liquidation, and whether they also intend to make a separate claim for remuneration and expenses for the period of the administration and, if they do, invited them to provide the further information and explanations sought (as to why the costs were properly an expense reasonably incurred in the care, preservation and realisation of the property of the EIF or reasonably incurred in the administration of the property of the EIF) by no later than 12 December 2017.

50. Now produced and shown to me and marked "DW-16" is a true and correct copy of the letter sent by my solicitors to the liquidators' solicitors dated 28 November 2017 including a sample of the spreadsheets enclosed with that letter (the complete copy is very large and so has not been included for convenience – but could be produced if that would assist). Please note that the spreadsheet provided by the liquidators under the cover of the letter from Hegarty Legal to Gadens dated 23 September 2016 referred to above were re-ordered in the spreadsheet attached to my solicitors letter dated 28 November 2017.
51. No substantive response has been received from the liquidators in response to this letter.

*Administrators' remuneration*

52. On 20 April 2012, at the second meeting of creditors of EL resolutions were passed:
- (a) appointing the administrators as liquidators of EL;
  - (b) fixing the remuneration of the liquidators in their capacities as Administrators of EL from the commencement of the Administration to 20 April 2012 up to a maximum of \$400,000 plus GST; and
  - (c) forming a Committee of Inspection.
53. Now produced and shown to me and marked "DW-17" is a true and correct copy of the minutes of the second meeting of creditors of EL.
54. By their letter dated 31 August 2012 (referred to at paragraph 27(f) above and contained in exhibit marked DW-6 herein), the liquidators sought an indemnity from the EIF for their remuneration for the voluntary administration period in the amount of \$805,486.00.
55. In the letter from my solicitors to the liquidators' solicitors dated 19 September 2012 (referred to at paragraph 27(f) above and contained in exhibit marked DW-6 herein), my solicitors responded to the liquidators' claim and sought *inter alia*:
- (a) a full explanation of the tasks undertaken;
  - (b) the remuneration incurred; and
  - (c) how the tasks the subject of the claim for remuneration were performed by EL as responsible entity of the EIF.
56. As noted at paragraph 51 above, despite this request and my repeated requests for this information, this further information has not been forthcoming from the liquidators.

*Liquidators' remuneration*

57. In the liquidators' report dated 22 August 2013, the liquidators advised that:
- (a) approval was sought from EL's Committee of Inspection (COI) for their remuneration for the period of the liquidation to 30 November 2012 in the amount of \$644,101.00;

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- (b) as this amount was not approved by the COI, they applied to the Court for approval of their remuneration and that the liquidators were awaiting a hearing date;
  - (c) a meeting of the COI was held on 18 April 2013 at which time the COI approved the liquidators' remuneration for the period from 1 December 2012 to 31 January 2013;
  - (d) at the meeting of the COI on 18 April 2013 a process was agreed between the liquidators and the COI in order to consider approval of the liquidators' remuneration going forward;
  - (e) a further meeting of the COI was held on 26 July 2013 to consider approving the liquidators' remuneration for the period 1 February 2013 to 30 April 2013 and that the amount sought for the period 1 May 2013 to 31 July 2013 was subject to further consideration by the COI.
58. Now produced and shown to me and marked "DW-18" is a true and correct copy of the liquidators' report dated 22 August 2013.
59. In the liquidators' report dated 15 November 2013, the liquidators advised that on 30 October 2013 the Court made orders that:
- (a) their remuneration for the period 20 April 2012 to 30 November 2012 be approved in the amount of \$497,714.03 plus GST; and
  - (b) their remuneration for the period 1 December 2012 to 30 April 2013 be approved in the amount of \$402,525.45.
60. Now produced and shown to me and marked "DW-19" is a true and correct copy of the liquidators' report dated 15 November 2013.
61. I have reviewed the liquidators' reports to creditors dated 23 December 2013, 17 April 2014, 23 June 2014, 14 July 2014, 4 October 2016 (as amended by a report to creditors dated 10 October 2016), 1 February 2017, 3 April 2017, 26 July 2017, and 11 May 2018. In addition, I have reviewed the minutes of the meeting of creditors held on 28 May 2018. These reports and the minutes of the 28 May 2018 meeting reveal that:
- (a) a meeting of the COI held on 21 November 2013 was requested to approve the liquidators' remuneration for the period from 1 May 2013 to 30 September 2013 in the amount of \$206,946.80 plus GST. However, that meeting of the COI failed to achieve a quorum and the request was not considered at that meeting;
  - (b) a meeting of creditors held on 21 October 2016 was requested to approve the liquidators' remuneration as follows (but did not approve any of the amounts of remuneration requested):
    - (i) for the period from 1 May 2013 to 30 September 2013 – \$206,946.00 plus GST;
    - (ii) for the period from 1 October 2013 to 30 June 2014 – \$143,473.00 plus GST; and
    - (iii) for the period from 1 July 2014 to 31 August 2016 – \$192,513.00 plus GST;
  - (c) the 28 May 2018 meeting of creditors was requested to approve the liquidators' remuneration as follows (but did not approve any of the amounts of remuneration requested):
    - (i) for the period from 1 May 2013 to 30 September 2013 – \$206,946.00 plus GST;
    - (ii) for the period from 1 October 2013 to 30 June 2014 – \$143,473.00 plus GST;

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- (iii) for the period from 1 July 2014 to 31 August 2016 – \$192,513.00 plus GST; and
  - (iv) for the period from 1 September 2016 to 31 March 2018 – \$290,056.50 plus GST; and
  - (d) accordingly, no further approvals of the liquidators' remuneration have been given by the COI, the creditors or the Court after 30 October 2013.
62. Now produced and shown to me and marked "DW-20" is a true and correct copy of the liquidators' report dated 4 October 2016, which details the request referred to in paragraph 61(a) above (at pages 6-7), together with the report to creditors dated 10 October 2016 which corrects a number of errors in that report.
63. Now produced and shown to me and marked "DW-21" is a true and correct copy of the liquidators' report dated 11 May 2018, which details the request referred to in paragraph 61(b) above (at page 8).
64. Now produced and shown to me and marked "DW-22" is a true and correct copy of the minutes of the meeting of creditors which took place on 28 May 2018 (referred to at paragraph 61 above), which details the request referred to in paragraph 61(c) above (at pages 5-6).
65. By their letter dated 23 September 2016 (referred to at paragraph 37 above and exhibit marked DW-9 herein), the liquidators sought an indemnity from the EIF for their remuneration for the liquidation period to 29 February 2016 in the amount of \$1,228,325.00.
66. In the letter from my solicitors to the liquidators' solicitors dated 28 November 2017 (referred to at paragraph 50 above and exhibit marked DW-16 herein), my solicitors responded to the liquidators' claim and sought *inter alia*:
- (a) a full explanation of the tasks undertaken;
  - (b) the remuneration incurred; and
  - (c) how the tasks the subject of the claim for remuneration were performed by EL as responsible entity of the EIF.
67. As noted at paragraphs 51 and 56 above, despite this request and my repeated requests for this information, this further information has not been received from the liquidators.

#### **Directions sought**

68. Given the liquidators and I have not been able to agree the amount of the indemnity from the EIF to which they are entitled for their remuneration as liquidators and administrators of EL, I consider it appropriate that directions be made to facilitate the resolution of any claim the liquidators may have to an indemnity from the EIF including in respect of any claim the liquidators maintain for their remuneration as liquidators or administrators of EL.
69. Furthermore, I also consider it appropriate that directions be made to facilitate the resolution of the proof of debt process, that is, the resolution of any claim for indemnity from the EIF with respect of any claim made by a creditor of EL (insofar as the expense or liability was or is incurred in connection with EL acting as RE for the EIF) and any expense or liability incurred or paid by EL in its capacity as RE of the EIF or by Blair Pleash or Richard Albarra in acting as administrators or liquidators of EL (insofar as the expense or liability was or is incurred in connection with EL acting as RE for the EIF).
70. In this regard, I propose that the Court make the following directions:

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Signed by: 

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- (a) the liquidators are directed to:
- (i) ascertain debts they say are payable by, and claims against, EL in accordance with the Act;
  - (ii) adjudicate upon those debts and claims in accordance with the provisions of the Act;
  - (iii) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which is admitted by the liquidators in the winding up of EL (each such claim for indemnity referred to as a "**Creditor Indemnity Claim**");
  - (iv) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, expense or liability incurred by Blair Pleash or Richard Albarran in acting as administrators or liquidators of EL (whether incurred in their own name or in the name of EL) insofar as the expense or liability was or is incurred in connection with EL acting as RE for the EIF (each such claim for indemnity referred to as an "**Administration Indemnity Claim**");
  - (v) identify whether EL has a claim for indemnity from the property of the EIF in respect of any, or any part of any, other expense or liability incurred or paid by EL in its capacity as RE of the EIF or by Blair Pleash or Richard Albarran in acting as administrators or liquidators of EL (whether incurred in their own name or in the name of EL) insofar as the expense or liability was or is incurred in connection with EL acting as RE for the EIF including any claim the liquidators maintain for their remuneration as liquidators or administrators (being an expense or liability to which paragraphs (iii) and (iv) do not apply) (each such claim for indemnity referred to as a "**Recoupment Indemnity Claim**");
- (b) within sixty days of the date of the order, the liquidators notify me in writing of any Administration Indemnity Claim and any Recoupment Indemnity Claim identified by the liquidators;
- (c) within 14 days after:
- (i) any debt or claim is admitted by the liquidators in the winding up of EL and, in respect of such debt or claim, a Creditor Indemnity Claim is identified by the liquidators;
  - (ii) any Administration Indemnity Claim (being one to which paragraph (b) does not apply) is identified by the liquidators;
  - (iii) any Recoupment Indemnity Claim (being one to which paragraph (b) does not apply) is identified by the liquidators,
- the liquidators must notify me in writing of any such claim;
- (d) when notifying me of a claim in accordance with paragraph (b) and (c) (each such claim for indemnity referred to as an "**Eligible Claim**"), the liquidators must:
- (i) provide me with:
    - (A) (if the Eligible Claim is a Creditor Indemnity Claim) a copy of the relevant proof of debt and supporting documentation relating to the Eligible Claim; and

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- (B) such other information the liquidators consider relevant to EL's claim for indemnity from the property of the EIF;
- (ii) within 14 days of receipt of a request from me pursuant to paragraph (e)(i) below for further information in respect of an Eligible Claim, provide such reasonably requested further information to me;
- (e) I am directed to:
  - (i) within 14 days of receipt of an Eligible Claim, request any further material or information I reasonably consider necessary to assess the Eligible Claim;
  - (ii) within 30 days of receipt of an Eligible Claim or of the information requested in accordance with (e)(i) above (whichever is the later):
    - (A) accept the Eligible Claim as one for which EL has a right to be indemnified from the scheme property of the EIF; or
    - (B) reject the Eligible Claim; or
    - (C) accept part of it and reject part of it;and give to the liquidators written notice of my determination; and
  - (iii) if I reject an Eligible Claim, whether in whole or in part, provide the liquidators with written reasons for my decision when, or within 7 days after, giving notice of my determination;
- (f) within 28 days of receiving notification from me of the reasons for rejecting, in whole or in part, any Eligible Claim ("**Rejected Claim**"), the liquidators:
  - (i) may make an application to this Honourable Court for directions as to whether or not the Eligible Claim is or is not one for which EL has a right of indemnity out of the scheme property of the EIF; or
  - (ii) must notify the relevant creditor for any Rejected Claim of:
    - (A) my decision;
    - (B) any reasons provided by me for my decision;
    - (C) any material provided pursuant to paragraphs (c), (d) and (e) hereof
    - (D) whether they intend to make an application for directions in respect of the Rejected Claim pursuant to paragraph (f)(i) hereof;
- (g) I have liberty to apply to the Court for directions in respect of any question arising in connection with my consideration or payment of an Eligible Claim or the orders sought.

71. I consider that the above suggested directions are reasonable and appropriate in the circumstances in order to resolve matters outstanding in the receivership of the EIF and will assist me to resolve outstanding matters so that I can progress this receivership to a conclusion.

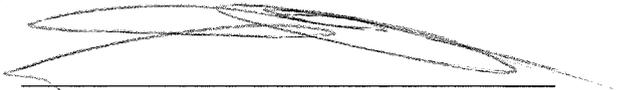
Signed by: 

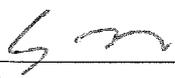
Taken by: 

72. Justice Jackson made almost identical orders in another proceeding in which I was a party in this Honourable Court (albeit as part of a broader set of orders): namely *In the matter of LM Investment Management Ltd* (proceeding number 3508 of 2015 in this Honourable Court). A true copy of the relevant orders, which are document number 36 on the court file for that matter, are now produced and shown to me and marked "DW-23".
73. These orders were envisaged by paragraph [79] of his Honour's reasons in *Park & Muller (liquidators of LM Investment Management Pty Ltd) v Whyte (receiver of LM First Mortgage Investment Fund)* [2015] QSC 283. For convenience, a true copy of those reasons is now shown to me and marked "DW-24".

**ALL THE FACTS** and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit. Nothing in this Affidavit waives, or is intended to waive, any privilege.

Sworn by **DAVID WHYTE** this 2<sup>nd</sup> day  
of August 2018 at Brisbane in the  
presence of:

)  
)  
)  
  
\_\_\_\_\_  
Deponent

  
\_\_\_\_\_  
Solicitor

**Craig Russell Melrose**  
Solicitor

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

**IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944**

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729**

**CERTIFICATE OF EXHIBIT  
INDEX TO EXHIBITS**

**VOLUME 1 OF 3**

Exhibits "DW-1" to "DW-12" to the affidavit of **DAVID WHYTE** sworn at Brisbane on this 2<sup>nd</sup> day of August 2018.

<b>Exhibit</b>	<b>Description</b>	<b>Date</b>	<b>Page No.</b>
<b>DW-1</b>	Order of Justice Applegarth	21.11.2011	1-27
	Order of Justice Applegarth	23.11.2011	
	Reasons for Judgment – <i>Re Equititrust Ltd</i> [2011] QSC 353	23.11.2011	
<b>DW-2</b>	Consolidated Constitution for the EIF	03.06.2011	28-79
<b>DW-3</b>	Replacement Constitution for the EPCIF	30.11.2010	80-125
	Deed Poll	13.12.2010	
<b>DW-4</b>	Order of Justice Dalton	29.02.2012	126-127
<b>DW-5</b>	Historical company search - Equititrust Limited	01.08.2018	128-153
<b>DW-6</b>	Letter from BDO to Hall Chadwick	19.03.2012	154-189
	Letter from Hall Chadwick to BDO	03.04.2012	
	Letter from Thomsons to Gadens	13.04.2012	
	Letter from Gadens to Thomsons	17.04.2012	
	Letter from BDO to Hall Chadwick	17.04.2012	
	Letter from Thomsons to Gadens	31.08.2012	
	Letter from Gadens to Thomsons	19.09.2012	

**Signed:**

  
Certificate of Exhibit  
Filed on behalf of the Court Appointed Receiver  
Form 47 R.435

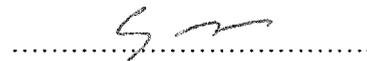
**Taken by:**

  
GADENS LAWYERS  
Level 11, 111 Eagle Street  
BRISBANE QLD 4000  
Tel No.: 07 3231 1666  
Fax No: 07 3229 5850  
SZC:JSO:201804017

<b>Exhibit</b>	<b>Description</b>	<b>Date</b>	<b>Page No.</b>
<b>DW-7</b>	Application - Liquidators	25.10.2012	190-191
<b>DW-8</b>	Letter from Gadens to Thomson Geer	31.08.2016	192-193
<b>DW-9</b>	Letter from Thomson Geer to Gadens, with sample of 7 pages of the attached spreadsheet	23.09.2016	194-213
<b>DW-10</b>	Letter from Gadens to Thomson Geer	01.11.2016	214-216
<b>DW-11</b>	Letter from Thomson Geer to Gadens	24.01.2017	217-220
<b>DW-12</b>	Letter from Gadens to Thompson Geer	21.03.2017	221



.....  
Deponent



.....  
Solicitor

**Craig Russell Melrose**  
Solicitor

"DW-1"

37

SUPREME COURT  
OF QUEENSLAND

4 1 NOV 2011

SUPREME COURT OF QUEENSLAND

FILED  
BRISBANE

REGISTRY: Brisbane  
NUMBER: 10478/2011

In the matter of **EQUITITRUST LIMITED ACN 061 383 944**

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

Before: Justice Applegarth

Date: 21 November 2011

Initiating document: Application filed 15 November 2011, and oral application made by the Australian Securities and Investments Commission on 21 November 2011

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

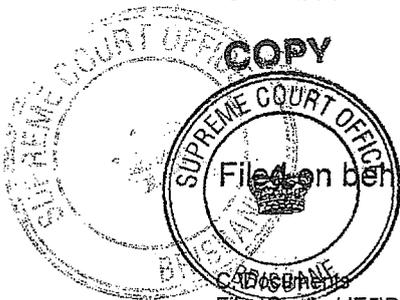
1. Pursuant to section 601ND (1)(a) of the *Corporations Act 2001* (Cth) (the "Act"):-
  - (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999 ("EIF");
  - (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999 ("EPCIF").
2. David Whyte ("**Mr Whyte**") be appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that:-
  - (a) the EIF is wound up in accordance with its constitution; and
  - (b) the EPCIF is wound up in accordance with its constitution.
3. Pursuant to section 601NF(2), that Mr Whyte:-

ORDER:

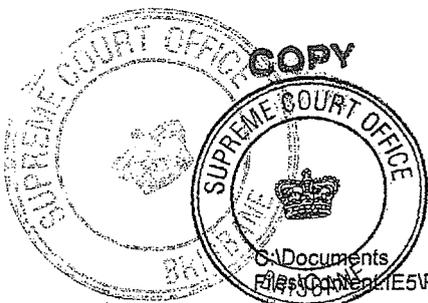
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TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

Filed on behalf of the Applicants

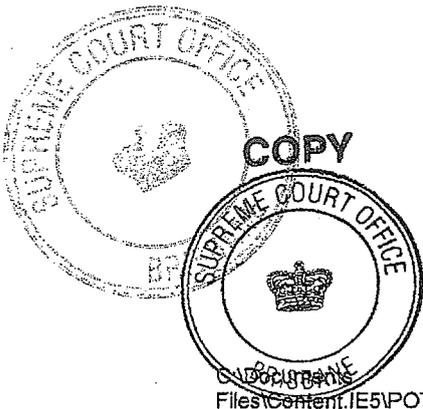
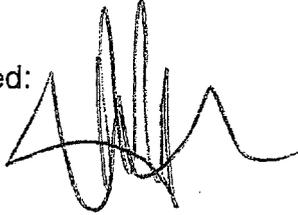


- (a) have access to the books and records of Equititrust Limited which concern the EIF and the EPCIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in effecting the winding up of the EIF;
  - (c) be indemnified out of the assets of the EPCIF in respect of any proper expenses or costs incurred in effecting the winding up of the EPCIF;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration; and
  - (e) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
4. Pursuant to sections 1101B(1) and 1101B(5) of the Act, Mr Whyte be appointed as:-
- (a) a receiver of the property of the EIF; and
  - (b) a receiver of the property of the EPCIF,
- until 4:00pm on Wednesday 23 November 2011, or further earlier order.
5. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Limited or the EIF.
6. That by 4pm on Tuesday 22 November 2011, Equititrust Limited publish on its website ([www.equititrust.com.au](http://www.equititrust.com.au)), in pdf form, by way of notice to members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
7. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with section 601NF(2) of the Act.



8. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
9. The oral application of ASIC be adjourned to 10:00am on Wednesday 23 November 2011.

Signed:



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SUPREME COURT  
OF QUEENSLAND

23 NOV 2011

SUPREME COURT OF QUEENSLAND

FILED  
BRISBANE

REGISTRY: Brisbane  
NUMBER: BS 10478 of 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: EQUITITRUST LIMITED ACN 061 383 944

AND

Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND  
ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST  
PRIORITY CLASS INCOME FUND ARSN 089 079 729

ORDER

Before: Justice Applegarth

Date: 23 November 2011

Initiating document: Application filed 15 November 2011 and Oral Application made 21  
November 2011

THE ORDER OF THE COURT IS THAT:

1. Pursuant to s.1101B(1) of the *Corporations Act 2001* (Cth) (*the Act*) David Whyte (*Mr Whyte*) be appointed as:
  - (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and
  - (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).
2. Pursuant to s.601NF(2) of the Act David Whyte (*Mr Whyte*) be appointed as:
  - (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and
  - (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).

ORDER  
Filed on behalf of the Intervener

Australian Securities & Investments Commission  
Hugh Copley, Litigation Counsel

Form 50  
Rule 661

Level 20, 240 Queen Street, Brisbane Qld 4000  
Tel: (07) 3867 4700  
Fax: (07) 3867 4725  
Ref: K Rodgers (11-40025)

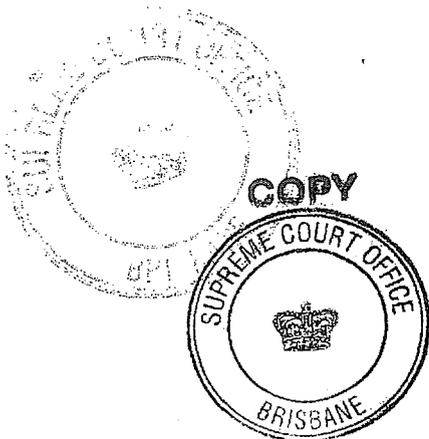
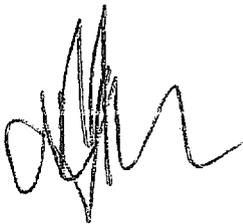


3. Pursuant to s.1101B(1) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 1 above, the powers set out in s.420 of the Act in addition to the powers set out in s.1101B(8)(a) to (c) of the Act.
4. Pursuant to s.601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 2 above, the powers set out in s.420 of the Act and the powers set out in s.1101B(8)(a) to (c) of the Act.
5. Pursuant to s.1101B(1) of the Act, Mr Whyte in respect of the appointment made in Order 1 above:
  - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
6. Pursuant to s.601NF(2) of the Act, Mr Whyte in respect of the appointment made in Order 2 above:
  - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
  - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
  - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
7. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Ltd or the property of the EIF.

**COPY**



8. That by 4pm on Thursday 24 November 2011, Equititrust Ltd publish on its website ([www.equititrust.com.au](http://www.equititrust.com.au)), in pdf form, by way of notice to its members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
9. That the parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
10. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with s.601NF(2) of the Act.



# SUPREME COURT OF QUEENSLAND

CITATION: *Re Equititrust Ltd* [2011] QSC 353

PARTIES: **EQUITITRUST LTD**  
**ACN 061 383 944**  
(applicant)  
v  
**THE MEMBERS OF THE EQUITITRUST INCOME  
FUND AND THE EQUITITRUST PRIORITY CLASS  
INCOME FUND**  
(respondents)

FILE NO: BS 10478 of 2011

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING  
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 and 23 November 2011

JUDGE: Applegarth J

ORDERS: **Orders for two registered schemes to be wound up pursuant to s 601ND of the *Corporations Act 2001* (Cth), for the appointment of a person to take responsibility for ensuring that each registered scheme is wound up and for the same person to be appointed as a receiver of the property of each scheme.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where company applied to Court for the winding up of two registered schemes of which it was the responsible entity and for the appointment of a temporary responsible entity – where circumstances of urgency exist due to impending lapse of insurance for officers of company – where directors indicated that they would resign upon lapse of insurance – where the administration of the schemes had broken down and the schemes’ purposes could no longer be accomplished – where the company was in breach of the *Corporations Act 2001* (Cth) and of conditions of its financial services licence – whether the Court had jurisdiction to appoint a temporary responsible entity – whether the Court should order the winding up of the schemes – whether the Court should appoint a receiver to the property of each scheme

*Corporations Act 2001 (Cth) s 601FA, s 601FN, s 601FP, 601ND, s 601NF, s 1101B*

*Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 cited  
*Capelli v Shepard* (2010) 264 ALR 167; [2010] VSCA 2 cited

*Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd R 76 cited

*Joye v Beach Petroleum N.L.* (1996) 67 FCR 275 cited

*Mier v FN Management Pty Ltd* [2006] 1 Qd R 339; [2005] QCA 408 discussed

*Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2)* [2008] WASC 232 cited

*Re Rubicon Asset Management Ltd* (2009) 74 ACSR 346; [2009] NSWSC 1068 discussed

*Re Stacks Managed Investments Ltd* (2005) 219 ALR 532; [2005] NSWSC 753 discussed

*Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 cited

*Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34; [2000] VSC 300 cited

COUNSEL: P L O'Shea SC and J W Peden for the applicant  
A S Martin SC and G M Drew for certain members  
D R W Tucker (solicitor) for a member, Tucker SF Pty Ltd  
T P Sullivan SC and S R R Cooper for the Australian Securities and Investments Commission intervening  
D D Keane instructed directly by Lion Advantage Ltd, an applicant for appointment as a temporary responsible entity (21 November 2011)  
J W Peden for the applicant and Mr Mark McIvor (23 November 2011)

SOLICITORS: Nyst Lawyers for the applicant  
Piper Alderman for certain members  
Tucker & Cowen for Tucker SF Pty Ltd  
Australian Securities and Investments Commission for the intervener  
Nyst Lawyers for Mr Mark McIvor (23 November 2011)

- [1] On Monday, 21 November 2011 I made certain orders following a hearing which was held on short notice and in circumstances of urgency. These are my reasons for making those orders. The circumstances of urgency included the fact that two insurance policies covering officers of Equititrust Ltd (the company) were due to expire at 3.00 pm that day. They were unlikely to be renewed and alternative insurance could not be sourced. In those circumstances, the recently-appointed directors of the company were not prepared to remain on the board and proposed to resign shortly before 3.00 pm.

- [2] By an originating application filed on 15 November 2011 the company sought the following two orders:

- “1. The Equititrust Income Fund be wound up pursuant to section 601ND of the *Corporations Act (Cth)* 2001;
2. The Equititrust Priority Class Income Fund be wound up pursuant to section 601ND of the *Corporations Act (Cth)* 2001.”

It also sought an order pursuant to s 601FN of the *Corporations Act (Cth)* 2001 (“the Act”) that:

“Equititrust Limited be replaced as the Responsible Entity of the Equititrust Income Fund and the Equititrust Priority Class Income Fund (**Funds**) by a temporary Responsible Entity, with that entity to wind-up the Funds and take steps to call a meeting of members to ratify its appointment”.

The company also sought an order pursuant to s 601NF that a committee consisting of Mr Jeff McDermid, Mr Paul Vincent and Mr Nick Combis be appointed to take responsibility for ensuring that the funds are wound up in accordance with their constitutions and that appropriate directions be made to effect that winding up.

- [3] Upon the hearing of the application the company initially sought only an order pursuant to s 601FN of the Act that it be replaced as the responsible entity of the two funds. However, it submitted that if I did not appoint a temporary responsible entity to replace it, I should order that the funds be wound up.
- [4] The Australian Securities and Investments Commission (ASIC) intervened in the proceeding and made an oral application for the appointment of a receiver to the funds pursuant to s 1101B of the Act.

#### **The application for the appointment of a temporary responsible entity**

- [5] There was a jurisdictional impediment to the making of an order under s 601FN for the appointment of a temporary responsible entity. That section entitles ASIC or a member of a registered scheme to apply to the Court for the appointment of a temporary responsible entity of a scheme under s 601FP if the scheme “does not have a responsible entity that meets the requirements of s 601FA”. Section 601FA requires the responsible entity of a registered scheme to be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme. At the time of the company’s application and at the time of the hearing it met both of these requirements. The fact that it was in breach of the terms of its financial services licence and faced the prospect of having that licence terminated or suspended did not alter the fact that it still held its licence.
- [6] This jurisdictional impediment was, in part, the result of the company seeking from ASIC and obtaining an adjournment until 22 November 2011 of a hearing to show cause why its licence should not be terminated.
- [7] Counsel for ASIC helpfully drew my attention to Regulation 5C.2.02 of the *Corporations Regulations* 2001 (Cth), although the company did not make any

application under that regulation. For the reasons given by ASIC, it is questionable whether that regulation provides a source of power for the Court to appoint a temporary responsible entity other than in the circumstances provided for in s 601FL or s 601FN.

- [8] In the result, the Court's power to appoint a temporary responsible entity upon an application under s 601FN was not invoked.
- [9] This makes it unnecessary to address the question of whether the appointment of a temporary responsible entity was in the interests of the members, and a contentious issue as to whether the replacement of the company by such an entity would result in a reconversion of subordinated units held by the company in its own right, and a decrease in the value of units held by other members.

### **The application under s 601ND to wind up the funds**

- [10] The company submitted that if I did not appoint a temporary responsible entity to replace it as the responsible entity for each fund, then I should make the orders sought in paragraphs 1 and 2 of its originating application for each of the funds to be wound up pursuant to s 601ND. ASIC supported this application. So did a member of the Equititrust Income Fund, Tucker SF Pty Ltd. The only opposition to making orders under s 601ND came from seven members for whom Mr Martin SC and Mr Drew of counsel appeared. The basis for that opposition was to enable members to call a meeting and to vote upon a proposal to wind up the Income Fund pursuant to s 601NB of the Act.
- [11] It is necessary to outline certain factual matters by way of background to explain why I reached the conclusion that it was just and equitable to make an order directing the responsible entity to wind up each fund, and why I considered that such an order should be made promptly rather than delayed for some uncertain period to allow the members to vote on a resolution to wind up the Income Fund.
- [12] The company is the responsible entity of three managed schemes, two of which are registered. The third, being the Equititrust Premium Fund ("EPF"), is not registered and is not required to be registered under the Act. The two registered managed investment schemes are known as the Equititrust Income Fund ("EIF") and the Equititrust Priority Class Income Fund ("EPCIF"). The EIF has some 1,400 members and net assets in excess of \$100,000,000. The EPCIF has only five members, all apparently associated with the company's sole shareholder, Mr McIvor. EPCIF holds 13,636,478 units in the EPF.
- [13] As its name suggests, the EIF was intended to be an "income fund" which provided monthly interest payments on most investments and the redemption of capital. Where a member invests for a period of 12 months the entitlement to redemption arises on the anniversary of the allotment of units after a request is made to redeem. The fund no longer achieves its purposes. The fund has been frozen since October 2008 in that no redemptions of units have been permitted since then. Since April 2011 the fund has ceased paying interest to members.
- [14] The company was beset by discord between directors and the company's sole shareholder, Mr McIvor, during 2011. It is unnecessary to describe fully the nature of the discord. An application was brought by the superannuation fund of a former director, Mr Tucker, seeking an order for the winding up of the EIF. The

application was adjourned on the basis of certain undertakings, given by Mr McIvor to the Court, not to seek to appoint any new director or remove any existing director from the board of the company without giving notice to the existing board and to ASIC, and seeking leave of the Court. These undertakings were given on 27 October 2011 in circumstances in which the company had been placed in the hands of a newly appointed board of directors. The newly appointed board comprised Mr Paul Vincent, Mr Jeff McDermid, Mr Troy Bingham and Mr Warwick Powell. Mr Vincent is a Fellow of the Institute of Chartered Accountants, and has 30 years experience as a Chartered Accountant. He and his fellow directors familiarised themselves with the operations of the company and considered how the funds might best be wound up. The new board considered the best realisation strategies.

[15] On 12 October 2011 a differently constituted board had unanimously resolved:

- (a) that Equititrust Limited as the responsible entity of the Equititrust Income Fund considers that the purpose of the Equititrust Income Fund cannot be accomplished (within the meaning of s 601NC(1) of the *Corporations Act*).
- (b) that Equititrust Limited as responsible entity of the Equititrust Income Fund take steps to wind up the Equititrust Income Fund within the meaning of s 601NC(1) and in accordance with its constitution.
- (c) that the chief executive officer prepare notices to give to members of the scheme and to ASIC in accordance with s 601NC(2) of the *Corporations Act*.

A similar resolution was passed the same day in respect of the EPCIF, namely that its purpose cannot be accomplished and that it should be wound up.

[16] The new board would have preferred to continue with the process of winding up that had been instigated, being a process provided for under s 601NC of the Act. However, the expiry and non-renewal of insurance policies on 21 November 2011 prompted them to have the company apply for winding up orders pursuant to s 601ND.

[17] Mr Vincent, in an affidavit sworn on 18 November 2011, assessed the approximate financial position of the company as at 31 October 2011 as follows:

- “a. ETL [Equititrust Ltd] has assets in its own right worth approximately \$26,498,000;
- b. ETL has liabilities in its own right in the approximate sum of \$26,470,000;
- c. ETL has assets that it holds for the EIF in the approximate sum of \$120 million;
- d. ETL has liabilities in its capacity as responsible entity for the EIF in the approximate sum of \$9 million;
- e. ETL has therefore net assets in the EIF in the approximate sum of \$111 million;

- f. ETL has liabilities in its capacity as Responsible Entity for EPF in the approximate sum of \$12.5 million;
- g. ETL has assets that it holds for the EPF of approximately \$13 million;
- h. ETL has therefore net assets in the EPF in the approximate sum of \$0.5 million.”

[18] The company has borrowings on its own behalf and also on behalf of the funds. The secured lenders include the Commonwealth Bank, the National Australia Bank and the Bank of Scotland International. The borrowings are secured by various real property mortgages and charges over assets of the company in its own right and also over assets of the funds. The total borrowings are approximately \$17 million, owed by EIF as to \$9 million and by EPF (the unregulated fund) as to \$8 million. The company’s assets and liabilities are more fully summarised in Mr Vincent’s affidavit sworn on 18 November 2011. That affidavit was supplemented by an affidavit sworn on 21 November 2011 which corrected paragraph 6 of the earlier affidavit by stating that the company in its capacity as responsible entity for the EPCIF holds 13,636,478 units in the EPF.

[19] Importantly for present purposes, according to Mr Vincent’s assessment the EIF has net assets of about \$111 million.

[20] Based upon his work as a director since his appointment, Mr Vincent was “clearly of the view that the Funds should be wound up”. His reasons were summarised as follows:

- “a. the Funds have been frozen since October 2008, in that no redemptions of units have been permitted since then;
- b. since April 2011, the Funds have ceased paying interest on the units to members of the Funds;
- c. the disharmony between Mr Tucker and Mr Kennedy on the one hand and Mr McIvor on the other hand over the past 12 months or so, as more fully described in the affidavits of Mr Tucker, Mr Kennedy and Mr McIvor filed in BS9534/2011, has destabilised the Funds to such a degree that it is extremely unlikely that the Funds could regain the possibility of resuming trading;
- d. the vast majority of the loans owed to ETL as responsible entity for the EIF are in default and require intensive management so as to maximise the value realisable from those loans;
- e. as indicated in paragraph 8 of my earlier affidavit, I have received widespread support from members for the winding up and no objections. I am aware of an indication, by correspondence from Piper Alderman as solicitors for a number of members who have mooted a potential class action against ETL and its former directors, that there may be some opposition

to the winding up, but I have not yet seen the details of any such opposition and am accordingly unable to comment on the reasons for such opposition; and

- f. against this background, it is clear to me that the purpose for which each of the EIF and EPCIF were established can not be accomplished.”

- [21] Mr Vincent and his fellow directors reached the conclusion that it is in the best interests of members of the EIF and the EPCIF that each fund be wound up forthwith.
- [22] It is unnecessary to canvass the board's preference for the appointment of a temporary responsible entity pursuant to s 601FP to enable the winding up to proceed subject to oversight by a committee. Mr Vincent's affidavit indicated that if a responsible entity was not able to be appointed to replace the company as the responsible entity by Monday, 21 November 2011, then the board recommended that an independent insolvency practitioner be appointed to wind up each fund in accordance with the provisions of its constitution.
- [23] The assessment by Mr Vincent and his fellow-directors of what is in the best interests of members of each fund was undertaken in difficult circumstances. I accepted the considered view of the new board that it was in the best interests of members of each fund that each fund be wound up forthwith.
- [24] As noted, the only opposition to such an order was advanced by counsel on behalf of a small number of members who, according to their Notice of Appearance, hold units in the EIF totalling \$2,433,743.11. Those members also obtained leave to file an application seeking a variety of orders including a declaration that certain notices given pursuant to s 601NC of the Act were invalid and an order pursuant to s 252E(1) of the Act that a meeting of the members of the EIF be called to consider and vote on an extraordinary resolution directing the responsible entity to wind up the EIF. I took into account the submissions made on behalf of these members as to the desirability of allowing the members to meet and consider a resolution to wind up the EIF. I was not in a position to make any assessment of the merit of a submission made by Mr Tucker to the effect that the opposition to an order to wind up the funds forthwith was to achieve some collateral advantage in connection with foreshadowed proceedings against the company and its former officers. I declined these members' application to adjourn the company's application and decided to make orders directing that each fund be wound up pursuant to s 601ND because such a course appeared to be in the best interests of members of the funds. Any advantage in allowing the members to vote on a resolution to wind up the EIF at a yet-to-be convened meeting at some uncertain future date was outweighed by the disadvantages associated with delaying orders for the winding up of each fund.
- [25] In addition to the matters supporting a winding up forthwith identified by Mr Vincent is the fact that the board intended to resign prior to 3.00 pm on Monday, 21 November 2011 in the event that the company was unable to obtain insurance coverage. Such a course would leave the company without directors unless and until Mr McIvor obtained a release from the undertakings given in relation to the appointment of directors. There is evidence from former directors of the company that Mr McIvor does not wish the company to properly pursue a winding up of the

funds. There was no proposal for directors who were independent of Mr McIvor to be appointed as directors. The task of winding up the funds, including the recovery of loans upon which there has been default, should be undertaken by an independent person who is appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and any orders made under subsection 601NF(2).

[26] Part 5C.9 of the Act creates a framework for the winding up of registered schemes. In general terms, a registered scheme may be wound up:

- (a) as required by the scheme's constitution pursuant to s 601NA;
- (b) at the direction of members after a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme, as envisaged by s 601NB;
- (c) pursuant to s 601NC, if the scheme's purpose is either accomplished or cannot be accomplished after the responsible entity gives members of the scheme and ASIC the written notice provided for in s 601NC(2) and if no meeting is called within 28 days of the responsible entity giving the notice to the members;
- (d) pursuant to s 601ND, by order of the Court either on the ground that the Court thinks that it is just and equitable to make an order directing the responsible entity to wind up the scheme or because of an unsatisfied judgment against the responsible entity in its capacity as the scheme's responsible entity.

[27] The company resolved in accordance with s 601NC that the funds should be wound up. Winding up under s 601NC could not commence until 25 November 2011 at the earliest, being 28 days after certain notices were given to members. However, a number of members requested a meeting of members to consider the proposed winding up of the EIF and to vote on an extraordinary resolution directing that the fund be wound up pursuant to s 601NB of the Act.

[28] In short, the company's proposal that the funds be wound up pursuant to s 601NC had been overtaken by events, and such a winding up would not commence until some uncertain future date, depending upon the calling of a meeting and the validity of certain notices. A winding up at the direction of members in accordance with s 601NB could not commence until the calling of a members' meeting to consider and vote on such a resolution. The date upon which such a meeting would occur was uncertain and the pending resignation of directors made uncertain the means by which such a meeting would be held. All parties, including ASIC, appeared to agree that the funds should be wound up. I was not persuaded that there was any particular advantage to the members of the fund by a delay in the commencement of the winding up of the funds. The circumstances that had arisen by 21 November 2011 made it appropriate to direct that each fund be wound up forthwith.

[29] Section 601ND(1)(a) authorises the Court to order that the responsible entity of a registered scheme wind up the scheme if the Court thinks it is "just and equitable to make the order". The principles concerning the winding up of companies on the

just and equitable ground inform the application of this provision.<sup>1</sup> A registered scheme may be wound up on the just and equitable ground because the administration and original arrangement have broken down.<sup>2</sup> The Court may wind up a registered scheme on the just and equitable ground if it is in the public interest to do so.<sup>3</sup>

[30] The evidence before me, particularly Mr Vincent's evidence, and the parties' submissions persuaded me that it was just and equitable to make orders directing the applicant, as responsible entity, to wind up each fund. The principal reasons for that conclusion are those contained in Mr Vincent's affidavit and which I have earlier quoted. They may be summarised as follows:

- (a) The administration of the funds has broken down and the funds' purposes cannot be accomplished;
- (b) Repayments to investors have been frozen since October 2008 and the funds ceased making monthly interest payments to members on 1 April 2011;
- (c) Disharmony and disputes between members of the board of the company and Mr McIvor prior to the recent appointment of new board members destabilised the administration of the funds with the result that it is extremely unlikely that the funds could resume trading;
- (d) The vast majority of the loans owed to the company as responsible entity for the EIF are in default and require proper management so as to maximise the realisation of funds for the benefit of members;
- (e) The company is in breach of the conditions of its Australian financial services licence, including by a failure to lodge audited accounts, and the company was also likely to be in breach of the conditions of its licence upon the expiry of necessary insurance coverage;
- (f) The members of the recently appointed board were due to resign prior to 3.00 pm on 21 November 2011, whereupon the proper administration of the funds would be jeopardised;
- (g) The appointment of an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2) appears to be in the best interests of members of each fund;
- (h) The winding up of the EIF appears to have received widespread support from members, and no member contended that the funds should not be wound up.

<sup>1</sup> *Capelli v Shepard* (2010) 264 ALR 167 at 190, [2010] VSCA 2 at [104]; *Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 at [124]; *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2)* [2008] WASC 232 at [44].

<sup>2</sup> *Capelli v Shepard* (2010) 264 ALR 167 at 186, [2010] VSCA 2 at [86]; *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [63].

<sup>3</sup> *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [64]; *Re Rubicon Asset Management Ltd* (2009) 74 ACSR 346 at 351, [2009] NSWSC 1068 at [23].

[31] For these reasons, I made orders on the afternoon of Monday, 21 November 2011 pursuant to s 601ND of the Act that:

- (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999; and
- (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999.

**Appointment of a person to take responsibility for the winding up of the funds**

[32] Section 601ND empowers the Court, by order, to direct the responsible entity to wind up the scheme. Section 601NE provides that the responsible entity must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if, among other things, the Court makes an order directing it to wind up the scheme. Section 601NF provides:

**“601NF Other orders about winding up**

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme’s constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of
  - (a) the responsible entity; or
  - (b) a director of the responsible entity; or
  - (c) a member of the scheme; or
  - (d) ASIC.”

[33] In the circumstances that presented themselves on 21 November 2011, including the jurisdictional impediment to the appointment of a temporary responsible entity pursuant to s 601FN and the pending resignation of recently appointed members of the company’s board, I considered it necessary to appoint a person to take responsibility for ensuring that each fund was wound up in accordance with its constitution and any orders made under subsection 601NF(2). No party argued against such a course. The pending resignation of the company’s directors made it necessary to appoint an independent person to take responsibility to wind up each fund. The parties accepted that an independent insolvency practitioner be appointed to wind up each fund. Different persons had indicated their preparedness to be

appointed. After hearing submissions I decided to appoint Mr David Whyte, who is an experienced insolvency practitioner.

#### **Powers conferred by s 601NF**

[34] Given the time constraints that applied in hearing the application and making appropriate orders on Monday, 21 November 2011, I was not in a position fully to consider that day the extent of the powers conferred upon Mr Whyte by virtue of his appointment to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and the extent of the Court's power to make orders pursuant to s 601NF(2) to facilitate the performance of his responsibility to ensure that each fund is wound up in accordance with its constitution. Having heard submissions, my provisional view was that orders might be made pursuant to s 601NF(2) directing that Mr Whyte act as a receiver of the property held by the company as:

- (a) responsible entity of the EIF; and
- (b) responsible entity of the EPCIF

However, I deferred making any orders pursuant to s 601NF in this regard so that I might consider relevant authorities concerning the power to make such orders pursuant to s 601NF.

#### **Appointment of a receiver pursuant to s 1101B of the Act**

[35] Soon after the commencement of the hearing on 21 November 2011, ASIC made an oral application pursuant to s 1101B of the Act for an order appointing a receiver of the property of each fund. The evidence and submissions indicated that the company had contravened the Act and one condition of its Australian financial services licence, and that upon the expiry of its insurance coverage would have contravened another condition. In the circumstances that I have earlier related concerning the need to appoint a person to take responsibility for ensuring that the funds were wound up, and in the absence of a specific order that Mr Whyte act as a receiver of the property of each fund, I made an interim order under s 1101B appointing him:

- (a) a receiver of the property of EIF; and
- (b) a receiver of the property of EPCIF

until 4.00 pm on Wednesday, 23 November 2011 or further earlier order. I was satisfied that such an order would not unfairly prejudice any person, and that such an order was in the interests of the members of each fund.

#### **Further orders**

[36] I have now had an opportunity to consider whether in lieu of a further order pursuant to s 1101B, or in addition to an order made under that section, Mr Whyte should be ordered pursuant to s 601NF to act as a receiver of the property of each fund and whether an order should be made as to the powers which he has to act as receiver.

- [37] I have set out the text of s 601NF above. The exercise of the power to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(2) may arise for consideration in a wide variety of circumstances. For example, the originating application in this matter envisaged the appointment pursuant to s 601NF of a capable and competent temporary responsible entity pursuant to s 601NF to wind up the funds and for a committee consisting of Mr McDermid, Mr Vincent and a partner of Mr Vincent to be appointed to s 601NF to oversee the winding up. In other circumstances a responsible entity will not exist or will not be capable of winding up the registered scheme under the oversight of a person appointed pursuant to s 601NF. Section 601NF(1) contemplates such situations. One such situation is where the responsible entity “has ceased to exist”. As ASIC submits, in such a case, unless a person appointed under s 601NF is empowered to deal with the assets of the scheme, that person will have no means to effect the winding up and the appointment would be rendered meaningless.
- [38] The terms of s 601NF(1) by which the Court may, by order, appoint a person “to take responsibility for ensuring” a registered scheme is wound up may be thought to necessarily carry with the appointment the authority to do such things as are necessary to wind up the registered scheme in accordance with its constitution and any orders made under subsection (2). McPherson SPJ (as his Honour then was) in *Re Crust ‘N’ Crumb Bakers (Wholesale) Pty Ltd*<sup>4</sup> stated that:
- “Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled.”
- This statement has been approved by the Court of Appeal in *Mier v FN Management Pty Ltd*<sup>5</sup> and by the Full Court of the Federal Court in *Joye v Beach Petroleum N.L.*<sup>6</sup> Accordingly, an appointment pursuant to s 601NF may be said itself to authorise the appointed person to cause assets to be collected, realised and other steps taken so as to wind up the scheme in accordance with its constitution and any orders made under s 601NF(2). In general terms, the constitution of the EIF provides for the winding up to involve the conversion of the funds’ assets to money and, after the payment of debts, the payment to members in proportion to the amount of the members’ interests in the scheme.
- [39] Depending upon the circumstances of a particular case, the responsibility for ensuring that a registered scheme is wound up may involve the appointed person ensuring that the responsible entity undertakes these kind of tasks. In other circumstances, for example, because the responsible entity has ceased to exist or is incapable of doing these tasks, the appointed person may need to undertake them or engage someone else to do so.
- [40] The nature and extent of the powers which s 601NF confers upon an appointed person by virtue of his or her appointment is not clear from the terms of the statute. The matter is not clarified or illuminated by the Explanatory Memorandum to the

<sup>4</sup> [1992] 2 Qd R 76 at 78.

<sup>5</sup> [2006] 1 Qd R 339 at 347, [2005] QCA 408 at [15].

<sup>6</sup> (1996) 67 FCR 275 at 287, 290.

*Managed Investments Bill 1997* (Cth) which simply stated in respect of proposed s 601NF (which is in identical terms to s 601NF as enacted) that:

“The Court may make other such orders as it sees fit.”

But the section, as enacted, is not in such simple terms. Instead, it provides for the appointment of a person pursuant to s 601NF(1), and goes on to provide that the Court may “by order” give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so. I note that subsection 601NF(2) is not simply a power to give directions.<sup>7</sup> It contemplates the Court making orders, not simply directions. The orders that might be made under s 601NF(2) are not confined to directions about winding up the scheme in accordance with its constitution. The section does not specify all of the circumstances under which it may be necessary to give directions, but the circumstances include the fact that the provisions in the scheme’s constitution are inadequate or impracticable.

- [41] The terms of s 601NF might be contrasted with the terms of s 601EE(2) in respect of unregistered managed investment schemes. Section 601EE(2) provides in such a case that the Court may make “any orders it considers appropriate for the winding up of the scheme.”
- [42] In *Re Stacks Managed Investments Ltd*,<sup>8</sup> White J compared s 601NF(2) with s 601EE(2) and considered the authorities in relation to s 601EE(2). Section 601EE(2) was said to empower the Court “to fashion the winding-up process.”<sup>9</sup> By contrast, s 601NF(2) gave power to make directions about how a registered scheme is to be wound up, where the winding up may already be on foot and should be provided for by the scheme’s constitution.
- [43] In that matter the plaintiff wished to have insolvency practitioners appointed as persons to take responsibility for ensuring that the scheme was wound up. The plaintiff sought the conferral of a wide range of powers on such persons. These included the power to conduct examinations in the same way that liquidators of companies have those powers. White J observed that the plaintiff had adapted the provisions of the *Corporations Act* dealing with the winding up of companies to the circumstances of the scheme. The plaintiff contended that powers could be conferred on the responsible persons, obligations imposed on third parties, and rights of creditors restricted to bring the winding up of the scheme into line with the winding up of companies.<sup>10</sup> His Honour observed that Part 5C.9 provides for the winding up of a registered scheme in accordance with its constitution and any order the Court might make under s 601NF(2). Where the scheme is a trust, what is envisaged by the winding up of a scheme is the realisation of its property, the payment by the responsible entity of liabilities incurred on behalf of the scheme or the retention by it of funds with which to meet its liabilities, the ascertainment of the members’ entitlements, and the distribution of the trust assets to the members in accordance with their entitlements.<sup>11</sup> The winding up of a trust was said to be quite a different thing from winding up a company, with the liquidation of a company being a matter governed by statute. His Honour observed that none of the detailed

<sup>7</sup> cf. the power of a Court to give directions under a provision such as the *Trusts Act 1973*, s 96 (Qld).  
<sup>8</sup> (2005) 219 ALR 532, [2005] NSWSC 753.  
<sup>9</sup> *Ibid* at 541, [37].  
<sup>10</sup> *Ibid* at 537, [19].  
<sup>11</sup> *Ibid* at 542, [42].

provisions of the *Corporations Act* that relate to the liquidation of a company applied to the winding up of a scheme.

