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**Banksia Securities Limited**  
**ACN: 004 736 458**  
**(Receivers and Managers Appointed)(In Liquidation) ("BSL")**

**Circular to Debenture Holders: Trustee Fee Application**

**8 February 2016**

The purpose of this circular is to provide debenture holders with a brief update on the status of the receivership and detailed information on the Trustee Fee Application.

**The Receivership**

The main aspects of the Receivership are largely complete. Debenture holders have received repayments of 80 cents in the dollar, and the Receivers are holding funds of \$25.6 million (which is equivalent to a repayment of approximately 3.5 to 4 cents in the dollar), noting that these funds are subject to some claims for costs. The issues the Receivers are still progressing include:

- a) managing a small number of remaining impaired loans;
- b) assisting the Liquidators as required, with the BSL litigation; and
- c) progressing the Trustee Fee application.

**Trustee Fee Application**

In our previous circulars to debenture holders we have foreshadowed that the Receivers would be seeking directions from the Court that the Receivers are justified in paying The Trust Company (Nominees) Limited ("**Trustee**") additional remuneration for work performed by the Trustee since the appointment of Receivers to BSL on 25 October 2012.

We confirm that the Receivers have now issued the foreshadowed application in the Supreme Court of Victoria ("**Remuneration Application**"). The Receivers are seeking a direction from the Court that the Receivers are justified in paying out of the assets of BSL the sum up to an amount of \$3,960,163 to the Trustee for work performed by the Trustee for the period 25 October 2012 to February 2014. The Receivers view is that the appropriate amount that BSL pay for additional remuneration be a lesser amount of \$2,767,931 for this period.

The Receivers' basis for recommending this amount is fully explained in the supporting affidavit sworn by Joseph Hayes (one of the receivers (on 16 December 2015) "**Hayes Affidavit**") and in particular in paragraph 142-174 of that affidavit. The amount represents the lowest sum offered by the Trustee and included no calculated uplift and 15% discount on fees. It is important to note that the Trustee's offer was made on the basis that the matter did not go to court and was accepted by the debenture holder committee. The debenture holder committee did not accept this offer. Therefore, the Receivers have determined to seek directions from the Court. Ultimately, it will be the Court's decision what, if any, direction is given to the Receivers as to the appropriate amount of additional remuneration to be paid to the Trustee.

Materials have been filed with the Court in support of the application, including an Originating Process and the Hayes Affidavit. The materials are voluminous so electronic copies have been made available electronically online at:

[www.mcgrathnicol.com/assignments/banksia-securities-limited/](http://www.mcgrathnicol.com/assignments/banksia-securities-limited/)



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If you do not have Internet access and you wish to be provided a hard copy of the materials, please contact Link Market Services on 02 8767 1029 or [banksia@linkmarketservices.com.au](mailto:banksia@linkmarketservices.com.au).

The work for which the Trustee is claiming remuneration is summarised in the Hayes Affidavit. The Receivers note that the Trustee is not claiming remuneration for fees incurred by it in respect of its defence of both the class action or the legal action brought by the Liquidators against the Trustee. The Trustee has borne its own costs in relation to its defence of both these proceedings. The Receivers also note that the remuneration sought by the Trustee is for the period up to February 2014. Whilst the Receivers understand that the Trustee has spent a significant amount of time dealing with this matter since February 2014, it has not charged any additional remuneration for that subsequent period. However, the Trustee reserves its right to do so and the Receivers will be seeking orders from the Court concerning the process for negotiating and approving any further remuneration (if any) claimed by the Trustee.

Attached to this circular is a summary of the background to the Remuneration Application, including an overview of:

- a) legal advice from Queen's Counsel;
- b) the Trustee's legal entitlement to remuneration; and
- c) consultation with the debenture holder committee.

It is important that debenture holders note that the attached is a high level summary of the steps the Receivers have taken in dealing with the Trustee's request for additional remuneration. For a full understanding of events, debenture holders should carefully read the Hayes Affidavit and exhibits.

In addition, we have attached answers to some anticipated Frequently Asked Questions ("FAQs") regarding the Remuneration Application.