- [44] The facts of that case are materially different to this proceeding. The plaintiff in that case sought the appointment of registered liquidators to provide the expertise which the plaintiff did not have in handling administrations. White J observed that the responsible entity was entitled under s 601FB to appoint those persons as its agents, or otherwise engage those persons, to do what the plaintiff was authorised to do in connection with the scheme. There was no necessity for an order under s 601NF(1). His Honour observed that such an order might be necessary if the plaintiff were failing in its duty to wind up the scheme, but there was no suggestion of that.
- [45] As to the proper scope for orders to be made under s 601NF(2), White J noted that the power was limited to giving directions about “how a registered scheme is to be wound up”. It did not authorise the Court “to confer additional powers upon a responsible entity to which third parties would be made subject, or to interfere with the rights which third parties would otherwise enjoy.”<sup>12</sup> His Honour went on to conclude that Parliament deliberately did not apply the regime for the winding up of companies to the winding up of registered schemes and that he did not read the power to give directions in s 601NF(2) “in the wide way for which the plaintiff contends as, in effect, permitting the court, by order, to impose a new legislative regime on the winding up of a particular scheme, and thereby affecting the rights of and imposing duties on third parties.”<sup>13</sup> I respectfully agree with these conclusions.
- [46] It is necessary, however, for me to consider whether s 601NF authorises the making of orders which are of a different kind.
- [47] In *Re Rubicon Asset Management Ltd*,<sup>14</sup> McDougall J was likewise concerned with the scope of the power to make orders pursuant to s 601NF(2). The matter in issue was a direction that the costs of winding up be borne by the responsible entity. The power to give such a direction was found to exist. The direction was not one which would take away any right that a third party had, or would subject a third party to any form of compulsory process for production of documents or examination. The order sought by the plaintiffs in that case was made. McDougall J noted that in *Re Stacks Managed Investments* White J gave as an example of what was authorised by s 601NF(2) “the making of directions of a kind which would be made in an administration suit for the purpose of settling the entitlements of members”. McDougall J stated that White J was not intending to give an exhaustive account of the width of the statutory power. Like McDougall J and White J, I do not propose to canvass the full extent of the power to give directions under s 601NF(2). My present concern is whether s 601NF authorises the Court by order to give a direction about how a registered scheme is to be wound up by giving a direction that the person to take responsibility for ensuring that the registered scheme is wound up has the power to act as a receiver of the property held by the company as responsible entity of the fund.

<sup>12</sup> Ibid at 544, [52].

<sup>13</sup> Ibid at 545, [55].

<sup>14</sup> (2009) 74 ACSR 346, [2009] NSWSC 1068.

- [48] In *Mier v FN Management Pty Ltd*<sup>15</sup>, Keane JA (as his Honour then was, and with whom McMurdo P and Douglas J agreed) was concerned with the power conferred by s 601EE(2) in relation to the getting in, realisation and distribution of the property of an unregistered managed investment scheme. Because the Act did not explicitly lay down a method for the winding up of an unregistered scheme, Keane JA stated that it must be assumed that, in general, the Court would be guided by analogies with the law relating to the winding up of companies, partnerships and trusts when deciding on the appropriate procedure for the winding up of a scheme. His Honour went on to observe that the best analogy might be thought to be the winding up procedure applicable to a registered scheme and continued:

“Unfortunately for present purposes, the Act, beyond directing that a registered scheme be wound up in accordance with its constitution, also **leaves the detail of the winding up of a registered scheme in the hands of the Court**, which may make such orders as it ‘thinks necessary to do so’.”<sup>16</sup> (emphasis added)

- [49] In *Capelli v Shepard*<sup>17</sup> the Victorian Court of Appeal made a passing comment in the context of a submission that the Court might give directions about whether the scheme property included certain trees. The Court did not think it appropriate to exercise the power under s 601NF(2) as suggested. Its first reason was that the question was not in terms raised in the appeal. Its second reason was that the Court was “not at all confident that a power such as this might be used to affect rights to property.” The Court observed that it “may be that ‘directions as to how a registered scheme is to be wound up’ are limited to procedural rather than substantive matters.” The Court did not develop this point or attempt to define the difference between procedural and substantive matters.
- [50] I am not concerned with an application of the kind that White J rejected in *Re Stacks Managed Investments Ltd*. The application does not seek an order that would give the person appointed pursuant to s 601NF(1) powers in relation to the property of third parties. The application does not seek to adapt and impose detailed provisions dealing with the winding up of companies to the circumstances of a registered scheme.
- [51] I am concerned with a question of whether s 601NF authorises the person who I have appointed to take responsibility for ensuring the funds are wound up to act as a receiver of the property of each fund. There may be doubt as to whether the appointment itself confers such a power. It may be thought necessary to make an order pursuant to s 601NF(2) directing the appointed person to act as receiver since such an order is one which gives directions about “how a registered scheme is to be wound up”. Such an order will be made only if the Court thinks it necessary to do so. For example, the occasion to make such an order may arise if the responsible entity is either unable or unwilling to wind up the scheme, or itself to appoint a person to collect the property of the scheme, realise it and otherwise undertake the winding up of the scheme in accordance with its constitution.
- [52] I am satisfied that in an appropriate case s 601NF(2) gives the Court power, by order, to give directions that the person appointed to take responsibility for ensuring

<sup>15</sup> [2006] 1 Qd R 339, [2005] QCA 408.

<sup>16</sup> *Ibid* at 348-349, [18] (footnotes omitted).

<sup>17</sup> (2010) 264 ALR 167 at 197, [2010] VSCA 2 at [146].

a registered scheme is wound up act as a receiver of the property of the scheme. The Court may exercise the power if it thinks it necessary to do so and one such circumstance might be if the property of the scheme was in jeopardy because the responsible entity was unable or unwilling to collect the property, realise it and do the other things necessary to wind up the scheme.

- [53] The present application is concerned with property that is held on trust. The person that I have appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution is required to ensure that a trust is wound up, but cannot necessarily rely upon the responsible entity itself to perform that task. In the analogous situation of a private trust in which trustees fail to get in trust property, a receiver may be appointed on the application of one of the trustees or of any beneficiary where the appointment is required for the safety of the trust property (the basis of the jurisdiction being the jeopardy of that property).<sup>18</sup> The Court may appoint a receiver of trust property where that is necessary for the well-being of the trust.<sup>19</sup> The Court will appoint a receiver of trust property where that property is in jeopardy through misconduct, waste, improper disposition, breach of a trustee's duty or the unsuitable character of the trustee.<sup>20</sup> The case in favour of appointment of a receiver must be a strong one but in assessing the risk to the trust the Court will apply a qualitative judgment.<sup>21</sup> In my view, the exercise of the power conferred by s 601NF(2) to order that the person who has been appointed to take responsibility for ensuring that the registered scheme is wound up act as a receiver of the scheme's property should be exercised with a similar caution, and only where a strong case is made out for the need for such an order.
- [54] Having now had the opportunity to consider the authorities cited to me at the hearing on 21 November 2011, I consider that s 601NF(2) provides a source of power to make an order giving directions that Mr Whyte act as a receiver of the property of each fund.
- [55] On the morning of Wednesday, 23 November 2011, I heard submissions as to whether it is appropriate to extend Mr Whyte's appointment as a receiver pursuant to s 1101B and to make a similar order pursuant to s 601NF(2). I decided to make such orders and my reasons for doing so follow.
- [56] In this matter the Court has directed the responsible entity, namely the company, to wind up each scheme. In the circumstances earlier outlined, it was necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2).
- [57] The appointment of a receiver of the property of each fund pursuant to s 1101B on ASIC's application and also pursuant to s 601NF(2) was supported by ASIC, and the members of the funds for whom Mr Martin SC and Mr Tucker respectively appeared. On this morning's hearing it was opposed by the company and by Mr McIvor for whom Mr Peden of Counsel appeared. Following the resignation of Mr

<sup>18</sup> *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 47, [2000] VSC 300 at [66]; J.D. Heydon and M.J. Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (Chatswood: LexisNexis Butterworths, 2006) at 625, [2305].

<sup>19</sup> *Ibid.*

<sup>20</sup> *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 52, [2000] VSC 300 at [84].

<sup>21</sup> *Ibid.*

Vincent, Mr McDermid, Mr Bingham and Mr Powell at 2.50 pm on Monday, Mr McIvor as sole shareholder of the company appointed himself, his wife Ms Stacey McIvor and Mr Ross Honeyman as directors.

- [58] Whereas on Monday, 21 November, the company did not oppose the appointment of Mr Whyte as a receiver of the property of the funds, it now does so. Mr Peden submitted on its behalf and on behalf of Mr McIvor that there was no need to appoint Mr Whyte as a receiver pursuant to s 1101B(1) or s 601NF(2).
- [59] ASIC made submissions as to why there was such a need. ASIC's submissions were adopted by Mr Martin SC on behalf of the members he represents. Mr Tucker also supported Mr Whyte's appointment as a receiver for essentially the same reasons.
- [60] ASIC placed particular reliance upon the affidavits upon which it previously relied, and on its previous submissions in this proceeding and in proceeding BS9694 of 2011, being a proceeding which it brought against the company. In summary, ASIC submits that there is no dispute that the company is in breach of a condition of its Australian financial services licence—that it hold a minimum amount of net tangible assets (“NTA”)—and has breached provisions of the Act requiring the company to lodge audited financial reports for each fund and audited reports of its compliance with the compliance plans for both funds. The affidavit material upon which ASIC relies, particularly an affidavit of Ms Gentles, and ASIC's written submissions detail the circumstances of these breaches.
- [61] ASIC was sufficiently concerned by the company's breaches of its licence and breaches of sections of the Act that it issued a Notice of Hearing under s 915C of the Act requiring the company to show cause as to why its licence should not be cancelled. Prior to that hearing it brought proceedings against the company, as did Tucker SF Pty Ltd. The material upon which ASIC relied included the matters that I have earlier addressed, and also identified substantial concerns as to how the company operated or proposed to operate each fund, the instability of the company's board and Mr McIvor's ability to change the board of the company at any time and without notice.
- [62] The affidavit of Ms Gentles is a substantial document, and contains material which justified ASIC's concern that Mr McIvor may not deal with the assets of the EIF in the best interests of members. The material relied upon by ASIC that supported its concern in this regard included documents that recorded the concerns of the board of the company in September and October 2011 about Mr McIvor's conduct. This included the then board's view that Mr McIvor “was responsible for making all of the current problem loans”. It also included claims that he had demonstrated extremely poor judgment in recent times (evidenced by emails attached to an affidavit filed in proceedings brought against the company by a borrower that had acquired a unit in the EIF and commenced proceedings to wind up the company). It included the directors' view that Mr McIvor had continued to deal on an unauthorised basis with some borrowers. Mr McIvor was said to be in ongoing conflict with the board and senior management and to have made a series of threats against staff.
- [63] Exhibits to Ms Gentles's affidavit provided evidence from a former chairman, a former director and a former CEO of the company about the exercise by Mr McIvor

of his ability to change the company's personnel and directors without notice and without consultation.

- [64] ASIC sought relief in the proceedings that it brought against the company and submitted on that occasion that such relief was appropriate in circumstances where:
- (a) the company was, by its own admission, in breach of the NTA requirements imposed by its licence;
  - (b) the company had failed, despite specific requests by ASIC, to notify ASIC of its current NTA position;
  - (c) the company had failed to lodge audited financial reports allowing ASIC to make an assessment of its financial position;
  - (d) the company had breached provisions of the Act in failing to lodge audited financial reports and audited reports of its compliance with compliance plans for both funds;
  - (e) the board of the company had been in a state of upheaval, with Mr McIvor apparently focused on ways to develop the assets of EIF, rather than simply proceeding with an orderly winding up.

These matters were said to pose an increased risk that the company might seek to operate the EIF in a manner which was not in the best interests of members.

- [65] On 27 October 2011, Martin J made consent orders in relation to the operation of the EIF and the EPCIF on ASIC's application.
- [66] In the application brought by Tucker SF Pty Ltd there were many allegations of misconduct by Mr McIvor. Mr McIvor's affidavit sworn 26 October 2011 stated that in respect of Mr Tucker's numerous allegations against him:

"I am deliberately not responding to those allegations as I do not consider them relevant to the present application. My response to those matters will occur in the fullness of time. By not responding to them in this affidavit I should not be taken as accepting the correctness of what Mr Tucker has said."

I am not in a position to resolve the allegations made by Mr Tucker against Mr McIvor.

- [67] The concerns raised by ASIC include concerns based upon facts, about which there is no dispute, relating to the company's failure to comply with the conditions of its licence and the requirements of the Act.
- [68] Mr McIvor gave undertakings to the Court on 26 October 2011 that he would not appoint a new director to the board of the company, or remove a director or seek to remove a director from its board without giving seven days' notice to the existing board and to ASIC, and seeking the leave of the Court after expiry of that notice. He also gave an undertaking that he would not seek to interfere with the conduct of the board in its business and the discharge of its responsibilities on the basis that it was clear that he was entitled to put properly documented proposals before the

board for its consideration. Mr McIvor stated that he gave these undertakings to “safeguard any concerns which may be held regarding the independence of the Board and Board members being subject to influence”.

[69] Following the resignation of the directors on Monday, I released Mr McIvor from these undertakings so that the company would have directors. There is no indication that Mr McIvor will not remain a director of the company. There is no indication that he intends to resign as a director and replace himself with other directors who are clearly independent of him. There is no evidence that independent directors would be prepared to assume such a role, and with the expiry of relevant insurance policies there is every reason to suppose that independent directors would not be willing to accept appointment in the absence of the kind of insurance cover that Mr Vincent and his fellow directors were unable to obtain.

[70] The matters raised by ASIC in the proceedings commenced by it, and also in these proceedings, raise serious concerns about the ability of the company while it remains under Mr McIvor’s control, and while he remains a director:

- (a) to operate each fund in a manner that will comply with the Act and the conditions of its Australian financial services licence; and
- (b) to act in a manner which is in the best interests of the members of each fund.

I am not persuaded that the company will wind up the funds in a manner that is in the best interests of their members. On the contrary, the matters relied upon by ASIC and the members who support the appointment of Mr Whyte as a receiver raise a strong case that the appointment of a receiver is necessary to ensure that each scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(1).

[71] Whereas the company on Monday did not oppose the making of orders for the appointment of a receiver, it now submits that such an appointment is premature and unfairly prejudicial to the interests of members. It and Mr McIvor submit that I should not assume that there will be problems in the orderly conduct of the winding up that I have ordered, that the company should be given the opportunity to wind up each scheme in accordance with its constitution and that Mr Whyte should only be appointed as a receiver if and when problems arise. They submit that it is not in the interests of members for Mr Whyte as receiver to assert control over the property of the funds and that the property of the funds should be left in the control of the company as a responsible entity, subject to the responsibility that Mr Whyte has by virtue of his appointment pursuant to s 601NF to take responsibility for ensuring that each scheme is wound up in accordance with its constitution.

[72] I do not accept this submission. I conclude that the best interests of most members of the funds, and the winding up of each scheme in accordance with its constitution, will be served by the appointment of Mr Whyte as a receiver. Such an appointment will avoid confusion and possible disputes over the control of property. Placing the property of the funds under the control of Mr Whyte as a receiver is likely to facilitate its realisation and the winding up of each fund for the benefit of its members. The appointment of Mr Whyte as receiver does not preclude him from having employees of the company (past, present and future) undertake tasks that are required to wind up each fund. As I mentioned more than once during the course of

argument, the best interests of members would appear to be served by relying upon the knowledge, skill and experience of persons who are familiar with the company's affairs, including persons who have taken steps to realise its property in the best interests of members. I am not, however, persuaded that the property of each fund should be left under the control of the company, subject only to the oversight of Mr Whyte by virtue of an appointment under s 601NF(1). The company's history of non-compliance with its statutory obligations, breaches of the conditions of its licence and the evidence pointed to by ASIC in relation to Mr McIvor present a strong case for the appointment of a receiver of each fund's property. The orderly conduct of the winding up of each fund will be facilitated by clarification of the fact that Mr Whyte is not only responsible for ensuring that each scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2), but that he has the power to do so, including the power of a receiver to take control of the property to which he has been appointed receiver and to deal with that property in a way that facilitates the winding up of each fund in a manner, and within a timeframe, that realises the property of each fund in the best interests of members.

- [73] I am not satisfied that Mr Whyte will be able to ensure that each fund is wound up in a timely, efficient and cost-effective manner unless he is appointed as a receiver of the property of each fund. I consider that it is in the interests of the members that the property of the funds be under his control.
- [74] In general, the circumstances that made it necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under s 601NF(2) also persuade me that it is in the best interests of each fund that the same person be appointed as receiver of its property. I am persuaded that the appointment of a receiver is necessary for the well-being of the property which is held on trust by the company, and to ensure that the winding up of each fund occurs in accordance with its constitution and any orders made under s 601NF(2).
- [75] Mr Peden also submitted that I should not appoint Mr Whyte as a receiver because such an order would cut across the legislative framework governing the winding up of a registered scheme. I do not agree with that submission.
- [76] First, insofar as an appointment as receiver pursuant to s 1101B(1) is concerned, the company's contravention of the Act and its contravention of conditions of its Australian financial services licence justify the appointment of a receiver in the circumstances. There is nothing inconsistent with the legislative framework for the winding up of a registered scheme in exercising a power conferred under s 1101B. Such an order may aid the winding up of a registered scheme.
- [77] Secondly, I do not consider that the legislative framework of Part 5C.9 precludes the appointment of a receiver pursuant to s 601NF(2) if it is necessary to do so. I have concluded in the circumstances of this matter that an order giving a direction that Mr Whyte be appointed as receiver of the property is necessary.
- [78] I raised during argument the issue of whether it was necessary for Mr Whyte to be appointed as a receiver pursuant to s 1101B(1) and also pursuant to s 601NF(2) of the Act. However, the parties supporting his appointment favoured such a course, and I intend to make such orders. To the extent that there may be some doubt concerning the extent of the Court's power to appoint a receiver pursuant to

s 601NF(2), I consider that the best interests of the members will be protected by making an order under s 1101B(1) of the Act. Even with an appointment as receiver under s 1101B(1), I think that it is necessary also to appoint Mr Whyte as a receiver pursuant to s 601NF(2). Such an appointment makes clear that one source of his power to act as receiver is s 601NF. It is appropriate that, in carrying out his responsibility for ensuring that the registered scheme is wound up in accordance with its constitution, he have powers that are sourced in the section of the Act that imposes that responsibility. Further, the possibility exists that in the future the Court may rescind or vary the order made under s 1101B, or suspend its operation, pursuant to s 1101B(11). If that occurs Mr Whyte should continue to have the powers and responsibilities associated with appointment as a receiver pursuant to s 601NF(2).

- [79] Mr Whyte's appointment as receiver should not be perceived to be based solely upon the contraventions by the company which attract the operation of s 1101B. It should be clear that Mr Whyte is also being appointed a receiver of the property of each fund because such an appointment is thought necessary to facilitate the performance of his responsibility for ensuring that each scheme is wound up in accordance with its constitution. The winding up of each fund will be facilitated by an order that indicates that one purpose of the appointment of Mr Whyte as receiver of the property of each fund is to facilitate the fund being wound up in accordance with its constitution. Mr Whyte, in discharging his responsibilities which arise by virtue of his appointment under s 601NF(1), will have the power to receive the property of each fund, and the directors of the company, its employees and third parties should understand that a source of the power which he is given to facilitate the responsibility imposed upon him by s 601NF(1) is s 601NF(2). He should have the power of a receiver and the order should state that one source of that power is an order made under s 601NF(2).
- [80] If I had acceded to the submissions made by the company and Mr McIvor this morning and not appointed Mr Whyte as a receiver, then there would have been scope for dispute and disagreement between Mr Whyte and individuals in control of the company, including Mr McIvor, concerning the control of the property of each fund. I consider that the appointment of Mr Whyte as a receiver will reduce the scope for such disputes.
- [81] In short, an order pursuant to s 601NF(2) directing that Mr Whyte be appointed as a receiver of the property of the EIF and a receiver of the property of the EPCIF is in the best interests of members and is necessary to facilitate the winding up of each fund.
- [82] A copy of the orders made by me on 21 November 2011 and a copy of the orders made by me today are set out as annexures to these reasons.

"DW-2"

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## Consolidated constitution

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Equititrust Income Fund ARSN 089 079 854

Equititrust Limited ACN 061 383 944

Version: 1

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## Deed poll

Dated 3<sup>rd</sup> June 2011

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By

**Manager**                    **Equititrust Limited ACN 061 383 944**  
of 67 Thomas Drive, Chevron Island, Queensland

In favour of

**Members**

### Background

- A. The Manager is the responsible entity of the Equititrust Income Fund ARSN 089 079 854 established by Deed Poll dated 9 August 1999 as amended from time to time.
- B. Pursuant to a request from ASIC under section 601GC(3) of the Corporations Act the Manager lodges this consolidated copy of the Constitution. This consolidated Constitution is an amalgam of the original Deed Poll and all subsequent amendments to that Deed Poll.
- C. This Constitution is made with the intent that the Manager and each Member will be bound by it.

### Agreed terms

#### **Trust not Confirmed**

- (a) Nothing expressly or impliedly contained in this consolidated Constitution (including the recitals) is effective to confirm, declare or otherwise acknowledge the trust declared under the original constitution, or to impress any new or additional trusts upon property held on trust as at the date of this consolidated Constitution.
- (b) Certain clauses (as identified) in this consolidated Constitution are reproduced (for the purpose of explanation only), but do not replace or restate the existing clauses.
- (c) Nothing in this consolidated Constitution should be interpreted as creating any new or further trust and at all times, the Scheme remains a simple trust.

#### **Manager and Members bound**

The Manager and the Members are bound by the terms of the Constitution as amended by this amending deed.

## **1 DEFINITIONS AND INTERPRETATIONS**

---

### **1.1 Defined Terms**

In this Constitution unless the context otherwise requires:

'Accounting Standards' has the meaning given to that term in section 9 of the Law;

'Applicant' means a person who has completed and lodged with the Manager an Application, pursuant to a Prospectus, and has paid the Application Money to which the Application refers, and includes his or her successors in title and permitted assigns;

'Application' means a duly completed and signed application to invest in the Scheme, lodged with the Manager and accompanied by payment of the Application Money;

'Application Account' means the Bank account established by the Manager under clause 3.3;

'Application Money' means all money paid by the Applicant pursuant to a Prospectus, accepted by the Manager and held by the Manager in the Application Account;

'Approved Valuer' means any person or firm appointed by the Manager, to value any property and who is independent of the Manager and includes a person employed or engaged by a company or firm and who:

- (a) is authorised under any law of the State or Territory where the valuation takes place to practice as a valuer; and
- (b) has at least 2 years continuous experience of valuation; or
- (c) because of their experience or qualifications, the Manager considers is suitably qualified to provide an assessment of the value of the relevant property.

'Assets' means all assets and liabilities of the Scheme which are, or would be, recognised as assets or liabilities of the Scheme by the application of generally accepted accounting principles;

'Associate' means an associate as defined in division 2 of part 1.2 of the Law;

'Auditor' means the auditor for the Scheme, appointed by the Manager, as required under the Law;

'Authorised Investments' means:

- (a) Mortgage Investments;
- (b) deposits at call or for a term with any Bank;
- (c) bills of exchange (including commercial bills) issues, drawn accepted or endorsed by any Bank or negotiable certificates of deposit issued by any Bank; and
- (d) any authorised investment as defined in section 21 of the Queensland *Trusts Act 1973*.

'Bank' has the meaning given to an Authorised Deposit Taking Institution as that term is defined in the *Banking Act 1959* and also includes a bank constituted by or under a law of the State or Territory and a 'foreign bank' as that term is defined in section 5 of the *Banking Act 1959*;

'Benchmark Return' is the relevant distribution hurdle rate for each Member (as nominated by the Manager when the Member invests in the Scheme) which that Member must receive from their investment in the Scheme before the Manager is entitled to receive the management fee referred to in clause 21.1. The Benchmark Return is not a forecast or a representation that the Member will receive this return or indeed any return from their investment in the Scheme;

'Business Day' means any day on which trading banks on the Gold Coast are generally open for business;

'Cash' includes cheques, currency notes, bank cheques, bank transfers and bank drafts in the lawful currency of Australia or another country;

'Certificate' means a certificate or document issued by the Manager to the Applicant evidencing the acceptance by the Manager of the Application;

**'Commencement Date'** means the date on which the Constitution was originally registered by the Commission;

**'Commission'** means the Australian Securities and Investments Commission;

**'Compliance Plan'** means the compliance plan for the Scheme and registered by the Commission and includes any approved amendments to the compliance plan from time to time;

**'Constitution'** means this Deed, and prior to thereto, shall where the context permits, also include the Former Constitution;

**'Current Interest Value'** means:

- (a) in relation to an Interest for the purpose of determining the Issue Price, the value of an Interest at the relevant time computed by dividing the Current Value of the Scheme by the total number of Issued Interests at that time and adjusted as provided in clause 3.16; and
- (b) in relation to an Interest for the purpose of determining the Redemption Price, the value of an Interest at the relevant time computed by dividing the Current Value of the Scheme by the total number of Issued Interests at that time and adjusted as provided in clause 11.19;

**'Current Liabilities'** in respect of the Scheme includes all of those Liabilities of the Scheme that would in the ordinary course of business be due and payable within 12 Months from the date on which they are ascertained;

**'Current Value'** means in relation to the Scheme the amount derived by deducting from the Value of the Assets of the Scheme:

- (a) all amounts borrowed for the purpose of the Scheme and remaining owing;
- (b) the amount of all actual Liabilities of the Scheme (other than interest and those referred to in paragraph (a) of this definition) owing but unpaid;
- (c) such amounts as the Manager thinks necessary to provide for all accrued and contingent outgoings and Liabilities of the Scheme (other than those referred to in paragraphs (a) and (b) of this definition);
- (d) such amounts which the Manager thinks necessary or desirable to provide or allow for depreciation or the writing down or replacement of any Authorised Investments of the Scheme (including provision for amortising leasehold property) or for any other provisions or allowances; and
- (e) all other amounts which the Manager considers should be deducted for the purposes of making a fair and reasonable determination, in accordance with Accounting Standards, of the Current Value of the Scheme;

**'Delay Event'** means a circumstance where any of the following exist:

- (a) the Scheme's cash reserves fall and remain below 5% of the total assets of the Scheme for 10 consecutive Business Days; or
- (b) if in any period of 90 days, the Manager received valid net redemption requests equal to 10% or more of the Scheme's issued Interests and, during the period of 10 consecutive days falling within the 90 day period, the Scheme's cash reserves are less than 10% of the total assets of the Scheme; or

- (c) the Manager is not satisfied that sufficient cash reserves are available to pay the Redemption Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
- (d) any other event or circumstance arise which the Manager considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme.

**'Distribution Amount'** means, in relation to the Scheme, the amount of any Income Warranty applicable to the particular Member;

**'Distribution Period'** means the period referred to in clause 8.4;

**'Dispute Resolution Service'** means the dispute resolution service approved by the Commission which the Manager nominates from time to time;

**'Distributable Income'** means subject to clause 8.5 any amount determined by the Manager from time to time to be distributed to Members, including –

- (a) the net income of the Scheme
- (b) other Income of the Scheme, and
- (c) any amount of capital of the Scheme.

**'Distribution Surplus'** means the surplus Income of the Scheme distributed in the manner provided in clause 8.5;

**'Expert'** includes solicitors, barristers, accountants, bankers, financial advisers, an Approved Valuer and other professionally qualified consultants;

**'Facility Agreement'** means any agreement (including any borrowing arrangements) to which the Manager is a party which may limit the capacity of the Manager to deal with Subordinated Interests;

**'Fees'** means all fees (including application and penalty), charges, late interest penalty payments paid by borrowers to the Manager on Mortgage Investments;

**'Financial Statements'** has the meaning given to that term in section 9 of the Law;

**'Financial Year'** means the period of 12 months ending on 30 June in each year during the continuance of this Constitution and includes the period commencing on the Commencement Date and expiring on the next succeeding 30 June and any period between 30 June last occurring before the termination of the Scheme;

**'First Mortgage'** means a registered first mortgage over the Land;

**'Former Constitution'** means the Deed Polls dated 9 August 1999 and 6 September 1999 made by the Manager and referred to in the Recitals;

**'Gross Asset Value'** means the aggregate of:

- (a) the Market Value of all investments of the Scheme including cash and amounts owing to the Scheme;
- (b) any prepayment of expenditure; and
- (c) such other increments or decrements as the Auditor approves to be included;

**'GST'** means a tax, impost or duty on goods, services or other things introduced by the Commonwealth, State or Territory either before or after the date of this Constitution;

**'GST Act'** means A New Tax System (Goods & Services Tax) Act 1999 as amended;

**'Income'** means all receipts from Authorised Investments which are paid into the Scheme Account;

**'Income Warranty'** has the meaning given to that term under Clause 8;

**'Interest'** means an undivided share in the Scheme as provided in clause 2;

**'Interest Liabilities'** means the liability of the Scheme to the Members for their undivided interest in the Assets.

**'Investment Deed'** is the deed by the holder of Subordinated Interests in favour of (amongst others) the Manager (in its capacity as responsible entity of the Scheme) relating to the acquisition, holding and redemption of Subordinated Interests;

**'Issue Price'** means in relation to the issue of an Interest, an amount equal to the Current Interest Value of the Interest at the time of issue plus:

- (a) the Statutory Revenue Charges (if any) payable by the Manager in connection with the issue of the Interest;
- (b) all other charges and disbursements of the Manager in connection with the issue of the Interest not included in the Issue Provision; and
- (c) the Issue Provision;

**'Issue Provision'** means such amount (if any) as may from time to time be determined by the Manager in respect of or as an allowance for costs and disbursements, commissions, expenses, legal fees, brokerage, stamp duty, taxes and other costs that may be incurred or expected to be incurred in connection with the conversion of Application Money into Authorised Investments;

**'Issued Interests'** means all Interests for the time being created and issued and not cancelled;

**'Land'** means a freehold estate or interest in real property in any part of the Commonwealth of Australia or any State or Territory thereof and including buildings, fixtures and fittings (including furnishings) and other improvements erected or installed thereon;

**'Law'** means the Corporations Act 2001 and Corporations Regulation;

**'Liabilities'** in respect of the Scheme includes:

- (a) unpaid administrative costs and expenses, including fees of the Manager;
- (b) accrued charges in respect of or owing in relation to any Asset of Scheme;
- (c) amounts required to meet present liabilities of the Scheme;
- (d) amounts of all borrowings of the Scheme;
- (e) any provisions for Taxes which, in the opinion of the Manager, should be taken into account; and
- (f) any other amounts required to meet liabilities or other expenditure which, in the opinion of the Manager, should be taken into account and which have not otherwise been taken into account in determining the amount of the liabilities in any of the preceding paragraphs of this definition;

**'Manager'** means Equititrust Ltd or any other person for the time being acting as manager, provided that at all times the Manager is the responsible entity of the Scheme as defined in section 9 of the Law and the trustee of this trust;

**'Market Value'** of an investment means the current market value determined in accordance with a method agreed between the Manager and an Approved Valuer or Expert. If there is a

dispute between the Manager and the Approved Valuer, the decision of the Approved Valuer shall prevail;

**'Member'** means a person whose Application is accepted and for the time being is registered under the provisions of this Constitution as a member of the Scheme and includes persons jointly so registered;

**'Minimum Investment Amount'** is the minimum investment by the holder of a Subordinated Interest as provided under the Investment Deed;

**'Minimum Redemption Amount'** means the minimum amount a Member can withdraw from the Scheme at any time, as disclosed in the Prospectus;

**'Month'** means calendar month;

**'Mortgage Investment'** means a loan secured by a registered mortgage over Land and other property subject to the following provisions:

- (a) the mortgage will rank as a registered First Mortgage and/or Second Mortgage over the mortgaged Land; and
- (b) the total of all money advanced and secured over such Land and any other property, shall not exceed 80% of the value of the Land and other property that has been valued by an Approved Valuer as shown in the valuation furnished by an Approved Valuer; and
- (c) the loan shall be for a maximum period of 30 years.

**'Officer'** means a person who is a director, secretary or executive officer of the Manager;

**'Prospectus'** means a product disclosure statement or any offer document issued by the Manager inviting Applications or offers to join the Scheme established by the Constitution or where the context requires, means the documentation that forms part of the disclosure inviting Applications or offers to join the scheme established by the Constitution;

**'Quarter'** means each period of 3 months ending on the last days of March, June, September and December in each year;

**'Redemption Amount'** means the number of Interests to be redeemed or repurchased multiplied by the relevant Redemption Price less any Taxes;

**'Redemption Date'** means the date determined by the Manager in accordance with clause 11.1 or 11.17 with effect from which an Interest is to be redeemed or repurchased;

**'Redemption Price'** means in relation to the redemption of an Interest, an amount equal to the Current Interest Value of the Interest at the time of redemption less:

- (a) the Statutory Revenue Charges (if any) payable by the Manager in connection with the redemption of the Interest;
- (b) all other charges and disbursements of the Manager in connection with the redemption of the Interest not included in the Redemption Provision; and
- (c) the Redemption Provision.

**'Redemption Provision'** means such amount (if any) as may from time to time be determined by the Manager in respect of or as an allowance for costs and disbursements, commissions, expenses, legal fees, brokerage, stamp duty, taxes and other costs that may be incurred or expected to be incurred in connection with the conversion of Authorised Investments into cash;

**'Register'** means the register of Members to be established and kept by the Manager under clause 12.1;

**'Regulations'** means the Corporations Regulations of Queensland;

'**Related Party**' means a related party as defined in part 5C.7 of the Law;

'**Scheme**' means the scheme established in accordance with the Constitution;

'**Scheme Accounts**' means the Bank accounts of the Scheme established and maintained in accordance with the Law and any ASIC policy;

'**Second Mortgage**' means a registered second mortgage over the Land;

'**Statutory Revenue Charge**' means a fee, tax, fine, duty, penalty, impost or other charge imposed by statute, rule or regulation and includes any bank account debit or financial institutions duty or tax;

'**Subordinated Interest**' is an Interest in the Scheme with the special rights and restrictions as provided in clause 2.12;

'**Tax Act**' means the *Income Tax Assessment Acts of 1936 and 1997* (Cth) and the regulations made thereunder from time to time; and

'**Taxes**' includes, without limitation, any:

- (a) present or future stamp or documentary taxes, or any other excise or property taxes, GST, charges or similar levies, interest, penalties, fees or other amounts (if any) imposed, levied, collected, withheld or assessed which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder or which are imposed on the Manager in respect of the Scheme, a Members Interest or any of the Authorised Investments thereof;
- (b) taxes, levies, imposts, duties, deductions or withholdings (however called), interest, GST, penalties, charges, fees or other amounts (if any) imposed, levied, collected, withheld or assessed of any nature whatever, whensoever and howsoever imposed, and all liabilities with respect thereto which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder; or
- (c) taxes, interest, penalties, charges, fees GST, or other amounts (if any) imposed, levied, collected, withheld or assessed upon:
  - (i) Application Money;
  - (ii) the Scheme, a Members Interest, Scheme Accounts, or the Income, capital gains, profits, transactions, accounts, accruals, receivables or any change in the worth or value of the Scheme, a Members Interest, the Assets or the Authorised Investments; or
  - (iii) the Manager in its capacity as manager of the Scheme,
  - (iv) all such taxes and imposts to include, without limitation, all imposts made pursuant to the Tax Act, financial institutions duty, debits tax, withholding tax, GST, stamp or documentary taxes, or any other excise or property taxes, charges or similar levies (howsoever called) imposed, levied, collected withheld or assessed by Australia or any political subdivision in, or of, Australia or any other jurisdiction from, or to, which a payment is made by, or on behalf of a Member or pursuant to any legislation enacted, proclaimed or otherwise brought into operation by any of the foregoing;

'**Value**' of an Asset when the value of that Asset is required to be ascertained or taken into account under this Deed or the Scheme shall mean its Market Value as last determined.

'**Wholesale Client**' has the meaning contained in the Law;

'**Withdrawal Date**' is the date from which a Member is entitled to have their Interests redeemed by the Manager as provided in clause 11.

'**Withdrawal Request Form**' means the request form prescribed by the Manager and given to the Manager by a Member for the purposes of clause 11.

## 1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) words expressing the singular include the plural and vice versa;
- (b) words denoting a natural person include corporations and body corporates and vice versa;
- (c) words denoting gender include both genders;
- (d) a reference to a part, clause, paragraph or schedule is a reference to a part, clause, paragraph or schedule of this Constitution;
- (e) references to this Constitution are references to this Constitution as amended, supplemented or varied from time to time;
- (f) a reference to writing includes printing, engraving, typewriting, lithography, photography and any other mode of reproducing words in a visible form;
- (g) a reference to a thing or matter includes a reference to a part of the thing or matter;
- (h) headings are included for convenience only and do not affect interpretation;
- (i) references to a party to this Constitution include the party's successors and permitted assigns;
- (j) references to a document or agreement include references to the document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (k) a reference to a statute includes a reference to or citation of all enactments amending or consolidating the statute and to an enactment substituted for the statute;
- (l) references to dollars and '\$' refer to amounts in Australian currency;
- (m) the schedules to this Constitution form part of this Constitution; and
- (n) where any word or phrase is given a defined meaning in this Constitution, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning.

## 2 CONSTITUTION AND DURATION

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### 2.1 Equititrust Income Fund

**[Not altered but reproduced]**

The Constitution establishes the Equititrust Income Fund, which commences on the Commencement Date.

### 2.2 Assets of the Scheme

**[Not altered but reproduced]**

The Manager declares that it holds and will at all times hold the Assets on trust for Members of the Scheme subject to the provisions of the Constitution and the Law.

### 2.3 Manager to act as responsible entity of the Scheme

**[Not altered but reproduced]**

The appointment of the Manager as manager of the Scheme is hereby confirmed and the Manager agrees to manager the Scheme upon and subject to the terms and conditions contained in the Constitution.

**2.4 Manager to establish Scheme**

**[Not altered but reproduced]**

The Manager shall, on the execution of the Constitution, lodge and hold the sum of one hundred dollars (\$100) to establish and constitute the Scheme. The Manager may, from time to time, cause or cause to be received more cash by way of addition to the Scheme to be held upon the trusts of the Constitution.

**2.5 Interests**

The beneficial interest in the Scheme shall be divided into Interests.

**2.6 Different Classes of Interest**

The Manager may issue Interests or classes of Interests with special rights or restrictions and those rights and restrictions prevail over any inconsistent provision of this Constitution. The rights or restrictions of a particular Interest or class of Interest shall be disclosed in any disclosure document offering investors the opportunity to invest in the Scheme.

**2.7 Creation of Additional Interests**

As and when an addition is made to the Scheme pursuant to this Constitution, additional Interests equal in number to the number computed by dividing the amount of Cash so added by the relevant Issue Price shall be created. The Manager may, instead of Cash, accept Authorised Investments as consideration for the issue of Interests in the Scheme provided that the Manager shall be satisfied as to the Value of such Authorised Investments and the number of Interests to be issued in respect thereof shall be the Value of such Authorised Investments divided by the relevant Issue Price at the date of issue of the Interests.

**2.8 Fractional Interests**

The Manager may at its discretion create a fractional Interest in 100 parts for an amount less than a whole dollar notwithstanding any other provision of this Constitution, the expression 'Interest' shall, where the context will allow, be deemed to include such a fractional Interest and such fractional Interest shall carry with it the rights and obligations which attach to a whole Interest and limited to the proportion of those rights and obligation which the number of 100ths in such fractional Interests bears to 1. A fractional Interest may also be created by the redemption of part of a whole Interest.

**2.9 Nature of Beneficial Interest**

A Member shall be entitled as herein provided or as provided by the Law to a beneficial interest in the Scheme but such interest shall not entitle the Member other than as provided by this Constitution:

- (a) to interfere with the rights or powers of the Manager in its dealings with the Scheme or any part thereof; or
- (b) to exercise any rights, powers or privileges in respect of any Authorised Investment.

**2.10 Minimum Investment Amounts and Holdings**

The Manager may at any time determine minimum amounts which may be invested and accepted as Application Moneys in the Scheme including any minimum holding of Interests in the Scheme.

**2.11 Binding Effect of Constitution**

This Constitution operates as a deed and is binding on the Manager and each Member and all persons claiming through them as if they were parties to this Constitution, and each Applicant by signing the Application, acknowledges being so bound.

## 2.12 Subordinated Interests

The Manager may pursuant to clause 2.6, issue Subordinated Interests to itself or any other person, provided that person is a Wholesale Client. The rights and restrictions of Subordinated Interests are:

- (a) The holder of a Subordinated Interest will have the same rights to vote at meetings of Members as the holders of Interests.
- (b) The holder of a Subordinated Interest has no entitlement to participate in any Income Warranty.
- (c) The holder of a Subordinated Interest has the right to receive the Distribution Surplus to be shared between the holders of Subordinated Interests in proportion to the number of Subordinated Interests they hold when the Distribution Surplus is distributed in accordance with clause 8.5.
- (d) The holders of Subordinated Interests must maintain the Minimum Investment Amount.
- (e) Subordinated Interests cannot be issued at an Issue Price which is less than the current Issue Price for Interests which are not Subordinated Interests.
- (f) Subject to paragraph (d) above, the redemption of a Subordinated Interest can only occur:
  - (i) with the consent of the Manager; and
  - (ii) all valid Withdrawal Request Forms have been processed and paid at a Redemption Price of not less than \$1.00 per Interest; and
  - (iii) provided the redemption does not breach any existing Facility Agreement;
  - (iv) there being retained sufficient surplus in the Scheme to meet any Income Warranty for the current month; and
  - (v) the Manager has a reasonable belief that:
    - (A) any Income Warranty; and
    - (B) any Benchmark Return,
    - (C) will continue to be met.
- (g) In the event the Manager is removed as responsible entity of the Scheme (other than with its consent) all Subordinated Interests will (subject to any existing Facility Agreement) on its removal convert to Access Investment Interests in the manner provided in clause 2.13.

## 2.13 Conversion of Subordinated Interests to Access Investment Interests

Where Subordinated Interests are converted to Access Investment Interests the following formula applies:

$$A = B \times (C/D)$$

- (a) Where:
- (b) A is the number of Access Investment Interests to which the Subordinated Interests are converted.
- (c) B is the number of Subordinated Interests held by the Subordinated Interests holder.
- (d) C is the Current Interest Value of the Subordinated Interests.
- (e) D is the Current Interest Value of Access Investment Interests.

### **3 APPLICATION PROCEDURES**

#### **3.1 Offer**

The Manager may, in accordance with the provisions of the Law and this Constitution, invite investment in the Scheme and issue a Prospectus in relation to such an invitation.

#### **3.2 Applications**

A person who wishes to invest in the Scheme must make an Application in the manner specified in the Prospectus and pay the Issue Price associated with the Application Money payable.

#### **3.3 Application Account**

Unless otherwise required by the Law, the Manager must establish and maintain a Bank account in the name of the Manager to be designated the Application Account for the Scheme. The Application Account must be established and operated in accordance with the requirements of the Law.

#### **3.4 Application Money to be paid to Manager**

The Manager must, in each Prospectus and other representations relating to the Scheme, direct how all cheques and other payment orders in respect of Applications are to be drawn on account of the Scheme.

#### **3.5 Application Money with completed Application**

Where the Manager receives Application Money with a completed Application relating to a current Prospectus, the Manager must pay the Application Money into the Application Account as soon as practicable after its receipt, but no later than the close of business on the next Business Day after the day of receipt.

#### **3.6 Application Money without completed Application**

Where the Manager receives Application Money that is not accompanied by a completed Application relating to a current Prospectus it will, as soon as practicable, return the Application Money to the Applicant or:

- (a) attempt to obtain the Application from the Applicant;
- (b) pay the Application Money into the Application Account; and
- (c) if interest accrues while the Application Money is held in the Application Account, ask the Applicant, in writing, whether the Applicant wants the interest to be dealt with as additional Application Money or to be paid to the Applicant.

#### **3.7 Dealing with Application Money**

Should the Manager pay the Application Money into the Application Account under clause 3.6, the Manager will:

- (a) hold the Application Money on trust for the Applicant, until the Application is received; and
- (b) if the Application is received by the Manager within 30 days after the Application Money is received:
  - (i) apply the Application Money to the Scheme Accounts as soon as practicable after receiving the Application; and
  - (ii) deal with any interest accrued while the Application Money was held by the Manager in the Application Account in the manner disclosed in the Prospectus; and
- (c) if the Application has not been received by the Manager within 30 days after the Application Money was received, return the Application Money and interest (if any) to the Applicant as soon as practicable.

**3.8 Manager's discretion**

The Manager has the sole discretion to determine whether to accept or reject an Application in whole or in part without giving reasons. Where the Manager determines to reject an Application, it must give written notice to the Applicant within a reasonable time after receipt of the Application. The Manager must within a further 10 Business Days after the notice of rejection is given, refund to the Applicant the Application Money.

**3.9 Manager may withdraw Prospectus**

The Manager may in its sole discretion determine at any time to withdraw a Prospectus. The Manager within 5 Business Days after the notice to withdraw the Prospectus is given, repay to all Applicants all Application Money paid pursuant to that Prospectus and held in the Application Account. Any interest that has accrued on Application Money in the Application Account shall be dealt with as disclosed in the Prospectus.

**3.10 Manager to Confirm Acceptance**

- (a) Once the Application is accepted the Manager must enter the Applicant on the Register as a Member.
- (b) The Manager must transfer the Application Money of the Member to the Scheme Accounts.

**3.11 Issue Price**

The issue price of an Interest shall be at the Issue Price and initially for each Interest shall be one dollar (\$1.00) of Application Money.

**3.12 Certificates**

The Manager

- (a) may issue to each Member a Certificate as evidence of the Members' investment in the Scheme; and
- (b) may cancel existing Certificates and reissue new Certificates where the Manager has been supplied with evidence to the satisfaction of the Manager that the existing Certificate has been lost, or stolen.

**3.13 Form of Certificate**

The Certificate is to be in the form as determined by the Manager.

**3.14 Joint Members**

In the case of joint Members, only the person whose name appears first in the Register is entitled to a Certificate relating to that Members Interest.

**3.15 Replacement Certificates**

Replacement Certificates may be issued in the circumstances and subject to such conditions as determined by the Manager.

**3.16 Issue Price Adjustment**

Where the Manager calculates the Issue Price of an Interest, and the Issue Price is less than \$1.00 per Interest the following will apply:

A = the Current Value of the Scheme

B = the total number of Issued Interests

C = the total number of Subordinated Issued Interests

$A/(B-C) = D$

$D - \$1.00 = E$

If E is zero or a negative number then the Issue Price of Interests which are not Subordinated Interests will be D and the Issue Price of Subordinated Interests will also be D.

If E is a positive number then the Issue Price of Interests which are not Subordinated Interests will equal \$1.00 and the Issue Price of a Subordinated Interest will also be \$1.00.

## **4 RESPONSIBILITIES, POWERS AND DUTIES OF MANAGER**

### **4.1 Exercise of powers of the Manager**

- (a) Subject to the provisions of this Constitution and the Law, the Manager has absolute and uncontrolled discretion as to the exercise of its powers, authorities and duties, in relation to the manner, mode and time of exercise of those powers, authorities and duties.
- (b) The Manager has all the powers of a natural person and a body corporate, including the power to invest and to borrow or raise money for the purposes of the Scheme and on security of the relevant Assets.

### **4.2 Power to Appoint Agent (Section 601FB(2))**

- (a) The Manager has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the Scheme.
- (b) For the purpose of determining whether:
  - (i) there is a liability to the Members; or
  - (ii) the Manager has properly performed its duties for the purposes of section 601GA(2) of the Law;

the Manager is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

### **4.3 Authority for Agent (Section 601FB(3))**

An agent appointed, or a person otherwise engaged, by:

- (a) the agent or person referred to in clause 4.2; or
- (b) a person who is taken under this clause to be an agent of the Manager;

to do anything that the Manager is authorised to do in connection with the Scheme is taken to be an agent appointed by the Manager to do that thing for the purposes of clause 4.2.

### **4.4 Liability of Agent (Section 601FB(4))**

If:

- (a) an agent holds any Assets on behalf of the Manager; and
- (b) the agent is liable to indemnify the Manager against any loss or damage that:
  - (i) the Manager suffers as a result of a wrongful or negligent act or omission of the agent; and
  - (ii) relates to a failure by the Manager to perform its duties in relation to the Scheme;

then any amount recovered under the indemnity forms part of the Assets.

### **4.5 Duties of Manager (Section 601FC)**

In exercising its powers and carrying out its duties, the Manager must:

- (a) act honestly;

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the Manager's position;
- (c) act in the best interests of the Members and, if there is a conflict between the Members' interests and the Manager's own interests, give priority to the Members' interests;
- (d) treat the Members of the same class equally and Members of different classes fairly;
- (e) not make use of information acquired through being the Manager in order to:
  - (i) gain an improper advantage for itself or another person; or
  - (ii) cause detriment to the Members of the Scheme;
- (f) ensure that the Constitution meets the requirements of sections 601GA and 601GB of the Law;
- (g) ensure that the Compliance Plan meets the requirements of section 601HA of the Law;
- (h) comply with the Compliance Plan;
- (i) ensure that the Assets are:
  - (i) clearly identified as Assets; and
  - (ii) held separately from property of the Manager, the assets of other Schemes established under the Constitution and the property of any other managed investments scheme;
- (j) ensure that all payments out of the Assets are made in accordance with the Constitution and the Law;
- (k) report to the Commission any breach of the law by the Manager that:
  - (i) relates to the Scheme; and
  - (ii) has had, or is likely to have, a materially adverse effect on the interests of Members;

as soon as practicable after the Manager becomes aware of the breach; and
- (l) carry out or comply with any other duty, not inconsistent with the Law, that is conferred on the Manager by the Constitution.

## **5 DUTIES OF OFFICERS AND EMPLOYEES OF MANAGER**

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### **5.1 Duties of Officers of the Manager (Section 601FD(1))**

An Officer of the Manager must:

- (a) act honestly;
- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the Officer's position;
- (c) act in the best interests of the Members and, if there is a conflict between the Members' interests and the interests of the Manager, give priority to the Members' interests;
- (d) not make use of information acquired through being an Officer of the Manager in order to:
  - (i) gain an improper advantage for the Officer or another person; or
  - (ii) cause detriment to the Members;
- (e) not make improper use of their position as an Officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the Members; and

- (f) take all steps that a reasonable person would take, if they were in the Officer's position, to ensure that the Manager complies with:
  - (i) the Law;
  - (ii) any conditions imposed by the Manager's licence;
  - (iii) the Constitution; and
  - (iv) the Compliance Plan.

**5.2 Duties of Employees of the Manager (Section 601FE(1))**

An employee of the Manager must not:

- (a) make use of information acquired through being an employee of the Manager in order to:
  - (i) gain an improper advantage for the employee or another person; or
  - (ii) cause detriment to Members; or
- (b) make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the Members.

**6 INDEMNITIES AND REIMBURSEMENTS OF EXPENSES**

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**6.1 Indemnity**

To the extent permitted by statute the Manager is indemnified out of the Assets for all debts, liabilities, damages, costs, Taxes, charges, expenses and outgoings reasonably and properly incurred by it in the proper performance of its functions and duties and exercising its powers under this Constitution or at law, except in the case of debts, liabilities, damages, costs, Taxes, charges, expenses or outgoings incurred or payable in respect of or as a result of gross neglect, deceit or a material breach of covenant of the Manager.

**6.2 Limitation of liability**

Except in the case of a failure to exercise care and diligence, the Manager will not to the extent permitted by statute be liable to account to nor to indemnify the Scheme, a Member or person claiming under or on behalf of a Member, for anything done in good faith in the performance of its functions and duties and the exercise of its powers under this Constitution or at law including:

- (a) a failure to perform or do an act or thing which or the Manager is hindered, prevented or forbidden from doing or performing by reason of any present or future law (statutory or otherwise); or
- (b) payments made by the Manager in good faith to a duly empowered fiscal authority of the Commonwealth, a State or Territory for Taxes or other charges on the Scheme, an Authorised Investment or a Certificate, or with respect to any transaction reasonably and properly entered into under this Constitution, although the payment as a matter of law ought or need not have been made; or
- (c) anything done in good faith relying upon advice from an Expert instructed or appointed by the Manager and independent of the Manager; or
- (d) anything done in good faith by the Manager in respect of an Application or notice on which there is a forged signature or inaccurate details provided that there were at the time of the doing of the act, matter or thing no reasonable grounds to believe that the signature or detail was not genuine or accurate.

**6.3 Further limitation of liability of the Manager**

Except in the case of the Manager's failure to exercise care and diligence, the Manager is not to the extent permitted by statute liable to Members to any extent greater than the extent of the

Assets vested in the Manager or received and/or held by it in accordance with the provisions of this Constitution.

#### **6.4 Transactions involving the Scheme**

Subject to the Law and the Manager's duties to Members, the Manager is entitled, in any capacity other than as manager of the Scheme, to contract with a Member, the Scheme or any Authorised Investment or any property proposed to be acquired as an Asset, without any liability to account to the Members only if:

- (a) the transaction is not in breach of any covenant contained in this Constitution; and
- (b) the Manager acts in the transaction with good faith to the Members.

#### **6.5 Further indemnity**

If the Manager acquires an Asset the holding of which exposes or may expose the Manager to personal liability or if the Manager enters into any contract, credit facility or other transaction on behalf of the Scheme which exposes or may expose the Manager to any personal liability, the Manager has a right of indemnity out of the Assets in respect of that liability.

#### **6.6 General Compliance Related Party Transactions**

- (a) The Manager must comply with part 5C.7 of the Law in respect of all Related Party transactions. In particular the Manager must not, unless permitted by the Law, give a financial benefit:
  - (i) to itself, or to a Related Party, out of the Assets; or
  - (ii) that could diminish or endanger the Assets;
- (b) Paragraph (a) does not prevent the Manager from paying itself fees, and exercising rights to an indemnity, in this Constitution and under section 601GA(2) of the Law and the law.

#### **6.7 Dealings by the Manager**

Nothing in this Constitution prevents the Manager or any person associated with the Manager from being a Member.

## **7 INVESTMENT**

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#### **7.1 Investment Management**

It is the role of the Manager to seek and invest the funds of the Scheme in Mortgage Investments.

#### **7.2 Investment of Assets in another managed investment scheme (Section 601FC(4))**

[Deleted and not replaced]

#### **7.3 Investment Oversight**

The Manager shall implement practices, systems and procedures to monitor the performance of Authorised Investments made by it and shall where considered prudent and appropriate take whatever action as may be necessary to protect the capital value of the Authorised Investments of the Scheme including institution of any recovery action under Mortgage Investments or other securities held in respect of Authorised Investments made in order to recover or maximise recovery of the capital and any unpaid income component of any Authorised Investment.

#### **7.4 Income Warranty**

- (a) The Manager may in a Prospectus or other offer document make provision for or representations as to the payment to Members of a minimum rate of distribution to be received by Members on their respective investments notwithstanding the percentage rates of interest payable under Mortgage Investments or Authorised Investments which

shall comprise Assets of the Scheme (in this and other clauses of the Deed to be called an Income Warranty').

- (b) The terms of any such Income Warranty may vary for each Prospectus or other offer document issued by the Manager on application to Applicants having regard to terms made by the Manager and based on the Manager's estimates of the Scheme's income, liabilities and expenses to be taken into account in estimating the likely return to Members and Applicants for periods (if any) nominated by the Manager in each prospectus or other offer document issued by it. The Manager may determine that the percentage rate of any Income Warranty be specified or provided for in any Application under a Prospectus or offer document issued by it or may leave such rate blank in any Application, with the Manager reserving the right to complete and/or accept an Application dependent upon the prevailing percentage rate of Income Warranty determined by and acceptable to the Manager at the time. Any Income Warranty given shall be deemed to be given by the Manager personally and shall not be binding on nor affect the Scheme notwithstanding that references to an Income Warranty may be included in an Application.

#### **7.5 Amending the Income Warranty**

The Manager may at any time amend the Income Warranty. In such circumstances the amendments must be notified to the Applicants before or at the time they complete their Application.

### **8 INCOME OF THE SCHEME**

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#### **8.1 Manager to collect Income**

The Manager will collect, receive and get in the Income of the Authorised Investments and will pay it into the Scheme Accounts. The Manager will make all payments relating to the Scheme from the Scheme Accounts.

#### **8.2 Decision of Manager final**

The decision of the Manager in consultation with the Auditor as to whether any amount to be distributed to Members is Income or capital shall be final.

#### **8.3 Distribution to Members**

The Manager shall distribute to the Members (excluding the holders of Subordinated Interests) the Distribution Amount within 14 days of the end of the Distribution Period for that Member.

#### **8.4 Distribution Period**

The Distribution Period for each Member (excluding the holders of Subordinated Interests) shall be:

- (a) quarterly, monthly, half yearly, or yearly as disclosed by the Manager in the Prospectus; or
- (b) if the Manager so provides, as agreed between the Member and the Manager at the time the Members Application is accepted.

#### **8.5 Distribution Surplus**

Following the payment in each Distribution Period to each Member (excluding the holders of Subordinated Interests), their Distribution Amount, any remaining surplus Income of the Scheme shall be paid in the following order of priority and subject to the provisions of clauses 2.12 and 21.5:

- (a) in payment of Scheme expenses;
- (b) payment to each Member a distribution up to their particular Benchmark Return;

- (c) in payment of the Manager's management fee; then the balance
- (d) as a distribution to the holders of Subordinated Interests as between those Members in proportion to the number of Subordinated Interests they hold.

**8.6 Manager to keep separate accounts**

The Manager may keep separate accounts of different categories and sources of Income and allocate the Income from any category or source to any Member.

**8.7 Reinvestment of income entitlement**

- (a) The Manager may invite Members in the Scheme to reinvest any or all of their Distribution Amount by way of application for additional Interests in the Scheme. The terms of any such invitation will be determined by the Manager and may, amongst other things, provide that unless a Member otherwise directs the Manager, that Member will be deemed to have elected to reinvest all or part of their Distribution Amount. Any invitation may be withdrawn or varied by the Manager.
- (b) Interests so applied for will be deemed to have been issued on the first day of the Distribution Period immediately following the Distribution Period in respect of which the Distribution Amount has accrued or such other date determined by the Manager.

**8.8 Members presently entitled to Distributable Income**

In accordance with clause 8.5, at the end of each Distribution Period the Members will be presently entitled (within the meaning of the Tax Act) to all Distributable Income derived during the relevant Distribution Period.

**9 TERMINATION OF THE SCHEME**

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**9.1 Termination of the Scheme**

[Not altered but reproduced]

Subject to clause 9.2, the Scheme will terminate 80 years from the Commencement Date unless otherwise specified in the Prospectus for the Scheme.

**9.2 Defined Event of Winding Up**

The Manager must wind up the Scheme or cause the Scheme to be wound up on the occurrence of any one of the following circumstances:

- (a) the Scheme is without a Manager for whatever reason;
- (b) the Manager uses the mechanism provided for in Section 601NC of the Law;
- (c) the Members decide in a meeting called in accordance with this Constitution and the Law to wind up the Scheme;
- (d) the Scheme comes to the end of its term (as set out in clause 9.1);
- (e) any of the circumstances set out in Section 601NE of the Law apply such that the Manager is required to wind up the Scheme; or
- (f) a court orders the Scheme to be wound up pursuant to Section 601ND of the Law.

**9.3 Procedure for Winding Up**

- (a) Unless otherwise required by the Law, the Manager is responsible for winding up the Scheme.
- (b) The Manager must convert to money all Assets, deduct all proper costs and then distribute the money to each Member in proportion to the Members Interests in the Scheme. The Manager may make interim distributions during the winding up process.

- (c) The Manager must proceed with the winding up efficiently, diligently and without undue delay. The Manager must complete the winding up process within such time frame as it considers is available to do so, whilst complying with its duties under this Constitution.
- (d) The Manager may retain from the proceeds of winding up:
  - (i) sufficient funds to meet future obligations which the Manager reasonably believes will fall due after a distribution is made to Members; and
  - (ii) to pay its own remuneration expenses for work to be done following the realisation of the Assets.
- (e) During the winding up of the Scheme, the Manager may terminate any agreements or arrangements it has entered into with Members which relate to the Scheme. The Manager must give notice to the Members of the termination of those agreements or arrangements.
- (f) Once the Manager believes the winding up is complete, the Manager must engage a registered company auditor to audit the final accounts of the Scheme. The Manager must send a copy of any report made by the auditor to Members within 30 days after the Manager receives the report from the auditor.
- (g) The operation of this clause is subject to the priority obligations in clause 9.4.

#### **9.4 Priority on a winding up**

In the winding up of the Scheme the realisation of the assets of the Scheme will be applied in the following priority:

- (a) must apply the assets of the Scheme, or the proceeds of their realisation, to pay any Liabilities (excluding Interest Liabilities); then
- (b) pay to the holders of Interests (excluding the holders of Subordinated Interests) the sum equivalent to their Issue Price for their Interests;
- (c) pay to the holders of Subordinated Interests the sum equivalent to their Issue Price for their Subordinated Interests; and thereafter
- (d) distribute the remaining assets or the net proceeds to all Members in proportion to the number of Interests of which they are the registered holder on the date of termination of the Scheme.

#### **9.5 Limitation of liabilities**

A Member is not liable to contribute towards the debts or liabilities of the Manager and is not liable to indemnify the Manager or any creditor or either of them in the event of any deficiency of the Scheme. The only rights, if any, of indemnity of the Manager and their respective creditors shall be limited to the Assets. The limitation of liability of Members set out in this clause 9.5 also apply to any liability which is incurred by the Manager as a result of any directions or requests of the Members.

## **10 TRANSFER AND TRANSMISSION OF MEMBERS INTERESTS**

### **10.1 General principles when dealing with Members' Interests**

- (a) A Member may transfer their Interests only in accordance with the provisions of this Constitution and, in particular:
  - (i) the transferee must agree to be bound by the provisions of this Constitution; and
  - (ii) a stamped transfer of the Interests in the Scheme must be delivered to the Manager together with the Certificate or Certificates in respect of the Interests to be transferred.

- (b) The Manager will not be required to effect any transaction or dealing in any Interest on behalf of or for the benefit of or at the request of any Member unless the Member has paid or otherwise provided for, to the Manager's satisfaction, all duties, Taxes, governmental charges, transfer fees, registration fees, brokerage fees and other charges (whether similar to the foregoing or not) which may have become or may be payable in respect of the transaction or dealing. The Manager is entitled, if it thinks fit, to pay and discharge all or any of those duties and charges on behalf of the Member concerned and retain the amount so paid out of any moneys to which the Member may be, or become, entitled.
- (c) The Manager may decline to register any transfer during the period that the Register is closed pursuant to clause 12.6.
- (d) Every instrument of transfer of an Interest which is registered will be retained by the Manager for such period as the Manager may determine, after which (subject to the provisions of any law or this Constitution to the contrary) the Manager may destroy it.
- (e) Where the Manager refuses to register any instrument of transfer, within 2 Months after the date on which the instrument was deposited with the Manager, the Manager will give notice of the refusal to the person who deposited it and any instrument of transfer which the Manager refuses to register will (except in the case of suspected fraud) be returned to the person depositing it upon request by such person within 2 months of the giving of the notice.
- (f) The Manager may refuse to register or fail to register or give effect to any transfer of an Interest without assigning a reason.
- (g) Upon the registration of a transfer of any Interest, the Manager will within one Month after the date of such registration issue to the transferee or transmittee written confirmation of the transfer or transmission.

#### 10.2 Form of transfer

The transfer of an Interest shall be form in the nominated by the Manager. The form will have regard to the need for the transferee to be bound to this Constitution and any other arrangements which go to the integrity of the Scheme.

#### 10.3 Transmission

Subject to the provisions of this Constitution:

- (a) in the case of the death of any Member the survivor or survivors (where the deceased was a joint holder) or the executors or administrators (where the deceased was the sole holder) are the only persons recognised by the Manager as having any title to or interest in the Interests registered in the deceased's name;
- (b) any person becoming entitled to any Interests in consequence of the death or bankruptcy of a Member may upon:
  - (i) producing to the Manager evidence of the capacity in which they propose to act under the provisions of this clause or of their title to the Interests as the Manager deems sufficient;
  - (ii) in the case of the death of the Member, producing to the Manager evidence of payment of any duties the Manager may require; and
  - (iii) delivering up to the Manager for cancellation the Certificate for the Interests, be registered as the holder of the Interests and the Manager shall cancel the existing Certificate for Interests and issue a new Certificate for Interests in their name;
- (c) any person becoming entitled to any Interests because of the death or bankruptcy of a Member may give a good and sufficient discharge to the Manager for any money paid to

them but are not entitled to receive notices of or to attend or vote at any meetings of Members until they have become registered as a Member in respect of such Interests.

## **11 WITHDRAWAL**

### **11.1 Obligation to redeem**

- (a) The Withdrawal Date applicable to each Member who invests for a fixed 12 month investment term will be each annual anniversary of the date that Member's Application was accepted by the Manager and Interests are issued. For the avoidance of doubt, if a Member's Application is accepted by the Manager and Interests are issued on 2 December 1999, then the first Withdrawal Date for those funds invested by that Member will be 2 December 2000 or if this is not a Business Day, the next Business Day thereafter. If a Member does not lodge a Withdrawal Request Form within the time prescribed by this clause 11, then the Member's next Withdrawal Date will be 2 December 2001 or if this is not a Business Day, the next Business Day thereafter.
- (b) A Member or a Member's duly authorised agent approved by the Manager, must at least 30 days before the Withdrawal Date give the Manager a Withdrawal Request Form specifying the number of Interests to be redeemed and such notice is to be accompanied by the relevant Certificates (if any).
- (c) Subject to the following provisions of this clause 11 and the existence of a Delay Event, on receipt of a Withdrawal Request Form and Certificates (if any), the Manager must within 180 days of the Withdrawal Date redeem the required Interests out of the Scheme at the Redemption Price applicable on the date the Members Interests are redeemed by the Manager for that Member. The date the Members Interests are redeemed by the Manager pursuant to this clause is the Redemption Date for that Member.
- (d) Subject to the Manager's rights under clause 11.7, the days and times specified in clauses 11.1 and 11.2 may be varied upon not less than 60 days' notice to Members.
- (e) Notwithstanding this clause 11.1, the Manager may at its discretion allow the Member to withdraw from the Scheme all or part of the Member's funds at any time, in accordance with clause 11.18.

### **11.2 Access and 7 day call Investment Interests**

- (a) Pursuant to clause 2.6 the Manager has created a separate class of Interests referred to as the Access Investment Interests and the 7 day call Investment Interests. Members who hold Interests of these classes, may lodge a Withdrawal Request Form with the Manager at any time they wish their Interest to be redeemed by the Manager on behalf of the Scheme.
- (b) From the date of this amendment 7 day call Investment Interests will thereafter be called and also referred to in this Constitution, as Access Investment Interests. The redemption provisions applying to Access Investment Interests apply equally to 7 day call Investment Interests.
- (c) Subject to the following provisions of this clause 11.2 and the existence of a Delay Event the Manager will generally redeem an Access Investment Interest within 7 days of receipt of that Members Withdrawal Request Form with respect to that Access Investment Interest. However, the Manager has up to 180 days from receipt of the Withdrawal Request Form, to redeem that Access Investment Interest and pay the Redemption Amount to the holder of the Access Investment Interest.
- (d) The date upon which the Manager redeems the Access Investment Interest in accordance with clause 11.2, will be the Redemption Date for that Access Investment Interests.

### 11.3 Extension of Redemption Date

- (a) Notwithstanding clauses 11.1(c) and 11.2, in the circumstances of a Delay Event the Manager must redeem Interests within 360 days of receiving a valid Withdrawal Request Form. Nothing in this clause 11.3 prohibits the Manager from redeeming Interests within these maximum timeframes.
- (b) The Manager is not required to process a redemption request where:
  - (i) the provisions of this Constitution relating to appropriate evidence of title have not been satisfied; or
  - (ii) the redemption would cause the Members Interests to fall below any minimum investment balance, as disclosed in the Prospectus.
- (c) The date the Manager redeems the Members Interests as provided in this clause 11.3 is the Redemption Date.
- (d) In satisfying redemption requests the Manager must treat all Members of the same class equally and as between classes fairly. Where the Manager holds more than one valid Withdrawal Request Form of the same class, it shall process them in order of receipt.

### 11.4 Suspension by Manager

The Manager may suspend the redemption of Interests for such period as it determines where it is impractical to calculate the Redemption Price due to:

- (a) the closure of a securities exchange or trading restrictions on a securities exchange;
- (b) an emergency or other state of affairs;
- (c) the declaration of a moratorium in a country where the Scheme has investments;
- (d) a closure of or restrictions on trading in the relevant foreign exchange market; or
- (e) the realisation of investments not being able to be effected at prices which would be realised if investments were realised in an orderly fashion over a reasonable period in a stable market.

No suspension may exceed 30 days unless a longer period is permitted by the Manager having regard to the circumstances. All outstanding redemptions with Redemption Dates which fall within that period of suspension and any Withdrawal Request Form received while the redemption of Interests is suspended, shall be reactivated with effect from the first Business Day after the suspension ceases.

### 11.5 Other suspension of redemption obligation

The Manager is not obliged to cause the redemption of Interests in the Scheme in any of the following circumstances:

- (a) the person making the request holds more than the Minimum Redemption Amount in the Scheme and the request relates to less than the Minimum Redemption Amount; or
- (b) carrying out the redemption will result in the person making the request holding less than the Minimum Redemption Amount in the Scheme; or
- (c) the request is made:
  - (i) after any notice convening a meeting of Members to vote on whether to wind up the Scheme has been sent by the Manager and before those eligible to vote have so voted; or
  - (ii) while the Scheme is being lawfully wound up, whether pursuant to a resolution to wind up the Scheme or in accordance with the Constitution or otherwise;

The Manager will remain entitled in its absolute discretion to or cause the redemption of Interests in accordance with clause 11.1 in the above circumstances.

**11.6 Staggering of Redemption Dates**

Despite any provision of this Constitution, the Manager may determine more than one Redemption Date for Interests to be redeemed pursuant to a Withdrawal Request Form and such Interests will be redeemed over those days in such proportions as the Manager determines, provided that all such Interests are redeemed within the time specified in clause 11.1.

**11.7 Funding of redemption**

To fund the redemption of Interests out of the Scheme, the Manager may apply or realise part of the Assets, and/or raise or borrow money, either unsecured or secured against Assets.

**11.8 Time for Payment of Redemption Amount**

The Manager will pay or cause to be paid to the Member the Redemption Amount in respect of any Interests within 90 days of the Redemption Date.

**11.9 Resale and redemption of Interests by Manager**

Where the Manager holds Interests for its own benefit, it may redeem those Interests out of the Scheme. This clause 11 will apply, with the necessary changes, to that redemption.

**11.10 Cancellation of Interests**

Interests which have been redeemed out of the Scheme will be cancelled and the Manager will record the cancellation in the Register.

**11.11 Transfer of specific assets**

The Manager may determine that the Redemption Amount will be satisfied wholly or in part by the transfer of investments of the Scheme at their Market Value. Expenses incurred in respect of the transfer must be paid by the Member.

**11.12 Compulsory redemption of small holdings**

If the Redemption Price of all Interests in the Scheme held by a Member is less than the Minimum Redemption Amount, the Manager may compulsorily redeem those Interests.

**11.13 Components of Redemption Price and payment of accrued distributions**

- (a) Unless the Manager otherwise notifies a Member whose Interests are redeemed, the Redemption Price paid to that Member will comprise capital only. The Manager may notify a Member that the Redemption Price comprises part capital and part Income. Where the Redemption Price paid to a Member comprises Income and capital, the Member will be presently entitled (within the meaning of the Tax Act) to the Income component and the Manager must notify the Member of the Income component of the Redemption Price paid to them. This notice may be given at the time of redemption but must in any case be given within 3 months of the end of the Financial Year of the Scheme in which the redemption occurs.
- (b) Where an Interest is redeemed after a right to a distribution, whether income or capital, has accrued in respect of that Interest, that distribution may be paid to the holder of the Interest at the time of payment of the applicable Redemption Price notwithstanding that the distribution has not been paid at that time to holders of other Interests.

**11.14 No required disposal**

A Member is not required to dispose of its Interests except as otherwise provided in this Constitution and the Corporations Law.

**11.15 Early Redemption**

Notwithstanding anything else contained in this clause 11:

- (a) A Member shall have no right of withdrawal during any period of twelve months following the application of funds by that Member other than as provided in clause 11.1.

- (b) Notwithstanding the foregoing, the Manager may at its complete discretion allow a Member to withdraw during the first six months following acceptance by the Manager of the Member's Application or during the first six months of any annual anniversary of a Member's Investment. In such circumstances, the Manager may charge the Member an early withdrawal fee as disclosed to the Member at the time of the request. In such circumstances the Redemption Date for the Member will be the date nominated by the Manager.
- (c) Notwithstanding the foregoing, the Manager may at its complete discretion allow a Member to withdraw during a period not otherwise provided in clause 11.11.15(a) or 11.15(b). In such circumstances, the Manager may charge the Member an early withdrawal fee as disclosed in the Prospectus. The Redemption Date for the Member in those circumstances shall be the date the Manager receives from the Member the Withdrawal Request Form.

#### 11.16 Liquidity Protection Rules

Notwithstanding any provision in this clause 11, the Manager may withhold or suspend payment to a Member or Members of a Redemption Amount or Redemption Amounts payable and/or withhold or suspend for further processing, any Withdrawal Request Forms then on hand if:

- (a) The Manager in any 30 day period receives Withdrawal Request Forms from a Member or Members where the Redemption Amount or Redemption Amounts is equal to or greater than 5% of the total value of the Assets of the Scheme; or
- (b) During a period of 10 consecutive days falling within a 90 day period, the Scheme's cash reserves are less than 5% of the total value of the Assets of the Scheme. In these circumstances, the Manager may refuse to accept any new Withdrawal Request Forms and may refuse to accept any new Applications for such period not exceeding 12 months as may be required to realise, in an orderly manner, the Assets of the Scheme.

#### 11.17 Additional Investments

- (a) Notwithstanding any other provision of clause 11, the Manager may (at its discretion) allow a Member to invest additional amounts to their 12 month investment for up to 30 days from the date their initial investment is accepted by the Manager and Interests issued. Where this occurs the Redemption Date for both the initial Interest and subsequent Interests will be the 12 month anniversary of the issue of the initial Interests. For example, the Member invests \$20,000 on 1 February 2006 and acquired 20,000 Interests (assuming the Issue Price is \$1.00 per Interest), and the Member (with the consent of the Manager) contributes a further \$15,000 and is issued 15,000 Interests on 25 February 2006 (assuming the Issue Price is \$1.00 per Interest). In this circumstance the Redemption Date (assuming the Member has lodged a valid Redemption Withdrawal Request Form) of all the Members Interest is 31 January 2007.
- (b) The Manager (at its discretion) may also allow Members to add to their 12 month investment during the 30 days prior to their Redemption Date. In this instance such an additional investment will constitute the early termination of their initial investment with both their initial and subsequent investments being deemed to be reinvested for a further full 12 months. For example, the Member invests \$20,000 on 1 February 2006 and is issued 20,000 Interests (assuming the Issue Price is \$1.00 per Interest). On 25 January 2007 the Member advises the manager that the Member wishes to invest an additional \$15,000 in the Scheme as an additional investment to their original investment and not as a new investment. Then with the consent of the Manager, the original Interests of the Member are redeemed by the Manager on the Redemption Date nominated by the Manager (which for the purpose of this example is 25 January 2007), and (assuming the then Redemption Price and Issue Price of Interests is \$1.00 per Interest) 35,000 new Interest are issued by the Manager on 25 January 2007 with a new Redemption Date of 24 January 2008.

- (c) Notwithstanding any other provision in this Constitution, the Manager in exercising its discretion in this clause 11 or as otherwise contained in the Constitution:
- (i) must do so in accordance with its obligations under the Corporations Act 2001; and
  - (ii) nothing in any way obliges or requires the Manager to exercise its discretion in favour of the Member or redeem the Members Interests before their original Redemption Date.

#### 11.18 Early Redemption

Notwithstanding anything else contained in this clause 11:

- (a) A Member who invests pursuant to clause 11.1 shall have no right of withdrawal during any period of twelve months following the application of funds by that Member other than as provided in clause 11.1.
- (b) Notwithstanding the foregoing, the Manager may at its complete discretion allow a Member to withdraw during the first six months following acceptance by the Manager of the Member's Application or during the first six months of any annual anniversary of a Member's Investment. In such circumstances, the Manager may charge the Member an early withdrawal fee as disclosed to the Member at the time of the request. In such circumstances the day the Manager allows the Member to withdraw early will be the Withdrawal Date (as provided in clause 11.1) and the process and timing of the withdrawal will be undertaken in the manner provided in clauses 11.1.
- (c) Notwithstanding the foregoing, the Manager may at its complete discretion allow a Member to withdraw during a period not otherwise provided in clauses 11.1 or 11.2. In such circumstances the day the Manager allows the Member to withdraw early will be the Withdrawal Date (as provided in clause 11.1) and the process and timing of the withdrawal will be undertaken in the manner provided in clause 11.1.

#### 11.19 Redemption Price Adjustment

Where the Manager calculates the Redemption Price of an Interest, and the Redemption Price is less than \$1.00 per Interest the following will apply:

A = the Current Value of the Scheme

B = the total number of Issued Interests

C = the total number of Subordinated Issued Interests

$$A/(B-C) = D$$

$$D - \$1.00 = E$$

If E is zero or a negative number then the Redemption Price of Interests which are not Subordinated Interests will be D and the Redemption Price of Subordinated Interests will be nil.

If E is a positive number then the Redemption Price of Interests which are not Subordinated Interests will equal \$1.00 and the Redemption Price of Subordinated Interests will be H, calculated as:

$$(B-C) \times \$1.00 = F$$

$$A - F = G$$

$$G / \text{total number of Subordinated Issued Interests} = H.$$

## **12 REGISTERS**

### **12.1 Member Register**

The Manager will keep and maintain an up-to-date Register at the registered office or principal place of business of the Manager in such form and containing such particulars as are required by the Law or any declaration, exemption or ruling granted or made thereunder, and such other particulars as the Manager may from time to time considers appropriate.

### **12.2 Details on Register**

Subject to clause 12.3, there will be entered in the Register:

- (a) the names and addresses of the Members from time to time;
- (b) the number of Interests from time to time held by each Member;
- (c) the date on which the name of each Member was entered in the Register, and
- (d) the date on which any person ceased to be a Member.

### **12.3 Expunging Information**

The information relating to a Member (or any of it) may be expunged from the Register at any time after the first day of the Financial Year occurring 7 years after the Financial Year in which the Member ceased to be a Member.

### **12.4 Inspection of Register**

The Manager need not allow inspection of the Register or any part thereof by any person except where:

- (a) the person seeking inspection is a Member or representative of a Member and the inspection relates to that part of the Register that contains particulars of the Member's Interest relevant to that person; or
- (b) the person provides to the Manager a written undertaking duly signed by the person and to the effect that inspection of the Register will not be used for any purpose other than the purpose of:
  - (i) calling a meeting of Members;
  - (ii) notifying a Member of a matter relating to the carrying out by the Manager of its functions and duties under the provisions of the Law or this Constitution; or
  - (iii) any other purpose approved in writing by the Commission.

### **12.5 Copies of Register**

- (a) If any person has the right to inspect the Register then that person also has the right to obtain copies of those parts of the Register inspected. The costs of copying and handling will be a rate set by the Manager but shall not exceed \$2.50 per page.
- (b) Paragraph (a) does not require the Manager to make available or provide copies of the Register in excess of its obligations to do so under the Law having regard to any declaration or exemption made or given by the Commission.

### **12.6 Closure of Register**

The Manager may close the Register or part of the Register for any time or times but so that no part of the Register may be closed for more than 30 days in the aggregate in each calendar year.

### **12.7 Change of Member Details**

Each Member will give the Manager notice of any change of name or address on the part of such Member and the Manager, upon receiving such notification, will alter the Register accordingly.

### **13 MEMBER MEETINGS (PART 2G.4)**

#### **13.1 Managers Power to call Members Meeting (Section 252A)**

The Manager may call a meeting of the Members at any time.

#### **13.2 Members power to call a meeting (Section 252B)**

- (a) The Manager must call and arrange to hold a meeting of the Members to consider and vote on a proposed special or extraordinary resolution on the request of:
  - (i) Members with at least 5% of the votes that may be cast on the resolution; or
  - (ii) at least 100 Members who are entitled to vote on the resolution.
- (b) The request by the Members must:
  - (i) be in writing; and
  - (ii) state any resolution to be proposed at the meeting; and
  - (iii) be signed by the Members proposing to move the resolution.
- (c) The request may be accompanied by a statement about the proposed resolution provided by the Members making the request.
- (d) Separate copies of a document setting out the request and statement (if any) may be used for signing by Members if the wording of the request and statement (if any) is identical in each copy.
- (e) The percentage of the votes that Members have is to be worked out as at the midnight before the request is given to the Manager.
- (f) The Manager must call the meeting within 21 days after the request is given to it. The meeting must be held not later than 2 months after the request is given to the Manager.
- (g) The Manager must give to each of the Members a copy of the proposed resolution and statement (if any) at the same time, or as soon as practicable afterwards, as it gives notice of the meeting. The Manager must distribute the copies in the same way in which it gives notice of the meeting.
- (h) The Manager does not have to distribute a copy of the resolution or statement if either is more than 1,000 words long or defamatory.
- (i) The Manager is responsible for the expenses of calling and holding the meeting and making the distribution. The Manager may meet those expenses from the Assets.

#### **13.3 Failure of Manager to call meeting of the Members (Section 252C)**

- (a) Members with more than 50% of the votes carried by interests held by the Members who make a request under section 252B of the Law may call and arrange to hold a meeting of the Members and distribute the statement (if any) if the Manager does not do so within 21 days after the request is given to the Manager.
- (b) The meeting must be called and the statement is to be distributed in the same way, so far as is possible, in which meetings of the Members may be called by the Manager and information is distributed to Members by the Manager. The meeting must be held not later than 3 months after the request is given to the Manager.
- (c) To call the meeting the Members requesting the meeting may ask the Manager for a copy of the Register. The Manager must give the Members requesting the meeting the copy of the Register without charge.
- (d) The Manager must pay the reasonable expenses the Members incurred because the Manager failed to call and arrange to hold the meeting and to make the distribution (if any). The Manager must not pay or be reimbursed those expenses from the Assets.

**13.4 Calling of meetings of Members by Members (Section 252D)**

- (a) Members who hold interests carrying at least 5% of the votes that may be cast at a meeting of Members may call and arrange to hold a meeting of the Members to consider and vote on a proposed special resolution or a proposed extraordinary resolution. The Members calling the meeting must pay the expenses of calling and holding the meeting.
- (b) The meeting must be called in the same way, so far as is possible, in which meetings of the Members may be called by the Manager.
- (c) The percentage of the votes carried by interests that Members hold is to be worked out as at the midnight before the meeting is called.

**14 HOW TO CALL MEETINGS OF MEMBERS**

**14.1 Notice of meetings (Section 252F)**

At least 21 days notice must be given of a meeting of Members.

**14.2 Notice of meetings of Members to Members, directors and auditors (Section 252G)**

- (a) Written notice of a meeting of Members must be given to:
  - (i) each Member entitled to vote at the meeting;
  - (ii) each director of the Manager;
  - (iii) the Auditor; and
  - (iv) the auditor of the Compliance Plan.
- (b) Notice to joint Members need only be given to the joint Member named first in the Register.
- (c) The Manager may give notice of the meeting to a Member:
  - (i) personally; or
  - (ii) by sending it by post to the address for the Member in the Register or an alternative address (if any) nominated by the Member; or
  - (iii) by sending it to the fax number or electronic address (if any) nominated by the Member.
- (d) A defect in the notice given or failure to receive the notice does not invalidate a meeting.
- (e) A notice of meeting sent by post is taken to be given 3 days after it is posted. A notice of meeting sent by fax, or other electronic means, is taken to be given on the business day after it is sent.

**14.3 Auditors entitled to other communications (Section 252H)**

The Manager must give the Auditor and the auditor of the Compliance Plan all communications relating to the meeting that a Member is entitled to receive.

**14.4 Contents of notice of meetings of Members (Section 252J)**

A notice of a meeting of Members must:

- (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this);
- (b) state the general nature of the meeting's business;
- (c) if a special or extraordinary resolution is to be proposed at the meeting, set out an intention to propose the special or extraordinary resolution and state the resolution; and
- (d) contain a statement setting out the following information:

- (i) that the Member has a right to appoint a proxy;
- (ii) that the proxy does not need to be a Member; and
- (iii) that if the Member appoints 2 proxies the Member may specify the proportion or number of votes the proxy is appointed to exercise.

**14.5 Notice of adjourned meetings (Section 252K)**

When a meeting is adjourned, new notice of the adjourned meeting must be given if the meeting is adjourned for one month or more.

**15 MEMBERS' RIGHTS TO PUT RESOLUTIONS AT MEETINGS OF MEMBERS**

**15.1 Members' resolutions (Section 252L)**

- (a) The following Members may give the Manager notice of a special or extraordinary resolution that they propose to move at a meeting of Members:
  - (i) Members with at least 5% of the votes that may be cast on the resolution; or
  - (ii) at least 100 Members who are entitled to vote at a meeting of Members.
- (b) The notice must:
  - (i) be in writing;
  - (ii) set out the wording of the proposed resolution; and
  - (iii) be signed by the Members giving the notice.
- (c) Separate copies of a document setting out the notice may be used for signing by Members if the wording of the notice is identical in each copy.
- (d) The percentage of the votes that Members have is to be worked out as at the midnight before the Members give the notice.

**15.2 Manager giving notice of Members' resolutions (Section 252M)**

- (a) If a Manager has been given notice of a special or extraordinary resolution under section 252L of the Law, the resolution is to be considered at the next meeting of Members that occurs more than 2 months after the notice is given.
- (b) The Manager must give all the Members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
- (c) The Manager is responsible for the cost of giving Members notice of the resolution if the Manager receives the notice in time to send it out to Members with the notice of meeting.
- (d) The Members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the Manager in giving Members notice of the resolution if the Manager does not receive the Members' notice in time to send it out with the notice of meeting. A resolution may be passed at a meeting of Members that the Manager is to meet the expenses out of the Assets.
- (e) The Manager need not give notice of the resolution:
  - (i) if it is more than 1,000 words long or defamatory; or
  - (ii) if the Members making the request are to bear the expenses of sending the notice out, unless the Members give the Manager a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

**15.3 Members' statements to be distributed (Section 252N)**

- (a) Members may request a Manager to give to all its Members a statement provided by the Members making the request about:

- (i) a resolution that is proposed to be moved at a meeting of Members; or
- (ii) any other matter that may be properly considered at a meeting of Members.
- (b) The request must be made by:
  - (i) Members with at least 5% of the votes that may be cast on the resolution; or
  - (ii) at least 100 Members who are entitled to vote at the meeting.
- (c) The request must be:
  - (i) in writing; and
  - (ii) signed by the Members making the request; and
  - (iii) given to the Manager.
- (d) Separate copies of a document setting out the request may be used for signing by Members if the wording of the request is identical in each copy.
- (e) The percentage of the votes that Members have is to be worked out as at the midnight before the request is given to the Manager.
- (f) After receiving the request, the Manager must distribute to all the Members a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives a notice of a meeting.
- (g) The Manager is responsible for the cost of making the distribution if the Manager receives the statement in time to send it out to Members with the notice of meeting.
- (h) The Members making the request are jointly and individually liable for the expenses reasonably incurred by the Manager in making the distribution if the Manager does not receive the statement in time to send it out with the notice of meeting. A resolution may be passed at a meeting of the Members that the Manager is to meet the expenses out of the Scheme's Assets.
- (i) The Manager need not comply with the request:
  - (i) if the statement is more than 1,000 words long or defamatory; or
  - (ii) if the Members making the request are responsible for the expenses of the distribution, unless the Members give the Manager a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution.

## **16 HOLDING MEETINGS OF MEMBERS**

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### **16.1 Time and place for meetings of Members (Section 252P)**

A meeting of Members must be held at a reasonable time and place.

### **16.2 Technology (Section 252Q)**

A Manager may hold a meeting of the Members at 2 or more venues using any technology that gives the Members as a whole a reasonable opportunity to participate.

### **16.3 Quorum (Section 252R)**

- (a) The quorum for a meeting of Members is 2 Members and the quorum must be present at all times during the meeting.
- (b) In determining whether a quorum is present, each individual attending as a proxy or body corporate representative is to be counted separately. However, if a Member has appointed more than one proxy or representative, these proxies or representatives only count as one person. If an individual is attending both as a Member and as a proxy or body corporate representative they shall all only be counted as one individual.

- (c) A meeting of Members that does not have a quorum present within 30 minutes after the time for the start of the meeting set out in the notice of meeting is adjourned to the date, time and place the Manager specifies. If the Manager does not specify one (1) or more of those things, the meeting is adjourned to:
  - (i) if the date is not specified—the same day in the next week; and
  - (ii) if the time is not specified—the same time; and
  - (iii) if the place is not specified—the same place.
- (d) If no quorum is present at the resumed meeting within 30 minutes after the time for the start of the meeting, the meeting is dissolved.

**16.4 Chairing meetings of Members (Section 252S)**

- (a) The Manager may, in writing, appoint an individual to chair a meeting called under section 252A or 252B of the Law.
- (b) The Members present at a meeting called under section 252A or 252B of the Law must elect a Member present to chair the meeting (or part of it) if:
  - (i) a chairperson has not previously been appointed to chair the meeting; or
  - (ii) a previously appointed chairperson is not available, or declines to act for the meeting (or part of the meeting).
- (c) The Members present at a meeting called under sections 252C, 252D or 252E of the Law must elect a Member present to chair the meeting.

**16.5 Auditors' right to be heard at meetings of Members (Section 252T)**

- (a) The Auditor and the auditor of the Compliance Plan are entitled to attend any meeting of the Members.
- (b) An auditor is entitled to be heard at the meeting on any part of the business of the meeting that concerns the auditor in their capacity as auditor.
- (c) An auditor may authorise a person in writing as their representative for the purpose of attending and speaking at any meeting of the Members.

**16.6 Adjourned meetings (Section 252U)**

- (a) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.
- (b) Only unfinished business is to be transacted at a meeting resumed after an adjournment.

**17 PROXIES AND BODY CORPORATE REPRESENTATIVES**

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**17.1 Who can appoint a proxy (Section 252V)**

- (a) A Member who is entitled to attend and cast a vote at a meeting of Members may appoint a person as the Member's proxy to attend and vote for the Member at the meeting.
- (b) The appointment may specify the proportion or number of votes that the proxy may exercise.
- (c) A Member may appoint one or 2 proxies. If the Member appoints 2 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.
- (d) Fractions of votes resulting from the application of paragraphs (b) and (c) are to be disregarded.

**17.2 Rights of proxies (Section 252W)**

- (a) A proxy appointed to attend and vote for a Member has the same rights as the Member:
  - (i) to speak at the meeting; and
  - (ii) to vote (but only to the extent allowed by the appointment).
- (b) A proxy is entitled to vote on a show of hands.
- (c) A proxy's authority to speak and vote for a Member at a meeting is suspended while the Member is present at the meeting.

**17.3 Manager sending appointment forms or lists of proxies must send to all Members (Section 252X)**

If the Manager sends a Member a proxy appointment form for a meeting or a list of persons willing to act as proxies at a meeting:

- (a) if the Member requested the form or list—the Manager must send the form or list to all Members who ask for it and who are entitled to appoint a proxy to attend and vote at the meeting; or
- (b) otherwise—the Manager must send the form or list to all its Members entitled to appoint a proxy to attend and vote at the meeting.

**17.4 Appointing a proxy (Section 252Y)**

- (a) An appointment of a proxy is valid if it is signed by the Member making the appointment and contains the following information:
  - (i) the Member's name and address;
  - (ii) the Scheme's name;
  - (iii) the proxy's name or the name of the office held by the proxy; and
  - (iv) the meetings at which the appointment may be used.
- (b) An appointment of a proxy remains valid even if paragraph (a) is not strictly complied with, provided in the reasonable opinion of the Manager the intentions of the Member is clear.
- (c) An undated appointment is taken to have been dated on the day it is given to the Manager.
- (d) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:
  - (i) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and
  - (ii) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and
  - (iii) if the proxy is the chairperson—the proxy must vote on a poll, and must vote that way; and
  - (iv) if the proxy is not the chairperson—the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.
- (e) If a proxy is also a Member, this clause does not affect the way that the person can cast any votes they hold as a Member.
- (f) The appointment of a proxy does not have to be witnessed.
- (g) The later appointment of a proxy revokes an earlier appointment, if both appointments could not be validly exercised at the meeting.

**17.5 Proxy documents (Section 252Z)**

- (a) For an appointment of a proxy for a meeting of Members to be effective, the following documents must be received by the Manager at least 48 hours before the meeting:
  - (i) the proxy's appointment; and
  - (ii) if the appointment is signed by the appointor's attorney, the authority under which the appointment was signed or a certified copy of the authority.
- (b) If a meeting of Members has been adjourned, an appointment and any authority received by the Manager at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.
- (c) A Manager receives an appointment authority when it is received at any of the following:
  - (i) the Manager's registered office;
  - (ii) a fax number at the Manager's registered office; or
  - (iii) a place, fax number or electronic address specified for the purpose in the notice of meeting.
- (d) An appointment of a proxy is ineffective if:
  - (i) the Manager receives either or both the appointment or authority at a fax number or electronic address; and
  - (ii) a requirement (if any) in the notice of meeting that:
    - (A) the transmission be verified in a way specified in the notice; or
    - (B) the proxy produce the appointment and authority (if any) at the meeting;
 is not complied with.

**17.6 Validity of proxy vote (Section 253A)**

- (a) Unless the Manager has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
  - (i) the appointing Member dies; or
  - (ii) the Member is mentally incapacitated; or
  - (iii) the Member revokes the proxy's appointment; or
  - (iv) the Member revokes the authority under which the proxy was appointed by a third party; or
  - (v) the Member transfers the Interest in respect of which the proxy was given.
- (b) A proxy who is not entitled to vote on a resolution as a Member may vote as a proxy for another Member who can vote if their appointment specifies the way they are to vote on the resolution and they vote that way.

**17.7 Body corporate representative (Section 253B)**

- (a) A body corporate may appoint an individual as a representative to exercise all or any of its powers at a meeting of Members. The appointment may be a standing one.
- (b) The appointment must set out what the representative is appointed to do and may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held, the appointment must identify the position.
- (c) A body corporate may appoint more than one representative but only one representative may exercise the body's powers at any one time.

- (d) Unless otherwise specified in the appointment, the representative may exercise, on the body corporate's behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution.

## **18 VOTING AT MEETINGS OF MEMBERS**

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### **18.1 How many votes a Member has (Section 253C)**

- (a) On a show of hands, each Member has one vote.
- (b) On a poll, each Member has one vote for each dollar of the value of the total interests they have in the Scheme.

### **18.2 Jointly held interests (Section 253D)**

If an interest is held jointly and more than one Member votes in respect of that interest, only the vote of the Member whose name appears first in the Register counts.

### **18.3 Manager and associates cannot vote if interested in resolution (Section 253E)**

The Manager and its Associates are not entitled to vote their interest on a resolution at a meeting of Members if they have an interest in the resolution or matter other than as a Member.

### **18.4 How to work out the value of an interest (Section 253F)**

The value of an interest of a Member in the Scheme is the amount that the Manager determines in writing to be the price that a willing but not anxious buyer would pay for the Members Interest if it was sold on the Business Day immediately before the day on which the poll is taken.

### **18.5 Objections to a right to vote (Section 253G)**

A challenge to a right to vote at a meeting of Members:

- (a) may only be made at the meeting; and
- (b) must be determined by the chairperson, whose decision is final.

### **18.6 Votes need not all be cast in the same way (Section 253H)**

On a poll a person voting who is entitled to 2 or more votes:

- (a) need not cast all their votes; and
- (b) may cast their votes in different ways.

### **18.7 How voting is carried out (Section 253J)**

- (a) A special or extraordinary resolution put to the vote at a meeting of Members must be decided on a poll.
- (b) Any other resolution put to the vote at a meeting of Members must be decided on a show of hands unless a poll is demanded. The resolution is passed on a poll if it has been passed by at least 50% of the votes cast by Members entitled to vote on the resolution.
- (c) On a show of hands, a declaration by the chairperson is conclusive evidence of the result. Neither the chairperson nor the minutes need to state the number or proportion of the votes recorded in favour or against.

### **18.8 Matters on which a poll may be demanded (Section 253K)**

- (a) A poll may be demanded on any resolution.
- (b) A poll cannot be demanded on any resolution concerning:
- (i) the election of the chairperson of a meeting; or
- (ii) the adjournment of a meeting.

- (c) A demand for a poll may be withdrawn.

**18.9 When a poll is effectively demanded (Section 253L)**

- (a) At a meeting of Members, a poll may be demanded by:
  - (i) at least five (5) Members present entitled to vote on the resolution; or
  - (ii) Members present with at least 5% of the votes that may be cast on the resolution on a poll; or
  - (iii) the chairperson.
- (b) The poll may be demanded:
  - (i) before a vote is taken; or
  - (ii) before the voting results on a show of hands are declared; or
  - (iii) immediately after the voting results on a show of hands are declared.
- (c) The percentage of votes that Members have is to be worked out as at close of business on the day before the poll is demanded.

**19 MINUTES AND MEMBERS' ACCESS TO MINUTES**

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**19.1 Minutes (Section 253M)**

- (a) A Manager must keep minute books in which it records within one month:
  - (i) proceedings of meetings of Members; and
  - (ii) resolutions of meetings of Members.
- (b) The Manager must ensure that minutes of a meeting are signed within a reasonable time after the meeting by the chairperson of the meeting or the chairperson of the next meeting.
- (c) The Manager must keep the minute books at:
  - (i) its registered office; or
  - (ii) its principal place of business in Australia; or
  - (iii) another place approved by the Commission.
- (d) A minute that is so recorded and signed is evidence of the proceeding or resolution to which it relates, unless the contrary is proved.

**19.2 Members' access to minutes (Section 253N)**

- (a) The Manager must ensure that the minute books for the meetings of Members are open for inspection by Members free of charge.
- (b) A Member may ask the Manager in writing for a copy of any minutes of a meeting of the Members or an extract of the minutes.
- (c) The Manager is entitled to charge a Member a copying fee of not more than \$2.50 per page or an amount not exceeding any amount prescribed, whichever is the lesser.
- (d) If the Manager requires payment for the copy, the Manager must send it:
  - (i) within 14 days after the Manager receives the payment; or
  - (ii) within any longer period that the Commission approves.

## **20 CHANGING THE CONSTITUTION**

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### **20.1 Power to Amend**

The Constitution may be modified, or repealed and replaced with a new constitution:

- (a) by special resolution of the Members; or
- (b) by the Manager if the Manager reasonably considers the change will not adversely affect Members' rights.

### **20.2 Lodgement of Amendment**

The Manager must lodge with the Commission a copy of the modification or the new Constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.

## **21 REMUNERATION OF MANAGER**

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### **21.1 Management Fee**

- (a) Subject to clause 21.5, the:
  - (i) Manager is entitled to be paid out of the Income of the Scheme a management fee of up to 1.5% per annum of the Gross Asset Value of the Scheme; and
  - (ii) the fee is calculated and payable monthly in arrears.
- (b) The Manager's management fee must be paid up to the date of completion of the final winding up of the Scheme.

### **21.2 Custodian's fees**

If a custodian is appointed, the Manager shall be responsible for payment of the custodian's fees and expenses.

### **21.3 Disputes between the Manager and Members**

A Member claiming that a dispute has arisen must notify the Manager giving details of the dispute in writing (including by email) or by telephone.

### **21.4 Best Efforts to Resolve the Dispute**

- (a) On receipt of a dispute from the Member, the Manager shall promptly reply (within 5 Business Days) acknowledging receipt of the notice of dispute.
- (b) The designated dispute resolution officer of the Manager shall immediately investigate the complaint and if necessary correspond directly with the complainant Member in relation to the disputed matter.
- (c) The dispute resolution officer shall within 30 Business Days of receipt of the notice of dispute from the Member seek to finalise its investigation of the dispute and report in writing to the Member the result of the dispute.
- (d) Where the Manager has been unable to substantially respond to the complaint within 45 days the dispute resolution officer will report in writing to the Member advising them reasons for the delay, when a response can be expected and referring them to the external dispute resolution scheme.
- (e) The Manager is entitled to be reimbursed from the Assets its reasonable costs incurred in complying with this clause.

**21.5 Priority**

Income distributions from the Scheme are to be conducted in the following order:

- (a) the Income Warranty (if any) has been paid;
- (b) expenses of the Scheme;
- (c) payment to each Member a distribution up to their Benchmark Return;
- (d) the Manager will pay any management fee;
- (e) as provided in clause 8.5(d).

**22 RETIREMENT, REMOVAL OR LIQUIDATION OF MANAGER**

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**22.1 Retirement of the Manager (Section 601FL)**

- (a) If the Manager wants to retire, it must call a Members' meeting to explain its reason for wanting to retire and to enable the Members to vote on an extraordinary resolution to choose a new Manager.
- (b) If the Members choose a manager and that person has consented, in writing, to becoming the Scheme's Manager:
  - (i) as soon as practicable and in any event within 2 Business Days after the resolution is passed, the current Manager must lodge a notice with the Commission asking it to alter the record of the Scheme's registration to the name of the new Manager;
  - (ii) if the current Manager does not lodge the notice required by paragraph (b)(i) the person chosen by the Members to be the new Manager may lodge that notice.
- (c) If the Members do not choose a person to be the new Manager, or the person they choose does not consent to becoming the Scheme's Manager, the current Manager may apply to the court for the appointment of a temporary Manager under section 601FP of the Law.

**22.2 Removal of the Manager by Members (Section 601FM)**

- (a) If the Members want to remove the Manager, they must take action under clause 13.2 for the calling of a Members' meeting to consider and vote on:
  - (i) an extraordinary resolution that the current Manager should be removed; and
  - (ii) an extraordinary resolution choosing a person to be the new Manager.
- (b) If the Members vote to remove the Manager and, at the same meeting, choose a person to be the new Manager that consents, in writing, to becoming the Scheme's Manager:
  - (i) as soon as practicable and in any event within 2 Business Days after the resolution is passed, the Manager must lodge a notice with the Commission asking it to alter the record of the Scheme's registration to name the person chosen as the Scheme's Manager; and
  - (ii) if the current Manager does not lodge the notice required by paragraph (b)(i), the person chosen by the Members to be the new Manager may lodge that notice.

## **23 CONSEQUENCES OF CHANGE OF MANAGER**

### **23.1 Former Manager to hand over books and provide reasonable assistance (Section 601FR)**

If the Manager of the Scheme changes, the former Manager must:

- (a) as soon as practicable give the new Manger any books in the former Manager's possession or control that the Law requires to be kept in relation to the Scheme; and
- (b) give other reasonable assistance to the new Manger to facilitate the change of manager.

### **23.2 Rights, obligations and liabilities of former Manager (Section 601FS)**

- (a) If the Manager of the Scheme changes the rights, obligations and liabilities of the former Manager in relation to the Scheme become rights, obligations and liabilities of the new Manager.
- (b) Despite paragraph (a), the following rights and liabilities remain rights and liabilities of the former Manager:
  - (i) any right of the former Manger to be paid fees for the performance of its functions before it ceased to be the manager; and
  - (ii) any right of the former Manager to be indemnified for expenses it incurred before it ceased to be the manger; and
  - (iii) any right, obligation or liability that the former Manager had as a Member of the Scheme; and
  - (iv) any liability for which the former Manager could not have been indemnified out of the Property if it had remained the Scheme's manager.