### **Update on first directions hearing**

The Remuneration Application was listed for a first directions hearing before the Honourable Justice Croft on 29 January 2016. At this directions hearing His Honour adjourned the Remuneration Application to **26 February 2016** to allow the Receivers to issue this circular to debenture holders and capture any responses or nominations for contradictor from debenture holders or other interested parties (discussed below).

### **Contradictor**

A debenture holder may wish to nominate themselves as a contradictor. The role of the contradictor is to assist the Court in presenting the opposing arguments to those put by the Receivers, so that all issues are properly ventilated before the Court. The contradictor may adduce evidence and / or make submissions to the Court in opposition to the payment of additional remuneration to the Trustee, in whole or in part. The contradictor's legal fees will be funded by BSL. The Receivers have received notification from Mr Bolitho (the class action plaintiff) that he intends to apply to be appointed as contradictor. Please note that it is for the Court to decide whether a contradictor is required, and who the contradictor should be.

### **Further updates**

We will keep debenture holders updated during the course of the legal proceedings, including any changes to Court dates, via the dedicated website noted above. If you are interested in the progress of the application, we suggest that you check the website regularly.



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### Next steps for debenture holders

We are conscious that this is a material issue and debenture holders may have questions or comments regarding the proposal.

If debenture holders wish to:

- a) comment on the Remuneration Application;
- b) support or object to the Remuneration Application; or
- c) nominate themselves as a contradictor to the Remuneration Application,

please contact Link Market Services by telephone on 02 8767 1029 or via email to [banksia@linkmarketservices.com.au](mailto:banksia@linkmarketservices.com.au) as soon as possible prior to **Friday 19 February 2016**.

Your comments, support or objections regarding the Remuneration Application will be summarised and provided to the Court together with any nominations for contradictor at the second directions hearing on **Friday 26 February 2016**.

### Further information

For further information, please continue to contact Link Market Services on 02 8767 1029 or [banksia@linkmarketservices.com.au](mailto:banksia@linkmarketservices.com.au).

We will separately provide an update in relation to the remaining issues in the receivership later this month.

Dated **8 February 2016**

Tony McGrath  
*Receiver and Manager*

Joseph Hayes  
*Receiver and Manager*



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### BACKGROUND TO REMUNERATION APPLICATION

It is important that debenture holders note that the below is a high level summary of the steps the Receivers have taken in dealing with the Trustee's request for additional remuneration. For a full understanding of events, debenture holders should carefully read the Hayes Affidavit and exhibits.

#### *Legal advice from Queen's Counsel*

In view of the complex nature of the Banksia receivership, the significant quantum of fees, and the possibility of disputes arising from the payment of professional fees, the Receivers sought advice from two Queen's Counsel and have proceeded on the basis that any payment of additional remuneration to the Trustee must either be endorsed by the debenture holder committee or by direction of the Court.

#### *Trustee's Legal Entitlement to Additional Remuneration*

In June 2013, we received a proposal from the Trustee for payment of additional remuneration for work performed by it following the enforcement of the relevant Trust Deed with respect to BSL. The Trustee proposed that it be paid a fee of \$4.2 million calculated on the basis of 1% of the total distributions made to debenture holders as at 3 June 2013. Following review of this fee proposal, the Receivers determined that it was appropriate that they seek legal advice from Queen's Counsel as to whether the Trustee:

- a) had a legal entitlement to be paid additional remuneration under the Trust Deed; and
- b) if so, how that amount should be calculated.

In broad terms, Queen's Counsel advised that:

- a) the Trustee did have a legal entitlement to be paid additional remuneration in consequence of enforcing the Trust Deed;
- b) the fee must be commensurate with any additional duties and responsibilities performed by the Trustee;
- c) the Trust Deed imposes an obligation on the Trustee and the Receivers to endeavour to reach an agreement as to the amount of additional remuneration to which the Trustee is entitled;
- d) the appropriate method for assessing the Trustee's fee is for the Trustee's work to be divided into two categories:
  - i. day to day work for which an appropriate hourly rate would be charged. For example, work of a procedural and administrative nature, such as communications with debenture holders and the Receivers; and
  - ii. work that has a real value add component which is not covered by an hourly rate (**Value Add work**). For example, work where the Trustee has exercised a high level of skill and judgement to enhance the level of distributions to debenture holders.
- e) the Trustee would not be entitled to be paid fees for work not benefitting debenture holders such as work relating to the class action, and time spent on negotiating its own remuneration.