## **24 NOTICES**

### **24.1 Notices to be in writing**

Notices given under or for the purpose of this Constitution must be written in the English language.

### **24.2 Notices to the Manager**

Notices to the Manager may be addressed to its principal place of business as disclosed in the Prospectus or notified to Members from time to time.

### **24.3 Joint Members**

Notices to a joint Member may be addressed to the one of them whose name first appears in the Register, at that one's address shown in the Register, and may be served at that address.

### **24.4 Form of Notice**

A notice may be delivered by hand, by prepaid post or by facsimile transmission.

### **24.5 Time of delivery**

If, before 5 pm. local time on a Business Day in the place of delivery, a party delivers a notice:

- (a) by hand; or
- (b) by facsimile transmission and the party completes transmission,

the notice will be taken as given on the day of delivery or transmission and in any other case on the next following Business Day.

**24.6 Notices by post**

If a party gives a notice by prepaid post the notice will be taken as given on the second Business Day after the notice is posted.

**24.7 Incomplete facsimile transmission**

If a party gives a notice by facsimile transmission and the transmission is not fully legible, the party giving the notice may not rely on this clause to prove the giving of the notice.

**24.8 Facsimile transmission reasonably believed to be unintelligible**

A facsimile transmission may not be relied upon if the party giving the notice has reason to believe that the transmission or part of the transmission is illegible, or not an accurate representation of the original document.

**24.9 Request for re-transmission**

A party is not entitled to object to a facsimile transmission as being not fully legible or accurate unless the party requests re-transmission within 2 hours (being hours between 9 am. and 5 pm local time on a Business Day at the place of receipt) of completion of transmission; if a facsimile transmission is made within 2 hours before 5 pm on a Business Day and is unintelligible, the receiving party has until 10 am local time on the next Business Day at the place of receipt to request re-transmission.

**24.10 Signatures**

A notice given by the Manager must be signed by an Officer of the Manager.

**24.11 Address of Applicants**

The address for service of an Applicant is the address shown in its Application until it notifies the Manager of another address in accordance with this clause.

**24.12 Address of Members**

The address for service of a Member is the address shown in the Register, or in the case of joint Members, the address shown in the Register of the joint Member who is first named in the Register.

**24.13 Changes of address for service of the Manager**

The Manager may by notice to the Commission, change its address or facsimile number for service under this clause.

**25 FINANCIAL STATEMENTS**

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**25.1 Preparation of Financial Statements (Section 292)**

A financial report and directors' report for the Scheme must be prepared for each Financial Year in accordance with the requirements of the Law.

**25.2 Compliance with Accounting Standards and Regulations (Section 296)**

- (a) The financial report for a Financial Year must comply with the Accounting Standards.
- (b) The financial report must comply with any further requirements in the Regulations.

**25.3 True and Fair View (Section 297)**

The Financial Statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the Scheme; and
- (b) if consolidated Financial Statements are required - the financial position and performance of the consolidated entity.

**25.4 Audit of annual financial report (Section 301)**

Each Scheme must have the financial report for the Financial Year audited in accordance with division 3 of part 2M.3 of chapter 2M of the Law and obtain an Auditors report.

**25.5 Annual Financial Report to Members (Section 314)**

- (a) The Manager must report to Members for a Financial Year by either:
  - (i) sending Members copies of:
    - (A) financial report for the year; and
    - (B) the directors' report for the year (see sections 298 - 300 of the Law); and
    - (C) the Auditors report on the financial report; or
  - (ii) sending Members a concise financial report for the year the complies with the Law.
- (b) A Scheme must report to its Members within 3 months after the end of the Financial Year.

**25.6 Members choices for Annual Financial Information (Section 316)**

- (a) A Member may request the Manager:
  - (i) not to send them the annual financial reports; or
  - (ii) to send them a full financial report and the directors' report and Auditors report.

A request may be a standing request or for a particular Financial Year. The Member is not entitled to a report for a financial year earlier than the one before the financial year in which the request is made.
- (b) The time for complying with a request under paragraph (a)(ii) is:
  - (i) 7 days after the request is received; or
  - (ii) 3 months after the end of the Financial Year;

whichever is later.
- (c) A full financial report, directors' report and Auditors report are to be sent free of charge unless the Member has already received a copy of them free of charge.

**25.7 Supplying information to the Auditor**

The Manager must supply the Auditor with any information the Auditor requests and which is necessary for the performance of the duties of the Auditor.

**25.8 Accounts of other Members**

- (a) The Manager must not prepare the financial report of the Scheme in such a way as to make it apparent to others reading the financial report (including Members) the details of individual Members Interest.
- (b) Nothing in this Constitution is to be read as requiring the Manager to send or make available reports of Member's Interests and to any person other than the Member concerned (or the Member's authorised agents).
- (c) The Manager may disclose details of the Members Interests to those involved in the preparation and auditing of the Scheme.
- (d) This clause is subject to any requirements imposed on the Manager by law.

## **26 AUDITOR**

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### **26.1 Appointment**

- (a) The Manager will appoint the Auditor and the auditor of the Compliance Plan. The appointments will be a registered company auditor according to the provisions of the Law;
- (b) The appointee may be the auditor of the Manager unless otherwise restricted by the Law.

### **26.2 Removal or Retirement of Auditor**

- (a) The Manager may remove the Auditor or auditor of the Compliance Plan at any time.
- (b) The auditors may retire after giving notice to the Manager. The auditors must give at least one month's notice unless otherwise agreed with by the Manager.

## **27 GENERAL**

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### **27.1 Payments to Members**

Any money payable by the Manager to a Member under this Constitution may be paid by any means as directed by the Member from time to time and, in the absence of a direction, may be made by direct Bank transfer or by crossed not negotiable cheque payable to the Member or order and sent through the post to the Member at its address in the Register, or in the case of joint holders made payable to the joint holders or bearer and sent to the Members at the address shown in the register of the joint holder who is first named in the Register. Payment of a cheque drawn and posted in accordance with this clause is in full satisfaction of the monies payable to the Member and a good discharge to the Manager.

### **27.2 Retention of documents**

The Manager is to retain, and make available to the auditor for inspection at reasonable times, for a period of at least 7 years from their respective dates, the following:

- (a) Applications;
- (b) cancelled Certificates; and
- (c) instruments of transfer and transmission.

### **27.3 Copies of this Constitution**

A copy of this Constitution must be held by the Manager at its principal office and registered office and made available during normal business hours at those places for inspection by Members. A Member is entitled to a copy of this Constitution upon payment to the Manager of the reasonable costs and expenses of preparing a copy.

### **27.4 Governing law and jurisdiction**

This Constitution is governed by and is to be construed in accordance with the laws of the State of Queensland. Each party and the Members and Applicants irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland and courts entitled to hear appeals from those courts.

### **27.5 No Waiver**

The failure of a party at any time to require full or partial performance of any provision of this Constitution shall not affect in any way the full right of that party to require that performance subsequently. The waiver by any party of a breach of a provision of this Constitution shall not be deemed a waiver of all or part of that provision or of any other provision or of the right of that party to avail itself of its rights subsequently. Any waiver of a breach of this Constitution shall be in writing signed by the party granting the waiver, and shall be effective only to the extent specifically set out in that waiver.

## 28 RESOLUTION OF DISPUTES

### 28.1 Complaints Handling System

The Manager shall establish a complaints handling framework that complies with AS ISO 10002-2006 Customer satisfaction - Guidelines for complaints handling in organizations (ISO 10002:2004, MOD) for the handling of disputes under this Constitution.

### 28.2 Essential Elements

The complaints handling process shall have as a minimum requirements for:

- (a) **(Commitment)**. There shall be a commitment to efficient and fair resolution of complaints.
- (b) **(Fairness)**. The complaints handling process shall recognise the need to be fair to both the complainant Member and the Manager.
- (c) **(Resources)**. There shall be adequate resources for complaints handling with sufficient levels of delegated authority.
- (d) **(Visibility)**. The complaints handling process shall be well publicised to Members and staff of the Manager and shall include information to Members about the right to complain.
- (e) **(Access)**. The complaints handling process shall be assessable to all Members and information shall be readily available on the details of making and resolving complaints.
- (f) **(Assistance)**. Assistance shall be available for Members in a formulation and lodgement of complaint.
- (g) **(Responsiveness)**. Complaints shall be dealt with quickly and the Members shall be treated courteously.
- (h) **(Charges)**. Complaints handling shall be at no charge to the particular complaining Member. The Manager shall be entitled to be reimbursed for its costs from Scheme assets in dealing with the particular complaints.
- (i) **(Remedies)**. The complaints handling process shall have the capacity to determine and implement remedies.
- (j) **(Data collection)**. There shall be appropriate systematic recording of complaints by Members and their outcome.
- (k) **(Systematic and recurring problems)**. Complaints shall be classified and analysed for the identification and rectification of systematic and recurring problems.
- (l) **(Accountability)**. There shall be appropriate reporting on the operation of the complaints handling process against documented performance standards.
- (m) **(Review)**. The complaints handling process shall be reviewed annually to ensure that it is sufficiently delivering effective outcomes.

### 28.3 Disputes between the Manager and Members

A Member claiming that a dispute has arisen must notify the Manager giving details of the dispute in writing.

### 28.4 Best Efforts to Resolve the Dispute

- (a) On receipt of the written notice of dispute from the Member, the Manager shall promptly reply (within 7 Business Days) acknowledging receipt of the notice of dispute.
- (b) The designated dispute resolution officer of the Manager shall immediately investigate the complaint and if necessary correspond directly with the complainant Member in relation to the disputed matter.

- (c) The dispute resolution officer shall within 30 Business Days of receipt of the notice of dispute from the Member finalise its investigation of the dispute and report in writing to the Member the result of the dispute.
- (d) Where the dispute is not resolved to the satisfaction of the Member the Member shall have 30 days from receipt of the report of the dispute resolution officer to refer the matter to the Manager's compliance committee if a compliance committee exists or alternatively the board of the Manager.
- (e) The Manager's board or compliance committee shall meet within 21 Business Days of receipt of a written complaint by a member, received pursuant to paragraph (j) to consider the dispute.
- (f) The Member shall be entitled to be present at the meeting of the board or compliance committee with or without legal representation and to be heard either in person or through the Member's legal representative.
- (g) Subsequent to hearing the Member's complaint the board or compliance committee shall have a maximum of 14 Business Days within which to consider the complaint and either accept, reject or resolve the dispute.
- (h) The board or compliance committee must notify the Member within 21 Business Days of the hearing under paragraph (e), of its decision.
- (i) If the Member is dissatisfied with the determination of board or compliance committee then the Member may refer the complaint to the Dispute Resolution Service.
- (j) The Manager is entitled to be reimbursed from the Assets its reasonable costs incurred in complying with this clause.

## **29 IMPACT OF INTERNATIONAL ACCOUNTING STANDARDS**

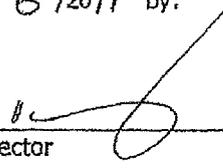
Notwithstanding anything to the contrary contained or implied by this Deed, where:

- (a) Assets;
- (b) Current Interest Value;
- (c) Current Value;
- (d) Gross Asset Value;
- (e) Income;
- (f) Issue Price;
- (g) Issue Provision;
- (h) Liabilities;
- (i) Market Value;
- (j) Net Income;
- (k) Redemption Price;
- (l) Redemption Amount;
- (m) Authorised Investments;
- (n) Scheme;
- (o) Value; or

- (p) similar terms or phrases ('the Items'),
- (q) are used for the purposes of calculating:
- (r) the issue or redemption price of Interests;
- (s) the fees payable to the Manager, any agent of the Manager or any custodian who holds Scheme property;
- (t) the extent of any limitation on borrowings or on investment of Scheme property; or
- (u) the amount of a distribution payable to Members,
- (v) the Items are to be calculated by reference to generally accepted accounting principles or accounting standards as generally accepted or in force immediately before 1 January 2005.

**EXECUTED** as a Deed Poll

Signed sealed and delivered  
by  
**EQUITRUST LTD ACN 061 383 944**  
on 3 16 / 2011 by:

A  \_\_\_\_\_  
Director

A  \_\_\_\_\_  
Director/Secretary

A DAVID KENNEDY  
Full name of Director

A MARK McIVOR  
Full name of Director/Secretary

"DW-3"

**EQUITRUST PRIORITY CLASS INCOME  
FUND**

**ARSN 089 079 729**

**REPLACEMENT CONSTITUTION**

REF: #188593

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## EQUITITRUST PRIORITY CLASS INCOME FUND

### REPLACEMENT CONSTITUTION

THIS DEED POLL is made on 30 November 2010

BY **EQUITITRUST LIMITED ACN 061 383 944** of 67 Thomas Drive,  
Chevron Island in the State of Queensland

(‘Manager’)

#### RECITALS

- A. The Manager is the responsible entity of the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999 (‘Original Deed’) as amended from time to time (‘the Former Constitution’).
- B. Pursuant to Clause 20.1(a) of the Former Constitution, the sole Member of the Scheme approved the amendments to the Former Constitution contained in this Deed Poll in accordance with the requirements of the Australian Securities and Investments Commission Class Order 09/552 on 30 November 2010.
- C. With effect from the date of this Deed Poll the Former Constitution is replaced with this Deed Poll including amending the name of the Scheme from the Equititrust Income Fund No. 2 to the Equititrust Priority Class Income Fund.
- D. From time to time the Manager may invite persons to invest in the Scheme and anyone who wants to participate in the Scheme may invest by completing and sending the Application and Application Money to the Manager.
- E. This Constitution is made with the intent that the Manager and each Member will be bound by it.

#### 1. DEFINITIONS AND INTERPRETATIONS

##### 1.1 Defined Terms

In this Constitution unless the context otherwise requires:

‘**Accounting Standards**’ has the meaning given to that term in section 9 of the Law;

‘**Applicant**’ means a person who has completed and lodged with the Manager an Application, pursuant to a Offer Document, and has paid the Application Money to which the Application refers, and includes their successors in title and permitted assigns;

**'Application'** means a duly completed and signed application to invest in a Scheme, lodged with the Manager and accompanied by payment of the Application Money;

**'Application Account'** means the Bank account established by the Manager under clause 3.3;

**'Application Money'** means all money paid by the Applicant pursuant to a Offer Document, accepted by the Manager and held by the Manager in the Application Account;

**'Approved Valuer'** means any person or firm appointed by the Manager, to value any property and who is independent of the Manager and includes a person employed or engaged by a company or firm and who:

- (a) is authorised under any law of the State or Territory where the valuation takes place to practice as a valuer; and
- (b) has at least 2 years continuous experience of valuation.

**'Assets'** means all assets and liabilities of the Scheme which are, or would be, recognised as assets or liabilities of the Scheme by the application of generally accepted accounting principles;

**'Associate'** means an associate as defined in Division 2 of Part 1.2 of the Law;

**'Auditor'** means the auditor for the Scheme, appointed by the Manager, as required under the Law;

**'Authorised Investments'** means:

- (a) Mortgage Investments;
- (b) loans of any kind including a loan to Equititrust Limited as the responsible entity of the Equititrust Income Fund ARSN 089 079 854 secured by a fixed and floating charge or such other appropriate security;
- (c) deposits at call or for a term with any Bank;
- (d) bills of exchange (including commercial bills) issues, drawn accepted or endorsed by any Bank or negotiable certificates of deposit issued by any Bank; and
- (e) any authorised investment as defined in section 21 of the *Queensland Trusts Act 1973*.

**'Bank'** has the meaning given to that term in section 5 of the *Banking Act 1959* and also includes a bank constituted by or under a law of the State or Territory and a 'foreign bank' as that term is defined in section 5 of the *Banking Act 1959*;

**Benchmark Return'** is the relevant distribution hurdle rate for each Member (as nominated by the Manager when the Member invests in the Scheme) which that Member must receive from their investment in the Scheme before the Manager is entitled to receive the management fee referred to in clause 14. The Benchmark Return is not a forecast or a representation that the Member will receive this return or indeed any return from their investment in the Scheme;

**'Borrower'** means a person who borrows or is lent funds from the Manager under a Mortgage Investment or other loan which forms an Authorised Investment;

**'Business Day'** means any day on which trading banks on the Gold Coast are generally open for business;

**'Cash'** includes cheques, currency notes, bank cheques, bank transfers and bank drafts in the lawful currency of Australia or another country;

**'Certificate'** means a certificate or document issued by the Manager to the Applicant evidencing the acceptance by the Manager of the Application;

**'Class'** has the meaning given to that term by clause 2.8.

**'Commencement Date'** means the date on which the Constitution was registered by the Commission;

**'Commission'** means the Australian Securities and Investments Commission;

**'Compliance Plan'** means the compliance plan for the Scheme and registered by the Commission and includes any approved amendments to the compliance plan from time to time;

**'Constitution'** means this Deed, and prior to thereto, shall where the context permits, also include the Former Constitution;

**'Current Interest Value'** means:

- (i) in relation to an Interest for the purpose of determining the Issue Price, the value of an Interest at the relevant time computed by dividing the Current Value of the Scheme by the total number of Issued Interests at that time; and
- (ii) in relation to an Interest for the purpose of determining the Redemption Price, the value of an Interest at the relevant time computed by dividing the Current Value of the Scheme by the total number of Issued Interests at that time;

**'Current Liabilities'** includes all of the Liabilities of the Scheme that would in the ordinary course of business be due and payable within 12 Months from the date on which they are ascertained;

**'Current Value'** means in relation to the Scheme the amount derived by deducting from the Value of the Assets of the Scheme:

- (a) all amounts borrowed for the purpose of the Scheme and remaining owing;
- (b) the amount of all actual Liabilities of the Scheme (other than interest and those referred to in paragraph (a) of this definition) owing but unpaid;
- (c) such amounts as the Manager thinks necessary to provide for all accrued and contingent outgoings and Liabilities of the Scheme (other than those referred to in paragraphs (a) to (c) of this definition);
- (d) such amounts which the Manager thinks necessary or desirable to provide or allow for depreciation or the writing down or replacement of any Authorised Investments of the Scheme (including provision for amortising leasehold property) or for any other provisions or allowances; and
- (e) all other amounts which the Manager considers should be deducted for the purposes of making a fair and reasonable determination, in accordance with Accounting Standards, of the Current Value of the Scheme;

**'Default'** means and includes any event of default under a document that secures a Mortgage Investment or loan which forms an Authorised Investment ;

**'Dispute Resolution Service'** means the dispute resolution service approved by the Commission which the Manager nominates from time to time;

**'Distributable Amount'** means, in relation to the Scheme, any amounts determined by the Manager from time to time to be distributed to Members including:

- (a) the Net Income of the Scheme;
- (b) other Income of the Scheme; and
- (c) any amount of capital of the Scheme,  
up to that Member's Benchmark Return.

**'Distribution Period'** is the regular period, being either monthly, quarterly, yearly or some other regular period, as agreed between the Manager and Member that Income from the Scheme will be distributed to Members.

**'Expert'** includes solicitors, barristers, accountants, bankers, financial advisers and other professionally qualified consultants;

**'Financial Statements'** has the meaning given to that term in section 9 of the Law;

**'Financial Year'** means the period of 12 Months ending on 30 June in each year during the continuance of this Constitution and includes the period commencing on the Commencement Date and expiring on the next succeeding 30 June and any period between 30 June last occurring before the termination of the Scheme;

**'Former Constitution'** means the Deed Polls dated 9 August 1999 and 6 September 1999 made by the Manager and referred to in the Recitals;

**'GST'** has the meaning given to that term by the GST Act;

**'GST Act'** means *A New Tax System (Goods & Services Tax) Act 1999* as amended;

**'Income'** means all amounts which are, or would be recognised as, income by the application of generally accepted accounting principles;

**'Interest'** means the beneficial interest of a Member in the Scheme;

**'Issue Price'** means in relation to the issue of an Interest, an amount equal to the Current Interest Value of the Interest at the time of issue.

**'Issued Interests'** means all Interests for the time being created and issued and not cancelled;

**'Land'** means a freehold estate or interest in real property in any part of the Commonwealth of Australia or any State or Territory thereof and includes buildings, fixtures and fittings (including furnishings) and other improvements erected or installed thereon;

**'Law'** means the *Corporations Act 2001 (Cth)*;

**'Liabilities'** in respect of the Scheme includes:

- (a) unpaid administrative costs and expenses, including fees of the Manager;
- (b) accrued charges in respect of or owing in relation to any Asset of the Scheme;
- (c) amounts required to meet present liabilities of the Scheme;
- (d) amounts of all borrowings of the Scheme;
- (e) any provisions for Taxes which, in the opinion of the Manager, should be taken into account; and
- (f) any other amounts required to meet liabilities or other expenditure which, in the opinion of the Manager, should be taken into account and which have not otherwise been taken into account in determining the amount of the liabilities in any of the preceding paragraphs of this definition;

**'Manager'** means Equititrust Limited ACN 061 383 944 or any other person for the time being acting as manager, provided that at all times the Manager is the responsible entity of the Scheme as defined in section 9 of the Law;

**'Margin Fee'** has the meaning given to that term under Clause 14.

**'Market Value'** of an investment means the current market value determined in accordance with a method agreed between the Manager and an Approved Valuer or Expert. If there is a dispute between the Manager and the Approved Valuer, the decision of the Approved Valuer shall prevail;

**'Member'** means a person whose Application is accepted and for the time being is registered under the provisions of this Constitution as a member of the Scheme and includes persons jointly so registered;

**'Month'** means calendar month;

**'Mortgage Investment'** means a loan secured by a registered mortgage over Land and any other Security Property;

**'Net Income'** means in relation to the Scheme, 'net income' as that term is defined in section 95 *Tax Act 1936* as calculated each Financial Year;

**'Officer'** means a person who is a director, secretary or executive officer of the Manager;

**'Offer Document'** means a offer document inviting Applications or offers to join the Scheme established by the Constitution;

**'Quarter'** means each period of 3 Months ending on the last days of March, June, September and December in each year;

**'Redemption Amount'** means in respect to a Member, the number of Interests held by the Member which are to be redeemed multiplied by the Redemption Price calculated at the time of redemption;

**'Redemption Date'** means the date the Manager agrees to redeem a Members' Interests;

**'Redemption Price'** means in relation to the redemption of an Interest, an amount equal to the Current Interest Value of the Interest at the time of redemption.

**'Register'** mean the register of Members to be established and kept by the Manager under clause 11.2;

**'Regulations'** means the *Corporations Regulations 2001* (Cth);

**'Related Party'** means a related party as defined in Part 5C.7 of the Law;

**'Scheme'** means the scheme established in accordance with this Constitution;

**'Scheme Accounts'** means the Scheme's bank account;

**'Security Property'** means the property offered as security by a Borrower;

**'Tax Act'** means the *Income Tax Assessment Acts of 1936 and 1997* (Cth) and the regulations made thereunder from time to time;

**'Taxes'** includes, without limitation, any:

- (a) present or future stamp or documentary taxes, or any other excise or property taxes, GST, charges or similar levies, interest, penalties, fees or other amounts (if any) imposed, levied, collected, withheld or assessed which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder or which are imposed on the Manager in respect of the Scheme or any of the Authorised Investments thereof;
- (b) taxes, levies, imposts, duties, deductions or withholdings (however called), interest, GST, penalties, charges, fees or other amounts (if any) imposed, levied, collected, withheld or assessed of any nature whatever, whensoever and howsoever imposed, and all liabilities with respect thereto which arise from any payment made to or by the Manager under this Constitution or any other instrument delivered hereunder; or
- (c) taxes, interest, penalties, charges, GST, fees or other amounts (if any) imposed, levied, collected, withheld or assessed upon:
  - (i) Application Money;
  - (ii) the Scheme, Scheme Accounts, or the Income, capital gains, profits, transactions, accounts, accruals, receivables or any change in the worth or value of the Scheme, the Assets or the Authorised Investments; or
  - (iii) the Manager in its capacity as manager of the Scheme,

all such taxes and imposts to include, without limitation, all imposts made pursuant to the Tax Act, financial institutions duty, debits tax, withholding tax, GST, stamp or documentary taxes, or any other excise or property taxes, charges or similar levies (howsoever called) imposed, levied, collected withheld or assessed by Australia or any political subdivision in, or of, Australia or any other jurisdiction from, or to, which a payment is made by, or on behalf of a Member or pursuant to any legislation enacted, proclaimed or otherwise brought into operation by any of the foregoing;

**'Value'** of an Asset when the value of that Asset is required to be ascertained or taken into account under this Deed or the Scheme shall mean its Market Value as last determined.

**'Withdraw Offer'** means a withdraw offer made by the Manager in accordance with Part 5C.6 Corporations Act.

**'Withdrawal Request Form'** means the request form prescribed by the Manager in accordance with clause 10.

## 1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) words expressing the singular include the plural and vice versa;
- (b) words denoting a natural person include corporations and body corporates and vice versa;
- (c) words denoting gender include both genders;
- (d) a reference to a part, clause, paragraph or schedule is a reference to a part, clause, paragraph or schedule of this Constitution;
- (e) references to this Constitution are references to this Constitution as amended, supplemented or varied from time to time;
- (f) a reference to writing includes printing, engraving, typewriting, lithography, photography and any other mode of reproducing words in a visible form;
- (g) a reference to a thing or matter includes a reference to a part of the thing or matter;
- (h) headings are included for convenience only and do not affect interpretation;
- (i) references to a party to this Constitution include the party's successors and permitted assigns;
- (j) references to a document or agreement include references to the document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (k) a reference to a statute includes a reference to or citation of all enactments amending or consolidating the statute and to an enactment substituted for the statute;
- (l) references to dollars and '\$' refer to amounts in Australian currency;
- (m) the schedules to this Constitution form part of this Constitution; and

- (n) where any word or phrase is given a defined meaning in this Constitution, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning.

## **2. CONSTITUTION AND DURATION**

### **2.1 Equititrust Priority Class Income Fund**

This trust established by the Original Deed is now called the Equititrust Priority Class Income Fund, which commenced on the Commencement Date.

### **2.2 Assets of Scheme**

The Manager declares that it holds and will at all times hold Assets on trust for Members of the Scheme subject to the provisions of the Constitution and the Law.

### **2.3 Manager to act as responsible entity of the Scheme**

The appointment of the Manager as manager of the Scheme is hereby confirmed and the Manager agrees to manage the Scheme upon and subject to the terms and conditions contained in the Constitution.

### **2.4 Manager to establish Fund**

The Manager shall, on the execution of the Constitution, lodge and hold the sum of one hundred dollars (\$100) to establish and constitute the Scheme. The Manager may, from time to time, cause or cause to be received more cash by way of addition to the Scheme to be held upon the trusts of the Constitution.

### **2.5 Interests**

- (a) The beneficial interest in the Scheme shall be divided into Interests.
- (b) Subject to this Constitution, each Interest represents an undivided part of beneficial interest in the Assets of the Scheme as a whole and not any particular Asset.
- (c) The Manager must issue an Interest at the Issue Price.

### **2.6 Fractional Interests**

The Manager may at its discretion create a fractional Interest in 100 parts for an amount less than a whole dollar notwithstanding any other provision of this Constitution, the expression 'Interest' shall, where the context will allow, be deemed to include such a fractional Interest and such fractional Interest shall carry with it the rights and obligations which attach to a whole Interest but be limited to the proportion of those rights and obligation which the number of 100ths in such fractional Interests bears to 1. A fractional Interest may also be created by the redemption of part of a whole Interest.

## **2.7 Nature of Beneficial Interest**

A Member shall be entitled under this Constitution or as provided by the Law to a specific beneficial interest in the Scheme but such interest shall not entitle the Member other than as provided by this Constitution:

- (a) to interfere with the rights or powers of the Manager in its dealings with the Scheme or any part thereof; or
- (b) to exercise any rights, powers or privileges in respect of any Authorised Investment.

## **2.8 Classes of Interest**

- (a) The Manager may create and issue Interests with different rights and restrictions as contained in an Offer Document or as otherwise determined by the Manager (**Class**).
- (b) Subject to the rights and restrictions of a Class as provided in paragraph (a) each Interest confers on its holder identical rights to those conferred by each other Interest of that Class.
- (c) The Manager may divide issued Interests into different Classes.

## **2.9 Binding Effect of Constitution**

The Constitution operates as a deed and is binding on the Manager and each Member and all persons claiming through them as if they were parties to the Constitution, and each Applicant by signing the Application, acknowledges being so bound.

## **2.10 Minimum Investment Amounts and Holdings**

The Manager may at any time determine minimum amounts which may be invested and accepted as Application Moneys in the Scheme including any minimum holding of Interests in the Scheme.

## **3. APPLICATION PROCEDURES**

### **3.1 Offer**

The Manager may, in accordance with the provisions of the Law and this Constitution, invite investment in the Scheme and issue a Offer Document in relation to such an invitation.

### **3.2 Applications**

A person who wishes to invest in the Scheme must make an Application in the manner specified in the Offer Document and pay the Issue Price associated with the Application Money payable.

### **3.3 Application Account**

Unless otherwise required by the Law, the Manager must establish and maintain a Bank account in the name of the Manager to be designated the Application Account for the Scheme. The Application Account must be established and operated in accordance with the requirements of the Law.

### **3.4 Application Money to be paid to Manager**

The Manager must, in each Offer Document and other representations relating to the Scheme, direct how all cheques and other payment orders in respect of Applications are to be drawn on account of the Scheme.

### **3.5 Application Money with completed Application**

Where the Manager receives Application Money with a completed Application relating to a current Offer Document, the Manager must pay the Application Money into the Application Account as soon as practicable after its receipt, but no later than the close of business on the next Business Day after the day of receipt.

### **3.6 Application Money without completed Application**

Where the Manager receives Application Money that is not accompanied by a completed Application relating to a current Offer Document it will, as soon as practicable, return the Application Money to the Applicant or:

- (a) attempt to obtain the Application from the Applicant;
- (b) pay the Application Money into the Application Account; and
- (c) if interest accrues while the Application Money is held in the Application Account, ask the Applicant, in writing, whether the Applicant wants the interest to be dealt with as additional Application Money or to be paid to the Applicant.

### **3.7 Dealing with Application Money**

If the Manager pays the Application Money into the Application Account under clause 3.6, the Manager will:

- (a) hold the Application Money on trust for the Applicant, until the Application is received; and

- (b) if the Application is received by the Manager within 30 days after the Application Money is received:
  - (i) apply the Application Money to the Scheme Accounts as soon as practicable after receiving the Application; and
  - (ii) deal with any interest accrued while the Application Money was held by the Manager in the Application Account in the manner disclosed in the Offer Document; and
- (c) if the Application has not been received by the Manager within 30 days after the Application Money was received, return the Application Money and interest (if any) to the Applicant as soon as practicable.

### **3.8 Manager's discretion**

The Manager has the sole discretion to determine whether to accept or reject an Application in whole or in part without giving reasons. Where the Manager determines to reject an Application, it must give written notice to the Applicant within a reasonable time after receipt of the Application. The Manager must within a further 10 Business Days after the notice of rejection is given, refund to the Applicant the Application Money, subject to clearance of the Application Money.

### **3.9 Manager may withdraw Offer Document**

The Manager may in its sole discretion determine at any time to withdraw a Offer Document. The Manager within 5 Business Days after the notice to withdraw the Offer Document is given, repay to all Applicants their Application Money paid pursuant to that Offer Document and held in the Application Account. Any interest that has accrued on Application Money in the Application Account shall be dealt with as disclosed in the Offer Document.

### **3.10 Manager to Confirm Acceptance**

- (a) Once the Application is accepted the Manager must enter the Applicant on the Register as a Member.
- (b) The Manager must transfer the Application Money of the Member to the Scheme Accounts and issue Interests to the Member at the Issue Price.

### **3.11 Issue Price**

Interests are issued at the Issue Price.

### **3.12 Certificates**

The Manager

- (a) may issue to each Member a Certificate as evidence of the Interest held by a Member; and
- (b) may cancel existing Certificates and reissue new Certificates where the Manager has been supplied with evidence to the satisfaction of the Manager that the existing Certificate has been lost, or stolen.

### **3.13 Form of Certificate**

The Certificate is to be in the form as determined by the Manager.

### **3.14 Joint Members**

In the case of joint Members, only the person whose name appears first in the Register is entitled to a Certificate relating to that Interest.

### **3.15 Replacement Certificates**

Replacement Certificates may be issued in the circumstances and subject to such conditions as determined by the Manager.

### **3.16 Scheme Accounts**

- (a) The Scheme Accounts may pool individual Member's funds.
- (b) The Manager shall at all times invest the Scheme Accounts in Authorised Investments.

## **4. RESPONSIBILITIES, POWERS AND DUTIES OF MANAGER**

### **4.1 Exercise of powers of the Manager**

- (a) Subject to the provisions of this Constitution and the Law, the Manager has absolute and uncontrolled discretion as to the exercise of its powers, authorities and duties, in relation to the manner, mode and time of exercise of those powers, authorities and duties.
- (b) The Manager has all the powers of a natural person and a body corporate, including the power to invest and to borrow or raise money for the purposes of a Scheme and on security of the relevant Assets.

### **4.2 Power to Appoint Agent (Section 601FB(2))**

- (a) The Manager has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the Scheme.
- (b) For the purpose of determining whether:
  - (i) there is a liability to the Members; or

- (ii) the Manager has properly performed its duties for the purposes of section 601GA(2) of the Law;

the Manager is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

#### **4.3 Authority for Agent (Section 601FB(3))**

An agent appointed, or a person otherwise engaged, by:

- (a) the agent or person referred to in clause 4.2; or
- (b) a person who is taken under this clause to be an agent of the Manager;

to do anything that the Manager is authorised to do in connection with a Scheme is taken to be an agent appointed by the Manager to do that thing for the purposes of clause 4.2.

#### **4.4 Liability of Agent (Section 601FB(4))**

If:

- (a) an agent holds any Assets on behalf of the Manager; and
- (b) the agent is liable to indemnify the Manager against any loss or damage that:
  - (i) the Manager suffers as a result of a wrongful or negligent act or omission of the agent; and
  - (ii) relates to a failure by the Manager to perform its duties in relation to a Scheme;

then any amount recovered under the indemnity forms part of the Assets.

#### **4.5 Attorney**

Each person who completes an Application accepted by the Manager or acquires an Interest, appoints the Manager and any director, officer, attorney or substitute nominated by the Manager severally for this purpose as its attorney with the rights and powers to:

- (a) sign complete or otherwise arrange any mortgage, loan, charge and all other documents required by the Manager in respect of any Authorised Investment;
- (b) sign a Withdrawal Request Form on behalf of the person/Member to facilitate that Members withdrawal from the Scheme;

- (c) appoint substitutes or otherwise delegate its powers (including this power of delegation);
- (d) execute any document or take any action in the Managers opinion it is reasonably necessary to protect the interests of the Member, Members or the Manager in respect of any Authorised Investment;
- (e) conduct or deal with any Security Property provided in respect of a Authorised Investment where the Borrower Defaults;
- (f) exercise any rights (including its right to exercise a power of sale) pursuant to any mortgage and/or the *Property Law Act 1974*;
- (g) subject to any mortgage documentation, execute any document or instrument required for conducting any power of sale, transfer, lease or other disposition partial or in full the property offered as security for the Authorised Investment;
- (h) may incur any debts in relation to any property offered as security for a Authorised Investment and generally manage the Scheme property on behalf of the Members; and
- (i) without limiting the aforementioned, do everything and anything which in the attorneys reasonable opinion is necessary or expedient to enable the exercise of any rights of the Manager, the Member or the Members under the Authorised Investment in relation to any Authorised Investment or the Scheme property.

## **5. INDEMNITIES AND REIMBURSEMENTS OF EXPENSES**

### **5.1 Indemnity**

The Manager is indemnified out of the Assets for all debts, liabilities, damages, costs, taxes, charges, expenses and outgoings reasonably and properly incurred by it in the proper performance of its functions and duties and exercising its powers under this Constitution or at law, except in the case of debts, liabilities, damages, costs, taxes, charges, expenses or outgoings incurred or payable in respect of or as a result of gross neglect, deceit or a material breach of covenant of the Manager.

### **5.2 Limitation of liability**

Except in the case of a failure to exercise care and diligence, the Manager will not be liable to account to nor to indemnify the Scheme, or a Member or person claiming under or on behalf of a Member, for anything done in good faith in the performance of its functions and duties and the exercise of its powers under this Constitution or at law including:

- (a) a failure to perform or do an act or thing which or the Manager is hindered, prevented or forbidden from doing or performing by reason of any present or future law (statutory or otherwise);
- (b) payments made by the Manager in good faith to a duly empowered fiscal authority of the Commonwealth, a State or Territory for Taxes or other charges on the Scheme, an Authorised Investment or a Certificate, or with respect to any transaction reasonably and properly entered into under this Constitution, although the payment as a matter of law ought or need not have been made;
- (c) anything done in good faith relying upon advice from an Expert instructed or appointed by the Manager and independent of the Manager;
- (d) anything done in good faith by the Manager in respect of an Application or notice on which there is a forged signature or inaccurate details provided that there were at the time of the doing of the act, matter or thing no reasonable grounds to believe that the signature or detail was not genuine or accurate; or
- (e) any other action taken by the Manager in respect of the Scheme where the Manager has acted in good faith.

### **5.3 Further limitation of liability of the Manager**

Except in the case of the Manager's failure to exercise care and diligence, the Manager is not liable to Members to any extent greater than the extent of the Assets vested in the Manager or received and/or held by it in accordance with the provisions of this Constitution.

### **5.4 Transactions involving the Scheme**

Subject to the Law and the Manager's duties to Members, the Manager is entitled, in any capacity other than as manager of the Scheme, to contract with a Member, a Scheme or any Authorised Investment or any property proposed to be acquired as an Asset, without any liability to account to the Members of that Scheme only if:

- (a) the transaction is not in breach of any covenant contained in this Constitution; and
- (b) the Manager acts in the transaction with good faith to the Members.

### **5.5 Further indemnity**

If the Manager acquires an Asset the holding of which exposes or may expose the Manager to personal liability or if the Manager enters into any contract, credit facility or other transaction on behalf of a Scheme which exposes or may expose the Manager to any personal liability, the Manager has a right of indemnity out of the Assets in respect of that liability.

## **5.6 Dealings by the Manager**

Nothing in this Constitution prevents the Manager or any person associated with the Manager from being a Member.

## **6. INVESTMENT**

### **6.1 Investment Management**

It is the role of the Manager to invest funds held in the Scheme Account in Authorised Investments for Members.

### **6.2 Investment in Authorised Investments**

The Manager subject to the terms of this Constitution has complete and unfettered discretion to invest Members' funds in Authorised Investments.

### **6.3 Investment Oversight**

The Manager shall implement practices, systems and procedures to monitor the performance of Authorised Investments made by it and shall where considered prudent and appropriate take whatever action as may be necessary to protect the capital value of the Authorised Investments of the Scheme including institution of any recovery action under Mortgages or other securities held in respect of Authorised Investments made in order to recover or maximise recovery of the capital and any unpaid income component of any Authorised Investment.

## **7. INCOME OF THE SCHEME**

### **7.1 Manager to collect Income**

The Manager will receive and collect the Income of the Authorised Investments and will pay it into the Scheme Accounts. The Manager will make all payments relating to the Scheme from the Scheme Accounts.

### **7.2 Decision of Manager final**

The decision of the Manager as to whether any item amount to be distributed to Members is Income or capital shall be final.

### **7.3 Distribution of Income**

The Manager must distribute to each Member, that Member's Income entitlement, accrued pursuant to clause 7.4 not less than 14 days after the end of the Distribution Period.

### **7.4 Distribution Period**

The Distribution Period for each Member shall be:

- (a) quarterly, monthly, half yearly, or yearly as disclosed by the Manager in the Offer Document; or
- (b) if the Manager so provides, as agreed between the Member and the Manager at the time the Members Application is accepted.

### **7.5 Distribution Surplus**

Notwithstanding any other provision in this Constitution, following each Distribution Period the Distributable Amount shall be paid in the following order of priority and subject to the provisions of clauses 2.8 and 14.5:

- (a) payment to each Member a distribution up to their particular Benchmark Return;
- (b) payment of the Manager's management fee;
- (c) payment of Scheme expenses; then the balance
- (d) a further distribution to Members commensurate with the number of Interests they hold.

### **7.6 Manager to keep separate accounts**

The Manager may keep separate accounts of different categories and sources of Income and allocate the Income from any category or source to any Member.

### **7.7 Reinvestment of income entitlement**

- (a) The Manager may invite Members in the Scheme to reinvest any or all of their distribution by way of application for additional Interests in the Scheme. The terms of any such invitation will be determined by the Manager and may, amongst other things, provide that unless a Member otherwise directs the Manager, that Member will be deemed to have elected to reinvest all or part of their distribution. Any invitation may be withdrawn or varied by the Manager.
- (b) Interests so applied for will be deemed to have been issued on the first day of the Distribution Period immediately following the Distribution Period in respect of which the distribution has accrued or such other date determined by the Manager.

### **7.8 Members presently entitled to Distributable Income**

In accordance with clause 7.5, at the end of each Distribution Period the Members will be presently entitled (within the meaning of the Tax Act) to all distributable income derived during the relevant Distribution Period in proportion to the Interests of which they are registered as the holders at such time.

## **8. TERMINATION OF THE SCHEME**

### **8.1 Termination of a Scheme**

Subject to clause 8.2, the Scheme will terminate 80 years from the Commencement Date unless otherwise specified in the Offer Document for the Scheme.

### **8.2 Defined Event of Winding Up**

The Manager must wind up the Scheme or cause the Scheme to be wound up on the occurrence of any one of the following circumstances:

- (a) The Scheme is without a Manager for whatever reason;
- (b) The Manager uses the mechanism provided for in Section 601NC of the Law;
- (c) The Members decide in a meeting called in accordance with this Constitution and the Law to wind up the Scheme;
- (d) The Scheme comes to the end of its term (as set out in clause 8.1);
- (e) Any of the circumstances set out in Section 601NE of the Law apply such that the Manager is required to wind up the Scheme; or
- (f) A court orders the Scheme to be wound up pursuant to Section 601ND of the Law.

### **8.3 Procedure for Winding Up**

- (a) Unless otherwise required by the Law, the Manager is responsible for winding up the Scheme.
- (b) The Manager must convert to money all Authorised Investments, deduct all proper costs and then distribute to each Member funds in proportion to the number of Interest held by a Member divided by the total number of Interests on issue. The Manager may make interim distributions during the winding up process.
- (c) The Manager must proceed with the winding up efficiently, diligently and without undue delay. The Manager must complete the winding up process within such time frame as it considers is available to do so, whilst complying with its duties under this Constitution.
- (d) The Manager may retain from the proceeds of winding up:
  - (i) sufficient funds to meet future obligations which the Manager reasonably believes will fall due after a distribution is made to Members; and

- (ii) to pay its own remuneration expenses for work to be done following the realisation of Members' Funds.
- (e) During the winding up of the Scheme, the Manager may terminate any other agreements or arrangements it has entered into with Members which relate to the Scheme. The Manager must give notice to the Members of the termination of those agreements or arrangements.
- (f) Once the Manager believes the winding up is complete, the Manager must engage a registered company auditor to audit the final accounts of the Scheme. The Manager must send a copy of any report made by the auditor to Members within 30 days after the Manager receives the report from the auditor.

## **9. TRANSFER AND TRANSMISSION OF MEMBERS' INTERESTS**

### **9.1 General principles when dealing with Members' Interests**

- (a) A Member may transfer their Interests only in accordance with the provisions of this Constitution and, in particular:
  - (i) the transferee must agree to be bound by the provisions of this Constitution; and
  - (ii) a transfer of the Interests in the Scheme must be delivered to the Manager together with the Certificate or Certificates (if any) in respect of the Interests to be transferred.
- (b) The Manager will not be required to effect any transaction or dealing in any Interest on behalf of or for the benefit of or at the request of any Member unless the Member has paid or otherwise provided for, to the Manager's satisfaction, all duties, Taxes, governmental charges, transfer fees, registration fees, brokerage fees and other charges (whether similar to the foregoing or not) which may have become or may be payable in respect of the transaction or dealing. The Manager is entitled, if it thinks fit, to pay and discharge all or any of those duties and charges on behalf of the Member concerned and retain the amount so paid out of any moneys to which the Member may be, or become, entitled.
- (c) The Manager may decline to register any transfer during the period that the Register is closed pursuant to clause 11.6.
- (d) Every instrument of transfer of an Interest which is registered will be retained by the Manager for such period as the Manager may determine, after which (subject to the provisions of any law or this Constitution to the contrary) the Manager may destroy it.

- (e) Where the Manager refuses to register any instrument of transfer, within 2 Months after the date on which the instrument was deposited with the Manager, the Manager will give notice of the refusal to the person who deposited it and any instrument of transfer which the Manager refuses to register will (except in the case of suspected fraud) be returned to the person depositing it upon request by such person within 2 Months of the giving of the notice.
- (f) The Manager may refuse to register or fail to register or give effect to any transfer of an Interest without assigning a reason.
- (g) Upon the registration of a transfer of any Interest, the Manager will within one Month after the date of such registration issue to the transferee or transmittee written confirmation of the transfer or transmission.

## **9.2 Form of transfer**

The transfer of an Interest shall be form in the nominated by the Manager. The form will have regard to the need for the transferee to be bound to this Constitution and any other arrangements which go to the integrity of the Scheme.

## **9.3 Transmission**

Subject to the provisions of this Constitution:

- (a) in the case of the death of any Member the survivor or survivors (where the deceased was a joint holder) or the executors or administrators (where the deceased was the sole holder) are the only persons recognised by the Manager as having any title to or interest in the Interests registered in the deceased's name;
- (b) any person becoming entitled to any Interests in consequence of the death or bankruptcy of a Member may upon:
  - (i) producing to the Manager evidence of the capacity in which they propose to act under the provisions of this clause or of their title to the Interests as the Manager deems sufficient;
  - (ii) in the case of the death of the Member, producing to the Manager evidence of payment of any duties the Manager may require; and
  - (iii) delivering up to the Manager for cancellation the Certificate for the Interests,

be registered as the holder of the Interests and the Manager shall cancel the existing Certificate for Interests and issue a new Certificate for Interests in their name;

- (c) any person becoming entitled to any Interests because of the death or bankruptcy of a Member may give a good and sufficient discharge to the Manager for any money paid to them but are not entitled to receive notices of or to attend or vote at any meetings of Members until they have become registered as a Member in respect of such Interests.

## **10. WITHDRAWAL**

### **10.1 Withdraw Offers**

- (a) Members will only be able to redeem their Interests under a Withdraw Offer made by the Manager in accordance with Part 5C.6 of the Law.
- (b) The Manager may, in its absolute discretion, determine whether or not to make a Withdraw Offer and the Manager may determine that the Withdraw Offer apply to Members in a specific Class of Members.

### **10.2 Form of a Member's request**

- (a) The Manager will prescribe from time to time a Withdrawal Request Form.
- (b) The Manager must keep a supply (either hard copy or on computer) of Withdrawal Request Forms at its registered office and principal place of business.
- (c) The Manager must provide Members on request with the current Withdrawal Request Form free of charge.

### **10.3 Accompanying evidence**

Any Member who makes a request for withdrawal must do so on the current Withdrawal Request Form and also provide satisfactory evidence to the Manager of the Member's title or authority to deal with the Member's Interest. The Manager must act reasonably in determining what is satisfactory evidence.

### **10.4 No redemption obligation**

The Manager is not obliged to cause the redemption of Interests in the Scheme in any circumstances.

### **10.5 Staggering of Redemption Dates**

Despite any provision of this Constitution, the Manager may determine more than one Redemption Date for Interests to be redeemed pursuant to a Withdrawal Request Form and such Interests will be redeemed over those days in such proportions as the Manager determines, provided that all such Interests are redeemed within the time specified in clause 10.1.

### **10.6 Funding of redemption**

To fund the redemption of Interests out of the Scheme, the Manager may apply or realise part of the Assets, and/or raise or borrow money, either unsecured or secured against Assets.

### **10.7 Resale and redemption of Interests by Manager**

Where the Manager holds Interests for its own benefit, it may redeem those Interests out of the Scheme. This clause 10 will apply, with the necessary changes, to that redemption.

### **10.8 Cancellation of Interests**

Interests which have been redeemed out of the Scheme will be cancelled and the Manager will record the cancellation in the Register.

### **10.9 Transfer of specific assets**

The Manager may determine that the Redemption Amount will be satisfied wholly or in part by the transfer of investments of the Scheme at their Market Value. Expenses incurred in respect of the transfer must be paid by the Member.

### **10.10 Compulsory redemption**

The Manager may compulsorily redeem any Members Interests under a Withdraw Offer provided they are paid the relevant Redemption Amount for their redeemed Interests.

### **10.11 Components of Redemption Price and payment of accrued distributions**

- (a) Unless the Manager otherwise notifies a Member whose Interests are redeemed, the Redemption Price paid to that Member will comprise capital only. The Manager may notify a Member that the Redemption Price comprises part capital and part Income. Where the Redemption Price paid to a Member comprises Income and capital, the Member will be presently entitled (within the meaning of the Tax Act) to the Income component and the Manager must notify the Member of the Income component of the Redemption Price paid to them. This notice may be given at the time of redemption but must in any case be given within 3 months of the end of the Financial Year of the Scheme in which the redemption occurs.
- (b) Where an Interest is redeemed after a right to a distribution, whether income or capital, has accrued in respect of that Interest, that distribution may be paid to the holder of the Interest at the time of payment of the applicable Redemption Price notwithstanding that the distribution has not been paid at that time to holders of other Interests.

### **10.12 No required disposal**

A Member is not required to dispose of its Interests except as otherwise provided in this Constitution and the Corporations Law.

## **11. REGISTERS**

### **11.1 Member Register**

The Manager covenants that it will keep and maintain an up-to-date Register at the registered office or principal place of business of the Manager in such form and containing such particulars as are required by the Law or any declaration, exemption or ruling granted or made thereunder, and such other particulars as the Manager may from time to time considers appropriate.

### **11.2 Details on Register**

Subject to clause 11.3, there will be entered in the Register:

- (a) the names and addresses of the Members from time to time;
- (b) the Interests held by each Member from time to time;
- (c) the date on which the name of each Member was entered in the Register, and
- (d) the date on which any person ceased to be a Member.

### **11.3 Expunging Information**

The information relating to a Member (or any of it) may be expunged from the Register at any time after the first day of the Financial Year occurring 7 years after the Financial Year in which the Member ceased to be a Member.

### **11.4 Inspection of Register**

The Manager need not allow inspection of the Register or any part thereof by any person except where:

- (a) the person seeking inspection is a Member or representative of a Member and the inspection relates to that part of the Register that contains particulars relating to the Member; or
- (b) the person provides to the Manager a written undertaking duly signed by the person and to the effect that inspection of the Register will not be used for any purpose other than the purpose of:
  - (i) calling a meeting of Members;

- (ii) notifying a Member of a matter relating to the carrying out by the Manager of its functions and duties under the provisions of the Law or this Constitution; or
- (iii) any other purpose approved in writing by the Commission.

### **11.5 Copies of Register**

- (a) If any person has the right to inspect the Register then that person also has the right to obtain copies of those parts of the Register inspected. The costs of copying and handling will be a rate set by the Manager but shall not exceed \$2.50 per page.
- (b) Paragraph (a) does not require the Manager to make available or provide copies of the Register in excess of its obligations to do so under the Law having regard to any declaration or exemption made or given by the Commission.

### **11.6 Closure of Register**

The Manager may close the Register or part of the Register for any time or times but so that no part of the Register may be closed for more than 30 days in the aggregate in each calendar year.

### **11.7 Change of Member Details**

Each Member will give the Manager notice of any change of name or address on the part of such Member and the Manager, upon receiving such notification, will alter the Register accordingly.

## **12. MEMBER MEETINGS**

### **12.1 Managers Power to call Members Meeting**

The Manager may call a meeting of the Members at any time.

### **12.2 Meeting process**

Meetings of Members are to be called and conducted in the manner prescribed by the Law.

## **13. CHANGING THE CONSTITUTION**

### **13.1 Power to Amend**

The Constitution may be modified, or repealed and replaced with a new constitution:

- (a) by special resolution of the Members; or

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

### **13.2 Lodgement of Amendment**

The Manager must lodge with the Commission a copy of the modification or the new Constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.

## **14. REMUNERATION OF MANAGER**

### **14.1 Manager's Fee Payable**

Subject to any restrictions contained in the Offer Document, the Manager is entitled to claim from the Assets a fee of up to 0.15% of the gross value of the assets of the Scheme for managing the Scheme.

### **14.2 Custodian's fees:**

If a custodian is appointed, the Manager shall be responsible for payment of the custodian's fees and expenses.

### **14.3 Manager's Expenses**

The Manager will be paid or reimbursed on a full indemnity basis out of the Assets for all expenses and liabilities which the Manager may incur in connection with the relevant Scheme or in performing its obligations or exercising its powers under the Constitution including but not limited to the following:

- (a) all costs, charges and expenses incurred in connection with the acquisition, maintenance, improvement, custody, transfer, financing or disposal of the Assets, including commissions, procuration fees, brokerage, legal fees, Taxes, Bank charges and stamp duty;
- (b) the fees and expenses of the auditors;
- (c) stamp duty on cheques;
- (d) all costs, charges and expenses incurred in connection with the borrowing of money on behalf of the Scheme or in connection with the Assets including stamp duty, Taxes, establishment fees, legal fees and interest together with discount and acceptance fees in respect of bill facilities;
- (e) all Taxes (save those payable in respect of the Income of the Manager) whether payable or which may become payable in respect of the Scheme;
- (f) fees and charges of any regulatory authority including, without limitation, local government, titles office, stamps office and the Commission;

- (g) fees and expenses of any Approved Valuer and of any Expert from time to time employed by the Manager in the discharge of its duties under this Constitution but no reimbursement of the fees and expenses of such Expert will be paid from the Scheme where such expert is appointed to perform the functions of the Manager;
- (h) all costs, charges and expenses of and incidental to the preparation, execution and stamping of any deeds supplemental hereto;
- (i) the costs of convening and holding any meeting of Members;
- (j) costs of printing, postage and other fees in respect of all electronic transfers or cheques, accounts, distribution statements, notices and other documents posted to all or any Members in accordance with provisions of this Constitution including envelopes enclosing same;
- (k) all costs charges and expenses incurred in relation to the preparation, and the distribution of any periodical or other report or document required by law to be prepared in respect of the Scheme or prepared by the Manager in good faith in respect of the Scheme;
- (l) expenses in connection with the keeping and maintaining of financial records and registers (including the Register);
- (m) all agents' fees and expenses;
- (n) costs incurred by the Manager in taking necessary action in respect of any Authorised Investment made on behalf of a Member (eg. legal proceedings instituted against a Borrower in default);
- (o) costs and disbursements incurred by or on behalf of the Manager in connection with the retirement of or the appointment of a substitute responsible entity or agent;
- (p) costs and disbursements incurred by the Manager in the initiation, conduct and settlement of any court proceedings to enforce any provisions of the Constitution;
- (q) insurance premiums involved in insuring any Asset;
- (r) costs and disbursements incurred in the preparation and lodgment of returns under the law or any other statute;
- (s) costs of acquiring, establishing and developing computer software systems required for the administration of the Scheme;
- (t) all other costs and disbursements and outgoings in connection with the management and administration of the Assets and the performance of the functions and duties of the Manager under the Constitution;

- (u) all costs, charges and expenses associated with the establishment and maintenance of the Compliance Plan, compliance committee and a dispute resolution service for the Scheme; and
- (v) all costs, charges and expenses (including legal, accounting, tax, financial and other services) of establishing the Constitution including all costs of preparation, execution and stamping of this Constitution and any constitution supplemental thereto, and including the preparation, due diligence, registration, promotion and distribution of the Offer Document and the preparation, registration, distribution, due diligence and promotion of any other document prepared in respect of the Constitution, or the Scheme.

#### 14.4 Goods and Services Tax

If any supply made by the Manager to the Members under this Constitution or any variation to it is a taxable supply for the purposes of the GST Act:

- (a) then in addition to any amount or consideration expressed as payable to the Manager elsewhere in this Constitution, but subject to issuing a valid tax invoice, the Manager shall be entitled to recover from the Members an additional amount on account of GST, such amount to be equal to the amount of the Manager's GST liability in respect of each supply and shall be recoverable at the same time as the amount or consideration is payable for such supply;
- (b) the Manager will review in good faith the terms of this Constitution, other than the timing of the recovery of GST, and make such amendments (if any) as are necessary to ensure that, having regard to paragraph (a), neither the Manager nor the Members are unfairly disadvantaged (nor advantaged) by the consequences of the GST and associated measures (such as the decreasing or removal of existing taxes, duties, levies and excise by the Commonwealth, State or Territory);
- (c) in the event that Members by way of ordinary resolution resolve that the amendments proposed under clause 14.3(b) are not in accordance with that clause then the changes to the arrangement will be determined by a person with expertise in goods and services tax and its application nominated by the president of the Institute of Chartered Accountants;
- (d) the Manager and the Members acknowledge and agree that each supply made by the Manager under this Constitution is made:
  - (i) on a progressive or periodic basis;
  - (ii) for consideration that is to be provided on a progressive or periodic basis; and

- (iii) each progressive or periodic component of the supply is to be treated as a separate supply.

#### **14.5 Priority**

Notwithstanding any other provision in this Constitution, Income (which unless the Manager determines otherwise will exclude capital) from the Scheme is to be applied in the following order:

- (a) payment to each Member a distribution up to their Benchmark Return;
- (b) payment of any management fee;
- (c) expenses of the Scheme; and thereafter
- (d) a further distribution to Members commensurate with the number of Interests they hold.

### **15. RETIREMENT, REMOVAL OR LIQUIDATION OF MANAGER**

#### **15.1 Retirement of the Manager**

- (a) If the Manager wants to retire, it must call a Members' meeting to explain its reason for wanting to retire and to enable the Members to vote on an extraordinary resolution to choose a new Manager.
- (b) If the Members choose a manager and that person has consented, in writing, to becoming a Scheme's Manager:
  - (i) as soon as practicable and in any event within 2 Business Days after the resolution is passed, the current Manager must lodge a notice with the Commission asking it to alter the record of the Scheme's registration to the name of the new Manager;
  - (ii) if the current Manager does not lodge the notice required by paragraph (b)(i) the person chosen by the Members to be the new Manager may lodge that notice.
- (c) If the Members do not choose a person to be the new Manager, or the person they choose does not consent to becoming the Scheme's Manager, the current Manager may apply to the court for the appointment of a temporary Manager under section 601FP of the Law.

#### **15.2 Removal of the Manager by Members**

- (a) If the Members want to remove the Manager, they must take action under clause 12.2 for the calling of a Members' meeting to consider and vote on:

- (i) an extraordinary resolution that the current Manager should be removed; and
  - (ii) an extraordinary resolution choosing a person to be the new Manager.
- (b) If the Members vote to remove the Manager and, at the same meeting, choose a person to be the new Manager that consents, in writing, to becoming the Scheme's Manager:
  - (i) as soon as practicable and in any event within 2 Business Days after the resolution is passed, the Manager must lodge a notice with the Commission asking it to alter the record of the Scheme's registration to name the person chosen as the Scheme's Manager; and
  - (ii) if the current Manager does not lodge the notice required by paragraph (b)(i), the person chosen by the Members to be the new Manager may lodge that notice.

## **16. CONSEQUENCES OF CHANGE OF MANAGER**

### **16.1 Former Manager to hand over books and provide reasonable assistance**

If the Manager of the Scheme changes, the former Manager must:

- (a) as soon as practicable give the new Manager any books in the former Manager's possession or control that the Law requires to be kept in relation to the Scheme; and
- (b) give other reasonable assistance to the new Manager to facilitate the change of manager.

### **16.2 Rights, obligations and liabilities of former Manager**

- (a) If the Manager of the Scheme changes the rights, obligations and liabilities of the former Manager in relation to the Scheme become rights, obligations and liabilities of the new Manager.
- (b) Despite paragraph (a), the following rights and liabilities remain rights and liabilities of the former Manager:
  - (i) any right of the former Manager to be paid fees for the performance of its functions before it ceased to be the manager; and
  - (ii) any right of the former Manager to be indemnified for expenses it incurred before it ceased to be the manager; and
  - (iii) any right, obligation or liability that the former Manager had as a Member of the Scheme; and

- (iv) any liability for which the former Manager could not have been indemnified out of the Property if it had remained the Scheme's manager.

## **17. NOTICES**

### **17.1 Notices to be in writing**

Notices given under or for the purpose of this Constitution must be written in the English language.

### **17.2 Notices to the Manager**

Notices to the Manager may be addressed to its principal place of business as disclosed in the Offer Document or notified to Members from time to time.

### **17.3 Joint Members**

Notices to a joint Member may be addressed to the one of them whose name first appears in the Register, at that one's address shown in the Register, and may be served at that address.

### **17.4 Form of Notice**

A notice may be delivered by hand, by prepaid post or by facsimile transmission.

### **17.5 Time of delivery**

If, before 5 p.m. local time on a Business Day in the place of delivery, a party delivers a notice:

- (a) by hand; or
- (b) by facsimile transmission and the party completes transmission,

the notice will be taken as given on the day of delivery or transmission and in any other case on the next following Business Day.

### **17.6 Notices by post**

If a party gives a notice by prepaid post the notice will be taken as given on the second Business Day after the notice is posted.

### **17.7 Incomplete facsimile transmission**

If a party gives a notice by facsimile transmission and the transmission is not fully legible, the party giving the notice may not rely on this clause to prove the giving of the notice.

### **17.8 Facsimile transmission reasonably believed to be unintelligible**

A facsimile transmission may not be relied upon if the party giving the notice has reason to believe that the transmission or part of the transmission is illegible, or not an accurate representation of the original document.

### **17.9 Request for re-transmission**

A party is not entitled to object to a facsimile transmission as being not fully legible or accurate unless the party requests re-transmission within 2 hours (being hours between 9 a.m. and 5 p.m. local time on a Business Day at the place of receipt) of completion of transmission; if a facsimile transmission is made within 2 hours before 5 p.m. on a Business Day and is unintelligible, the receiving party has until 10 a.m. local time on the next Business Day at the place of receipt to request re-transmission.

### **17.10 Signatures**

A notice given by the Manager must be signed by an Officer of the Manager.

### **17.11 Address of Applicants**

The address for service of an Applicant is the address shown in its Application until it notifies the Manager of another address in accordance with this clause.

### **17.12 Address of Members**

The address for service of a Member is the address shown in the Register, or in the case of joint Members, the address shown in the Register of the joint Member who is first named in the Register.

### **17.13 Changes of address for service of the Manager**

The Manager may by notice to the Commission, change its address or facsimile number for service under this clause.

## **18. FINANCIAL STATEMENTS**

### **18.1 Preparation of Financial Statements (Section 292)**

A financial report and directors' report for a Scheme must be prepared for each Financial Year in accordance with the requirements of the Law.

### **18.2 Compliance with Accounting Standards and Regulations (Section 296)**

- (a) The financial report for a Financial Year must comply with the Accounting Standards.
- (b) The financial report must comply with any further requirements in the Regulations.

### **18.3 Annual Financial Report to Members (Section 314)**

- (a) The Manager must report to Members for a Financial Year by either:
  - (i) sending Members copies of:
    - (A) financial report for the year; and
    - (B) the directors' report for the year (see sections 298 - 300 of the Law); and
    - (C) the Auditors report on the financial report; or
  - (ii) sending Members a concise financial report for the year the complies with the Law.
- (b) A Scheme must report to its Members within 3 Months after the end of the Financial Year.

## **19. AUDITOR**

### **19.1 Appointment**

- (a) The Manager will appoint the Auditor and the auditor of the Compliance Plan. The appointments will be a registered company auditor according to the provisions of the Law;
- (b) The appointee may be the auditor of the Manager unless otherwise restricted by the Law.

### **19.2 Removal or Retirement of Auditor**

- (a) The Manager may remove the Auditor or auditor of the Compliance Plan at any time.
- (b) The auditors may retire after giving notice to the Manager. The auditors must give at least one Month's notice unless otherwise agreed with by the Manager.

## **20. GENERAL**

### **20.1 Payments to Members**

Any money payable by the Manager to a Member under this Constitution may be paid by any means as directed by the Member from time to time and, in the absence of a direction, may be made by direct Bank transfer or by crossed not negotiable cheque payable to the Member or order and sent through the post to the Member at its address in the Register, or in the case of joint holders made payable to the joint holders or bearer and sent to the Members at the address shown in the register of the joint holder who is first named in the Register. Payment of a cheque

drawn and posted in accordance with this clause is in full satisfaction of the monies payable to the Member and a good discharge to the Manager.

## **20.2 Retention of documents**

The Manager is to retain, and make available to the auditor for inspection at reasonable times, for a period of at least 7 years from their respective dates, the following:

- (a) Applications;
- (b) cancelled Certificates; and
- (c) instruments of transfer and transmission.

## **20.3 Copies of this Constitution**

A copy of this Constitution must be held by the Manager at its principal office and registered office and made available during normal business hours at those places for inspection by Members. A Member is entitled to a copy of this Constitution upon payment to the Manager of the reasonable costs and expenses of preparing a copy.

## **20.4 Governing law and jurisdiction**

This Constitution is governed by and is to be construed in accordance with the laws of the State of Queensland. Each party and the Members and Applicants irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland and courts entitled to hear appeals from those courts.

## **20.5 No Waiver**

The failure of a party at any time to require full or partial performance of any provision of this Constitution shall not affect in any way the full right of that party to require that performance subsequently. The waiver by any party of a breach of a provision of this Constitution shall not be deemed a waiver of all or part of that provision or of any other provision or of the right of that party to avail itself of its rights subsequently. Any waiver of a breach of this Constitution shall be in writing signed by the party granting the waiver, and shall be effective only to the extent specifically set out in that waiver.

## **21. RESOLUTION OF DISPUTES**

### **21.1 Complaints Handling System**

The Manager shall establish a complaints handling framework that complies with the Law and the Regulations.

## 21.2 Essential Elements

The complaints handling process shall have as a minimum requirement for:

- (a) **(Recognition of complaint)** The framework shall recognise that a complaint is an expression of dissatisfaction made to the Manager, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.
- (b) **(Commitment).** There shall be a commitment to efficient and fair resolution of complaints.
- (c) **(Fairness).** The complaints handling process shall recognise the need to be fair to both the complainant Member and the Manager.
- (d) **(Resources).** There shall be adequate resources for complaints handling with sufficient levels of delegated authority.
- (e) **(Visibility).** The complaints handling process shall be well publicised to Members and staff of the Manager and shall include information to Members about the right to complain.
- (f) **(Access).** The complaints handling process shall be assessable to all Members and information shall be readily available on the details of making and resolving complaints.
- (g) **(Assistance).** Assistance shall be available for Members in a formulation and lodgment of complaint.
- (h) **(Responsiveness).** Complaints shall be dealt with quickly and the Members shall be treated courteously.
- (i) **(Charges).** Complaints handling shall be at no charge to the particular complaining Member. The Manager shall be entitled to be reimbursed for its costs from Scheme assets in dealing with the particular complaints.
- (j) **(objectivity)** The Manager shall ensure complaints are treated in an equitable, objective and unbiased manner.
- (k) **(confidentiality)** The framework shall recognise that personally identifiable information about Members should be available when needed but used only to the extent necessary, and be actively protected from disclosure, unless a Member expressly consents to the disclosure.
- (l) **(customer-focused approach)** The framework shall have a customer-focused approach, facilitate the receipt and collection of feedback and foster commitment to resolving complaints which is demonstrated by the Manager's actions.

- (m) **(Remedies).** The complaints handling process shall have the capacity to determine and implement remedies.
- (n) **(Data collection).** There shall be appropriate systematic recording of complaints by Members and their outcome.
- (o) **(Systematic and recurring problems).** Complaints shall be classified and analysed for the identification and rectification of systematic and recurring problems.
- (p) **(Accountability).** There shall be appropriate reporting on the operation of the complaints handling process against documented performance standards.
- (q) **(Review).** The complaints handling process shall be reviewed annually to ensure that it is sufficiently delivering effective outcomes.

### 21.3 Disputes between the Manager and Members

A Member claiming that a dispute has arisen must notify the Manager giving details of the dispute in writing (including by email) or by telephone.

### 21.4 Best Efforts to Resolve the Dispute

- (a) On receipt of the written notice of dispute from the Member, the Manager shall promptly reply (within 7 Business Days) acknowledging receipt of the notice of dispute.
- (b) The designated dispute resolution officer of the Manager shall immediately investigate the complaint and if necessary correspond directly with the complainant Member in relation to the disputed matter.
- (c) The dispute resolution officer shall within 30 Business Days of receipt of the notice of dispute from the Member finalise its investigation of the dispute and report in writing to the Member the result of the dispute.
- (d) Where the dispute is not resolved to the satisfaction of the Member the Member shall have 30 days from receipt of the report of the dispute resolution officer to refer the matter to the board of the Manager.
- (e) The Manager's board shall meet within 21 Business Days of receipt of a written complaint by a Member, received pursuant to paragraph (d) to consider the dispute.
- (f) The Member shall be entitled to be present at the meeting of the board with or without legal representation and to be heard either in person or through the Member's legal representative.

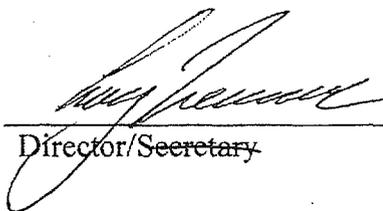
- (g) Subsequent to hearing the Member's complaint the board shall have a maximum of 14 Business Days within which to consider the complaint and either accept, reject or resolve the dispute.
- (h) The board must notify the Member within 21 Business Days of the hearing under paragraph (e), of its decision and what avenues are available to the Member to pursue the complaint further, including referring the Member to the Dispute Resolution Service.
- (i) If the Member is dissatisfied with either:
  - (i) the dispute resolution officer's report; or
  - (ii) the determination of board or compliance committee,then the Member may refer the complaint to the Dispute Resolution Service.
- (j) The Manager is entitled to be reimbursed from the Assets its reasonable costs incurred in complying with this clause.

**EXECUTED** as a Deed Poll

Signed sealed and delivered

by  
EQUITITRUST LIMITED ACN 061 383 944  
on 30/11/2010 by:

A  \_\_\_\_\_  
Director

A  \_\_\_\_\_  
Director/Secretary

A DAVID JOHN KEN JEDY  
Full name of Director

A CRAIG GRANVILLE TREASURE  
Full name of Director/Secretary

Australian Securities & Investments Commission



Form 5101 B  
Corporations Act 2001  
601GC

# Notification of change to managed investment scheme's constitution

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

## Scheme details

Managed investment scheme name

EQUITRUST INCOME FUND

ARSN

089 079 854

Responsible entity name

EQUITRUST LIMITED

ACN

061 383 944

## Lodgement details

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

Firm/organisation

MCCULLOUGH ROBERTSON

Contact name/position description

SEAN ROBERTSON

ASIC registered agent number (if applicable)

296

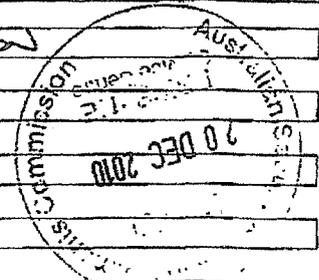
Telephone number

07 3233 2888

Postal address or DX address

DX 158

BRISBANE



## 1 Details of change

Modification of constitution authorised by special resolution of members

Date of resolution  
[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

ASIC form code  
B

Replacement of constitution authorised by special resolution of members

Date of resolution  
[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

C

Modification of constitution authorised by responsible entity

Date authorised  
13 / 12 / 08  
(D) (D) (M) (M) (Y) (Y)

B

Replacement of constitution authorised by responsible entity

Date of replacement  
[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

C

Consolidated constitution

Date of consolidation  
[ ] [ ] / [ ] [ ] / [ ] [ ]  
(D) (D) (M) (M) (Y) (Y)

D

**2 Documents to be attached**

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

**Signature**

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

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

Name

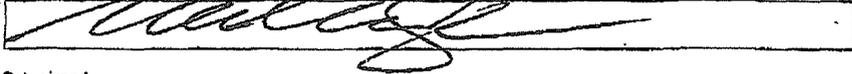
MARK MCIVOR

Capacity

Director of responsible entity

Secretary of responsible entity

Signature



Date signed

13/12/08

[D] [D] [M] [M] [Y] [Y]

**Lodgement**

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

**For help or more information**

Telephone: 1300 300 630  
Email: [info.enquiries@asic.gov.au](mailto:info.enquiries@asic.gov.au)  
Web: [www.asic.gov.au](http://www.asic.gov.au)

## DEED POLL

Made on 13 December 2010

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BY **Equititrust Limited ACN 061 383 944 of 67 Thomas Drive, Chevron Island in the State of Queensland**  
(**'Manager'**)

### BACKGROUND

- A. The Equititrust Income Fund ('Scheme') was originally established by constitution dated 9 August 1999 as amended from time to time by the Manager ('Constitution').
- B. Clause 20.1(b) of the Constitution provides that the Constitution may be modified or repealed and replaced by the Manager if it reasonably considers the change will not adversely affect members' rights.
- C. The Manager is satisfied the changes contemplated by this deed poll will not adversely affect Unit Holders rights.

### OPERATIVE PROVISIONS

#### RESOLUTION OF DISPUTES.

1. Clause 21.3 of the Constitution is deleted in its entirety and replaced with:

##### **21.3 Disputes between the Manager and Members**

A Member claiming that a dispute has arisen must notify the Manager giving details of the dispute in writing (including by email) or by telephone.

2. Clause 21.4 of the Constitution is deleted in its entirety and replaced with:

##### **21.4 Best Efforts to Resolve the Dispute**

- (a) On receipt of a dispute from the Member, the Manager shall promptly reply (within 5 Business Days) acknowledging receipt of the notice of dispute.
- (b) The designated dispute resolution officer of the Manager shall immediately investigate the complaint and if necessary correspond directly with the complainant Member in relation to the disputed matter.
- (c) The dispute resolution officer shall within 30 Business Days of receipt of the notice of dispute from the Member seek to finalise its investigation of the dispute and report in writing to the Member the result of the dispute.
- (d) Where the Manager has been unable to substantially respond to the complaint within 45 days the dispute resolution officer will report in writing to the Member advising them reasons for the delay, when a response can be expected and referring them to the external dispute resolution scheme.
- (e) The Manager is entitled to be reimbursed from the Assets its reasonable costs incurred in complying with this clause.

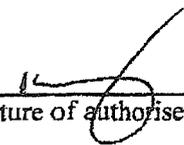
CONFIRMATION

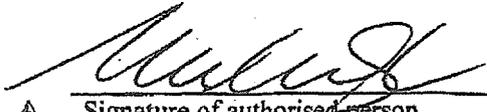
3. The Trustee confirms that, save for the amendments made by this Deed Poll, the provisions of the Constitution shall remain in full force and effect and that by such amendments the Trustee is not resettling or redeclaring the Trust nor are such amendments removing or changing the rights of Unit Holders to vote or receive distributions in respect of a Unit or Option.

EFFECTIVE DATE

4. In accordance with section 601 GC (2) of the Corporations Act 2001, the amendments to the Constitution contained in this Deed Poll will take effect when a copy of this Deed Poll is lodged with ASIC.

SIGNED SEALED AND DELIVERED BY )  
EQUITRUST LIMITED ACN 061 383 944 )  
in accordance with its constitution in the )  
presence of: )

A   
Signature of authorised person

A   
Signature of authorised person

A DAVID JOHN KENNEDY  
Name of authorised person

A MARK MCVOR  
Name of authorised person

A DIRECTOR  
Office held

A DIRECTOR  
Office held

"DW-4"

SUPREME COURT OF QUEENSLAND

uplicate

REGISTRY: BRISBANE  
NUMBER: BS 10478 OF 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN 089 079 854 AND THE MEMBERS OF THE EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089 079 729**

ORDER

Before: Justice Dalton

Date: 29 February 2012

Initiating document: Application filed 24 February 2012

In this order, "Receiver" means Mr David Whyte, in his capacity as receiver of the property of the Equititrust Income Fund ARSN 089 079 854 (EIF) and as the person responsible for ensuring the EIF is wound up in accordance with its constitution pursuant to the Orders of Justice Applegarth of 21 November 2011 and 23 November 2011 in these proceedings (Orders),

THE COURT DIRECTS THAT:

1. Without derogating in any way from the Receiver's appointment or the Receiver's powers pursuant to the Orders, the Receiver is authorised to:
  - (a) take all steps necessary to ensure the realisation of property of EIF held by Equititrust Limited as Responsible Entity of the EIF (EL as RE of the EIF) by exercising any legal right of EL as RE of the EIF in relation to the property, including but not limited to:
    - (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
    - (ii) providing a response as appropriate to matters raised by receivers of property of EL as RE of the EIF to which receivers have been appointed;
    - (iii) dealing with any creditors with security over the property of the EIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;



Order Filed on behalf of the Court Appointed Receiver

Form No. R.661

29 FEB 2012

GADENS LAWYERS  
Level 25, 240 Queen Street  
BRISBANE QLD 4000  
Tel No.: 07 3231 1666  
Fax No.: 07 3229 5850  
SZC:JSK:201110996

- (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
- (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above;
- (b) bring, defend or maintain any proceedings on behalf of EIF in the name of EL as is necessary for the winding up of the EIF in accordance with clause 9 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions;
- (c) take all steps necessary to effect the implementation of a NAB bank guarantee facility and the replacement of the existing CBA bank guarantee facilities including:
  - (i) providing instructions to solicitors as are necessary to negotiate and finalise the facilities and/or the security documentation required for a replacement bank guarantee facility from the NAB and the repayment of the CBA facilities and the release of any security held by the CBA;
  - (ii) dealing with NAB and CBA direct to provide for the replacement of the bank guarantees and finalise the documentation in relation to same; and
  - (iii) executing any and all facility and/or security documentation on behalf of EL as RE of the EIF or all such other legal documents as are necessary to ensure the security documentation is finalised and the CBA bank guarantee facilities replaced by the NAB bank guarantee facility.

THE ORDER OF THE COURT IS THAT:

2. That the parties appearing on this application, save for ASIC, the National Australia Bank and the receivers Messrs Colwell and Moloney, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.

Signed:



DEPUTY REGISTRAR

**ASIC & Business Names**  
**ORGANISATIONAL SEARCH ON EQUITRUST LIMITED**

**Historical Extract**

This information was extracted from ASIC database on 01 August 2018 at 08:52AM

This extract contains information derived from the Australian Securities and Investment Commission's (ASIC) database under section 1274A of the Corporations Act 2001. Please advise ASIC of any error or omission which you may identify.

<b>061 383 944</b>	<b>EQUITRUST LIMITED</b>	<b>DOCUMENT NO.</b>
ABN	061 383 944 74 061 383 944	
Registered in	QLD	
Date Registered	18-Aug-1993	
Review Date	18-Aug-2018	

**Current Organisation Details**

Name	EQUITRUST LIMITED	7E4277681
Name Start	25-Jan-2002	
Status	EXTERNALLY ADMINISTERED	
	For information about this status refer to the documents listed under the heading "External Administration and/or Appointment of Controller", below.	
Type	AUSTRALIAN PUBLIC COMPANY	
Class	LIMITED BY SHARES	
Subclass	UNLISTED PUBLIC COMPANY	
Disclosing Entity	NO	

**Ceased/Former Organisation Details**

Details Start	25-Jan-2002	015946604
Details End	14-Feb-2012	
Name	EQUITRUST LIMITED	
Name Start	25-Jan-2002	
Status	REGISTERED	
Type	AUSTRALIAN PUBLIC COMPANY	
Class	LIMITED BY SHARES	
Subclass	UNLISTED PUBLIC COMPANY	
Disclosing Entity	NO	
Details Start	22-Oct-1996	
Details End	24-Jan-2002	
Name	EQUITILOAN LTD	
Name Start	11-Apr-1994	
Status	REGISTERED	

Type AUSTRALIAN PUBLIC COMPANY  
Class LIMITED BY SHARES  
Subclass UNLISTED PUBLIC COMPANY  
Disclosing Entity NO

Details Start 28-Sep-1996  
Details End 21-Oct-1996  
Name EQUITILLOAN LTD  
Name Start 11-Apr-1994  
Status STRIKE-OFF ACTION IN PROGRESS  
Type AUSTRALIAN PUBLIC COMPANY  
Class LIMITED BY SHARES  
Subclass UNLISTED PUBLIC COMPANY  
Disclosing Entity NO

Details Start 11-Apr-1994 005257655  
Details End 27-Sep-1996  
Name EQUITILLOAN LTD  
Name Start 11-Apr-1994  
Status REGISTERED  
Type AUSTRALIAN PUBLIC COMPANY  
Class LIMITED BY SHARES  
Subclass UNLISTED PUBLIC COMPANY  
Disclosing Entity NO

Details Start 11-Mar-1994 005261696  
Details End 10-Apr-1994  
Name EQUITILLOAN PTY LTD  
Name Start 11-Mar-1994  
Status REGISTERED  
Type AUSTRALIAN PROPRIETARY COMPANY  
Class LIMITED BY SHARES  
Subclass EXEMPT PROPRIETARY COMPANY  
Disclosing Entity NO

Details Start 18-Aug-1993 004329320  
Details End 10-Mar-1994  
Name M C MORTGAGE MANAGEMENT PTY LTD  
Name Start 18-Aug-1993  
Status REGISTERED  
Type AUSTRALIAN PROPRIETARY COMPANY  
Class LIMITED BY SHARES  
Subclass EXEMPT PROPRIETARY COMPANY  
Disclosing Entity NO

**Current Registered Office**

Address 65-67 THOMAS DRIVE, SURFERS PARADISE, QLD, 4217 015950413  
Start Date 12-May-2000

**Ceased/Former Registered Office**

Address PKF WORLDWIDE, 'LEVEL 4, WATERSIDE EAST', HOLDEN PLACE, BUNDALL, QLD, 4217 014891088  
Start Date 01-Dec-1999  
End Date 11-May-2000

Address PANNELL KERR FORSTER, LEVEL 4 TOWER 1 WATERSIDE OFFICE PARK, HOLDEN PLACE, BUNDALL, QLD, 4217 06138394I  
Start Date 18-Jun-1997 (AR 1998)  
End Date 30-Nov-1999

Address LEVEL 1, 65-67 THOMAS DRIVE, SURFERS PARADISE, QLD, 4217 005246398  
Start Date 21-Jun-1994  
End Date 17-Jun-1997

Address MCIVOR COGHLAN SOLICITORS, 1150 GOLD COAST HIGHWAY, PALM BEACH, QLD, 4221 005947086  
Start Date 27-Oct-1993  
End Date 20-Jun-1994

Address C/- TOP SHELF COMPANY SERVICES, SUITE 1, 31 CROMBIE AVENUE, BUNDALL, QLD, 4217 004329320  
Start Date 18-Aug-1993  
End Date 26-Oct-1993

**Current Principal Place of Business**

Address 65-67 THOMAS DRIVE, SURFERS PARADISE, QLD, 4217 06138394G  
Start Date 11-Jun-1997 (AR 1996)

**Ceased/Former Principal Place of Business**

Address 65-67 THOMAS DRIVE, SURFERS PARADISE, QLD, 4217 011666628  
Start Date 10-Oct-1996 (AR 1995)  
End Date 10-Jun-1997

Address MCIVOR COGHLAN SOLICITORS, 1150 GOLD COAST HIGHWAY, PALM BEACH, QLD, 4221 06138394Z  
Start Date 31-Dec-1994 (AR 1994)  
End Date 09-Oct-1996

**Ceased/Former Principal Executive Officer**

Officer Name MARK MCIVOR 009156517  
ABN Not available  
Birth Details 27-Mar-1956 DALBY QLD  
Address 67 JEFFERSON LANE, PALM BEACH, QLD, 4221  
Appointment Date 15-May-1995  
Cease Date 08-Dec-1995

**Current Director**

Officer Name MARK MCIVOR 7E4106959  
ABN Not available  
Birth Details 27-Mar-1956 DALBY QLD  
Address 1 SOUTHERN CROSS DRIVE, CHEVRON ISLAND, QLD, 4217  
Appointment Date 21-Nov-2011

Officer Name DAVID HICKIE 7E4245817  
ABN Not available  
Birth Details 21-Sep-1951 MELBOURNE VIC  
Address UNIT 5, 78 QUEEN ROAD, MELBOURNE, VIC, 3004  
Appointment Date 12-Jan-2012

Officer Name ROSS JAMES HONEYMAN 030085152  
ABN Not available  
Birth Details 02-Apr-1957 SYDNEY NSW  
Address U13, 'INFO RECEIVED ADDRESS MAY BE INVALID 21/07/17',  
3508 \*\*MAIN BEACH PARADE, MAIN BEACH, QLD, 4217  
Appointment Date 21-Nov-2011

**Ceased/Former Director**

Officer Name STACEY BLYTHE MCIVOR 7E4106959  
ABN Not available  
Birth Details 02-Mar-1971 SYDNEY NSW  
Address 1 SOUTHERN CROSS DRIVE, CHEVRON ISLAND, QLD, 4217  
Appointment Date 21-Nov-2011  
Cease Date 16-Dec-2011

Officer Name JEFFREY IAN MCDERMID 7E4034319  
ABN Not available  
Birth Details 05-Feb-1951 BANGALOW NSW  
Address UNIT 2604, 159 OLD BURLEIGH ROAD, BROADBEACH, QLD,  
4218  
Appointment Date 17-Oct-2011  
Cease Date 21-Nov-2011

Officer Name TROY BINGHAM 7E4034319  
ABN Not available  
Birth Details 17-Jan-1969 DURBAN SOUTH AFRICA  
Address 12 PORTOBELLO DRIVE, MERMAID WATERS, QLD, 4218  
Appointment Date 12-Oct-2011  
Cease Date 21-Nov-2011

Officer Name WARWICK POWELL 7E4034319  
ABN Not available  
Birth Details 01-Nov-1969 HONG KONG CHINA  
Address 69-77 KILLIGREW ROAD, TAMBORINE, QLD, 4270  
Appointment Date 11-Oct-2011

Cease Date	21-Nov-2011	
Officer Name	PAUL JAMES VINCENT	7E4044308
ABN	Not available	
Birth Details	06-Apr-1957 BRISBANE QLD	
Address	15 MCGREGOR STREET, CLAYFIELD, QLD, 4011	
Appointment Date	24-Oct-2011	
Cease Date	21-Nov-2011	
Officer Name	JOHN ALEXANDER GODDARD	7E3283588
ABN	Not available	
Birth Details	14-Jun-1950 SYDNEY NSW	
Address	3 ELLWOOD COURT, HIGHVALE, QLD, 4520	
Appointment Date	12-Oct-2010	
Cease Date	17-Oct-2011	
Officer Name	DAVID JOHN SANDFORD JACKSON	7E3844445
ABN	Not available	
Birth Details	02-Feb-1955 BRISBANE QLD	
Address	23 KAMBER STREET, BARDON, QLD, 4065	
Appointment Date	28-Jul-2011	
Cease Date	17-Oct-2011	
Officer Name	CRAIG GRANVILLE TREASURE	7E3283613
ABN	Not available	
Birth Details	21-Dec-1962 BRISBANE QLD	
Address	3018 THE BOULEVARDE, BENOWA, QLD, 4217	
Appointment Date	12-Oct-2010	
Cease Date	16-Oct-2011	
Officer Name	HARVEY PARKER	7E4034319
ABN	Not available	
Birth Details	16-Nov-1943 MACKAY QLD	
Address	76 WOODSIDE AVENUE, FRANKSTON, VIC, 3199	
Appointment Date	11-Oct-2011	
Cease Date	12-Oct-2011	
Officer Name	DAVID ROBERT WALTER TUCKER	7E3191967
ABN	Not available	
Birth Details	23-Oct-1967 MELBOURNE VIC	
Address	29 SASSAFRAS STREET, THE GAP, QLD, 4061	
Appointment Date	03-Sep-2010	
Cease Date	11-Oct-2011	
Officer Name	DAVID JOHN KENNEDY	7E3099509
ABN	Not available	
Birth Details	24-Dec-1968 BRISBANE QLD	
Address	3 SIR BRUCE SMALL BOULEVARD, BENOWA, QLD, 4217	
Appointment Date	14-May-2010	
Cease Date	14-Jun-2011	

Officer Name	MARK MCIVOR	1F0208790
ABN	Not available	
Birth Details	27-Mar-1956 DALBY QLD	
Address	1 SOUTHERN CROSS DRIVE, CHEVRON ISLAND, QLD, 4217	
Appointment Date	01-Jul-1995	
Cease Date	13-Jun-2011	
Officer Name	THOMAS JOHN HANEY	015943136
ABN	Not available	
Birth Details	01-Dec-1956 MOUNT ISA QLD	
Address	25 MIDSHIPMAN COURT, SURFERS PARADISE, QLD, 4217	
Appointment Date	03-Jul-2000	
Cease Date	03-Sep-2010	
Officer Name	WAYNE MCIVOR	7E2388579
ABN	Not available	
Birth Details	07-May-1954 WARWICK QLD	
Address	79 RIVER CRESCENT, BROADBEACH WATERS, QLD, 4218	
Appointment Date	10-Aug-2000	
Cease Date	14-May-2010	
Officer Name	LESLIE WAYNE PETERS	014228497
ABN	Not available	
Birth Details	25-Dec-1959 HUGHENDEN QLD	
Address	UNIT A10-3 RIVAGE ROYALE, 75 BRIGHTON PARADE, SOUTHPORT, QLD, 4215	
Appointment Date	15-Sep-1999	
Cease Date	10-Aug-2000	
Officer Name	MARK THOMAS DIXON	014228497
ABN	Not available	
Birth Details	24-Apr-1956 GYMPIE QLD	
Address	9 HYTHE STREET, MIAMI, QLD, 4220	
Appointment Date	15-Sep-1999	
Cease Date	03-Jul-2000	
Officer Name	JOHN LEONARD BENNETTS	013833932
ABN	Not available	
Birth Details	07-Dec-1962 BRISBANE QLD	
Address	UNIT 23 CARRINGTON CRT, 3576 MAIN BEACH PARADE, MAIN BEACH, QLD, 4217	
Appointment Date	10-Mar-1998	
Cease Date	15-Sep-1999	
Officer Name	WAYNE MCIVOR	06138394H
ABN	Not available	(AR 1997)
Birth Details	07-May-1954 WARWICK QLD	
Address	UNIT 124 GRAND MARINER, 12 COMMODORE DRIVE, SURFERS PARADISE, QLD, 4217	
Appointment Date	18-Aug-1993	

Cease Date 15-Sep-1999  
Officer Name KERRY ARTHUR O'MEARA 011680137  
ABN Not available  
Birth Details 24-May-1958 ROTORUA NEW ZEALAND  
Address 92 AMALFI DRIVE, SURFERS PARADISE, QLD, 4217  
Appointment Date 28-Nov-1996  
Cease Date 10-Mar-1998

Officer Name ROSS DONALD JANETZKI 005257634  
ABN Not available  
Birth Details 25-Jun-1968 PRAHRAN VIC  
Address UNIT 5, 28 PANORAMA DRIVE, CURRUMBIN, QLD, 4223  
Appointment Date 23-Feb-1994  
Cease Date 28-Nov-1996

Officer Name JOHN RICHARD MCIVOR 005947087  
ABN Not available  
Birth Details 07-May-1930 WARWICK QLD  
Address 2 RAZORBACK ROAD, TWEED HEADS, NSW, 2485  
Appointment Date 18-Aug-1993  
Cease Date 01-Jul-1995

Officer Name FROLA SHANEENE GILLTRAP 004329337  
ABN Not available  
Birth Details 19-May-1949 BRISBANE QLD  
Address 16 DOUBLEVIEW DRIVE, ELANORA, QLD, 4221  
Appointment Date 18-Aug-1993  
Cease Date 18-Aug-1993

Officer Name GEORGE STEPHENSON GILLTRAP 004329337  
ABN Not available  
Birth Details 20-Feb-1949 ROTORUA NEW ZEALAND  
Address 16 DOUBLEVIEW DRIVE, ELANORA, QLD, 4221  
Appointment Date 18-Aug-1993  
Cease Date 18-Aug-1993

#### Current Secretary

Officer Name ROSS JAMES HONEYMAN 030085152  
ABN Not available  
Birth Details 02-Apr-1957 SYDNEY NSW  
Address U13, 'INFO RECEIVED ADDRESS MAY BE INVALID 21/07/17',  
3508 \*\*MAIN BEACH PARADE, MAIN BEACH, QLD, 4217  
Appointment Date 17-Oct-2011

#### Ceased/Former Secretary

Officer Name DAVID JOHN KENNEDY 7E3737048  
ABN Not available

Birth Details 24-Dec-1969 BRISBANE QLD  
Address 3 SIR BRUCE SMALL BOULEVARD, BENOWA, QLD, 4217  
Appointment Date 14-Jun-2011  
Cease Date 17-Oct-2011

Officer Name SIDNEY SUPER 7E2388579

ABN Not available

Birth Details 29-Jan-1956 DURBAN SOUTH AFRICA  
Address '48 DEVILLE APARTMENTS', 3645 MAIN BEACH PARADE, MAIN  
BEACH, QLD, 4217  
Appointment Date 16-Jan-2004  
Cease Date 01-Jul-2011

Officer Name LYNDELL RUTH EASTON 06138394M

ABN Not available (AR 2002)

Birth Details 17-Dec-1962 NARRABRI NSW  
Address UNIT 1, 21 VENICE STREET, MERMAID BEACH, QLD, 4218  
Appointment Date 15-Sep-1999  
Cease Date 15-Jan-2004

Officer Name WAYNE MCIVOR 06138394H

ABN Not available (AR 1997)

Birth Details 07-May-1954 WARWICK QLD  
Address UNIT 124 GRAND MARINER, 12 COMMODORE DRIVE,  
SURFERS PARADISE, QLD, 4217  
Appointment Date 18-Aug-1993  
Cease Date 15-Sep-1999

Officer Name GEORGE STEPHENSON GILLTRAP 004329336

ABN Not available

Birth Details 20-Feb-1949 ROTORUA NEW ZEALAND  
Address 16 DOUBLEVIEW DRIVE, ELANORA, QLD, 4221  
Appointment Date 18-Aug-1993  
Cease Date 18-Aug-1993

#### Current Appointed Auditor

Officer Name KPMG 024300137

Number 024510530 (FR 2007)

ABN Not available

Address 'CORPORATE CENTRE ONE LEVEL 11', CNR BUNDALL &  
SLATER AVENUE, BUNDALL, QLD, 4217  
Appointment Date 06-Jun-2001

#### Ceased/Former Appointed Auditor

Officer Name PRICEWATERHOUSECOOPERS 015497012

Number 083013423 (FR 1999)

ABN Not available

Address LEVEL 11 WATERFRONT PLACE, 1 EAGLE STREET,  
BRISBANE, QLD, 4000

Appointment Date 31-Dec-1994  
Cease Date 28-Jun-2001

#### Current Receiver Manager

Officer Name WILLIAM MARTIN COLWELL 7E4286099  
ABN Not available  
Address FERRIER HODGSON (QLD), ROYAL & SUN ALLIANCE  
BUILDING LEVEL 7, 145 EAGLE STREET, BRISBANE, QLD,  
4000  
Appointment Date 16-Feb-2012

Officer Name CHRISTOPHER RICHARD COOK 7E4686885  
ABN Not available  
Address LEVEL 8, 102 ADELAIDE STREET, BRISBANE, QLD, 4000  
Appointment Date 27-Aug-2012

#### Ceased/Former Receiver Manager

Officer Name MICHAEL RICHARD PELDAN 7E4686885  
ABN Not available  
Address LEVEL 8, 102 ADELAIDE STREET, BRISBANE, QLD, 4000  
Appointment Date 27-Aug-2012  
Cease Date 19-Jun-2018

Officer Name GREGORY MICHAEL MOLONEY 7E4286099  
ABN Not available  
Address FERRIER HODGSON (QLD), LEVEL 7, 145 EAGLE STREET,  
BRISBANE, QLD, 4000  
Appointment Date 16-Feb-2012  
Cease Date 11-May-2018

Officer Name WILLIAM JAMES HARRIS 028033519  
ABN Not available  
Address MCGRATHNICOL, LEVEL 14, 145 EAGLE STREET, BRISBANE,  
QLD, 4000  
Appointment Date 21-Feb-2012  
Cease Date 27-Aug-2012

Officer Name JOSEPH DAVID HAYES 028033519  
ABN Not available  
Address MCGRATHNICOL, LEVEL 14, 145 EAGLE STREET, BRISBANE,  
QLD, 4000  
Appointment Date 21-Feb-2012  
Cease Date 27-Aug-2012

Officer Name JOHN PATRICK CRONIN 028033519  
ABN Not available  
Address MCGRATHNICOL, LEVEL 14, 145 EAGLE STREET, BRISBANE,  
QLD, 4000  
Appointment Date 21-Feb-2012  
Cease Date 27-Aug-2012

**Current Petitioner Court Action**

Officer Name	IAN DAVID LAZAR	027770829
ABN	Not available	
Address	4 MOROTAI CRESCENT, CASTLECRAG, NSW, 2068	
Appointment Date	21-Sep-2011	
Court details affecting role		
Court Type	Federal	Court State New South Wales
Court application No	1614	Court application year 2011

**Current Appointed Liquidator (Creditors Voluntary Winding up)**

Officer Name	BLAIR ALEXANDER PLEASH	7E5846751
ABN	Not available	
Address	HALL CHADWICK, LEVEL 40, 2-26 PARK STREET, SYDNEY, NSW, 2000	
Appointment Date	20-Apr-2012	

Officer Name	BLAIR ALEXANDER PLEASH	7E5846751
ABN	Not available	
Address	HALL CHADWICK, LEVEL 40, 2-26 PARK STREET, SYDNEY, NSW, 2000	
Appointment Date	20-Apr-2012	

Officer Name	RICHARD ALBARRAN	7E5846853
ABN	Not available	
Address	HALL CHADWICK, LEVEL 40, 2-26 PARK STREET, SYDNEY, NSW, 2000	
Appointment Date	20-Apr-2012	

Officer Name	RICHARD ALBARRAN	7E5846853
ABN	Not available	
Address	HALL CHADWICK, LEVEL 40, 2-26 PARK STREET, SYDNEY, NSW, 2000	
Appointment Date	20-Apr-2012	

**Ceased/Former Appointed Liquidator (Creditors Voluntary Winding up)**

Officer Name	GLEN PETER OLDHAM	7E4412884
ABN	Not available	
Address	LEVEL 19, 144 EDWARD STREET, BRISBANE, QLD, 4000	
Appointment Date	20-Apr-2012	
Cease Date	17-Jul-2013	

Officer Name	GLEN PETER OLDHAM	7E4412913
ABN	Not available	
Address	LEVEL 19, 144 EDWARD STREET, BRISBANE, QLD, 4000	
Appointment Date	20-Apr-2012	
Cease Date	17-Jul-2013	

**Ceased/Former Administrator of a Company Under Administration**

Officer Name RICHARD ALBARRAN 7E4277681  
 ABN Not available  
 Address HALL CHADWICK, 'ST MARTINS TOWER' LEVEL 29, 31  
 MARKET STREET, SYDNEY, NSW, 2000  
 Appointment Date 15-Feb-2012  
 Cease Date 20-Apr-2012

Officer Name BLAIR ALEXANDER PLEASH 7E4277681  
 ABN Not available  
 Address HALL CHADWICK, 'ST MARTINS TOWER' LEVEL 29, 31  
 MARKET STREET, SYDNEY, NSW, 2000  
 Appointment Date 15-Feb-2012  
 Cease Date 20-Apr-2012

Officer Name GLEN PETER OLDHAM 7E4277681  
 ABN Not available  
 Address LEVEL 19, 144 EDWARD STREET, BRISBANE, QLD, 4000  
 Appointment Date 15-Feb-2012  
 Cease Date 20-Apr-2012

**Current Issued Capital**

Type Current 06138394G  
 Class ORD (AR 1996)  
 ORDINARY SHARES  
 Number of Shares/Interests issued 500  
 Total amount paid/taken to be paid \$4097385.00  
 Total amount due and payable \$0.00

**Ceased/Former Issued Capital**

Type Ceased/Former 1F0077488  
 Class C  
 CLASS C SHARES  
 Number of Shares/Interests issued 1  
 Total amount paid/taken to be paid \$1.00  
 Total amount due and payable \$0.00

Note: For each class of shares issued by a proprietary company, ASIC records the details of the twenty members of the class (based on shareholdings). The details of any other members holding the same number of shares as the twentieth ranked member will also be recorded by ASIC on the database. Where available, historical records show that a member has ceased to be ranked amongst the twenty members. This may, but does not necessarily mean, that they have ceased to be a member of the company.

**Documents Relating to External Administration and/or Appointment**

This extract may not list all documents relating to this status. State and territory records should be searched.