Queen's Counsels' advice was provided to the Trustee and negotiations commenced regarding the appropriate amount of additional remuneration that should be paid to the Trustee using the guidelines and principles set out in Queen's Counsels' advice. These negotiations culminated in the Receivers entering into an agreement with the Trustee on 10 December 2013 for the payment of additional remuneration of \$3.1 million for the period from commencement of the receivership to 31 August 2013, subject to consultation with the debenture holder committee and, if necessary, Court approval.



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### *Consultation with the debenture holder committee*

The Receivers convened a debenture holder committee meeting on 12 December 2013 to present to the committee the advice obtained from Queen's Counsel regarding the Trustee's entitlement to be paid additional remuneration and the Trustee's fee proposal to be paid \$3.1 million. At the debenture holder committee meeting the debenture holder committee accepted that the Trustee was entitled to be paid some additional remuneration under the Trust Deed, however approved the payment of a lower amount calculated exclusively on an hourly rate basis with no provision for Value Add work.

The debenture holder committee subsequently advised the Receivers that this approval was also subject to appropriate fees being charged (and detail being given) by the Trustee for the period from 1 September 2013 to 30 November 2013.

A further fee submission was issued by the Trustee to the Receivers on 9 January 2014 in relation to the period 1 September 2013 to 30 November 2013, and was provided to the debenture holder committee by the Receivers. Following receipt of the further fee submission from the Trustee, the debenture holder committee did not approve the further fee request, and additionally withdrew its approval of the earlier fee amount noting that the appropriate course was for the Receivers to seek approval of the Court.

An alternative fee proposal was put by the Trustee to the debenture holder committee on 10 February 2014 for the period 25 October 2012 to 30 November 2013 ("**February Fee Proposal**"). In this proposal the Trustee proposed:

- a) a fee of \$2,647,931 representing no amount for Value Add work and a 15% discount on its fees; and
- b) the Trustee's ongoing fees be capped at \$60,000 for December 2013 and then at \$30,000 from January 2014 onwards.

The February Fee Proposal was not approved by the debenture holder committee, which maintained its view that no fee should be paid to the Trustee until Court approval was obtained.

On 29 April 2014 the Receivers received a final fee proposal from the Trustee for the period 25 October 2012 to February 2014 for the amount of \$3.8 million calculated on the basis of hourly rate work and Value Add work ("**April Fee Proposal**"). This fee proposal noted that the Trustee had previously attempted to compromise its claim for additional remuneration in the February Fee Proposal but these attempts had been rejected by the debenture holder committee.

In an attempt to avoid the costs of bringing a court application, the Receivers canvassed with the debenture holder committee the possibility of the debenture holder committee passing a resolution to endorse the process the Receivers had undertaken to negotiate the amount of the additional remuneration (as distinct to agreeing to the actual amount of the fee payable to the Trustee). However, the debenture holder committee remained of the view that no payment should be made to the Trustee without an order from the Court.

Accordingly, on 17 December 2015 the Receivers issued the Remuneration Application seeking directions from the Court as to the appropriate amount of additional remuneration that should be paid to the Trustee for work performed in consequence of enforcing the Trust Deed.

In relation to the amount of additional remuneration claimed, we note that the amount set out in the Originating Process of \$3,960,163 is referable to the April Fee Proposal provided by the Trustee to the Receivers for the period 25 October 2012 to 28 February 2014. However, in the Hayes Affidavit the Receivers conclude that it is appropriate that the Receivers cause BSL to pay the additional remuneration as set out in the February Fee Proposal, being the lesser amount of \$2,767,931.

We note that in forming this view, that other stakeholders, including the Trustee, will have their own views on the most appropriate amount for the Additional Remuneration, following the approval process the Receivers have tried to put in place. We note in that regard, as set out in the Hayes Affidavit, that the



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Receivers were prepared, at different stages during the process, to recommend a higher sum be approved by the debenture holder committee.

Ultimately, it will be up to the Court to provide guidance to the Receivers as to the appropriate amount of additional remuneration to be paid to the Trustee.



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## FREQUENTLY ASKED QUESTIONS

### 1. WHAT IS THIS COURT APPLICATION ABOUT?

The Receivers have made an application to the Supreme Court of Victoria seeking directions for BSL to pay additional remuneration to the Trustee as a result of enforcing the Trust Deed, which the Trustee has demanded be paid pursuant to the Trust Deed.