Received	Form Type	Processed	No. Pages	Effective	
29-Jun-2018	5011	18-Jul-2018	5	28-May-2018	030368335

5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
28-Jun-2018	5011	28-Jun-2018	67	28-May-2018	7EAB53535
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
20-Jun-2018	505	20-Jun-2018	2	19-Jun-2018	7EAB23258
505L	NOTICE BY EXTERNAL ADMINISTRATOR/CONTROLLER-APPOINT/CEASE RECEIVER MANAGER CEASING TO ACT				
18-May-2018	524	18-May-2018	6	19-Apr-2018	7EAA20862
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
11-May-2018	505	11-May-2018	2	11-May-2018	8E0176063
505L	NOTICE BY EXTERNAL ADMINISTRATOR/CONTROLLER-APPOINT/CEASE RECEIVER MANAGER CEASING TO ACT				
26-Mar-2018	524	26-Mar-2018	11	26-Feb-2018	8E0032203
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
06-Mar-2018	524	06-Mar-2018	5	15-Feb-2018	7E9966858
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
17-Nov-2017	524	17-Nov-2017	6	19-Oct-2017	7E9657230
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
22-Sep-2017	524	22-Sep-2017	11	26-Aug-2017	7E9475810
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
15-Sep-2017	524	15-Sep-2017	5	15-Aug-2017	7E9449413
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
16-May-2017	1500	16-May-2017	6	19-Apr-2017	7E9058213
1500	ANNUAL REPORT TO CREDITORS				
16-May-2017	524	16-May-2017	11	19-Apr-2017	7E9058182
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
07-Mar-2017	524	07-Mar-2017	11	26-Feb-2017	7E8836412
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER &				

MANAGER

28-Feb-2017	524	28-Feb-2017	5	15-Feb-2017	7E8813815
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
21-Nov-2016	5011	21-Nov-2016	78	21-Oct-2016	7E8545366
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
21-Nov-2016	524	21-Nov-2016	11	19-Oct-2016	7E8545089
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP Altered by 030 018 041				
22-Sep-2016	524	22-Sep-2016	11	26-Aug-2016	7E8370433
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
19-Aug-2016	524	19-Aug-2016	5	15-Aug-2016	7E8267058
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
19-Jul-2016	1500	19-Jul-2016	3	19-Apr-2016	7E8170620
1500	ANNUAL REPORT TO CREDITORS				
19-May-2016	524	19-May-2016	11	19-Apr-2016	7E7974897
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
11-Mar-2016	524	11-Mar-2016	6	15-Feb-2016	7E7781311
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
02-Mar-2016	524	02-Mar-2016	7	26-Feb-2016	7E7750909
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
25-Feb-2016	1500	25-Feb-2016	4	19-Apr-2014	7E7733520
1500	ANNUAL REPORT TO CREDITORS				
25-Feb-2016	1500	25-Feb-2016	4	19-Apr-2015	7E7733519
1500	ANNUAL REPORT TO CREDITORS				
18-Nov-2015	524	18-Nov-2015	11	19-Oct-2015	7E7478077
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP Altered by 029 659 012				
14-Sep-2015	524	14-Sep-2015	5	15-Aug-2015	7E7300645

524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
28-Aug-2015	524	28-Aug-2015	12	26-Aug-2015	7E7254326
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
19-May-2015	524	19-May-2015	10	19-Apr-2015	7E6965131
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP Altered by 029 659 013				
11-Mar-2015	524	11-Mar-2015	12	26-Feb-2015	7E6786737
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
04-Mar-2015	524	04-Mar-2015	11	15-Feb-2015	7E6768288
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
13-Nov-2014	524	13-Nov-2014	10	19-Oct-2014	7E6519562
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP Altered by 029 659 004				
12-Sep-2014	524	12-Sep-2014	11	15-Aug-2014	7E6363601
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
27-Aug-2014	524	27-Aug-2014	11	26-Aug-2014	7E6320910
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
19-May-2014	524	19-May-2014	11	19-Apr-2014	7E6058531
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP Altered by 029 659 005				
25-Mar-2014	524	25-Mar-2014	12	26-Feb-2014	7E5935182
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
07-Mar-2014	524	07-Mar-2014	11	15-Feb-2014	7E5891185
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
18-Feb-2014	506	18-Feb-2014	7	18-Feb-2014	7E5846853
506L	NOTIFICATION OF CHANGE OF ADDRESS OF NOTICE OF CHANGE OF				

ADDRESS OF EXTERNAL ADMINISTRATOR(ELEC)

18-Feb-2014	506	18-Feb-2014	7	18-Feb-2014	7E5846853
506L	NOTIFICATION OF CHANGE OF ADDRESS OF NOTICE OF CHANGE OF ADDRESS OF EXTERNAL ADMINISTRATOR(ELEC)				
18-Feb-2014	506	18-Feb-2014	7	18-Feb-2014	7E5846751
506L	NOTIFICATION OF CHANGE OF ADDRESS OF NOTICE OF CHANGE OF ADDRESS OF EXTERNAL ADMINISTRATOR(ELEC)				
18-Feb-2014	506	18-Feb-2014	7	18-Feb-2014	7E5846751
506L	NOTIFICATION OF CHANGE OF ADDRESS OF NOTICE OF CHANGE OF ADDRESS OF EXTERNAL ADMINISTRATOR(ELEC)				
29-Nov-2013	5011	29-Nov-2013	3	21-Nov-2013	7E5683783
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
18-Nov-2013	524	18-Nov-2013	11	19-Oct-2013	7E5654848
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
10-Sep-2013	524	10-Sep-2013	11	15-Aug-2013	7E5501261
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
04-Sep-2013	524	04-Sep-2013	22	26-Aug-2013	7E5486813
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
26-Aug-2013	1500	07-Mar-2016	18	20-Apr-2013	028646601
1500	ANNUAL REPORT TO CREDITORS Altered by 029 535 808				
30-Jul-2013	5011	30-Jul-2013	6	19-Jul-2013	7E5405281
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
30-Jul-2013	5011	30-Jul-2013	4	26-Jul-2013	7E5405273
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
17-Jul-2013	505	17-Jul-2013	2	17-Jul-2013	7E5377606
505R	NOTIFICATION OF RESIGNATION OR REMOVAL OF LIQUIDATOR/PROVISIONAL LIQUIDATOR				
20-May-2013	524	20-May-2013	11	19-Apr-2013	7E5229723
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				

16-May-2013	5011	16-May-2013	8	18-Apr-2013	7E5221441
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
16-May-2013	5011	16-May-2013	3	16-Apr-2013	7E5221439
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
12-Mar-2013	524	12-Mar-2013	11	26-Feb-2013	7E5081061
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
11-Mar-2013	524	11-Mar-2013	8	15-Feb-2013	7E5076287
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
21-Jan-2013	5011	21-Jan-2013	7	21-Dec-2012	7E4970710
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
19-Nov-2012	524	19-Nov-2012	8	19-Oct-2012	7E4857222
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
16-Oct-2012	507	16-Oct-2012	11	16-Feb-2012	7E4785713
507G	REPORT AS TO AFFAIRS FROM MANAGING CONTROLLER WHO IS ALSO A RECEIVER/MANAGER				
21-Sep-2012	507	21-Sep-2012	11	27-Aug-2012	7E4733772
507G	REPORT AS TO AFFAIRS FROM MANAGING CONTROLLER WHO IS ALSO A RECEIVER/MANAGER				
17-Sep-2012	524	28-Sep-2012	9	20-Aug-2012	028211192
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
17-Sep-2012	524	28-Sep-2012	6	27-Aug-2012	028211191
524P	PRESENTATION OF ACCOUNTS & STATEMENT FINAL ACCOUNTS OF RECEIVER & MANAGER Altered by 028 749 955				
03-Sep-2012	524	03-Sep-2012	11	15-Aug-2012	7E4693473
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
30-Aug-2012	504	30-Aug-2012	4	27-Aug-2012	028216061

504B	NOTIFICATION OF APPOINTMENT OF A RECEIVER AND MANAGER				
30-Aug-2012	505	30-Aug-2012	2	27-Aug-2012	7E4686885
505B	NOTIFICATION OF APPOINTMENT OF RECEIVER AND MANAGER				
28-Aug-2012	505	28-Aug-2012	2	27-Aug-2012	7E4681504
505L	NOTIFICATION OF RECEIVER MANAGER CEASING TO ACT				
25-May-2012	5011	25-May-2012	19	20-Apr-2012	7E4478241
5011B	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION UNDER S.436E OR S.439A Altered by 028 468 193				
08-May-2012	5011	08-May-2012	5	16-Apr-2012	7E4441212
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A				
02-May-2012	524	02-May-2012	8	20-Apr-2012	7E4428908
524Z	PRESENTATION OF ACCOUNTS & STATEMENT PRESENTATION OF FINAL ACCOUNTS OF ADMINISTRATOR				
24-Apr-2012	505	24-Apr-2012	2	20-Apr-2012	7E4412932
505Y	NOTIFICATION OF RESIGNATION OR REMOVAL OF ADMINISTRATOR OF COMPANY UNDER ADMINISTRATION UNDER S.436E(4), 449B OR 449C				
24-Apr-2012	505	24-Apr-2012	2	20-Apr-2012	7E4412913
505J	NOTIFICATION OF APPOINTMENT OF LIQUIDATOR (CREDITORS' VOLUNTARY WINDING UP)				
24-Apr-2012	509D	24-Apr-2012	2	20-Apr-2012	7E4412884
509DA	NOTICE UNDER S.446A OF SPECIAL RESOLUTION TO WIND UP COMPANY RESOLVED THAT COMPANY BE WOUND UP UNDER 439C(C)				
02-Apr-2012	5011	02-Apr-2012	44	27-Feb-2012	7E4374020
5011B	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION UNDER S.436E OR S.439A				
22-Mar-2012	507	10-Apr-2012	8	21-Feb-2012	028013819
507G	REPORT AS TO AFFAIRS FROM MANAGING CONTROLLER WHO IS ALSO A RECEIVER/MANAGER				
24-Feb-2012	504	27-Feb-2012	4	16-Feb-2012	028033729
504B	NOTIFICATION OF APPOINTMENT OF A RECEIVER AND MANAGER				
22-Feb-2012	505	24-Feb-2012	3	21-Feb-2012	028016776
505B	NOTIFICATION OF APPOINTMENT OF RECEIVER AND MANAGER				
22-Feb-2012	504	23-Feb-2012	4	21-Feb-2012	028033519
504B	NOTIFICATION OF APPOINTMENT OF A RECEIVER AND MANAGER				
20-Feb-2012	505	20-Feb-2012	2	16-Feb-2012	7E4286099

505B NOTIFICATION OF APPOINTMENT OF RECEIVER AND MANAGER

15-Feb-2012 505 15-Feb-2012 2 15-Feb-2012 7E4277681  
 505U NOTIFICATION OF APPT OF ADMINISTRATOR UNDER S.436A, 436B,  
 436C, 436E(4), 449B, 449C(1), 449C(4) OR 449(6)

03-Oct-2011 519 21-Nov-2011 3 21-Sep-2011 027770829  
 519A NOTIFICATION OF FILING OF APPLICATION FOR WINDING UP ORDER

09-May-2011 519 09-May-2011 3 06-May-2011 027527066  
 519C NOTIFICATION OF DISMISSAL OF APPLICATION FOR WINDING UP  
 ORDER

**Charges**

ASIC Charge Number 470140 Charge status Satisfied  
 Date registered 13-Dec-1994 Time registered 10:15:00  
 Charge type Both Fixed & Floating  
 Date Created 08-Dec-1994

**Chargee NATIONAL AUSTRALIA BANK LIMITED**  
 004 044 937

Lodged	Form Type	Processed	No. Pages	
11-Dec-2002	312	11-Dec-2002	1	018191480
312	NOTIFICATION OF			
312A	DISCHARGE			

ASIC Charge Number 909111 Charge status Satisfied  
 Date registered 11-Dec-2002 Time registered 10:42:00  
 Charge type Both Fixed & Floating  
 Date Created 05-Dec-2002

**Chargee CAPITAL FINANCE AUSTRALIA LIMITED**  
 069 663 136

Lodged	Form Type	Processed	No. Pages	
04-Jun-2007	312	08-Jun-2007	1	023773940
312	NOTIFICATION OF			
312A	DISCHARGE			

ASIC Charge Number 1066324 Charge status Satisfied  
 Date registered 28-Jul-2004 Time registered 15:30:00  
 Charge type Both Fixed & Floating  
 Date Created 28-Jul-2004

**Chargee COMMONWEALTH BANK OF AUSTRALIA**  
 123 123 124

Lodged	Form Type	Processed	No. Pages	
03-Sep-2004	312	03-Sep-2004	1	020494250
312	NOTIFICATION OF			
312A	DISCHARGE			

ASIC Charge Number 2105255 Charge status Satisfied

Date registered 20-Dec-2010 Time registered 14:59:00  
 Charge type Both Fixed & Floating  
 Date Created 13-Dec-2010

**Chargee** ECG FUNDS MANAGEMENT LTD AS CUSTODIAN AND  
 AGENT FOR EQUITRUST LTD AS RESPONSIBLE ENTITY  
 FOR THE EQUITRUST PRIORITY CLASS INCOME FUND  
 147 968 741

Lodged	Form Type	Processed	No. Pages	
26-Aug-2011	312	04-Oct-2011	2	027621512
312	NOTIFICATION OF			
312A	DISCHARGE			

**Document Details**

Received	Form Type	Processed	No. Pages	Effective	
01-Dec-2017	FS67	01-Dec-2017	1	01-Dec-2017	030203010
FS67	Order Suspending Afs Licence				
16-May-2017	902	29-May-2017	5	19-Oct-2016	030018041
902	Supplementary Document				
	Alters 7E8 545 089				
01-Dec-2016	FS67	01-Dec-2016	2	01-Dec-2016	027730811
FS67	Order Suspending Afs Licence				
24-Jun-2016	902	25-Jul-2016	23	19-Apr-2015	029659013
902	Supplementary Document				
	Alters 7E6 965 131				
24-Jun-2016	902	25-Jul-2016	24	19-Oct-2015	029659012
902	Supplementary Document				
	Alters 7E7 478 077				
24-Jun-2016	902	25-Jul-2016	24	19-Apr-2014	029659005
902	Supplementary Document				
	Alters 7E6 058 531				
24-Jun-2016	902	25-Jul-2016	23	19-Oct-2014	029659004
902	Supplementary Document				
	Alters 7E6 519 562				
23-Feb-2016	902	07-Mar-2016	19	20-Apr-2013	029535808
902	Supplementary Document				
	Alters 028 646 601				
01-Dec-2015	FS67	01-Dec-2015	0	01-Dec-2015	027730371
FS67	Order Suspending Afs Licence				
11-Nov-2014	FS67	01-Dec-2014	1	11-Nov-2014	027719889
FS67	Order Suspending Afs Licence				
15-Jan-2014	902	16-Jan-2014	3	27-Aug-2012	028749955
902	Supplementary Document				

Alters 028 211 191

04-Apr-2013 902	902 Supplementary Document Alters 7E4 478 241	27-May-2013	28	20-Apr-2012	028468193
05-Dec-2012 FS67	FS67 Order Suspending Afs Licence	07-Dec-2012	2	05-Dec-2012	027719067
31-Jan-2012 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	31-Jan-2012	2	31-Jan-2012	7E4245817
20-Dec-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	20-Dec-2011	2	20-Dec-2011	7E4173170
14-Dec-2011 FS67	FS67 Order Suspending Afs Licence	14-Dec-2011	8	14-Dec-2011	026082473
22-Nov-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	22-Nov-2011	3	22-Nov-2011	7E4107256
22-Nov-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	22-Nov-2011	3	22-Nov-2011	7E4106959
26-Oct-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	26-Oct-2011	2	26-Oct-2011	7E4044308
21-Oct-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	21-Oct-2011	2	21-Oct-2011	7E4034358
21-Oct-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	21-Oct-2011	4	21-Oct-2011	7E4034319
26-Aug-2011 312A	312 Notification of Discharge	04-Oct-2011	2	26-Aug-2011	027621512
28-Jul-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	28-Jul-2011	2	28-Jul-2011	7E3844445
15-Jun-2011 484E	484 Change to Company Details Appointment or Cessation of A Company Officeholder	15-Jun-2011	2	15-Jun-2011	7E3737048
03-May-2011 519G	519 Notification of Application to Wind Up Company Under S. 459p, 462 or 464	03-May-2011	3	03-May-2011	027211980
27-Apr-2011	FS02	27-Apr-2011	23	27-Apr-2011	0L0309086

FS02 Copy of Afs Licence

07-Feb-2011	FS90	07-Feb-2011	1	07-Feb-2011	7E3456767
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
07-Feb-2011	FS90	07-Feb-2011	1	07-Feb-2011	7E3456753
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
20-Dec-2010	309	21-Dec-2010	51	13-Dec-2010	027412174
309A	NOTIFICATION OF DETAILS OF A CHARGE				
15-Dec-2010	FS88	15-Dec-2010	3	15-Dec-2010	7E3366502
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
09-Nov-2010	484	09-Nov-2010	2	09-Nov-2010	7E3283613
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
09-Nov-2010	484	09-Nov-2010	2	09-Nov-2010	7E3283588
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
30-Sep-2010	388	08-Nov-2010	58	30-Jun-2010	027362052 (FR 2010)
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				
24-Sep-2010	484	24-Sep-2010	2	24-Sep-2010	7E3191967
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
13-Sep-2010	FS02	13-Sep-2010	23	13-Sep-2010	0L0308402
FS02	COPY OF AFS LICENCE				
11-Aug-2010	484	11-Aug-2010	2	11-Aug-2010	7E3099509
484A1	CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS				
21-May-2010	484	21-May-2010	2	21-May-2010	7E2908272
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
18-Jan-2010	FS02	18-Jan-2010	22	18-Jan-2010	0L0502165
FS02	COPY OF AFS LICENCE				
30-Sep-2009	388	28-Oct-2009	60	30-Jun-2009	025950974 (FR 2009)
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				
21-Sep-2009	5120	22-Sep-2009	6	21-Sep-2009	024768053
5120	NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME				
25-Aug-2009	484	25-Aug-2009	2	25-Aug-2009	7E2388579
484A1	CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS				

11-Feb-2009	FS88	11-Feb-2009	3	06-Feb-2009	7E2032162
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
28-Dec-2008	FS90	05-Jan-2009	6	28-Dec-2008	024857933
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
25-Nov-2008	5122	26-Nov-2008	5	14-Nov-2008	024668944
5122	NOTICE OF DECLARATION RE MANAGED INVESTMENT SCHEME				
25-Nov-2008	5120	26-Nov-2008	6	14-Nov-2008	024668943
5120	NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME				
31-Oct-2008	388	06-Jan-2009	60	30-Jun-2008	025343802
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				(FR 2008)
05-Sep-2008	484	05-Sep-2008	4	05-Sep-2008	1F0208790
484A1	CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS				
21-Apr-2008	FS55	21-Apr-2008	1	21-Apr-2008	018714168
FS55	ORDER ISSUED PURSUANT TO S1020E(2)				
18-Apr-2008	FS53	11-Jun-2008	11	18-Apr-2008	024614380
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
20-Mar-2008	FS55	20-Mar-2008	2	20-Mar-2008	018714080
FS55	ORDER ISSUED PURSUANT TO S1020E(2)				
28-Sep-2007	388	23-Oct-2007	41	30-Jun-2007	024300137
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				(FR 2007)
01-Aug-2007	FS53	07-Sep-2007	11	31-Jul-2007	024030038
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
05-Jul-2007	350	09-Jul-2007	1	05-Jul-2007	023936368
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY PROVISIONAL CHARGE Alters 023 956 177				
05-Jul-2007	350	09-Jul-2007	1	05-Jul-2007	023936367
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY PROVISIONAL CHARGE Alters 023 956 176				
26-Jun-2007	311	26-Jun-2007	2	04-Jun-2007	023084888
311A	NOTIFICATION OF ASSIGNMENT OF CHARGE				
15-Jun-2007	309	18-Jun-2007	38	13-Jun-2007	023956176
309A	NOTIFICATION OF DETAILS OF A CHARGE Altered by 023 936 367				
15-Jun-2007	309	18-Jun-2007	38	13-Jun-2007	023956177
309A	NOTIFICATION OF DETAILS OF A CHARGE				

Altered by 023 936 368

15-Jun-2007	312	18-Jun-2007	3	15-Jun-2007	023956178
312C	NOTIFICATION OF RELEASE OF PROPERTY				
15-Jun-2007	312	18-Jun-2007	3	15-Jun-2007	023956179
312C	NOTIFICATION OF RELEASE OF PROPERTY				
04-Jun-2007	312	08-Jun-2007	2	04-Jun-2007	023773941
312C	NOTIFICATION OF RELEASE OF PROPERTY				
15-Mar-2007	FS56	15-Mar-2007	1	15-Mar-2007	023083091
FS56	REVOCATION OF STOP ORDER S1020E(5)				
15-Mar-2007	FS53	05-Apr-2007	11	15-Mar-2007	023103489
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
01-Mar-2007	FS53	15-Mar-2007	11	16-Feb-2007	023099191
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
27-Feb-2007	FS54	06-Mar-2007	1	27-Feb-2007	023083052
FS54	INTERIM ORDER ISSUED PURSUANT TO S1020E(5)				
23-Jan-2007	484	23-Jan-2007	6	23-Jan-2007	1F0001132
484	CHANGE TO COMPANY DETAILS				
484A1	CHANGE OFFICEHOLDER NAME OR ADDRESS				
484G	NOTIFICATION OF SHARE ISSUE				
484O	CHANGES TO SHARE STRUCTURE				
484N	CHANGES TO (MEMBERS) SHARE HOLDINGS				
02-Nov-2006	FS55	10-Nov-2006	1	02-Nov-2006	022523692
FS55	ORDER ISSUED PURSUANT TO S1020E(2)				
01-Nov-2006	388	28-Nov-2006	47	30-Jun-2006	023394275
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY			(FR 2006)	
16-Oct-2006	FS54	19-Oct-2006	1	16-Oct-2006	022523542
FS54	INTERIM ORDER ISSUED PURSUANT TO S1020E(5)				
21-Jul-2006	484	21-Jul-2006	3	21-Jul-2006	022876207
484	CHANGE TO COMPANY DETAILS				
484H	NOTIFICATION OF SHARE CANCELLATION - REDEEMABLE PREFERENCES				
484O	CHANGES TO SHARE STRUCTURE				
27-Jan-2006	350	27-Jan-2006	1	27-Jan-2006	019271258
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY PROVISIONAL CHARGE				
	Alters 022 351 727				
24-Jan-2006	312	07-Feb-2006	2	24-Jan-2006	022691023
312C	NOTIFICATION OF RELEASE OF PROPERTY				
24-Jan-2006	312	07-Feb-2006	2	24-Jan-2006	022691002
312C	NOTIFICATION OF RELEASE OF PROPERTY				

23-Dec-2005	484	24-Jan-2006	3	23-Dec-2005	1F0077488
484	CHANGE TO COMPANY DETAILS				
484G	NOTIFICATION OF SHARE ISSUE				
484O	CHANGES TO SHARE STRUCTURE				
22-Dec-2005	309	22-Dec-2005	42	14-Dec-2005	022351727
309A	NOTIFICATION OF DETAILS OF A CHARGE				
	Altered by 019 271 258				
08-Dec-2005	FS53	10-Jan-2006	11	01-Dec-2005	022353958
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
03-Oct-2005	388	26-Oct-2005	25	30-Jun-2005	022285929
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR				(FR 2005)
	DISCLOSING ENTITY				
03-Oct-2005	484	09-Nov-2005	4	06-Oct-2005	022285487
484	CHANGE TO COMPANY DETAILS				
484G	NOTIFICATION OF SHARE ISSUE				
484O	CHANGES TO SHARE STRUCTURE				
484N	CHANGES TO (MEMBERS) SHARE HOLDINGS				
07-Feb-2005	FS53	09-Feb-2005	6	09-Nov-2004	020981780
FS53A	NOTIFICATION OF USE OF PDS - BY AFS LICENSEE				
25-Oct-2004	484	25-Oct-2004	3	25-Oct-2004	020745645
484	CHANGE TO COMPANY DETAILS				
484A1	CHANGE OFFICEHOLDER NAME OR ADDRESS				
484A2	CHANGE MEMBER NAME OR ADDRESS				
30-Sep-2004	388	26-Nov-2004	24	30-Jun-2004	020866482
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR				(FR 2004)
	DISCLOSING ENTITY				
19-Aug-2004	350	19-Aug-2004	1	19-Aug-2004	020496816
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY				
	PROVISIONAL CHARGE				
	Alters 020 503 332				
19-Aug-2004	350	19-Aug-2004	1	19-Aug-2004	020496815
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY				
	PROVISIONAL CHARGE				
	Alters 019 654 728				
12-Aug-2004	312	12-Aug-2004	1	12-Aug-2004	020501228
312C	NOTIFICATION OF RELEASE OF PROPERTY				
12-Aug-2004	312	12-Aug-2004	1	12-Aug-2004	020501229
312C	NOTIFICATION OF RELEASE OF PROPERTY				
06-Aug-2004	350	06-Aug-2004	1	06-Aug-2004	020501044
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY				
	PROVISIONAL CHARGE				
	Alters 020 496 010				

03-Aug-2004 309A	309 NOTIFICATION OF DETAILS OF A CHARGE Altered by 020 496 816	03-Aug-2004 26	02-Aug-2004	020503332
28-Jul-2004 309A	309 NOTIFICATION OF DETAILS OF A CHARGE Altered by 020 496 815	28-Jul-2004 26	28-Jul-2004	019654728
27-Jul-2004 309A	309 NOTIFICATION OF DETAILS OF A CHARGE Altered by 020 501 044	27-Jul-2004 33	21-Jul-2004	020496010
26-Feb-2004 484J	484 CHANGE TO COMPANY DETAILS NOTIFICATION OF SHARE CANCELLATION - COMPANY BUY-BACK	02-Mar-2004 4	25-Feb-2004	020058392
06-Feb-2004 280	280 NOTICE OF MEETING AND DOCUMENTS RE BUY-BACK	10-Feb-2004 2	06-Feb-2004	020053042
23-Jan-2004 484E	484 CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER	06-Feb-2004 7	15-Jan-2004	020045260
15-Dec-2003 309A	309 NOTIFICATION OF DETAILS OF A CHARGE	15-Dec-2003 49	28-Nov-2003	019674836
12-Nov-2003 5120	5120 NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME	14-Nov-2003 1	12-Nov-2003	017914658
14-Oct-2003 FS02	FS02 COPY OF AFS LICENCE	14-Oct-2003 19	14-Oct-2003	0L0200526
26-Sep-2003 388A	388 FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY	13-Oct-2003 29	30-Jun-2003 (FR 2003)	019777182
02-Apr-2003 FS50	FS50 PDS OPT-IN NOTICE	08-Apr-2003 3	02-Apr-2003	018172296
23-Jan-2003 766C	766C SUPPLEMENTARY DISCLOSURE DOCUMENT FOR MANAGED INVESTMENT SCHEME Alters 017 937 276	23-Jan-2003 2	23-Jan-2003	017914312
15-Jan-2003 7113	7113 NOTICE OF DECLARATION RE FUNDRAISING CHAPTER 6D	17-Feb-2003 1	15-Jan-2003	017914326
20-Dec-2002 316 316P 316G	316 ANNUAL RETURN CHANGE OF NAME OR ADDRESS OF OFFICEHOLDER ANNUAL RETURN - UNLISTED PUBLIC COMPANY	30-Dec-2002 4	18-Dec-2002	06138394M (AR 2002)
11-Dec-2002 309A	309 NOTIFICATION OF DETAILS OF A CHARGE	11-Dec-2002 36	05-Dec-2002	017885826

THERE ARE FURTHER DOCUMENTS LODGED BY THIS COMPANY.  
 SELECT THE 'ORDER COMPANY DOCUMENTS' OPTION FROM THE  
 ORGANISATIONAL SEARCH SUMMARY SCREEN TO OBTAIN A  
 COMPLETE LIST OF COMPANY DOCUMENTS.

#### Annual Returns

Year	Return Due Date	Extended Due Date	AGM Due Date	Extended AGM Due Date	AGM Held Date	Outstanding
1994	Unknown				31-Dec-1994	N
1995	31-Dec-1995		30-Nov-1995		15-Dec-1995	N
1996	31-Dec-1996		30-Nov-1996		31-Dec-1996	N
1997	31-Dec-1997		30-Nov-1997		25-Mar-1998	N
1998	31-Jan-1999					N
1999	31-Jan-2000					N
2000	31-Jan-2001					N
2001	31-Jan-2002					N
2002	31-Jan-2003					N

#### Financial Reports

Balance Date	Report Due Date	AGM Due Date	Extended AGM Due Date	AGM Held Date	Outstanding
30-Jun-1999	31-Oct-1999	Unknown	Unknown	Unknown	N 015497012
30-Jun-2000	31-Oct-2000	Unknown	Unknown	Unknown	N 016703322
30-Jun-2001	31-Oct-2001	Unknown	Unknown	Unknown	N 017677206
30-Jun-2002	31-Oct-2002	Unknown	Unknown	Unknown	N 018250503
30-Jun-2003	31-Oct-2003	Unknown	Unknown	Unknown	N 019777182
30-Jun-2004	31-Oct-2004	Unknown	Unknown	Unknown	N 020866482
30-Jun-2005	31-Oct-2005	Unknown	Unknown	Unknown	N 022285929
30-Jun-2006	30-Nov-2006	Unknown	Unknown	Unknown	N 023394275
30-Jun-2007	31-Oct-2007	Unknown	Unknown	Unknown	N 024300137
30-Jun-2008	31-Oct-2008	Unknown	Unknown	Unknown	N 025343802
30-Jun-2009	31-Oct-2009	Unknown	Unknown	Unknown	N 025950974
30-Jun-2010	31-Oct-2010	Unknown	Unknown	Unknown	N 027362052

Section 146A of the *Corporations Act 2001* states 'A contact address is the address to which communications and notices are sent from ASIC to the company.'

Address PO BOX 8111, GOLD COAST MC, QLD, 9726  
 Start Date 28-Jun-2003

\*\*\* End of Extract \*\*\*

"DW-6"



Tel: +61 7 3237 5999  
Fax: +61 7 3221 9227  
www.bdo.com.au

Level 18, 300 Queen St  
Brisbane QLD 4000  
GPO Box 457 Brisbane QLD 4001  
Australia

Blair Pleash, Richard Albarran and Glen Oldham  
Hall Chadwick  
GPO Box 3555  
SYDNEY NSW 2000

19 March 2012

Dear Sirs

**EQUITRUST LIMITED (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) ("EL")**  
**ECG ADMINISTRATION PTY LTD (ADMINISTRATORS APPOINTED) ("ECGA")**  
**EQUITRUST INCOME FUND (RECEIVER APPOINTED) ("EIF")**

I refer to various correspondence received from you in respect of the above (in particular your two letters to me dated 14 March 2012 and your letter dated 15 March 2012) and my meetings with Blair Pleash and Jovan Singh on 24 February 2012 and Blair Pleash and Glen Oldham on 5 March 2012.

I respond to the issues raised by you, as follows:

## 1. Services Agreement

I refer to Gadens Lawyers letter to you dated 12 March 2012. As set out in that letter, at our meeting on 5 March 2012 Mr Pleash advised me that it was your intention to disclaim all leases held by EL after 16 March 2012 and to terminate all staff and consultants on this date. It was also agreed at our meeting on 5 March 2012 that I would vacate the business premises on 16 March 2012 as the lease for the business premises would be disclaimed on that date and the Services Agreement be terminated from that date. It was further agreed that I would take over the provision of staff and consultants directly as and from 16 March 2012 and would also pay the wages due on 14 March 2012 direct to the staff.

As you are aware, I asked for your confirmation that the services agreement be terminated by mutual consent on 16 March 2012 with the staff/consultants and their entitlements being transferred to the EIF effective from 14 March 2012 as had previously been discussed with Mr Pleash.

I note that despite what was discussed at our meeting on 5 March 2012 you have not provided your written agreement to the termination of the Services Agreement as and from 16 March 2012. Accordingly, I hereby provide you with 30 days written notice of the termination of the Services Agreement pursuant to clause 24.2 of the agreement. The Services Agreement will terminate as and from Tuesday 17 April 2012. Written notice will also be given today to the other parties to the Services Agreement.

Document3



As previously advised, I wish to engage a number of the staff and consultants direct and subject to their agreement transfer their entitlements from ECGA to the EIF.

I understand that you did not pay the staff and consultants when due on 14 March 2012. I advise that in order to maintain continuity in the winding up of the EIF, I have paid a month's salary to Brenton Task, Arthur Taylor, Toni Napier, Jodie Markovitch and Trish Riley.

Please confirm if and when it is your intention to issue letters of termination for these staff and Sue Hughes so that I may liaise with them accordingly.

## **2. Debt Owning by Equititrust Ltd to EIF**

As discussed at my meeting with Blair Pleash and Jovan Singh on 24 February 2012, as a result of my investigations into the affairs of the EIF (as receiver of the property of the EIF and person responsible for ensuring the EIF is wound up in accordance with its constitution) I consider Equititrust Ltd is a debtor of the EIF and not a creditor as you have asserted.

I note your comment that the management accounts of EL record an amount of \$2,272,388 owing to EL by the EIF. You state "whilst investigations into this amount are continuing I expect that this will be due and payable." As noted above, this statement is contrary to my understanding of the position as a result of my investigations. Would you please provide me with an explanation as to why you consider this amount to be due and payable by the EIF and provide me with the documentary evidence to support this position in order that I consider this claim further.

As I have explained to you previously, as a result of my investigations into the affairs of the EIF I am of the view that no management fee is payable to EL by the EIF.

I further note that the board of EL appointed after my appointment on 21 November 2011 has sought to include a management fee of \$2,810,045.43 for the year ended 30 June 2011 in the loan account balance between the entities.

I have previously sought an explanation as to why the board considered this to be payable. No response was received prior to your appointment.

My investigations have revealed that this fee was waived by the previous board and indeed at an investors briefing on 23 September 2011, the former director and chief executive officer, David Kennedy advised investors that "Equititrust Ltd was entitled to a management fee of \$2.8M for the 2011 financial year but this has not been drawn and will not be."

Further, a review of the EIF constitution confirms that the management fee is only payable if interest payments are being made to investors.

As all distributions to investors during the 2011 financial year were capital and not interest then no management fee is payable for that year.

Accordingly, according to the adjusted management accounts as at 24 February 2012, Equititrust Ltd owed the EIF the sum of \$537,656.57 (\$2,272,388.86 recorded in the accounts as a loan to Equititrust Ltd adjusted to reflect the reversal of the management fee).



The net amount owing on the loan balance includes the invoices to EIF up to the date of your appointment on 15 February 2012. As Equititrust Ltd has already received the benefit of these invoices in reduction of the loan account, no funds are payable to EL in this respect.

The EIF will rank as an unsecured creditor in respect of the outstanding balance at the date of your appointment and a proof of debt will be lodged with you in this respect in due course.

Any reimbursement of expenses request pursuant to the terms of the services agreement post your appointment, should be forwarded to me for consideration. Such requests must be made pursuant to the terms of the Services Agreement and must be accompanied by appropriate invoicing and documentation in accordance with clause 7.5 of the Services Agreement.

### 3. Offer to Purchase Assets of ECGA

I refer to our previous discussions relating to the potential purchase from you of certain computer equipment and other assets held by EL to assist in the on-going winding up of the EIF. As you have not responded to my offer to purchase such computers and other assets, I have made alternative arrangements. Therefore, any such offer is hereby withdrawn.

### 4. Creditors Subject to Indemnity in EIF Constitution

I refer to your letter dated 14 March 2012 and note you have queried my response to Adam Purss in respect of a request to pay outstanding audit fees to KPMG.

I do not know in what capacity Adam Purss is acting and why he has sought my comments. I do not intend to correspond with him further.

As you will be aware, pursuant to the terms of the constitution and compliance plan for the EIF, it is the Responsible Entity that incurs the expense, pays it and then seeks reimbursement of the expense from the EIF. Accordingly, in respect of any such expenses incurred by EL as RE, EL is liable to pay such expenses. Once such expenses have been properly incurred by EL in its capacity as RE for the EIF and such expenses have been discharged, EL is then entitled to seek such reimbursement from the EIF. It is not for the fund to pay any such expenses direct.

I also note for the sake of completeness in relation to any audit expenses, it should be noted that when a fund is being wound up, there is no requirement for on-going audited accounts.

For your information I note that section 301 of the Corporations Act 2001 ("the Act") provides that a registered scheme must have the financial report for a financial year audited in accordance with Division 3 of Part 2M.3 of the Act and obtain an auditor's report. However, this obligation does not apply where a scheme is in the process of being wound up (see *Environinvest Ltd (in liquidation) v Misko*). Section 9.3(f) of the EIF constitution and section 8.3(f) of the EPCIF constitution, requires EL (once it believes the winding up is complete) to engage a registered company auditor to audit the final accounts of the schemes.

I also note that section 331AD of the Act provides that an auditor of a registered scheme ceases to hold office if the Court makes an order directing the responsible entity to wind up the scheme.

## 5. Potential Change of Responsible Entity

I note at the first meeting of creditors held on Monday 27 February 2012 that Richard Albarran advised creditors it was his view the best way forward for investors of the EIF was to change the responsible entity.

If the administrators are presently considering any such request, I enquire whether any of the following matters have been considered in this respect:

- The company's board resolved to wind up the funds on 12 October 2011;
- The transcript of the court hearing on 21 November 2011 that resulted in my appointment and the comments made by the judge when considering the company's application to replace the responsible entity in this respect;
- The company's alternative request for a court appointed liquidator to wind up the fund in the event the request for a replacement responsible entity was not granted;
- The potential negative effect on investors if this were to occur and if Equititrust Ltd's subordinated investment is "triggered" to rank equally with ordinary investors;
- The potential for a conflict of interest for the Administrators if they were to recommend any such change when it may benefit Equititrust Ltd to the detriment of investors. Conversely, if the Administrators were to consider waiving the subordination in the event a replacement responsible entity is appointed.
- The limited role of any such replacement RE given the orders of the Court already made to wind up the funds.

I am obviously an interested party if the RE were to change as I may need to liaise with any such replacement RE. Accordingly would you please advise me of any proposals you have received or receive in the future for a replacement RE. In the meantime would you please provide me with your comments in relation to the above matters.

## 6. Books and Records of the EIF

I refer to your letter to me dated 15 March 2012. I note that you have made the surprising claim that you have a lien over the books and records of the EIF.

Given the terms of the court orders in respect of my appointment, including the terms of the orders of Her Honour Justice Dalton dated 29 February 2012 which you consented to I do not understand the basis upon which you would purport to assert a lien over the books and records of the EIF. Further, I refer you to the terms of the orders appointing me as receiver of the property of the EIF and in particular the powers contained in sections 420 and 1101B(8) of the Act as to my entitlement to the books and records of the EIF.

Would you please advise me of the basis upon which you assert a lien over the books and records of the EIF and the reasons why you would seek to assert such a lien.



In any event, Blair Pleash has previously advised me that the administrators would copy the records and provide the originals to me. I am of course happy to continue to make such records of the EIF available to you as is required for you to complete your investigations for the purposes of your section 439A report. Please contact me to make appropriate arrangements in this respect, as required.

I note that we have also discussed copying the server and providing an undertaking that if any records are found that do not relate to the EIF we will delete same or provide the documents to the relevant party to copy before deleting.

Please advise if this is not satisfactory and bearing in mind I already have a full copy of the server at the time of my appointment.

## 7. Reporting to the Administrators

As previously advised and agreed in the context of the orders of Her Honour Justice Dalton dated 29 February 2012, in order to save costs, I will forward you a copy of my regular reports to investors. I intend posting my next report to investors on the website by Friday 23 March 2012 in this respect. If following receipt of that report you require any further information for the purposes of your section 439A report I am happy to meet with you to discuss any further information you may require.

In the event a deed of company arrangement proposal is received by you, or there are any resolutions proposed at the second meeting of creditors that may have an impact on the winding up of the funds, I ask that you please forward a copy of any such proposal prior to the issue of your section 439A report so that I can provide any comments as necessary for your consideration.

## 8. BDO Sydney/Melbourne

I find your comments in relation to BDO International's termination of BDO NSW and Victoria's licence to be misinformed and discourteous. The Brisbane firm of BDO is financially independent of the remaining BDO offices in Australia. I note the remaining offices of BDO continue to perform well.

BDO Brisbane has 45 partners and approximately 380 staff providing more than adequate resources to assist me in the winding up of the funds.

It should be noted that I have not used any BDO Sydney or Melbourne staff to assist me in the winding up.

By way of background, the following are excerpts of a statement sent to some of our clients clarifying the position:

"On Friday 9 March, 2012, BDO International Limited terminated its member agreement with BDO NSW/VIC Pty Ltd, which is the controlling entity of our Sydney and Melbourne offices. The Sydney and Melbourne firm is financially integrated but separate from the rest of the BDO member firms in Australia. This termination applies only to the Sydney and Melbourne firm.

I am assisted by staff of BDO Business Recovery & Insolvency (QLD) Pty Ltd, a company of which I am a director. The operations of BDO Business Recovery & Insolvency (QLD) Pty Ltd and other BDO member firms outside of Victoria and NSW are unaffected by the financial issues that have been reported regarding BDO NSW/VIC Pty Ltd.



The decision by BDO International Limited to terminate the member agreement with BDO NSW/VIC Pty Ltd followed a strategic review of the business models of all the BDO Member firms in Australia and the inability of the Sydney and Melbourne offices to align its business model to sufficiently progress its plans to prepare for integration.

We believe we made every effort to assist BDO NSW/VIC Pty Ltd to improve their situation. Their current position meant it would have been irresponsible of BDO International to delay action any further and therefore could no longer allow these offices to operate as part of the BDO network.

Protecting the BDO network and its ability to service our clients is our number one priority and while this decision will create some short-term challenges, we believe the long-term position of BDO in Sydney and Melbourne and the network in Australia will be stronger.

This decision does not affect our local operations or services. Any existing arrangements for any services provided out of Sydney and Melbourne will be re-assigned in the short term. Our number one priority is to ensure that we meet the expectations of our clients.

BDO is a well respected brand and we are frequently approached by other firms to join our network so we are confident that we will quickly establish a strong and vibrant presence in Sydney and Melbourne."

## 9. Queries

Should you have any queries in the above respect, please contact me on (07)3237 5887.

Yours faithfully



David Whyte  
Receiver

3 April 2012

BDO  
Level 18, 300 Queen Street  
Brisbane QLD 4000

Attention: David Whyte  
Via Email: [david.whyte@bdo.com.au](mailto:david.whyte@bdo.com.au)

Dear Sir,

**Re: Equititrust Limited A.C.N. 061 383 944  
(Receiver Appointed) (Administrators Appointed)  
(Receivers and Managers Appointed)  
(‘ETL’)**

**Equititrust Income Fund A.R.S.N. 089 079 854  
(Receiver Appointed)  
(‘EIF’)**

**Equititrust Premium Fund A.R.S.N. 089 079 729  
(Receivers and Managers Appointed)  
(‘EPF’)**

**ECG Administration Pty Limited A.C.N. 144 977 275  
(Administrators Appointed)  
(‘ECGA’)**

I refer to your letter dated 19 March 2012 and respond to the issues addressed as follows.

## 1. Services Agreement

I confirm that termination letters were issued to Brenton Task, Arthur Taylor, Toni Napier, Jodie Markovitch and Sue Hughes on 16 March 2012 effective of this date. As you have confirmed that you have paid these employees (except for Sue Hughes) from 14 March 2012 onwards I will advise them that the Administrators will not be paying them for 14 March 2012 to 16 March 2012.

## 2. Debt owing by ETL to EIF

It is clear that your position in regards to whether ETL is a creditor or a debtor of EIF is in contrast to the position of the Administrators.

With respect to decisions of the various boards of ETL you note that your investigations indicate that a previous board waived the management fee and that at an investors briefing on 23 September 2011 David Kennedy advised investors the management fee had not been drawn and would not be drawn. Please advise whether during your investigations you have sighted any resolutions or minutes at which this board waived the management fee and if so on what basis. Please also advise whether your investigations indicate why Mr Kennedy made such a statement at the investors briefing.

In regards to your comments with respect to the distributions to investors I note that the management fee is calculated on a monthly basis and at the time of calculation the distributions were not capital in nature, resulting in the management fee being due and payable. Further to this the determination that the distributions may be capital in

## SYDNEY

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## PARRAMATTA

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## PENRITH

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Fx: (612) 4721 8155

## MELBOURNE

Ph: (613) 8678 1600  
Fx: (613) 8678 1699

## PERTH

Ph: (618) 9489 2560  
Fx: (618) 9489 2562

## BRISBANE

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nature is for tax purposes only. For accounting purposes and for the purposes of ETL they were interest distributions to the investors as per the EIF Constitution. This is further reinforced by the fact that the distribution to unit holders did not reduce their unit holding, which would be expected if the distribution was capital. As such the Administrators remain of the view that the management fee remains validly charged.

To simplify discussions of the amounts outstanding I will break them down as follows:

(a) Sundry Debtors EIF account

As previously noted the management accounts of ETL indicate an amount of \$2,272,388 outstanding from EIF and it is on this basis which I consider it to be due and payable. I note that I have investigated this account and I believe that it does not include the management fee but rather the scheme expenses outstanding to ETL.

Investigations have indicated that the management fee was initially charged by the following transaction:

DR	Billed Disbursement	xxx
CR	Management Fee	xxx

and recorded as having been received by the following transaction:

DR	Cash at bank	xxx
CR	Billed Disbursement	xxx

As such the Sundry Debtors EIF account is not affected by the above entries and accordingly I reiterate that the amount of \$2,272,388 is due and payable and ought to be paid.

(b) Billed Disbursements

Your correspondence on 19 March 2012 refers to a loan balance which includes the invoices between the abovementioned dates and advises that as a result of the invoices reducing the loan account, no funds are payable by EIF to ETL in this regard. I presume you are referring to the Sundry Debtors EIF account with the balance of \$2,272,388 in which case I advise that this account does not include these invoices for the period 30 November 2011 to 15 February 2012.

These invoices were included in an account titled 'Billed Disbursements' and accordingly are due and payable by EIF to ETL. As such I reiterate my request for payment of \$16,407.17 for the period 30 November 2011 to 19 December 2011 and \$159,146.23 for the period 20 December 2011 to 15 February 2012.

(c) Expenses from 15 February 2012 to 16 March 2012

As you are aware we were appointed Administrators on 15 February 2012 and accordingly I am finalising an invoice for expenses incurred from this date to the termination of the services agreement (16 March 2012 as we terminated employees on this date).

### 3. Creditors subject to Indemnity in EIF Constitution

Your correspondence on 19 March 2012 notes that pursuant to the EIF Constitution and the Compliance Plan it is ETL which incurs the expense, pays it and then seeks reimbursement of the expense from EIF. Our review of the EIF Constitution and Compliance Plan indicates only that the expense must be incurred by ETL and not necessarily paid for it to be paid by EIF. Further to this clause 9 of the EIF Constitution stipulates that the liabilities of EIF must be paid during the course of the winding up of EIF. As such please clarify the basis upon which you consider ETL must pay these expenses as opposed to simply incurring them.

Invoices in regards to work previously completed by KPMG were incurred when the requirement for annual audited accounts was in place and accordingly should be paid as per the indemnity in the EIF Constitution. Accordingly I will provide to you in due course the invoices relating to work completed by creditors subject to the Indemnity in the EIF constitution and anticipate these will be paid as per the above.

#### **4. Change in Responsible Entity**

I note that any recommendations made by the Administrators with respect to a potential change in responsible entity would be following due consideration to a number of issues not limited to those you have identified. These issues are continuing to be considered and will be discussed in the report to creditors pursuant to Section 439A of the Corporations Act 2001.

#### **5. Reporting to Administrators**

I refer to my previous requests with respect to your strategies to wind up EIF and your expected costs and timeframe of completing your appointment to which I do not appear to have had a response. Should this information not be provided I will have no choice other than to advise creditors of this and accordingly I am not in a position to make a comparison with any proposals from other responsible entities.

Should you wish to discuss the above please do not hesitate to contact me.

Yours faithfully,



**BLAIR PLEASH**  
**ADMINISTRATOR**

Our Ref: PJH:3353939

13 April 2012

[scouper@qld.gadens.com.au](mailto:scouper@qld.gadens.com.au)

Mr Scott Couper  
Gadens Lawyers  
GPO Box 129  
BRISBANE QLD 4001

Dear Sirs

**Equititrust Limited (Administrators Appointed) (Receiver & Manager Appointed)  
("Company")**

We act for the administrators of the Company, Messrs Blair Pleash, Richard Albarran and Glen Oldham.

We understand that you act for Mr David Whyte, the Receiver appointed by order of Applegarth J on 23 November 2011.

Our clients have incurred significant expenses in the conduct of the administration to date and have themselves also incurred significant professional fees. A table setting out the expenses incurred by our clients is enclosed for your information.<sup>1</sup>

The purpose of this letter is to seek some clarity from your client as to his position in respect of our clients' right of indemnity from the Equititrust Income Fund ("EIF"). It is necessary for our clients to obtain this clarification from your client in circumstances where he currently controls the EIF.

**Your client's letter of 19 March 2012**

In your client's letter of 19 March 2012, with reference to audit fees incurred by KPMG at Section 4, your client stated that:

*'As you would be aware, pursuant to the terms of the constitution and compliance plan for the EIF, it is the Responsible Entity that incurs the expense, pays it and then seeks reimbursement of the expense from the EIF. Accordingly, in respect of any such expenses incurred by EL, EL is liable to pay such expenses. Once such expenses have been properly incurred by EL in its capacity as RE for the EIF, and such expenses have been discharged, EL is then entitled to seek such reimbursement from the EIF. It is not for the Fund to pay any such expenses direct.'*

We have assumed that the relevant Constitution to which your client has made reference is the Constitution dated 3 June 2011, a copy of which is enclosed for your ease of reference. If our assumption is incorrect and there is an amended Constitution in operation for which your client has referenced and our clients are unaware, please provide a copy to us as soon as possible.

That being the case, your client's appraisal as to the operation of the Constitution and the Compliance Plan seems to be incorrect. There exists a clear right of indemnity under the Constitution at clause 6.1, as distinct from any right of exoneration as suggested by your client's letter. The right to that indemnity is in no way contingent upon payment being made by the Company in the first instance. There is also nothing within the Compliance Plan which qualifies this position.

If it remains your client's position that he asserts there is no direct right of indemnity for such expenses, please set out with particularity the basis upon which it is asserted that to be the case, with reference to the operative provisions of the Constitution and Compliance Plan.

### **Our clients' position**

Our clients' position in relation to their right to indemnity from the EIF is as follows:

1. Our clients' indemnity in the first instance arises from s443D of the *Corporations Act 2001* (Cth), which provides that administrators are entitled to be indemnified out of Company's property. As the responsible entity, the Company's property includes its right of indemnity against the EIF in accordance with the Constitution.
2. Section 601FH of the *Corporations Act* also relevantly provides that:

*'If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a Deed of Company Arrangement that is not terminated:*

  - (a) *the provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company of the Deed, if it purports to deny the company a right to be indemnified out of the scheme property the company would have had if it were not being wound up, were not under administration, had not executed a Deed of Company Arrangement;*
  - (b) *a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the Deed.'*
3. However, it is not necessary for our clients to resort to section 601FH of the *Corporations Act* as the indemnity provided for under the Constitution is fairly clear on its face. In this regard, clause 6.1 of the Constitution relevantly provides that:

*'To the extent permitted by statute, the Manager is indemnified out of the assets for all debts, liabilities, damages, costs, taxes, charges, expenses and outgoing reasonably and properly incurred by it in the proper performance of its functions and duties and exercising its powers under this Constitution or at law, except in the case of debts, liabilities, damages, costs, taxes, charges, expenses or outgoing incurred or payable or as a result of gross neglect, deceit or a material breach of covenant.'*

4. Our clients maintain that each of the expenses set out in the enclosed schedule, fall squarely within the terms of this indemnity, as does their own remuneration, which has been incurred by our clients in performing their statutory duties as administrators of the Company.
5. In addition to the above, there is considerable case law in respect of circumstances in which trust companies are wound up. Section 601FC(2) of the *Corporations Act* does after all provide that '*the responsible entity holds scheme property on trust for scheme members*'.
6. Section 72 of the *Trusts Act 1973* (Qld) also confirms the trustees right of indemnity. Section 65 of the *Trusts Act* further provides that such indemnity is not capable of being excluded by the trust instrument. McPherson J in *Kemtron Industries Pty Limited v Commissioner of Stamp Duties* [1984] 1 Qd R 576 observed at 585 in relation to this right of indemnity that:

*"In the exercise of his right of indemnity the trustee may resort to the trust assets for the purpose of discharging liabilities incurred but not paid, and also for the purpose of reimbursing himself in respect of liabilities paid by him out of his own funds."*

7. There is ample authority to the effect that liquidators of trustee companies are entitled to indemnity from trust assets, where sufficient monies are not available from the company itself (See for example *Re GB Nathan & Co Pty Limited (in liq)* (1991) 9 ACLC 1,292, *Re Greater Western Insurance Brokers Pty Limited* (2003) 39 ACSR 301, *ASIC v Rowena Nominees Pty Ltd* (2003) 21 ACLC 1447). Analogous considerations also apply in the context of a voluntary administration.