The Court will be asked for guidance on whether the Receivers are justified in paying the additional remuneration to the Trustee in accordance with the Trust Deed and as to the appropriate amount.

### 2. WHY IS THE TRUSTEE ENTITLED TO ADDITIONAL REMUNERATION FOLLOWING ENFORCEMENT OF THE TRUST DEED?

Pursuant to the terms of the Trust Deed, the Trustee is entitled to be paid additional remuneration for any additional duties and responsibilities performed as a consequence of enforcing the Trust Deed.

The remuneration must be commensurate with or proportionate to the work performed. The amount of additional remuneration is not fixed by the Trust Deed, rather it is to be agreed between the Trustee and the Receivers of BSL.

### 3. WHAT ADDITIONAL WORK HAS THE TRUSTEE DONE THAT IT IS CLAIMING ADDITIONAL REMUNERATION FOR?

The Trustee has identified certain work performed by it following the enforcement of the Trust Deed, which it considers to be additional duties and responsibilities performed as a consequence of enforcing the Trust Deed. According to the Trustee, these include the following categories of work:

- a) dealing with the Kyabram Group and other interested parties;
- b) overseeing the Receivers' loan book sale processes;
- c) accounting to debenture holders and other stakeholders;
- d) overseeing the memorandum of understanding process;
- e) attending and reporting on board meetings;
- f) legal tasks relating to the appointment and the receivership;
- g) communications and stakeholder liaison; and
- h) reporting to ASIC.

### 4. WHAT IS THE AMOUNT OF THE ADDITIONAL REMUNERATION CLAIMED?

In the Originating Process for the application, the Receivers have asked for directions from the Court that BSL is justified in paying the Trustee the following amounts in additional remuneration:

- a) for the period 25 October 2012 to February 2014, the amount of \$3,960,163 (or such other sum as the Court considers appropriate); and
- b) for the period from February 2014 to completion of the enforcement of the BSL Trust Deed, the Receivers will be seeking orders from the Court concerning the process for negotiating and approving any further remuneration (if any) claimed by the Trustee.

The Receivers' view is that the appropriate amount that the Trustee should be paid for this period is \$2,767,931 (refer to the circular for further detail). Ultimately, it will be the Court's decision what, if any, direction is given to the Receivers about what is an appropriate amount of additional remuneration for BSL to pay to the Trustee.



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**5. WILL THE PAYMENT OF ADDITIONAL REMUNERATION TO THE TRUSTEE REDUCE THE AMOUNT OF FURTHER DISTRIBUTIONS TO DEBENTURE HOLDERS?**

Yes. The additional remuneration will be paid to the Trustee from the assets of BSL, which means that the payment will reduce the amount of further distributions to debenture holders. This is consistent with the order of priority of payments under the Trust Deed.

**6. WHAT IS A CONTRADICTOR?**

Because this is an application for directions there are no defendants or other parties to the proceeding. In these circumstances, the Court may decide to appoint a "contradictor" to put forward the countervailing position to the Court.

A contradictor is a person who appears at the hearing to represent the interests of a person or group of people who will be affected by the decision in the Court application. The contradictor will make sure that all relevant information has been presented to the Court and make submissions in opposition to the Receivers' application to pay the additional remuneration (in whole or in part). The contradictor's legal fees will be funded by BSL.

The Receivers have notified the debenture holder committee about seeking an interest in being appointed as the contradictor. If a debenture holder would like to participate as a contradictor they should contact Link Market Services by telephone on 02 8767 1029 or via email to [banksia@linkmarketservices.com.au](mailto:banksia@linkmarketservices.com.au) as soon as possible prior to Friday, 19 February 2016. The Court will ultimately decide whether to appoint a contradictor and, if so, who the contradictor should be.

**8. WHEN WILL THE SUPREME COURT MAKE A DECISION?**

The Supreme Court has set the date for a second directions hearing on 26 February 2016. At that hearing, the Court is likely to appoint a contradictor and set a timetable for the proceeding, including a date for the final hearing. Following the final hearing, the Court will make a decision in relation to the payment of the additional remuneration to the Trustee. The Court may take some time after the hearing to make that decision.