#### **Our clients' request**

As your client will appreciate, our clients will continue to incur significant expenses and professional fees in performing their statutory duties. Accordingly, it is of great importance to our clients that some clarity be obtained as to your client's position in relation to the indemnity available to them as soon as possible.

In the circumstances, we are instructed to request that:

- (a) you indicate by return whether your client acknowledges our clients' right of indemnity as set out above; and
- (b) to the extent that your client is not prepared to acknowledge our clients' right of indemnity, they set out with particularity the basis for that position.

We request that a response be provided within seven (7) days.

Yours faithfully  
**THOMSONS LAWYERS**



**Peter Hegarty**  
Partner  
T +61 2 8248 3407  
M 0416 052 176  
E [phegarty@thomsonslawyers.com.au](mailto:phegarty@thomsonslawyers.com.au)

encl

<sup>1</sup> Table setting out expenses

**Equititrust Limited**  
**(Receiver Appointed) (Receiver and Manager Appointed)**  
**(Administrators Appointed)**  
**Disbursements List as at 2 April 2012**

<b>Item/Service Description Outstanding</b>	<b>Cost (\$)</b>
Facsimile	8.80
File maintenance fee	275.00
Legal Fees	80,399.06
Link Market Services	20,447.90
Meeting room hire - HC (Across all states)	660
Photocopying & Printing	7,962.64
Insurance	TBA
Telephone hotline	100
Website cost	TBA
<b>Total</b>	<b>109,853.40</b>
<b>Item/Service Description paid by Hall Chadwick</b>	
Advertising (relevant state newspapers)	4,666.50
Courier	612.86
Postage and Handling	1,116.20
Search fees on ABR	1,508.98
Flights and Accommodation	10,619.49
Travel & Parking	3,902.29
Venue Hire (Initial creditor's meeting)	7,811.92
Sundries	167.53
Counsel Fees	19,964.00
Redback (Phone facility for Creditor's meeting)	281.63
<b>Total</b>	<b>50,651.40</b>
<b>Grand - Total</b>	<b>160,504.80</b>

Our Reference  
Direct Line  
Email

Scott Couper 201110996  
+61 7 3231 1651  
scouper@qld.gadens.com.au



17 April 2012

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**Attention: Peter Hegarty**

Dear Sirs

**Equititrust Limited (Administrators Appointed)(Receivers and Managers Appointed)("Company")  
Equititrust Income Fund (Receiver Appointed) ("EIF")**

Thank you for your letter dated 13 April 2012. We confirm we act for Mr David Whyte the court appointed receiver to the EIF. We have been instructed to respond to the matters raised in your letter dated 13 April 2012.

You have asked that we respond to you and have requested that we indicate whether our client acknowledges your clients' right of indemnity as set out in your letter.

We are instructed to advise our client acknowledges the indemnity contained in clause 6.1 of the Consolidated Constitution of the EIF. That is, the following indemnity:

*"to the extent permitted by statute the Manager [Equititrust Limited] is indemnified out of the Assets for all debts, liabilities, damages, costs, Taxes, charges, expenses and outgoings reasonably and properly incurred by it in the proper performance of its functions and duties and exercising its powers under this Constitution or at law, except in the case of debts, liabilities, damages, costs, Taxes, charges, expenses or outgoings incurred or payable in respect of or as a result of gross neglect, deceit or a material breach of covenant of the Manager."*

Any indemnity which your clients as administrators of the Company may be entitled to call upon is limited to the above indemnity contained in the Constitution.

We note on page 3 of your letter you state your clients maintain that each of the expenses set out in the schedule which is enclosed in your letter falls within the terms of the indemnity as does your clients' remuneration which has been incurred by your clients in performing their statutory duties as administrators of the Company.

Our client does not agree that the indemnity provided in the Constitution provides your clients with a blanket indemnity for all expenses and all remuneration which your clients have incurred as administrators of the Company. Such a proposition would be clearly inconsistent with the terms of the indemnity provided in the Constitution. The Constitution is clear. The indemnity only extends to debts, liabilities etc "reasonably and properly incurred by it in the proper performance of its functions and duties and exercising its powers under this Constitution or at law...". The indemnity only extends to the Company performing its duties as responsible entity. It could not be said that this indemnity would extend to, for example, the administrators undertaking steps in relation to the Company in its own right or in respect of acting as responsible entity for the other funds for which the Company is responsible entity. We assume that your clients do not contend to the contrary. If this is not the case and your clients contend that in fact the indemnity extends to all of the expenses and remuneration incurred by your clients

performing their duties as administrators over and above those tasks which may be incurred as responsible entity for the EIF please advise us of the basis for such contention by return.

Further, and in addition to the clear wording of the Constitution, we are instructed to bring to your attention the followings matters:

- (a) Your clients have had a limited role in relation to the Company as responsible entity given the appointment of the court appointed receiver. This is particularly so following the court Order on 29 February 2012. We **enclose** a copy of that Order for your ease of reference.
- (b) The court appointed receiver, and we expect indeed the unit holders for the EIF will rely on Mr. Albarran's comments at the first meeting of creditors wherein he assured investors that no costs of the administration would be levied against the EIF.
- (c) As you will be aware your clients sought confirmation from the court appointed receiver that the court appointed receiver would acknowledge an indemnity for their costs in respect of the hearing on 29 February 2012. Our client indicated that he accepted that your clients costs in respect of that Application would be met out of the indemnity provided in the Constitution. However, at no other time has your clients raised with our client that they would seek an indemnity out of the fund in respect of any other matters.

Given the above, it is clear that our client anticipates that there would only be a very limited amount of remuneration and disbursements which would relate to your client administrators attending to matters for the Company in its role as responsible entity for the EIF.

In the circumstances, our client requires your clients to identify what disbursements and what remuneration they consider relate to the "debts, liabilities etc" which have been reasonably and properly incurred by them in the proper performance of their functions and duties in the exercise of power under the Constitution and at law.

In addition to the above, we refer to your clients report to creditors pursuant to section 439A of the Corporations Act 2001 dated 12 April 2012. We are instructed to advise that our client will be writing to your clients direct to raise a number of matters with your clients arising from that report.

Yours faithfully



Scott Couper  
for **GADENS LAWYERS**

Enc.



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Brisbane QLD 4000  
GPO Box 457 Brisbane QLD 4001  
Australia

Blair Pleash, Richard Albarran and Glen Oldham  
Hall Chadwick  
GPO Box 3555  
SYDNEY NSW 2000

17 April 2012

Dear Sirs

**EQUITITRUST LIMITED (ADMINISTRATORS APPOINTED)(RECEIVERS AND MANAGERS APPOINTED)("EL")  
EQUITITRUST INCOME FUND (RECEIVER APPOINTED) ("EIF")**

I refer to the Administrators report to creditors pursuant to Section 439A of the Corporations Act 2001 dated 12 April 2012 and the meeting of creditors to be held at 11.00am on Friday, 20 April 2012 at the Watermark Hotel and Spa Gold Coast, 3032 Surfers Paradise Boulevard, Surfers Paradise, QLD 4217.

There are two main issues I wish to raise with you at this time in respect of your report. These issues are as follows:

## **1. Administrators Proposed Remuneration and Expenses**

As previously advised, I am of the view that the Equititrust Income Fund (Receiver Appointed) is a creditor of Equititrust as at the date of your appointment as Administrators on 15 February 2012.

That being the case, I wish to express my concerns at the level of fees proposed by the Administrators and taking into account:

- The assets of the EIF and EPCIF are under my control;
- The assets of the EPF are under the control of the Receivers and Managers, McGrath Nicol;
- The assets of Equititrust in its own right are under the control of the Receivers and Managers, Ferrier Hodgson;
- There are very limited assets under the control of the Administrators;
- The court order of 29 February 2012 clarifying my role as Receiver of the EIF and after discussions took place with you to ensure there would be no duplication of effort/fees incurred relating to the affairs of the EIF.

In the circumstances, I would appreciate your advice as to why the fees incurred are so substantial.

In a situation such as this, I would not expect Administrators fees to be more than between \$50,000 and \$100,000 plus GST and therefore find it difficult to understand the level of fees you have incurred to date.

Could you please provide a more detailed breakdown of your fees, including background timesheets.

Document3



Further, please clarify if Sydney rates are being charged for the administration and why staff from Sydney rather than Brisbane are being used to conduct the administration.

As you know, my solicitors received a letter from your solicitors on Friday 13 April 2012 in relation to the Administrators right of indemnity from the EIF for their remuneration and expenses and this has been responded to under separate cover from my solicitors.

## 2. Potential Replacement of Responsible Entity

Can you please advise the specific costs and expenses incurred by the Administrators in pursuing this aspect of the matter to date.

I have previously raised my concerns in this respect and bearing in mind the court order in place and the history of the matter.

I note that you are requesting investors to complete a survey form in respect of whether or not they wish the Administrators to continue investigating the potential for a new responsible entity.

In my view, you have not disclosed sufficient information to investors in order for them to properly consider this position nor have you advised the EIF investors if you will be seeking an indemnity from the EIF assets in pursuing such a course of action.

So that investors are better informed before completing the survey form, can you please clarify the following:

- The costs and expenses incurred by the Administrators in considering the position to date and the extent to which you are seeking an indemnity from the EIF for such costs and expenses;
- Why you have incurred fees in pursuing this course when the change of responsible entity is a matter for the investors?
- How many investors asked you to review the position? How many of those are related to the Equititrust directors?
- What are the likely costs to be incurred in pursuing this strategy and to what extent will you be seeking an indemnity from the EIF?
- What is the timeline for pursuing the strategy?
- What are the prospects of success of ASIC and the court of approving such a strategy?
- What is the effect of a change in responsible entity on the return to ordinary investors given the Equititrust subordinated investment converting to ordinary units on replacement as responsible entity?
- Please explain why it would be worth pursuing such a strategy taking the above costs and timing into account as well as the time it would take a new responsible entity to inform itself in relation to the remaining assets of the EIF/devise appropriate strategies. This is particularly so given how advanced the winding up of the fund presently is and would be by the time a change in RE could occur;
- How will you determine whether or not to proceed with the incurrence of further fees and expenses in relation to this matter? For example, will you require a majority in value and number of those completing the survey form to approve such a strategy?



Can you please address the above points and table your responses at the forthcoming meeting of creditors.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Whyte', written over a horizontal line.

David Whyte  
Receiver

Our ref PDH:3353939

31 August 2012

[mryan@qld.gadens.com.au](mailto:mryan@qld.gadens.com.au)

Mr Scott Couper  
Gadens Lawyers  
111 Eagle Street  
BRISBANE QLD 4000

Dear Sirs

**Equititrust Limited (in liquidation) (Receivers and Managers appointed) (EL)  
Equititrust Income Fund (EIF)**

We refer to your letter dated 17 April 2012 concerning our clients' right of indemnity.

**Our clients' indemnity**

In your letter you acknowledge our clients' right of indemnity arising from clause 6.1 of the Consolidated Constitution.

As you would be aware, our clients also have an additional basis to seek indemnity at general law. We assume this further entitlement is uncontroversial given that it was a position advanced by your client's counsel in *Equititrust Limited v RM Walsh Land Holdings Pty Limited* [2012] NSWSC 427.

We respectfully disagree with your contention that our clients are not entitled to the entirety of their remuneration and expenses arising from tasks performed by them as voluntary administrators. To suggest that this work was performed in a capacity other than as Responsible Entity draws an artificial distinction.

In any case, notwithstanding the position as articulated in our letter dated 13 April 2012, our clients are prepared to compromise their position on the basis that they be paid a portion of their fees to date which were incurred in the voluntary administration period. In making this compromise, our clients will of course seek to recover the balance of their fees from any recoveries subsequently made by them.

The total fees incurred by our client in the voluntary administration period are \$805,486.00. In the event that the matter cannot be resolved, our clients will be seeking Court approval for the entirety of this amount. However, with a view to avoiding the consequent costs of commencing those proceedings our clients are prepared to accept an amount of \$319,381.00 now, with a view to satisfying the remainder of their outstanding fees from any other recoveries made by them.

This amount has been arrived at by our clients by calculating the amounts attributable to task which very clearly relate the Company's role as Responsible Entity. These include:

1. reviewing proposals for replacement Responsible Entities;
2. fielding enquiries from unit holders as to the status of their investments;
3. reviewing records with respect to the funds managed by the Company in order to obtain an understanding of the funds and their respective asset portfolio to determine possibility of a

new Responsible Entity;

4. liaising and corresponding with various other potential Responsible Entities in regard to continued management of the funds;
5. liaising and corresponding with potential Responsible Entities with respect to offers received and information required;
6. liaising with Court appointed Receiver with respect to any proposal for the Company to continue as the Responsible entity;
7. consideration of and obtaining advice in relation to the implications of the change of the Responsible Entity;
8. reviewing the Constitution of the EIF with respect to the change of the Responsible Entity;
9. internal meetings to discuss/review proposals to replace the existing Responsible Entity;
10. reporting to investors in respect of proposals made.

Whilst our clients maintain that they ought be entitled to the entirety of their fees from the EIF, the amount sought by our clients in this proposed compromise has excluded amounts referable to preparation of the section 439A Report, the conduct of creditors meetings, meetings with the committee of creditors and dealing with proofs of debt submitted by creditors.

As regards our clients' disbursements, which have previously been forwarded to you, our clients seek payment of these amounts in full.

Please indicate your client's position to payment of that amount by return. In the absence of a favourable response, our clients will be approaching the Court and seeking appropriate orders providing for the payment of the entirety of their fees from the EIF.

**ECG Administration Pty Limited (in liquidation) (ECGA)**

We have been provided with a copy of your letter to our client dated 24 July 2012.

In it you suggest that any liability of the EIF is to EL, who in turn have a liability to GCP(HQ) Pty Limited (GCP). We enclose invoices issued by GCP (HQ) Pty Limited to EL and EL to the EIF for the period up to 23 February 2012 in respect of the reimbursement sought from amounts payable by GCP to ECGA.

Additionally, our clients' letter to your client dated 22 June 2012 enclosed with it an invoice from EL to the EIF for the subsequent period.

Please reimburse our clients for these amounts in order that they are in a position to satisfy the liability to GCP.

As to the suggestion by you that EL is indebted to the EIF in an amount of approximately \$600,000.00, this position is denied by our clients.

If it is the case that your client as Receiver seeks to rely upon such a set off, the basis pursuant to which your client entered into the Service Agreement dated 20 December 2011, will be a matter which will need to be scrutinised. It is readily apparent that for EL's part it was not simply seeking to achieve a set off by incurring liability to others subsequent to the agreement.

In any event, we note that the obligation on the part of the Receiver to indemnify and reimburse as provided for at clause 9.1, makes no mention of any reliance on a set off or counterclaim. It was clearly intended that there be payment.

We await your early response.

Yours faithfully  
**Thomsons Lawyers**



**Peter Hegarty**  
Partner  
T +61 2 8248 3407  
M 0416 052 176  
E [phegarty@thomsonslawyers.com.au](mailto:phegarty@thomsonslawyers.com.au)

# EQUITRUST LTD

(Administrators Appointed)(Receivers & Managers Appointed)

ABN: 89 144 977 275

PO Box 8111  
GOLD COAST MC QLD 9726  
Phone: 07 5527 5527  
Facsimile: 07 5527 5900

TAX INVOICE NO: 107471

**Customer**

Equititrust Income Fund c/- BDO Group Holdings  
GPO Box 457  
BRISBANE QLD 4001  
ABN: 89 144 977 275

Date: 17/2/2012

Qty	Description	Unit Price	TOTAL
1	Reimbursement of Scheme Expenses Paid on behalf of Equititrust Income Fund Period 20 December 2011 to 31 January 2012  Detailed schedule attached	63,047.09	63,047.09
		SubTotal	\$63,047.09
		GST	\$6,304.71
		TOTAL	\$69,351.80

Payment by EFT to:  
Equititrust Ltd  
BSB: 084 462 Account: 627483632

# GCP (HQ) Pty Ltd

ACN: 154 769 178  
ABN: 45 154 769 178

PO Box 8111  
GOLD COAST MC QLD 9726  
Phone: 07 5527 5527  
Facsimile: 07 5527 5900

TAX INVOICE NO: 0001

Customer  
Equitrust Ltd (Administrators appointed)  
(Receivers & Managers Appointed)  
PO Box 8111  
GOLD COAST MC QLD 9726  
ABN: 74 061 383 944

Date: 17/2/2012

Qty	Description	Unit Price	TOTAL
1	Reimbursements of Services provided for Equitrust Income Fund Reimbursement of Equitrust Income Fund Scheme Expenses Period 20 December 2011 to 31 January 2012	61,934.78	61,934.78
1	Reimbursement of Equitrust Premium Fund Scheme Expenses Period 20 December 2011 to 31 January 2012	6,696.66	6,696.66
1	Reimbursement of Sophisticated Fund Expenses Period 20 December 2011 to 31 January 2012	600.87	600.87
		SubTotal	\$69,232.31
		GST	\$6,923.23
		TOTAL	\$76,155.54

Payment by EFT to:  
GCP (HQ) Pty Ltd  
BSB: 034-660 Account: 302296

# ECG ADMINISTRATION PTY LTD

(Receivers & Managers Appointed)

ABN: 89 144 977 275

PO Box 8111  
GOLD COAST MC QLD 9726

Phone: 07 5527 5527

Facsimile: 07 5527 5900

**TAX INVOICE NO: 130**

Customer

GCP (HQ) Pty Ltd  
PO Box 8111  
GOLD COAST MC QLD 9726

ABN: 45 154 769 178

Date: 17/2/2012

Qty	Description	Unit Price	TOTAL
	Management Fees provided by ECG Admin for:		
1	Reimbursement of Equititrust Income Fund Scheme Exp Period 20 December 2011 to 31 January 2012	61,934.78	61,934.78
1	Reimbursement of Equititrust Premium Fund Scheme Exp Period 20 December 2011 to 31 January 2012	6,696.66	6,696.66
1	Reimbursement of Sophisticated Fund Exp Period 20 December 2011 to 31 January 2012	600.87	600.87
		SubTotal	\$69,232.31
		GST	\$6,923.23
		TOTAL	\$76,155.54

Payment by EFT to:

ECG Administration Pty Ltd

BSB: 084 004 Account: 17 717 0400



# EQUITITRUST LTD

(Administrators Appointed) (Receivers and Managers Appointed)



PO Box 8111  
GOLD COAST MC QLD 9728

A.B.N. 74 061 383 944

## Tax Invoice

Bill To:

Equititrust Income Fund c/o BDO Group Holdings  
GPO Box 457  
BRISBANE QLD 4001

Invoice #: 00107474

Date: 23/02/2012

Description	Amount	Code
Claim for scheme expenses incurred 01 February to 15 February 2012	\$81,631.30	GST

Your Order #:	Terms: Net 7	Sub Total	\$81,631.30
		GST:	\$8,163.13
COMMENT		Total Inc GST:	\$89,794.43
Payment may be by either cheque - made out to ' Equititrust Limited '		Amount Applied:	\$0.00
or by EFT to the following NAB account:		Balance Due:	\$89,794.43
BSB: 084-462 Account: 62 748 3632			

# GCP (HQ) Pty Ltd

ACN: 154 769 178  
ABN: 45 154 769 178

PO Box 8111  
GOLD COAST MC QLD 9726  
Phone: 07 5527 5527  
Facsimile: 07 5527 5000

TAX INVOICE NO: 0002

**Customer**

Equititrust Ltd (Administrators appointed)  
(Receivers & Managers Appointed)  
PO Box 8111  
GOLD COAST MC QLD 9726  
ABN: 74 061 383 944

Date: 23/2/2012

Qty	Description	Unit Price	TOTAL
1	Reimbursements of Services provided for Equititrust Income Fund		
1	Reimbursement of Equititrust Income Fund Scheme Expenses Period 01 to 15 February 2012	70,631.30	70,631.30
1	Reimbursement of Equititrust Premium Fund Scheme Expenses Period 01 to 15 February 2012	817.94	817.94
1	Reimbursement of Sophisticated Fund Expenses Period 01 to 15 February 2012	73.46	73.46
		SubTotal	\$71,522.70
		GST	\$7,152.27
		TOTAL	\$78,674.97

Payment by EFT to:  
GCP (HQ) Pty Ltd  
BSB: 034-660 Account: 302296

# ECG ADMINISTRATION PTY LTD

(Receivers & Managers Appointed)

ABN: 89 144 977 275

PO Box 8111  
GOLD COAST MC QLD 9726  
Phone: 07 5527 5527  
Facsimile: 07 5527 5900

TAX INVOICE NO: 131

**Customer**

GCP (HQ) Pty Ltd  
PO Box 8111  
GOLD COAST MC QLD 9726  
ABN: 45 154 769 178

Date: 23/2/2012

Qty	Description	Unit Price	TOTAL
	Management Fees provided by ECG Admin for:		
1	Reimbursement of Equititrust Income Fund Scheme Exp Period 01 to 15 February 2012	70,631.30	70,631.30
1	Reimbursement of Equititrust Premium Fund Scheme Exp Period 01 to 15 February 2012	817.94	817.94
1	Reimbursement of Sophisticated Fund Exp Period 01 to 15 February 2012	73.46	73.46
		SubTotal	\$71,522.70
		GST	\$7,152.27
		TOTAL	\$78,674.97

Payment by EFT to:  
ECG Administration Pty Ltd  
BSB: 084 004 Account: 17 717 0400

Payments for period: 01 to 15 February 2012

7.3B

99%

Basis for allocation ETL Admin 1.00%  
 Oncharging 1 99.00%

Average EUM - 15 February 2012		Loan bats		Combined	Comp Spec	Total
ETL	n/a	n/a	n/a			ETL
EIF	89.47%	106,728,540.75		\$ 81,631.30		81,631.30 EIF
EPP	9.66%	11,524,246.89		\$ 817.94		817.94 EPP
SOP	0.87%	1,035,013.98		\$ 73.46		73.46 SOP
	100.00%	119,287,801.62		\$ 82,522.70		82,522.70

Co	Supplier Invoice Date	Paid Date	Supplier Invoice No	Supplier	Expense Type	Supplier Detail	Invoiced Amount	Max claim as per Service Agreement (inc GST)	Section	%	Oncharge Funds	EIF	EPP	ETL	Reimbursed by BDO
ECG	01-Feb-12	15-Feb-12	28783-94013	Property Ops Solutions Pty Ltd		Access to Priceliner website - Monthly fee for February 12	-\$632.50	\$632.50	7.3B	99%	626.18	560.25	60.49	5.43	
ECG	31-Jan-12	14-Feb-12		Advisor Resources Management		Consulting services for January (per service agreement)	-\$13,200.00	\$13,200.00	Schedule 2	100%	13,200.00	13,200.00			
ECG	10-Feb-12	14-Feb-12		Australian Superannuation Fund		SGC Contribution - February 2012	-\$5,418.96	\$5,418.96	Schedule 2	100%	5,418.96	5,418.96			
ECG	30-Jan-12	14-Feb-12	97419	FinPower Australia Pty Ltd		Finpower monthly fees - 4000 open deposits @ \$378 per 100	-\$1,386.00	\$1,386.00	7.3B	99%	1,372.14	1,227.67	132.56	11.91	
ECG	01-Feb-12	14-Feb-12	IC7336784	ISS Washroom Services		Annual charge for supply and maintenance of hygiene bins to January 2012	-\$640.20	\$640.20	7.3B	99%	633.80	567.07	61.23	5.50	
ECG	24-Jan-12	14-Feb-12	NA00389160	Metroview Pty Ltd (Xerox Business Centre)		Telephone system maintenance 06/1/12 - 05/4/12	-\$662.08	\$662.08	7.3B	99%	655.46	586.45	63.32	5.69	
ECG	03-Feb-12	14-Feb-12	122034	Office National Tweed		Stationery order	-\$205.98	\$205.98	7.3B	99%	203.92	182.45	19.70	1.72	
ECG	10-Feb-12	14-Feb-12	122598	Office National Tweed		Stationery items	-\$109.41	\$109.41	7.3B	99%	108.32	96.91	10.46	0.94	
ECG	06-Feb-12	14-Feb-12	122190	Office National Tweed		Kitchen supplies	-\$67.02	\$67.02	7.3B	99%	66.35	59.36	6.44	0.58	
ECG	05-Feb-12	14-Feb-12	122119	Office National Tweed		Stationery supplies	-\$12.95	\$12.95	7.3B	99%	12.82	11.47	1.24	0.11	
ECG	06-Feb-12	14-Feb-12	122189	Office National Tweed		Stationery	-\$11.75	\$11.75	7.3B	99%	11.63	10.41	1.12	0.10	
ECG	13-Feb-12	13-Feb-12	001	Alleasing Pty Ltd		toshiba copier lease - January 12	-\$225.19	\$225.19	7.3B	99%	222.94	199.47	21.54	1.93	
ECG	03-Feb-12	10-Feb-12	86	Beachfrog		Office cleaning 01 - 03 Feb 2012	-\$270.00	\$270.00	7.3B	99%	267.30	239.16	25.82	2.32	
ECG	31-Jan-12	10-Feb-12	85	Beachfrog		Weekly office cleaning 16 - 31 Jan 2012	-\$990.00	\$990.00	7.3B	99%	980.10	876.91	94.69	8.50	
ECG	10-Feb-12	10-Feb-12		Employees		Wages 4 weeks to 13 March 2012 (plus 5 weeks annual leave for SH)	-\$39,762.21	\$39,762.21	Schedule 2	100%	39,762.21	39,762.21			
ECG	31-Jan-12	10-Feb-12	151870	GCOMM Pty Ltd		Technical Support - Customer responsive programme	-\$924.00	\$924.00	7.3B	99%	914.76	818.45	88.37	7.94	
ECG	31-Jan-12	10-Feb-12	41394	GCOMM Pty Ltd		Additional Domain	-\$807.40	\$807.40	7.3B	99%	799.33	715.17	77.22	6.94	
ECG	21-Dec-11	10-Feb-12	557942	McCallough Robertson Lawyers		General corporate advice - loan repayment changes	-\$389.40	\$389.40	7.3B	99%	385.51	344.92	37.24	3.34	
ECG	24-Dec-11	10-Feb-12	122925	Paradise Security Australia Pty Ltd		Alarm Monitoring for January 2012	-\$218.23	\$218.23	7.3B	99%	216.05	193.30	20.87	1.87	
ECG	09-Feb-12	10-Feb-12	105	True IT Services Pty Ltd		Consultancy fees for IT services - February 2012	-\$4,675.04	\$4,675.04	Schedule 2	100%	4,675.04	4,675.04			
ECG	7/02/2012	7/02/2012		Toshiba (Australia) Pty Limited		Photocopier lease - ref M4T1211995001	-\$444.40	\$444.40	7.3B	99%	439.96	393.64	42.50	3.82	
ECG	10/1/2012	6/02/2012	77 (Oct 11)	Beachfrog		Weekly office cleaning 17-19 and 21 October 2011	-\$360.00	\$360.00	7.3B	99%	356.40	318.88	34.43	3.09	
ECG	23/01/2012	6/02/2012	17224	Chevron Island News		Monthly newspaper delivery (part month only) 16 - 20 January	-\$25.00	\$25.00	7.3B	99%	24.75	22.14	2.39	0.21	
ECG	10/1/2012	6/02/2012	300436A (N)	Dinamica Print & Design		HP toner and delivery	-\$170.50	\$170.50	7.3B	99%	168.80	151.02	16.31	1.46	
ETL	10/2/2012	10/2/2012	40940	Crowther-Blaylock and Associates		Patricia Riley invoice	-\$1,000.00	\$1,000.00	Schedule 2	100%	1,000.00	1,000.00			

382,608.22	\$ 82,522.70	\$ 81,631.30	\$ 817.94	\$ 73.46
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Our Reference            Jacqueline Kemp 201110996  
Direct Line             3231 1688  
Email                     jkemp@qld.gadens.com.au  
Partner Responsible     Scott Couper



19 September 2012

Thomsons Lawyers  
Level 25  
1 O'Connell Street  
SYDNEY NSW 2000

**Attention: Peter Hegarty**

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BY EMAIL [phegarty@thomsonslawyers.com.au](mailto:phegarty@thomsonslawyers.com.au)

Dear Sir

**Your client: Equititrust Limited ACN 061 383 944 (In Liquidation) (Receivers and Managers Appointed) ("EL")**

**Our client: Equititrust Income Fund (Receiver Appointed) ("EIF")**

We refer to our letter of 17 April 2012 and to your letter of 31 August 2012.

As you are aware, we act for David Whyte.

We note your clients are seeking payment of the amount of \$319,381.00 from the EIF in respect of their remuneration. You also advise that your clients' total fees for the period of the voluntary administration are now claimed to be \$805,486.00. We further note that your clients have stated that, in the event the matter cannot be resolved, they will be seeking Court approval of their remuneration for the entirety of this amount.

It seems to us that there are two main issues raised by your correspondence, firstly, in respect of EL's right of indemnity from the EIF and, secondly, in respect of the remuneration being claimed by the administrators.

We are instructed to respond as follows.

#### **Right of indemnity of EL**

As stated in our letter to you of 17 April 2012 our client acknowledges EL's right of indemnity as contained in clause 6.1 of the Consolidated Constitution of the EIF dated 3 June 2011 (the **Constitution**). The decision of *Equititrust Limited v RM Walsh Land Holdings Pty Limited* [2012] NSWSC 427 records Counsel for the plaintiff establishing EL's right of indemnity from the EIF in contract (under clause 6.1 of the Constitution) and at common law.

As stated above, and in our previous correspondence, our client does not dispute that EL has a right of indemnity from the EIF. However, it is our client's position that any indemnity which your clients (as voluntary administrators of EL) may be entitled to call upon is limited to the indemnity as contained in the Constitution. It is clear from the terms of the indemnity (and as reiterated by Counsel for the plaintiff in *Equititrust Limited v RM Walsh Land Holdings Pty Limited* [2012] NSWSC 427) that the indemnity only extends to debts, liabilities etc. "reasonably and properly incurred by it in the performance of its

*functions and duties and exercising its power under this Constitution or at law...*" (refer to clause 6.1 of the Constitution).

Our client maintains that the indemnity provided in the Constitution does not afford your clients with a blanket indemnity for all expenses and all remuneration which your clients incurred as administrators of EL. That is because, not all of the work performed by your clients could have been performed by them as administrator of EL in its capacity as responsible entity of the EIF. This position should be uncontroversial given that EL was not only trustee and responsible entity for the EIF but also the trustee of two other funds, being the Equititrust Priority Class Income Fund (EPCIF) and the Equititrust Premium Fund (EPF). Accordingly, it would have been necessary for your clients, in discharging their duties as administrators of EL, to consider the position of not only the EIF but the EPCIF and the EPF as well as the company acting in its own right. For example, the costs related to investigations of the position of the EPCIF and the EPF, could not possibly fall within the indemnity contained in clause 6.1 of the Constitution. This is not to draw an "artificial distinction" as you seek to maintain. On the contrary, it is a very necessary distinction to draw in order to ensure the rights of the investors in the EIF are protected and to ensure that any claim to an indemnity under the Constitution is properly made. If your clients maintain a different position, we invite you to write to us with a detailed explanation as to your clients' basis for claiming the entirety of their remuneration and expenses costs from the EIF.

#### **EL's claim for fees during the voluntary administration period**

At the outset, we enclose for your reference a copy of the minutes of the second meeting of creditors lodged by your clients on 25 May 2012 (Minutes).

As stated above, we note your clients are seeking the amount of \$319,381.00 from the EIF in payment of part of the administrators' remuneration for the period 15 February 2012 to 20 April 2012.

As to your clients' claim for payment from the EIF, we note the following matters:

- On 21 February 2012, in light of your clients' appointment and the appointment of receivers and managers to EL, and at the instigation of your clients' then solicitors, our client attended at a meeting with Blair Pleash and Glen Oldham of Hall Chadwick and William Colwell and Robert Malt of Ferrier Hodgson and the parties' respective solicitors to discuss the recent appointments to EL and the most appropriate course of action in moving forward in the winding up of the Funds.
- At that meeting, it was agreed by your clients that, in light of the recent appointments of numerous insolvency practitioners and given the need for certainty and minimisation of costs, it was appropriate for our client to make an application for directions so that our client could continue with the winding up of the EIF in accordance with the Orders of His Honour Justice Applegarth of 21 November 2011 and 23 November 2011 and in accordance with the Constitution.
- At the hearing of that application which was held on 29 February 2012, our client (by consent of all other parties including your clients) sought and obtained an Order from Her Honour Justice Dalton which authorised our client to *inter alia*:
  - take all steps necessary to ensure the realisation of property of the EIF held by EL as RE of the EIF by exercising any legal right of EL as RE of the EIF in relation to the property of the EIF;
  - bring, defend or maintain any proceedings on behalf of the EIF in the name of EL as is necessary for the winding up of the EIF in accordance with clause 9 of EIF's constitution; and

- effect the implementation of a National Australia Bank bank guarantee facility and the replacement of the existing Commonwealth Bank of Australia bank guarantee facilities.
- The main purpose of obtaining this order was to clarify the role of the various insolvency practitioners and to avoid duplication of work and minimise costs. This was clear from the submissions made to the court at the hearing.
- Given the appointment of our client and, in particular, following the Orders of Justice Dalton of 29 February 2012, your clients had a limited role in relation to EL as responsible entity of the EIF.
- Our client relied on Richard Albarran's comments at the first meeting of creditors wherein he assured investors that no costs of the administration would be levied against the EIF.
- At the second meeting of creditors, Mr Albarran attempted to distance himself from his initial representation that no costs would be levied against the EIF on the basis that he had now received different legal advice regarding this matter.
- In the administrators' section 439A Report to Creditors and at the second meeting of creditors, the administrators advised that they would be seeking the guidance of the Court as to the extent of the indemnity available to EL in its capacity as responsible entity (refer to page 46 of the Report and page 6 of the Minutes). Notwithstanding this, your clients have now approached our client directly and sought payment of approximately \$320,000 from the EIF with very little information to justify the calculation of this amount, no supporting evidence to justify the amount claimed and a very basic description of the nature of the work undertaken in incurring this remuneration.
- Mr Albarran at the second meeting of creditors stated that the administrators' intention was to recover funds for payment of their fees from asset realisations as opposed to claiming under EL's right of indemnity from the EIF (refer to pages 6 and 14 of the Minutes). Our client relied on and will continue to rely on these statements. No doubt the unit holders also relied on these statements in coming to a decision about how to vote at the second meeting of creditors.
- Furthermore, at the second meeting of creditors Mr Albarran advised that a significant amount of time had been spent on investigations into the recoverable actions available to the creditors of EL (refer to pages 13 to 14 of the Minutes). These are clearly tasks which were performed by EL in its own right and for the benefit of the creditors of the EL not by EL in its capacity as responsible entity of the EIF. With respect to those tasks, your clients are not entitled to claim under the indemnity contained in the Constitution and, if your clients assert otherwise, we request you provide us with an explanation as the basis for this assertion.

Given the above, our client maintains his position that there could only be a very limited amount of remuneration and disbursements which would relate to your clients attending to matters for EL in its role as responsible entity of the EIF.

In our letter of 17 April 2012, we requested your clients identify what disbursements and what remuneration they consider relate to the "debts, liabilities etc" which have been reasonably and properly incurred by them in the proper performance of their functions and duties in the exercise of power under the Constitution and at law. It appears clear, given the content of your letter, that your clients have not attended to this. We note that in your letter of 31 August 2012 the only further information which has been provided is a brief list of 10 items. This is clearly insufficient to allow our client to give proper consideration to those matters which your clients seek remuneration for. So that our client may give proper consideration to whether your clients claim for remuneration falls within the ambit of the indemnity provided under the Constitution, our client requires at the very least that your clients provide the following information with respect to each item:

- (a) details of the time spent on each category and the costs and remuneration attributable to each category;
- (b) a breakdown of each individual who carried out each task, their charge out rate and the relevant narrative in support of each amount of remuneration claimed; and
- (c) an explanation as to why these tasks were carried out (including why they were proper and necessary) and in what way they were done by EL as responsible entity for the EIF and for the benefit of investors.

We note that items 1 and 3 to 10 of your letter relate to EL's investigation of a change in the responsible entity. As stated to you previously, it is our client's position that investigating the replacement of the responsible entity is not time or expenses which could be said to be reasonably and properly incurred by EL in the proper performance of its functions and duties. This is because the Court had ordered (on EL's application) that the EIF be wound up in accordance with its Constitution. The Constitution specifically sets out the procedure to be conducted for the winding up (which does not contemplate the replacement of the responsible entity). Further, your clients consented to an order whereby our client, as court appointed receiver of the EIF, should have the conduct of the winding up of the EIF. In those circumstances, could you please explain on what basis your clients can assert that the investigation of the replacement of the responsible entity and the costs incurred with respect to same could be said to be reasonably and properly incurred by EL in the performance of its functions and duties and exercising its power under the Constitution?

We note for the sake of completeness that our clients position will not come as a surprise to your clients as our client has maintained since the appointment of your clients that any such costs relating to the replacement of the responsible entity are not considered by him to be cost claimable under the constitution.

With respect to item 2 of your letter, it is our view that the administrators could only have incurred limited fees in respect of the performance of this task because any investor related query with respect to the EIF or the EPCIF should have been directed to our client. Indeed, the administrators during the course of the second meeting of creditors reiterated that our client was conducting the winding down of the EIF and referred investor queries to our client (refer to pages 7, 9 and 10 of the Minutes). The administrators' section 439A Report also refers investors to David Whyte of BDO in regard to any queries as to the current value and status of their investment (refer to page 5 of the Report). For completeness, we note that there may have been work undertaken by EL fielding enquiries from unit holders in their capacity as contingent creditors of EL. This, however, could not be said to have been work performed by EL in its capacity as responsible entity of the EIF and therefore, it seems to our client, does not come within the ambit of the indemnity.

For the reasons set out above and in the absence of a full explanation of the tasks undertaken, the remuneration incurred and how the tasks the subject of the claim for remuneration were performed by EL as responsible entity of the EIF, our client is not in a position to consider the payment of the amount of \$319,381.00 to the administrators.

#### **Application to Court to seek approval of remuneration**

With respect to your clients claim that, if the matter cannot be resolved, they will apply to Court and seek approval of the entirety of the fees we respond as follows.

In the administrators' section 439A Report to Creditors and at the second meeting of creditors (at which you were present) the administrators stated their fees to 20 April 2012 were \$650,000. The total amount now being claimed is over \$800,000. It is surprising that an additional \$150,000 of costs is now being claimed as remuneration since the date of your clients' appointment as liquidators on 20 April 2012. Would your clients please provide an explanation as to the further costs which they allege have been incurred in the administration which were not disclosed to creditors in the section 439A report or at the meeting of creditors? We assume such additional costs do not relate to costs incurred as liquidators given

the statement by Richard Albarran at the second meeting of creditors that the liquidators would not seek to claim any such costs from the EIF (referred to at pages 6 and 7 of the Minutes).

At the second meeting of creditors the administrators sought approval of their remuneration and proposed the following resolution:

*"the remuneration of the Administrators from the commencement of the Administration to 20 April 2012 be approved to a maximum amount of \$400,000 plus GST, calculated in accordance with the Hall Chadwick hourly rates as detailed in the Report to Creditors dated 17 February 2012 ("the base rate") and as varied from time to time with such annual increases (if any) to be no greater than 10% of the base rate, and that the Administrators be authorised to draw the remuneration on a monthly basis or as required."*

As noted above, the resolution proposed approval for the reduced amount of \$400,000. At the meeting our client asked whether the administrators would "write off" the additional \$250,000 if the fees were approved at the amount of \$400,000. Mr Albarran acknowledged the administrators would "write off" the difference and this acknowledgement is recorded in the minutes of the meeting lodged by your clients (page 14 of the Minutes). A resolution was subsequently passed by the creditors approving the administrators' fees for the period of the administration in the amount of \$400,000 (refer to page 16 of the Minutes).

In light of the above, your clients claim that it will seek the entirety of the costs of \$805,486.00 from the Court is entirely inconsistent with the statement made by Mr Albarran at the second meeting of creditors and indeed the resolution which was passed by creditors at that meeting. It seems to us very likely that unit holders/ creditors voting on this remuneration resolution would have relied on Mr Albarran's representations, as our client did.

Further, pursuant to section 449E(1) of the *Corporations Act 2001* (Cth) (Act):

*"The administrator of a company under administration is entitled to receive such remuneration as is determined:*

- (a) by agreement between the administrator and the committee of creditors (if any); or*
- (b) by resolution of the company's creditors; or*
- (c) if there is no such agreement or resolution - by the Court."*

In accordance with section 449E(1)(b) of the Act, a resolution was passed at the second meeting of creditors approving the administrators' remuneration to a maximum amount of \$400,000.

We note that under section 449E(2) of the Act the Court may, on application of the administrators, review their remuneration if it has been approved by the creditors.

It is a matter for your clients as to whether they wish to make such an application. If your clients are so minded, the Court must have regard to whether the remuneration is reasonable and take into account a number of factors as set out in 449E(4) of the Act. The question to be decided on such an application is whether the remuneration already determined is reasonable – or unreasonable because it is too high or too low: *Paul's Retail Pty Ltd v Morgan* (2009) 76 ACSR 26.

As stated above, absent a full explanation of the tasks undertaken, the remuneration incurred and how the tasks the subject of the claim for remuneration were performed by EL as responsible entity of the EIF and given it is our client's position that investigating the replacement of the responsible entity is not time or expenses which could be said to be reasonably and properly incurred by EL in the proper performance of its functions and duties, our client is not in a position to consider the payment of remuneration to the administrators from the EIF at this time.

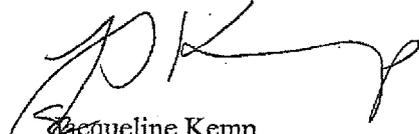
It seems to us, given the above, it may be appropriate in the circumstances for your clients to make an application and to have the Court determine what, if any, of the administrators' remuneration should be paid out of the EIF.

**ECG Administration Pty Ltd (In Liquidation) ("ECGA")**

We note your letter of 31 August 2012 includes a response to our letter to your clients dated 24 July 2012.

We will write to you separately in respect of this matter.

Yours faithfully



Jacqueline Kemp  
for **GADENS LAWYERS**

Enc.

"DW-7"

GH<sup>2</sup>

SUPREME COURT  
OF QUEENSLAND

23 OCT 2012

FILED  
BRISBANE

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS10478 of 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: EQUITITRUST LIMITED ACN 061 383 944

AND

Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND  
ARSN 089 079 854 AND THE MEMBERS OF THE  
EQUITITRUST PRIORITY CLASS INCOME FUND ARSN 089  
079 729

APPLICATION

TAKE NOTICE that Richard Albarran, Blair Alexander Pleash and Glen Peter Oldham as liquidators, and former administrators, of Equititrust Limited (in liquidation) (receivers and managers appointed) (EL) are applying to the Court for the following directions and orders:

1. Directions as to the manner in which, and the extent to which, they may seek to recover their remuneration and expenses in respect of the administration of EL out of the assets of the Equititrust Income Fund (receiver appointed) (the EIF).
2. A direction that Mr Whyte, as the receiver of the EIF, is to cause \$202,388.99 to be paid from the EIF to EL so as to reimburse and indemnify EL for liabilities incurred by EL under an agreement entitled "Service Agreement" entered into by EL, Mr Whyte and others on or about 20 December 2011.

Such further or other order as may seem meet.

This application will be heard by the Court at Brisbane

on: Wednesday, 21 November 2012, at 10.00am

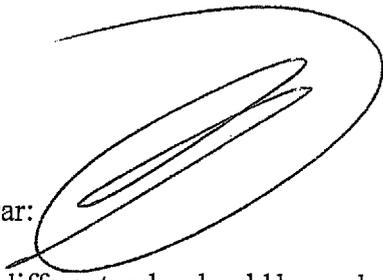
APPLICATION

Filed on behalf of Messrs Albarran, Pleash and Oldham as liquidators (and former administrators) of Equititrust Ltd (in liquidation) (receivers and managers appointed)  
Form 9 - R.32

Thomsons Lawyers  
Level 16 Waterfront Place  
1 Eagle Street  
Brisbane QLD 4000  
Tel: 07 3338 7500  
Fax: 07 3338 7599



Filed in the Brisbane registry on: 25 October 2012:

Registrar: 

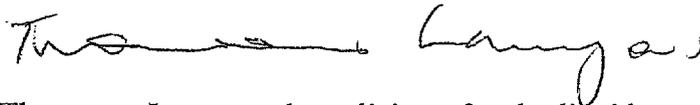
If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the applicant intends to rely on the following affidavits -

1. Affidavit of Blair Alexander Pleash, to be filed.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOCATED – 2 hours

Signed:



Description: Thomsons Lawyers, the solicitors for the liquidators of Equititrust Ltd (in liquidation) (receivers and managers appointed)

Dated: 24 October 2012

This application is to be served on: Mr David Whyte, as the receiver of the EIF, C/- his solicitors, Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane QLD 4000

"DW-8"

Our Reference Jacqueline Ogden 201110996  
Direct Line +61 7 3231 1688  
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**gadens**

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31 August 2016

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Attention: Peter Hegarty

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By email: [PHegarty@tglaw.com.au](mailto:PHegarty@tglaw.com.au)

Dear Colleagues

**Equititrust Limited (In Liquidation) (Receivers and Managers Appointed) (EL)**

We note you act for the liquidators of EL, Blair Pleash and Richard Albarran.

As you are aware, we act for David Whyte, whom by Orders of Justice Applegarth in Supreme Court Proceedings number 10478 of 2011 was appointed receiver of the property of the Equititrust Income Fund (EIF) and the Equititrust Priority Class Income Fund (EPCIF) and was appointed the person responsible for ensuring the EIF and the EPCIF are wound up in accordance with their constitutions.

EL is the responsible entity of the EIF and the EPCIF.

As you are aware, in respect of the receivership of the EIF:

- (a) there are no more properties remaining to be sold;
- (b) there remains two proceedings which are still ongoing, being:
  - i. a claim against a valuer in respect of a property located at Earlando Road, Cape Gloucester (Airlie Beach), Queensland;
  - ii. a claim against certain officers of EL.

We also note that your clients are presently prosecuting proceedings numbered NSD2028 of 2013 which may also result in a recovery for the investors of the EIF.

- (c) there are outstanding matters which will need to be finalised in order for the winding up of the EIF to be completed as required by the Court orders, which matters our client has identified will include, but is not limited to:
  - i. obtaining directions and/or a declaration from the Court in relation to an equalisation payment to certain investors of the EIF;
  - ii. your clients' claim for an indemnity from the EIF for their remuneration as administrators and liquidators of EL;
  - iii. determining an appropriate process as between our respective clients by which:
    - A. any outstanding debts payable by, and the claims against, EL can be ascertained;
    - B. those debts and claims can be adjudicated upon (in accordance with the *Corporations Act 2001*);

- C. any claim for an indemnity from the property of the EIF in respect of any, or any part of any, debt payable by or claim against EL which is admitted can be identified;
- D. our client is notified of any such claim for an indemnity from the property of the EIF and can have the opportunity to seek further information in relation to any claim and then accept or reject any claim (or accept or reject any part of it),

(referred to herein as the **proof of debt process**),

- iv. obtaining directions and/or a declaration from the Court in relation to the final distribution to be made to all investors of the EIF (once the proceedings and all matters referred to above have been finalised).

We are instructed our client intends to make an additional interim distribution to unitholders of the EIF in the short term.

For the purposes of making this interim distribution, our client intends to apply to the Court to obtain directions in order to resolve a number of the outstanding matters referred to above, namely:

- (a) the equalisation payment to certain investors of the EIF;
- (b) your clients' claim for an indemnity from the EIF for their remuneration as administrators and liquidators of EL; and
- (c) to the extent necessary, the proof of debt process.

To the extent our respective clients can resolve any issues outstanding as between themselves that is obviously preferred as that will likely limit the extent of the issues to be determined by the Court. We refer to the parties previous attempts to resolve outstanding matters which have to date been unsuccessful. Our client remains open to progressing the resolution of these matters with your clients. However, given the progression of the receivership, it is necessary that outstanding matters now been resolved.

In light of the above, and for the purposes of our client's foreshadowed application, we invite your clients to:

- (a) provide to our client further information to support their claim for an indemnity under clause 6.1 of the Constitution of the EIF and the general law for their remuneration as administrators and liquidators and outlays which will include, but is not limited to:
  - i. an explanation as to what tasks were undertaken in respect of which an indemnity is sought from the EIF;
  - ii. an explanation as to why such tasks were necessary and proper and for the benefit of the EIF; and
- (b) provide our client with a proposal in respect of the proof of debt process for our client's consideration.

Would you please provide us with your clients' response as soon as possible but in any event by no later than **Wednesday, 14 September 2016**.

We look forward to hearing from you.

Yours faithfully

  
**Jacqueline Ogden**  
Senior Associate

"DW-9"

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Sydney NSW 2000 Australia

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Our ref PJH:3688014  
Your ref

23 September 2016

**Scott.couper@gadens.com / Jacqueline.ogden@gadens.com**

Gadens Lawyers  
Via email only

Attention: Mr Scott Couper / Ms Jacqueline Ogden

Dear Sirs

**Equititrust Ltd (in liquidation)(receivers appointed)(receivers & managers appointed) ("Company")**

**Equititrust Income Fund (receiver appointed) ("EIF")**  
**Equititrust Priority Class Income Fund ("EPCIF")**  
**Equititrust Premium Fund (an unregistered scheme) (Controller appointed) ("EPF")**  
**(together the "Funds")**

We refer to your letter dated 31 August 2016.

In this letter our client seeks to set out their claim to an indemnity and payment from the Funds for your client's consideration.

## **1 Our clients' general right to an indemnity**

As you aware, it is generally accepted that our clients are entitled to be indemnified from the Funds' assets for work done and expenses and liabilities properly incurred in connection with the Funds and the Funds' administration and assets (*Re Berkeley Applegate (Investment Consultants) Ltd (in liq) (No 2) (1988) 4 BCC 279; Re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171*). It has also been held that it is appropriate for a liquidator to be permitted to claim remuneration and expenses from trust assets for work other than that directly involved in administering the trust (see for example, *GB Nathan & Co Pty Ltd (in liq) (1991) 24 NSWLR 674*).

### **1.1 Indemnity in EIF Constitution**

- (a) Since about March 2012 there has been considerable correspondence as between our clients/us and your client/you as regards the interpretation of the indemnity clause contained in the EIF Constitution.
- (b) We refer to the following correspondence in particular:
  - (i) Letter from our clients to your client dated 14 March 2012;
  - (ii) Letter from your client to our clients dated 19 March 2012;
  - (iii) Letter from our clients to your client dated 3 April 2012;
  - (iv) Letter from us to you dated 13 April 2012;

- (v) Letter from you to us dated 17 April 2012;
- (vi) Letter from your client to our clients dated 17 April 2012;
- (vii) Letter from our client to your client dated 6 June 2012;
- (viii) Letter from us to you dated 31 August 2012;
- (ix) Email from us to you dated 17 September 2012; and
- (x) Letter from you to us dated 19 September 2012.

Each of these letters and their enclosures are relied upon by our clients.

## 1.2 Unit holders also creditors

- (a) The tasks undertaken by our clients have either saved your client from incurring the costs incidental to those tasks, were directly relevant to the Company's role as Responsible Entity, or were tasks performed for the benefit of the unit holders.
- (b) At both the First Meeting of Creditors and the Second Meeting of Creditors in the Company's administration the Proofs of Debt submitted by each unit holder were admitted for one dollar each for the purposes of voting. The proofs of debt submitted by them were in respect of alleged breaches of duties owed by the Company as responsible entity under section 601FC of the *Corporations Act 2001 (Cth) (Act)*, failure to properly report in accordance with section 675 of the Act, negligence and misleading and deceptive conduct.
- (c) As at today's date we provide the following table of creditors, noting those that are ordinary unsecured creditors and those that are unit holders:

Creditor Type	Quantity	Value Advised (\$)	Proofs of Debt (\$)
Ordinary Unsecured Creditors	27	663,346.28	80,000,122.88
Unitholder Unsecured Creditors	1648	276,970,334.63	97,890,794.14
<b>Total</b>	<b>1675</b>	<b>277,633,680.91</b>	<b>177,890,917.02</b>

- (d) We are instructed that, of the 27 ordinary unsecured creditors and 1648 unit holder creditors, only 20 and 490 respectively have submitted proofs of debt as at today's date. The extent to which each of those unit holders in the Funds will be in a position to prove in the liquidation will be dependent upon the amounts recovered by your client in winding up the Funds and distributed to unitholders.
- (e) To the extent that there is any shortfall in the amounts recovered by your client, those unit holders will be entitled to prove in the liquidation for that shortfall. Accordingly, each unit holder stands to benefit from tasks undertaken by our clients.

## 2 General description of work undertaken

- 2.1 As requested by you, we have enclosed an Excel spreadsheet setting out our clients' Work In Progress (WIP) to 29 February 2016 highlighting those items for which they seek an indemnity and payment from the Funds. In total, all tasks have seen our clients incur WIP in the amount of \$1,228,325.00.
- 2.2 We also **enclose** a summary of disbursements incurred by our clients in the administration of the Company to date.

Disbursements	Cost (\$)
Advertising	8,594.50
Courier	5,903.46
Facsimile	11.00
File maintenance fee	3,743.94
Link Market Services	20,447.90
Lodgements	946.00
Meeting room hire - HC (Across all states)	1,540.00
Photocopying	50,857.52
Postage and Handling	5,888.14
Printing	38,753.33
Redback (Phone facility for Creditor's meeting)	281.63
Search fees on ABR	7,207.61
Storage	7,070.36
Telephone	4,338.94
Travel & Parking	30,409.35
Venue Hire	7,811.92
Miscellaneous	6,095.16
ECG Services Agreement	202,389.00
<b>Total</b>	<b>402,289.76</b>

Note: The entry with respect to the ECG Services Agreement is referred to with greater particularity in the correspondence referred to above, most particularly the letter dated 6 June 2012.

2.3 Legal costs incurred with my fee in the total amount of \$527,350.40, comprised as follows:

Date of Invoice	Invoice No.	Professional fees	GST on professional fees	Disbursements	GST on Disbursements	Total Invoice Amount
<b>Thomson Geer matter number: 3441653 – Remuneration Application</b>						
28/2/13	488441	12,890.00	1,289.00	46.50	4.65	14,230.15
30/4/13	494381	5,732.50	573.25	97.89	9.79	6,413.43
31/5/13	497849	750.00	75.00	31.65	3.17	859.81
31/8/13	506763	6,076.50	607.65	18.82	1.88	6,704.85
31/10/13	512661	4,250.00	425.05	NIL	NIL	4,675.55
31/1/14	520269	1,588.50	158.85	NIL	NIL	1,747.35
					<b>SUBTOTAL</b>	<b>\$34,631.14</b>
<b>Thomson Geer matter number: 3353939 – General</b>						
30/10/12	476470	NIL	NIL	9,000.00	900.00	9,900.00
25/1/13	484007	NIL	NIL	860.00	86.00	946.00
28/2/13	487836	NIL	NIL	9,540.00	954.00	10,494.00

Date of Invoice	Invoice No.	Professional fees	GST on professional fees	Disbursements	GST on Disbursements	Total Invoice Amount
15/3/13	489422	251,431.25	25,143.13	1,921.40	192.14	278,687.93
31/3/13	490723	11,341.50	1,134.15	7.55	0.76	12,483.96
30/4/13	494375	17,607.50	1,760.75	28.52	2.85	19,399.62
31/5/13	497851	27,225.00	2,722.50	20,342.70	2,034.27	52,324.46
30/6/13	501003	22,190.00	2,219.00	7.27	0.73	24,417.00
31/7/13	503431	4,529.50	452.95	2,200.00	220.00	7,402.45
31/8/13	506799	7,132.50	713.25	33.00	3.30	7,882.05
30/9/13	509920	7,808.50	780.85	38.40	3.84	8,631.59
6/12/13	Wilkins Fee note no. 1076			29,590.00		29,590.00
					<b>SUBTOTAL</b>	<b>\$462,159.06</b>
<b>Thomson Geer matter number: 3688014 – Set Off</b>						
5/11/15	592080	3,527.00	352.70	NIL	NIL	3,879.70
31/1/16	601439	552.00	55.20	NIL	NIL	607.20
29/2/16	605849	8,196.00	819.60	NIL	NIL	9,015.60
31/3/16	608767	7,967.00	796.70	NIL	NIL	8,763.70
30/4/16	613414	255.00	25.50	NIL	NIL	280.50
31/5/16	616656	3,238.00	323.80	NIL	NIL	3,561.80
31/8/16	628430	615.00	61.50	NIL	NIL	676.50
					<b>SUBTOTAL</b>	<b>\$26,785.00</b>
<b>Thomson Geer matter number: 3854897 – Jeanes Proceedings</b>						
31/3/16	608766	2,769.00	276.90	NIL	NIL	3,045.90
30/4/16	613236	546.00	54.60	NIL	NIL	600.60
31/5/16	616598	117.00	11.70	NIL	NIL	128.70
					<b>SUBTOTAL</b>	<b>\$3,775.20</b>
					<b>TOTAL</b>	<b>\$527,350.40</b>

We are in the process of redacting the privileged portions of the invoices referred to in this above table, which we will provide to you in due course.

- 2.4 In general, the steps taken by our clients in the administration of the Company included:
- (a) conducting preliminary investigations into the affairs of the Company, utilising the books and records held by the Company and the Company's external accountant, KPMG, including review of the Company's management accounts and externally prepared financial statements;
  - (b) issuing demands to deliver books and records of the Company to various parties;
  - (c) attending the Company's premises to review and take control of the Company's books and records;
  - (d) holding numerous meetings and discussions with the Company's directors;
  - (e) holding numerous meetings and discussions with staff contracted to provide services to the Company;
  - (f) holding numerous meetings and discussions with representatives of the respective external appointees acting in respect of the Company and the Funds as follows:
    - (i) Mr David Whyte of BDO, the Court appointed Receiver of EIF and EPCIF;
    - (ii) Mr Robert Malt of Ferrier Hodgson, on behalf of the Receivers of the Company;
    - (iii) Mr Henry McKenna of McGrath Nichol, on behalf of the Receivers of the property of EPF;
  - (g) attending a meeting with Mr Whyte of BDO, Ferrier Hodgson, and their respective solicitors on 21 February 2012, to discuss the roles of the Applicants and the respective external appointees acting in respect of the Company and the Funds;
  - (h) prior to the Orders made on 29 February 2012, liaising with Mr Whyte in relation to the sale of property assets in relation to EIF, including reviewing and signing contracts of sale and other documents;
  - (i) considering and investigating information supplied by third parties, in particular:
    - (i) David Tucker of Tucker & Cowen Solicitors (who is also a former director of the Company), regarding various insurance issues and allegations against the Company and its current and former directors;
    - (ii) Amanda Banton of Piper Alderman Lawyers, regarding a potential class action claim and various allegations asserted by a number of the Funds' members against the Company and its current and former directors;
    - (iii) A claim asserted for damages in the order of \$20,000,000 against the Company by a borrower in relation to the EIF, for alleged negligence and/or breaches of duty by the Company in appointing a receiver pursuant to a mortgage in favour of the Company (for EIF) over the borrower's property;
  - (j) seeking legal advice in relation to a number of the complex issues arising in relation to the administration of the Company, its role as the Responsible Entity of the Funds, and the interaction with the respective Receivers acting in respect of the Company and the Funds;
  - (k) attending to numerous enquiries from the Funds' members received from the Company's investor enquiry telephone line and email address, [equititrust@hallchadwick.com.au](mailto:equititrust@hallchadwick.com.au);
  - (l) liaising with various parties in relation to possible Deed of Company Arrangement Proposals;

- (m) liaising with, and considering proposals from, the following parties in relation to the Company being replaced as Responsible Entity of the Funds:
  - (i) Balmain NB Corporation Limited;
  - (ii) Trilogy Funds Management Limited; and
  - (iii) Venture Axess Group Limited;
- (n) reviewing the validity, extent and quantum of claims by the Company's secured creditors;
- (o) reviewing records with respect to the Funds managed by the Company in order to gain an understanding of same and their respective asset portfolios;
- (p) discussing various regulatory issues with government authorities;
- (q) placing on the Company's website, letters to update investors in relation to the administration of the Company;
- (r) meeting with ASIC legal officers to discuss the administration of the Company and related issues of interest to ASIC;
- (s) preparing and issuing the initial Report to Creditors of the Company dated 17 February 2012;
- (t) holding the first creditor's meeting on 27 February 2012, as mentioned above;
- (u) preparing and issuing the Report to Creditors of the Company dated 12 April 2012;
- (v) holding the meeting of committee of creditors of the Company on 16 April 2012;
- (w) holding the second creditor's meeting on 20 April 2012;
- (x) negotiating the terms of a Litigation Funding Agreement with International Litigation Partners No.1 Limited (**ILP**);
- (y) instructing solicitors in relation to the Funding Agreement to be entered into with ILP;
- (z) instructing solicitors with respect to examinations and Orders for Production;
- (aa) instructing solicitors in relation to proceedings commenced in accordance with the Litigation Funding Agreement entered into with ILP;
- (bb) Instructing solicitors in relation to multiple iterations and amendments to pleadings in proceedings and requests for particulars; and
- (cc) attending mediation on 1 September 2016.

2.5 Set out below is a more detailed description of the tasks performed.

### **3 Initial review of documents held by the Company as responsible entity and making enquiries of the Company's directors**

3.1 Since our clients' appointment as administrators, our clients spent considerable time reviewing documents held by the Company as Responsible Entity of the Funds with a view to determining precisely what assets were held by the Funds.

3.2 Before the orders made by Justice Dalton on 29 February 2012 it was necessary that our clients were properly apprised of this information in order that they could approve or not approve proposed sales of property. It has also been necessary that our clients inform themselves of this information in order that they were in a position to report the position to unit holders, consider proposals for the replacement of the Company as Responsible Entity and liaise with your client in relation to the matter.

3.3 In addition to reviewing and collating documents held by the Company as responsible entity our clients assisted other external parties such as your client and Ferriers for the collection of the books and records which would assist in the any potential return to these parties to their clients and accordingly to the unit holders.

#### 4 Fielding enquiries of investors

4.1 Since our clients' appointment, our clients have spent a great amount of time responding to enquiries of unit holders. These enquiries have included significant enquiries as to:

- (a) the respective roles of our clients and that of Mr Whyte as Court appointed Receiver;
- (b) how those investors ought go about making claims;
- (c) when they are likely to receive a return;
- (d) how things have progressed to a point whereby the Company is in administration;
- (e) the impact on them and their unit holdings;
- (f) how to treat previous returns on their investment;
- (g) how to deal with outstanding amount and tax implications;
- (h) what investigations are being conducted in regards to the loss suffered on the loans; and
- (i) how the existence of the secured creditors impacts their investment.

4.2 A number of the unit holder creditors are elderly and have a lack of understanding of insolvency processes. Given that there are numerous appointments in relation to the Company, its assets, and the Funds this has added a greater layer of complexity which quite understandably created a level of confusion with the Company's unit holder creditors.

4.3 A telephone line was set up specifically for creditor and unitholder enquiries on 23 February 2012. Following a reduction in the number of calls to it, the line was cancelled on 30 October 2012. Around the times that our clients issued Reports to Creditors or held meetings, they received around 30 telephone calls a day.

4.4 Other work undertaken in respect of the unit holder creditors in particular included tasks such as:

- (a) re-sending reports to unit holder creditors who did not receive the report when originally dispatched;
- (b) receiving death certificates and telephone calls regarding deaths of unit holders and updating details in the system;
- (c) changing addresses and contact details of unit holder creditors;
- (d) answering questions in relation to liquidation processes;
- (e) providing unit holder creditors with the Receiver, and your client's, contact details regarding specific funds and their involvement in relation to our clients' appointment;

- (f) answering questions from unit holder creditors in relation to the likely chance of a distribution from the Company and the relevant funds;
- (g) providing updates on the progress of our investigations and on the liquidation generally;
- (h) providing updates on the Piper Alderman class action;
- (i) answering questions from unit holder creditors regarding reports;
- (j) providing explanations to unit holder creditors about how to complete a proof of debt and proxy forms, and the reasons for completing these forms;
- (k) responding to enquiries about the value of individual units for Centrelink and tax purposes;
- (l) providing advice regarding to whom correspondence, forms and unit holder information should be addressed;
- (m) providing advice regarding meeting attendance requirements, and the agenda for the meetings; and
- (n) responding to enquiries about pursuing the directors of the Company, particularly Mr Mark McIvor, and what the liquidators' powers consist of in this respect.

## 5 Reviewing proposals for replacement Responsible Entities

- 5.1 During the course of the administration period, fees were incurred by our clients on behalf of the Company as Responsible Entity in considering proposals made for some replacement responsible entities, potentially through a Deed of Company Arrangement. In this regard, our clients took the view that they needed to do all things necessary to preserve the assets of the fund and had to give appropriate consideration to the proposals made to them.
- 5.2 Prior to fielding any of these proposals, our clients obtained legal advice from their former Solicitors, Mills Oakley Lawyers, as to how this could be done in circumstances where Mr Whyte had already been appointed to wind up the EIF. The advice received by our clients was that in order for there to be a replacement of the Responsible Entity, it would require:
- (a) a meeting of Unit holders;
  - (b) Notice to ASIC;
  - (c) an application to Court to ensure termination of the winding up of the EIF and EPF in a manner analogous to an application for termination of a winding up in accordance with section 482 of the *Corporations Act 2001* (Cth); and
  - (d) consequential amendments to the respective Constitutions of the EIF and EPF.
- 5.3 Three different proposals for the replacement of the Company as Responsible Entity were received from:
- (a) Balmain NB Corporation Limited;
  - (b) Trilogy Funds Management Limited; and
  - (c) Venture Axess Group Limited.
- 5.4 During the course of our clients' investigations into the replacement of the Company as Responsible Entity they met with and held discussions with the above proposers in regards to their proposals, the respective procedure suggested by all three, and the impact on the unit holders of a change in Responsible Entity.

- 5.5 In order to make an assessment of the above mentioned proposals it required that our clients review the records of the Funds in order that an understanding could be obtained of the Funds and their respective asset portfolios.
- 5.6 The requisite procedure and the various proposals are set out in section 14 of our clients' Report to Creditors dated 12 April 2012 [s439A Report] (pages 40 to 43 of the Report) which can be accessed at <http://www.equitytrust.com.au/Updates.html>.
- 5.7 Our clients also conducted a survey of the investors at the Second Meeting of Creditors as to their view of the proposals made. The survey determined that of those unit holders who voted, the majority did not wish to replace the Company as Responsible Entity.
- 5.8 Having considered the proposals made, our clients formed the view that the complexity of the proposals and the further costs in bringing them into effect were such that they were not in the interests of unit holders, particularly in circumstances where there was not a clear benefit which would flow to the unit holders if those proposals were accepted. That view was expressed by our clients to the unit holders at the Second Meeting of Creditors.
- 5.9 Whilst a replacement of the Company as responsible entity was not ultimately pursued, it was incumbent upon our clients in their roles as Administrators of the Company to consider, review and put those proposals to the unit holders.
- 6 Meetings and other communications with your client**
- 6.1 In the course of the administration, our clients have had numerous meetings with your client.
- 6.2 Our clients have had meetings and/or discussions with your client on the following dates:
- (a) Friday, 17 February 2012;
  - (b) Thursday, 23 February 2012;
  - (c) Friday, 24 February 2012;
  - (d) Thursday, 25 February 2016.
- 6.3 The issues canvassed at these meetings included:
- (a) the various appointments and how they would coexist;
  - (b) updates on various loans and the underlying securities;
  - (c) assistance required on the various loans and the underlying securities; and
  - (d) assistance required in dealing with staff employed by ECG Administration Pty Limited (in liquidation) (**ECGA**); and
  - (e) the extent of any indemnity available to our clients.
- 6.4 Prior to the orders of His Honour Justice Dalton on 29 February 2012 our clients were also contacted by your client to seek our clients' assistance on the realisation and settlement of number of loans.
- 6.5 Our clients have also regularly sought reports from your client's office in order that our clients were better placed to respond to enquiries made by unit holders and other creditors.

## **7 Services Agreements**

- 7.1 Upon being appointed administrators of the Company there was already in place a service agreement between ECGA and the Company. A subsequent Services Agreement was entered into with your client on 20 December 2011.
- 7.2 ECGA invoiced the Company for the cost of providing staff, and then the Company sought reimbursement from the EIF.
- 7.3 The services provided through the Services Agreement were integral to the winding up of the EIF.
- 7.4 In proceeding to administer this process time has been spent calculating the amounts owing, issuing invoices and instructing us to make demand upon your client for the amounts claimed from the EIF.
- 7.5 Additionally, it has been necessary for our client to instruct us to correspond with you in relation to the issue with a view to obtaining payment from the EIF. To date, these requests for payment have been to no avail.

## **8 Investigations as to conduct of the Company and its officers and subsequent litigation**

- 8.1 Since our clients' appointment as administrators it has been necessary for them to investigate whether the Company in its role as responsible entity had breached its duties as a responsible entity under section 601FC of the Act, had engaged in misleading and deceptive conduct, or was negligent.
- 8.2 This investigation was necessary for the purpose of considering the proofs of debt submitted by the unit holders and reporting to the unit holders and other creditors in the report prepared by our clients in accordance with section 439A of the Act.
- 8.3 This investigation was also necessary for the purpose of an action on behalf of the unit holders against the Company's officers and other stakeholders responsible for the financial reporting requirements of the Company and the EIF.
- 8.4 In the course of the administration our clients also investigated alleged breaches of the Company's director Mr Mclvor of sections 208, 601FD, 675 and 1021C of the Act by:
- (a) using his position to obtain a personal benefit to the detriment of the funds' members;
  - (b) failing to act honestly in dealing with various borrowers, loans and properties;
  - (c) amending the Company's Constitution without disclosure to the Funds members, to the detriment of its members; and
  - (d) failing to disclose various transactions to the Funds members which may have an impact on the value of the members investments.
- 8.5 A Litigation Funding Agreement was also entered into with International Litigation Funding No1 Limited so that the available claims could be progressed. Our clients had to instruct our firm in relation to the negotiation of this agreement.
- 8.6 Our clients have also met and had ongoing communications with Ms Amanda Banton (previously of Piper Alderman and now Squire Patton Boggs) and her staff. Ms Banton acts for a number of unit holders in regards to their claims against the Company and its officers, key stakeholders responsible for the financial reporting requirements of the Company and the Equititrust Income Fund and also any claims against their respective insurers.
- 8.7 These investigations are ongoing. Mr Mclvor, along with a number of other parties, were the subject of examinations on the following dates:

Dates	Examinees
24 and 25 July 2014	Mr Tim James and Mr Sid Super
15 to 18 September 2014	Mr Mark McIvor, Mr Ryan Maddock, Mr Stephen Board and Mr Paul Steer

8.8 Following on from these examinations proceedings have been conducted through Piper Alderman against the directors and auditors, they being Proceedings number 10478 of 2011. The unit holders will have the benefit of the fruits of those actions along with other creditors.

8.9 In conducting that litigation it has been necessary for our clients to, among other things:

- (a) review and provide instructions in relation to various iterations and amendments to the pleadings;
- (b) provide instructions in relation to the provision of particulars; and
- (c) attend a mediation.

## 9 Dealing with ASIC

9.1 During the course of the administration our clients have continued to keep ASIC informed as to the progress of the administration.

9.2 For example, our clients had a meeting with Simon Temple and Amanda Rogers of ASIC on Monday 5, March 2012 in which the administration, replacement of the Company as the Responsible Entity and also the impact of an investors action group was discussed. In addition to the above our client has also reported his findings from his investigations during the administration in his report pursuant to Section 438D of the Act on 18 May 2012 and Section 533.

## 10 Dealing with loans in the EIF

10.1 During the course of the administration our clients have been involved in dealings with various loans in EIF which includes conducting investigations on these via reviewing records. Our clients attended the Company's premises during the weeks following the appointment to have discussions with Company staff about these loans and during this time photocopied records held by the Company in relation to EIF and its managed assets. This information has been investigated to determine the position of the loans and the underlying securities which in turn was used to determine current position of the EIF, likely recoveries and accordingly the impact on unit holders. Set out below is a non-exhaustive list of the matters which have been attended to by our clients with respect to loans from the EIF.

(a) *Potential litigation regarding Collingwood Park property and others*

On or about 23 February 2012 our clients had discussions with employees of the Company, Mr Brenton Task and Mr Arthur Taylor about litigation either on foot or to be commenced with regards to the Collingwood Park property, the Carbrook property, the Toowoomba property and with Mr Ian Lazar with respect to properties at Richmond and Windsor.

(b) *Tweed Central Pty Limited*

With respect to a loan made to Tweed Central Pty Limited, this was a recovery which was discussed at a meeting on 17 February 2012 attended by Ross Honeyman, Brenton Task, Mark McIvor and your client. The loan was also discussed by our clients together at a meeting with your client on 24 February 2012 in which a heads of agreement concerning a land swap between Lanslove, Tweed Heads Coursing Club and others.

(c) *Kristine Lorraine Newton*

The loan from Kristine Lorraine Newton secured by the property at Lennox Head was also discussed at the meeting on 17 February 2012. Your client requested that our clients execute the Contract for Sale in respect of this property by email dated 23 February 2012, as by that stage your client was not in a position to execute documents on behalf of the Company.

Prior to signing the Contract for Sale it was necessary for our clients to review the sale contract to satisfy themselves that it was in order.

(d) *Nirvana by the Sea*

Nirvana by the Sea was a development owned by Kirra Beachfront Investments Pty Limited. The first mortgagee was the Bank of Scotland who assigned their interest to Broadbeach BV. The Company was the Second Mortgagee.

On 27 February 2012 our clients received an email from the Company's in-house lawyer Mr Brenton Task requesting that our clients make urgent arrangements to sign a release of mortgage over the property known as Lot 801.

As our clients had no direct knowledge of the position with respect to this loan, it was necessary for some due diligence to be undertaken to ensure that, by executing the discharge, it was not adverse to the interests of the unitholders.

(e) *Rosea Pty Ltd*

Funds were lent to Rosea Pty Limited by the EIF, the EPF and the Sophisticated Fund of which 50% was lent by the Company, and 50% lent by Shareholder Pty Ltd. Prior to our appointment a settlement deed had been entered into under which, relevantly, an interim settlement sum was due on 17 June 2012, and a final settlement sum was due on 17 June 2013.

It was necessary for our clients to review documents regarding the loan, investigate and verify settlement statements, and review correspondence with your client and the Receivers regarding settlement of the loan and proceeds from settlement. Our clients were also involved in discussions regarding the distribution of the settlement proceeds.

(f) *RM Walsh Land Holdings Pty Ltd & Ors*

On about 16 July 2012, His Honour Brereton J granted leave to RM Walsh Land Holdings Pty Ltd to commence proceedings by way of filing a cross claim against the Company, which was filed on 27 July 2012. Prior to and after this order, it was necessary for our clients to review documents regarding the litigation and liaise with legal advisors about how to proceed, including responding to correspondence received relating to the settlement of the loan.

(g) *Toowoomba (Foundry Shopping Centre) Pty Ltd*

The work done by our clients regarding the loan to Toowoomba (Foundry Shopping Centre) Pty Ltd included discussions with directors about recovery of the loan and potential avenues of realisation of the property, as well as meeting with your client to discuss recovery of the loan and the potential avenues of realisation.

Whilst your client had been empowered by the orders made by the Court, your client requested our clients execute sale documents and discharge of mortgage documents to facilitate those sales. In each case, it has required some level of diligence on the part of our clients to ascertain whether our clients were acting in accordance with their duties by executing those documents. For example, our clients required valuations to ensure the sales were taking place at arms-length and a basic review of security documents to ensure the documents our clients were executing were in order.

## 11 Dealing with various issues on the Equititrust Income Fund

- 11.1 As regards the management fee payable to the Company from the EIF, it was necessary for our clients to review documentation regarding the management fee said to be payable to the Company. It was also necessary to enter into discussions with Company employees and your client regarding the claiming of these fees by the Company from the EIF.
- 11.2 It has also been necessary for our clients to investigate the creation of subordinated units and the impact on subordinated unit holder and ordinary unit holders. This included seeking and reviewing legal advice and discussions with the Company's directors and your client.
- 11.3 Our clients have also investigated the extent to which there have been impairments of loans of the EIF and the consequential impact on unit holders. The extent of these impairments and its reporting to unit holders was a focus of the examinations which were held.

## 12 Summary

We enclose some spread sheets detailing the various time entries for which indemnity is sought.

From the material included herein you will see that our client seeks indemnity for remuneration of \$1,228,325.00 (until 29 February 2016) and disbursements of \$929,640.16.

As to your enquiry concerning the mutual exchange of Proofs of Debt between our respective clients we confirm that our clients are amenable to considering such a process. Please advise how your client proposes that such a process be undertaken.

We look forward to discussing the matter further at an appropriate shortly.

Yours faithfully  
**THOMSON GEER**



**Peter Hegarty**

Partner

T +61 2 8248 3407

M 0416 052 176

E p hegarty@tglaw.com.au

**Equititrust Limited**  
**(Receiver Appointed) (In Liquidation) (Receivers and Managers Appointed)**  
**Prebilling Report by Employee Detailed**  
**For the Period 20 April 2012 until 30 November 2012**

Equititrust Limited  
 Equititrust Limited/Creditors Voluntary 1

<u>Time</u>	Partners						
<u>CREDITOR</u>							
20/04/2012		590.00	5.20	3,088.00	0.00	0.00	3,088.00
29/06/2012		590.00	1.50	885.00	0.00	0.00	885.00
4/09/2012		590.00	2.90	1,711.00	0.00	0.00	1,711.00
8/10/2012		590.00	0.70	413.00	0.00	0.00	413.00
14/11/2012		590.00	0.20	118.00	0.00	0.00	118.00
18/11/2012		590.00	0.40	236.00	0.00	0.00	236.00
22/11/2012		590.00	0.20	118.00	0.00	0.00	118.00
30/11/2012		590.00	2.10	1,239.00	0.00	0.00	1,239.00
<b>Total Task Code</b>	<b>CREDITOR</b>	<b>4,720.00</b>	<b>13.20</b>	<b>7,788.00</b>	<b>0.00</b>	<b>0.00</b>	<b>7,788.00</b>
<u>INVESTIGATIONS</u>							
2/07/2012		590.00	3.20	1,888.00	0.00	0.00	1,888.00
11/07/2012		590.00	1.40	826.00	0.00	0.00	826.00
12/07/2012		590.00	0.70	413.00	0.00	0.00	413.00
24/08/2012		590.00	2.10	1,239.00	0.00	0.00	1,239.00
<b>Total Task Code</b>	<b>INVESTIGATIONS</b>	<b>2,360.00</b>	<b>7.40</b>	<b>4,366.00</b>	<b>0.00</b>	<b>0.00</b>	<b>4,366.00</b>
<u>LITIGATION</u>							
5/06/2012		590.00	0.50	295.00	0.00	0.00	295.00
18/06/2012		590.00	1.10	649.00	0.00	0.00	649.00
25/06/2012		590.00	0.20	118.00	0.00	0.00	118.00
28/06/2012		590.00	0.30	177.00	0.00	0.00	177.00
28/06/2012		590.00	3.50	2,065.00	0.00	0.00	2,065.00
9/07/2012		590.00	1.20	708.00	0.00	0.00	708.00
13/07/2012		590.00	0.70	413.00	0.00	0.00	413.00
17/07/2012		590.00	0.40	236.00	0.00	0.00	236.00
20/07/2012		590.00	0.30	177.00	0.00	0.00	177.00
6/08/2012		590.00	1.40	826.00	0.00	0.00	826.00
8/08/2012		590.00	0.30	177.00	0.00	0.00	177.00
8/08/2012		590.00	0.40	236.00	0.00	0.00	236.00
13/08/2012		590.00	0.20	118.00	0.00	0.00	118.00
17/08/2012		590.00	2.80	1,652.00	0.00	0.00	1,652.00
22/08/2012		590.00	0.90	531.00	0.00	0.00	531.00
27/08/2012		590.00	0.90	531.00	0.00	0.00	531.00

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27/08/2012			590.00	0.80	472.00		0.00	0.00	472.00
28/08/2012			590.00	1.10	849.00		0.00	0.00	649.00
29/08/2012			590.00	0.40	236.00		0.00	0.00	236.00
30/08/2012			590.00	2.90	1,711.00		0.00	0.00	1,711.00
31/08/2012			590.00	0.40	236.00		0.00	0.00	236.00
7/09/2012			590.00	1.20	708.00		0.00	0.00	708.00
10/09/2012			590.00	1.40	826.00		0.00	0.00	826.00
17/09/2012			590.00	1.40	826.00		0.00	0.00	826.00
18/09/2012			590.00	2.70	1,593.00		0.00	0.00	1,593.00
20/09/2012			590.00	1.40	826.00		0.00	0.00	826.00
21/09/2012			590.00	0.20	118.00		0.00	0.00	118.00
24/09/2012			590.00	1.20	708.00		0.00	0.00	708.00
23/10/2012			590.00	0.60	354.00		0.00	0.00	354.00
29/10/2012			590.00	0.30	177.00		0.00	0.00	177.00
31/10/2012			590.00	1.70	1,003.00		0.00	0.00	1,003.00
19/11/2012			590.00	0.30	177.00		0.00	0.00	177.00
20/11/2012			590.00	1.10	649.00		0.00	0.00	649.00
22/11/2012			590.00	0.10	59.00		0.00	0.00	59.00
27/11/2012			590.00	0.70	413.00		0.00	0.00	413.00
28/11/2012			590.00	0.60	354.00		0.00	0.00	354.00
28/11/2012			590.00	0.60	472.00		0.00	0.00	472.00
29/11/2012			590.00	1.20	708.00		0.00	0.00	708.00
30/11/2012			590.00	0.20	118.00		0.00	0.00	118.00
<b>Total Task Code</b>		<b>LITIGATION</b>	<b>23,019.00</b>	<b>37.80</b>	<b>22,302.00</b>		<b>0.00</b>	<b>0.00</b>	<b>22,302.00</b>
<b>Total Employee</b>	<b>Albarran Richard</b>		<b>30,090.00</b>	<b>58.40</b>	<b>34,456.00</b>		<b>0.00</b>	<b>0.00</b>	<b>34,456.00</b>
<b>Andrew Elizabeth</b>		<b>Accounting</b>							
<b>ADMINISTRATION</b>									
20/04/2012			250.00	1.00	250.00		0.00	0.00	250.00
23/04/2012			250.00	0.20	50.00		0.00	0.00	50.00
9/05/2012			250.00	0.20	50.00		0.00	0.00	50.00
11/05/2012			250.00	0.10	25.00		0.00	0.00	25.00
18/06/2012			250.00	0.40	100.00		0.00	0.00	100.00
26/06/2012			250.00	0.20	50.00		0.00	0.00	50.00
17/07/2012			250.00	0.10	25.00		0.00	0.00	25.00
<b>Total Task Code</b>		<b>ADMINISTRATION</b>	<b>1,750.00</b>	<b>2.20</b>	<b>550.00</b>		<b>0.00</b>	<b>0.00</b>	<b>550.00</b>
<b>ASSETS</b>									

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	24/04/2012			250.00	0.10	25.00		0.00	0.00	25.00	
Total Task Code	10/05/2012	ASSETS		250.00	0.10	25.00		0.00	0.00	25.00	
<u>CREDITOR</u>				500.00	0.20	50.00		0.00	0.00	50.00	
	20/04/2012			250.00	3.00	750.00		0.00	0.00	750.00	
Total Task Code	20/04/2012	CREDITOR		250.00	0.40	100.00		0.00	0.00	100.00	
<u>INVESTIGATIONS</u>				500.00	3.40	850.00		0.00	0.00	850.00	
	9/05/2012			250.00	0.30	75.00		0.00	0.00	75.00	
	14/05/2012			250.00	0.10	25.00		0.00	0.00	25.00	
	17/05/2012			250.00	0.20	50.00		0.00	0.00	50.00	
	18/05/2012			250.00	0.70	175.00		0.00	0.00	175.00	
Total Task Code	4/06/2012	INVESTIGATIONS		250.00	0.10	25.00		0.00	0.00	25.00	
Total Employee	Andrew Elizabeth			1,250.00	1.40	350.00		0.00	0.00	350.00	
Aripin Lysa		Support		4,000.00	7.20	1,800.00		0.00	0.00	1,800.00	
<u>ADMINISTRATION</u>											
	15/08/2012			135.00	0.10	13.50		0.00	0.00	13.50	
Total Task Code	1/11/2012	ADMINISTRATION		135.00	0.10	13.50		0.00	0.00	13.50	
Total Employee	Aripin Lysa			270.00	0.20	27.00		0.00	0.00	27.00	
Azzam Shaneez		Accounting		270.00	0.20	27.00		0.00	0.00	27.00	
<u>ADMINISTRATION</u>											
	27/04/2012			150.00	0.20	30.00		0.00	0.00	30.00	
	1/05/2012			150.00	0.20	30.00		0.00	0.00	30.00	
	2/05/2012			150.00	0.10	15.00		0.00	0.00	15.00	
	8/05/2012			150.00	0.20	30.00		0.00	0.00	30.00	
	22/06/2012			150.00	0.30	45.00		0.00	0.00	45.00	
Total Task Code	27/06/2012	ADMINISTRATION		150.00	0.80	120.00		0.00	0.00	120.00	
Total Employee	Azzam Shaneez			900.00	1.80	270.00		0.00	0.00	270.00	
Cook Timothy		Associates		900.00	1.80	270.00		0.00	0.00	270.00	
<u>? Unspecified Time</u>											
	14/08/2012			550.00	0.50	275.00		0.00	0.00	275.00	
	14/08/2012			550.00	0.30	165.00		0.00	0.00	165.00	
	14/08/2012			550.00	0.20	110.00		0.00	0.00	110.00	
Total Task Code	14/08/2012	? Unspecified Time		550.00	0.10	55.00		0.00	0.00	55.00	
<u>ADMINISTRATION</u>				2,200.00	1.10	605.00		0.00	0.00	605.00	
	13/08/2012			550.00	0.20	110.00		0.00	0.00	110.00	
Total Task Code		ADMINISTRATION		550.00	0.20	110.00		0.00	0.00	110.00	
<u>ASSETS</u>											
	3/05/2012			550.00	0.80	440.00		0.00	0.00	440.00	
	29/05/2012			550.00	0.20	110.00		0.00	0.00	110.00	

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packing up from meeting of creditors

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ASSETS

Total Task Code  
CREDITOR



16/07/2012	550.00	0.20	110.00	0.00	0.00	110.00
16/07/2012	550.00	0.90	495.00	0.00	0.00	495.00
16/07/2012	550.00	0.30	165.00	0.00	0.00	165.00
16/07/2012	550.00	0.30	165.00	0.00	0.00	165.00
17/07/2012	550.00	0.30	165.00	0.00	0.00	165.00
24/07/2012	550.00	0.10	55.00	0.00	0.00	55.00
25/07/2012	550.00	0.70	385.00	0.00	0.00	385.00
25/07/2012	550.00	0.30	165.00	0.00	0.00	165.00
1/08/2012	550.00	0.30	165.00	0.00	0.00	165.00
6/08/2012	550.00	2.80	1,540.00	0.00	0.00	1,540.00
6/08/2012	550.00	0.30	165.00	0.00	0.00	165.00
10/08/2012	550.00	1.10	605.00	0.00	0.00	605.00
13/08/2012	550.00	2.90	1,595.00	0.00	0.00	1,595.00
16/08/2012	550.00	0.30	165.00	0.00	0.00	165.00
28/08/2012	550.00	0.10	55.00	0.00	0.00	55.00
28/08/2012	550.00	0.20	110.00	0.00	0.00	110.00
4/09/2012	550.00	0.30	165.00	0.00	0.00	165.00
5/09/2012	550.00	0.10	55.00	0.00	0.00	55.00
12/09/2012	550.00	0.80	440.00	0.00	0.00	440.00
13/09/2012	550.00	0.10	55.00	0.00	0.00	55.00
14/09/2012	550.00	0.80	440.00	0.00	0.00	440.00
14/09/2012	550.00	0.50	275.00	0.00	0.00	275.00
17/09/2012	550.00	0.20	110.00	0.00	0.00	110.00
24/09/2012	550.00	1.20	660.00	0.00	0.00	660.00
25/09/2012	550.00	0.30	165.00	0.00	0.00	165.00
12/10/2012	550.00	1.20	660.00	0.00	0.00	660.00
17/10/2012	550.00	0.30	165.00	0.00	0.00	165.00
23/10/2012	550.00	1.80	990.00	0.00	0.00	990.00
29/10/2012	550.00	0.30	165.00	0.00	0.00	165.00
30/10/2012	550.00	0.20	110.00	0.00	0.00	110.00
31/10/2012	550.00	1.00	550.00	0.00	0.00	550.00
5/11/2012	550.00	1.80	990.00	0.00	0.00	990.00

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7/11/2012		550.00	0.80	440.00	0.00	0.00	440.00
13/11/2012		550.00	0.30	165.00	0.00	0.00	165.00
21/11/2012		550.00	4.50	2,475.00	0.00	0.00	2,475.00
22/11/2012		550.00	4.80	2,640.00	0.00	0.00	2,640.00
23/11/2012		550.00	1.60	880.00	0.00	0.00	880.00
23/11/2012		550.00	2.60	1,430.00	0.00	0.00	1,430.00
26/11/2012		550.00	0.10	55.00	0.00	0.00	55.00
28/11/2012		550.00	0.50	275.00	0.00	0.00	275.00
29/11/2012		550.00	0.80	440.00	0.00	0.00	440.00
29/11/2012		550.00	0.20	110.00	0.00	0.00	110.00
29/11/2012		550.00	0.20	110.00	0.00	0.00	110.00
29/11/2012		550.00	0.20	110.00	0.00	0.00	110.00
30/11/2012		550.00	2.50	1,375.00	0.00	0.00	1,375.00
<b>Total Task Code</b>	<b>INVESTIGATIONS</b>	<b>33,000.00</b>	<b>54.40</b>	<b>29,920.00</b>	<b>0.00</b>	<b>0.00</b>	<b>29,920.00</b>
<b>LITIGATION</b>							
29/05/2012		550.00	0.10	55.00	0.00	0.00	55.00
23/10/2012		550.00	2.80	1,540.00	0.00	0.00	1,540.00
7/11/2012		550.00	0.20	110.00	0.00	0.00	110.00
15/11/2012		550.00	1.60	880.00	0.00	0.00	880.00
28/11/2012		550.00	1.20	660.00	0.00	0.00	660.00
<b>Total Task Code</b>	<b>LITIGATION</b>	<b>2,750.00</b>	<b>5.90</b>	<b>3,245.00</b>	<b>0.00</b>	<b>0.00</b>	<b>3,245.00</b>
<b>Total Employee</b>	<b>Cook Timothy</b>	<b>66,750.00</b>	<b>118.00</b>	<b>64,900.00</b>	<b>0.00</b>	<b>0.00</b>	<b>64,900.00</b>

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"DW - 10"

Our Reference Jacqueline Ogden 201110996  
Direct Line +61 7 3231 1688  
Email jacqueline.ogden@gadens.com  
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

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1 November 2016

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Attention: Peter Hegarty

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By email: [PHegarty@tglaw.com.au](mailto:PHegarty@tglaw.com.au)

Dear Colleagues

**Equititrust Limited (In Liquidation) (Receivers and Managers Appointed) (EL)**

We refer to your letter of 23 September 2016.

We are presently considering the information provided in your letter, including the spreadsheets detailing the time entries for which indemnity is sought.

In the interim, we are instructed to seek from your clients' clarification in relation to their remuneration and disbursements claim.

**Remuneration**

Specifically, we note that in the spreadsheet provided to us it records:

- for the period 20 April 2012 to 30 November 2012 – work in the amount of \$384,283.50;
  - for the period 1 December 2012 to 26 February 2016 – work in the amount of \$844,071.50,
- totalling \$1,228,355.00.<sup>1</sup>

However, in your clients' Form 524s and reports to investors it records:

- that on 15 March 2013 your clients were paid fees in the amount of \$440,000;
- that on 18 April 2013 your clients were paid fees in the amount of \$260,162.46;
- that on 26 July 2013 your clients were paid fees in the amount of \$231,813.09;
- that on 30 October 2013 your clients' remuneration for the period 20 April 2012 to 30 November 2012 was approved by the Court in the amount of \$497,714.03 plus GST;
- that on 30 October 2013 your clients' remuneration for the period 1 December 2012 to 30 April 2013 was approved by the Court in the amount of \$402,525.45 plus GST;

<sup>1</sup> We note that on page 13 of your letter it refers to a claim for the amount of \$1,228,325. We assume this is a typographical error and in fact the claim is for the total amount of \$1,228,355.

- that on 14 November 2013 your clients were paid fees in the amount of \$498,287.88; and
- that, to date, they have been paid remuneration totalling **\$1,430,263.43**.

As a preliminary comment, we note that the description of the work undertaken by your clients provided in your letter of 23 September 2016 includes:

- a description of work which took place in the months immediately following your clients' appointment as liquidators, the remuneration for which work appears to have already been claimed, approved and now paid;
- a description of work undertaken by your clients on behalf of Equititrust Limited in its own right and in respect of its role as manager/trustee of other funds (ie. the Equititrust Premium Fund).

In light of the above, and in order so that our client may properly consider the information provided in support of your clients' claim for remuneration, would you please:

- (a) clarify for what periods the paid fees (referred to above) relate to;
- (b) provide us with copies of any documents evidencing the fixing and/or approval of your clients' remuneration (either by the committee of inspection, resolution of creditors or order of the Court), including, but not limited to, a copy of the orders made on or about 30 October 2013, referred to in your clients' report dated 15 November 2013; and
- (c) clarify the basis for your clients' claim for indemnity for their remuneration of \$1,228,325.00 (for the period until 29 February 2016), given it appears they have already been paid remuneration for the same period now being claimed.

#### **Disbursements**

Your letter includes a summary of the disbursements claimed, including:

- disbursements in the amount of \$402,289.76 (including the amount of \$202,389 claimed in respect of the ECG Services Agreement);
- legal fees in the amount of \$527,350.40 for matters including "Remuneration Application", "General", "Set Off" and "Jeanes Proceedings",

totalling \$929,640.16.

Would you please let us know when we can expect to receive the redacted invoices of the legal costs summarised in your letter. Would you please also provide with these invoices an explanation as to what work was undertaken in respect of each matter, that is, what work was undertaken in respect of each matter named "Remuneration Application", "General", "Set Off" and "Jeanes Proceedings".

On a preliminary review of the information contained in your letter, it appears that some of the amounts claimed under the "General" matter may relate to proceedings numbered 10709 of 2013. As your clients are aware, they were ordered to pay our client's cost in those proceedings.

Further, in your clients' Form 524s it records that:

- an amount of \$464,506.86 has been paid to Thomson Lawyers (for legal fees and disbursements); and
- an amount of \$287,413.87 have been paid to your clients for disbursement.

In light of the above, in addition to the remuneration information sought above, in order so that our client may properly consider the information provided in support of your clients' claim for disbursements, would you please:

- (a) clarify what has already been paid to your clients by way of disbursements, noting those amounts recorded in your clients Form 524s;
- (b) clarify the basis for your clients' claim for disbursements of \$929,640.16, given it appears they have already been paid the amount of \$751,920.73 for disbursements for the same period now being claimed.

Separately, we note that your letter refers to work relating to the examinations conducted by your clients as well as the proceedings commenced by them against certain directors/former directors of Equititrust Limited and the auditors of Equititrust Limited. In order so that our client may consider this aspect of your clients' claim, would you please provide us with a copy of the Litigation Funding Agreement entered into by your clients.

Would you please provide us with your clients' response as soon as possible but in any event by no later than **Tuesday, 8 November 2016**.

We look forward to hearing from you.

Yours faithfully



**Jacqueline Ogden**  
Senior Associate

" DW-111 "

**THOMSON GEER**  
LAWYERS

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Our ref PJH:3688014

24 January 2017

**Scott.couper@gadens.com / Jacqueline.ogden@gadens.com**

Attention: Mr Scott Couper / Ms Jacqueline Ogden  
Gadens Lawyers  
Via email only

Dear Sirs

**Equititrust Ltd (in liquidation)(receivers appointed)(receivers & managers appointed) ("Company")  
Equititrust Income Fund (receiver appointed) ("EIF")  
Equititrust Priority Class Income Fund ("EPCIF")  
Equititrust Premium Fund (an unregistered scheme) (Controller appointed) ("EPF")  
(together the "Funds")**

We refer to your letter of 1 November 2016.

We are instructed that your summary as to the amounts paid to our clients is correct.

However, your letter proceeds on the incorrect premise that simply by reason of our clients having been paid those amounts from other recoveries, they do not maintain an entitlement to any indemnity from the EIF. That is simply not the case.

Were the position as advanced in your letter correct, it would mean that creditors of our client's liquidation would be prejudiced by effectively meeting the liability of the EIF to our clients under the indemnity. To the extent any amounts have been paid, a right of subrogation clearly emerges.

All amounts payable to our clients need to be paid to them, whereupon our clients will make a distribution in accordance with the priorities under the *Corporations Act 2001* (Cth) upon determining all Proofs of Debt. In this respect your client is at liberty to himself submit a Proof of Debt, which we would again respectfully suggest represents the most appropriate means of advancing matters.

You have made reference to our client's letter having described work undertaken by our clients on behalf of Equititrust Limited in its own right and in respect of its role as manager/trustee of other funds. Please identify the references to which you have referred in this respect, so that our clients may consider them.

As requested, we **enclose** a copy of the Short Minutes of Order agreed by the parties and entered by the Court on 1 November 2013, which relate to the periods of 20 April 2012 to 30 April 2013.

We are in the process of redacting our clients' invoices which we will provide to you shortly. You will appreciate that those invoices contain privileged material.

We are instructed that our client is not in a position to provide a copy of the subject Litigation Funding Agreement as it is subject to obligations of confidentiality.

We trust this letter assists your client in considering its position and await your response.

Yours faithfully  
**THOMSON GEER**



**Peter Hegarty**

Partner

T +61 2 8248 3407

M 0416 052 176

E phegarty@tglaw.com.au

encl

## SHORT MINUTES OF ORDER

### COURT DETAILS

Court Supreme Court of New South Wales  
Division Equity  
List Corporations  
Registry Sydney  
Case number 2013/136475

### TITLE OF PROCEEDINGS

Plaintiff **RICHARD ALBARRAN, BLAIR ALEXANDER PLEASH  
AND GLEN PETER OLDHAM IN THEIR CAPACITY AS  
LIQUIDATORS OF EQUITITRUST LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN  
LIQUIDATION)  
ABN 74 061 383 944**

Objector/Applicant **MS ASIA DEBT ACQUISITIONS LIMITED**

### FILING DETAILS

Filed for **Richard Albarran, Blair Alexander Pleash and Glen  
Peter Oldham in their capacity as liquidators of  
Equititrust Limited (Receivers and Managers  
Appointed) (In liquidation), Plaintiff**

Legal representative Peter Justin Hegarty, Thomsons Lawyers  
Legal representative reference PJH:3441653  
Contact name and telephone Katherine Jones, (02) 8248 3406  
Contact email kjones@thomsonslawyers.com.au

### TERMS OF ORDERS

By Consent, the Court orders that:

- 1 Pursuant to section 511 of the *Corporations Act 2001 (Cth)* that the amount of the remuneration of Richard Albarran, Blair Alexander Pleash and Glen Peter Oldham as the joint and several liquidators of Equititrust Limited ACN 061 383 944 (In Liquidation) (Receivers & Managers Appointed) for the period 20 April 2012 to 30 November 2012 be fixed in the sum of \$497,714.03 plus any applicable GST;
- 2 Pursuant to section 504(1) of the *Corporations Act 2001 (Cth)* that the amount of the remuneration of Richard Albarran, Blair Alexander Pleash and Glen Peter Oldham as the joint and several liquidators of Equititrust Limited ACN 061 383 944

(In Liquidation) (Receivers & Managers Appointed) for the following periods be fixed in the following amounts plus any applicable GST:

a. 1 December 2012 – 31 December 2012	\$87,272.62
b. 1 January 2013 – 31 January 2013	\$125,587.58
c. 1 February 2013 – 28 February 2013	\$61,476.00
d. 1 March 2013 – 31 March 2013	\$65,711.70
e. 1 April 2013 – 30 April 2013	\$62,477.55
TOTAL:	\$402,525.45

- 3 The costs of the Applicant, MS Asia Debt Acquisition Limited, be fixed in the sum of \$15,000 (inclusive of GST) and paid from the assets of the liquidation as a priority.
- 4 These proceedings, including the Interlocutory Process filed 27 August 2013, otherwise be dismissed.

**SIGNATURES**

Signature of legal representative  
Capacity  
Date of signature

Solicitor for the Plaintiff

Signature of legal representative  
Capacity  
Date of signature

*TUCKER & COHEN*

Solicitor for the Objector/ Applicant

*1/11/2013*

"DW-12"

Our Reference  
Direct Line  
Email  
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21 March 2017

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Attention: Peter Hegarty

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By email: [PHegarty@tglaw.com.au](mailto:PHegarty@tglaw.com.au)

Dear Colleagues

**Equititrust Limited (In Liquidation) (Receivers and Managers Appointed) (EL)**

We refer to our recent correspondence in this matter.

We note you previously indicated you would provide us with a copy of the redacted invoices of the legal costs summarised in your letter of 23 September 2016. We have not yet received a copy of those invoices. Would you please provide us with a copy of the redacted invoices as soon as possible.

We also note our previous request that you provide, with these invoices, an explanation as to what work was undertaken in respect of each matter, that is, what work was undertaken in respect of each matter named "Remuneration Application", "General", "Set Off" and "Jeanes Proceedings".

In addition to the above, we note that the spreadsheet you have provided of the relevant narrations for the work undertaken to the period ending 29 February 2016, does not include any narrations for the period in which EL was in voluntary administration.

Would you please clarify whether your client's seek any indemnity for any remuneration or costs in their capacity as administrators of EL?

We look forward to hearing from you as soon as possible but in any event by no later than **Tuesday, 28 March 2017**.

Yours faithfully

  
**Jacqueline Ogden**  
Senior Associate