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6 November 2024

Circular to Debenture Holders

Dear Sir/Madam

**Banksia Securities Limited
(Receivers and Managers Appointed) (In Liquidation) (Special Purposes Receivers Appointed)
ACN 004 736 458 (Banksia)**

IMPORTANT NOTICE RE PROPOSED SETTLEMENTS AND FINAL DISTRIBUTION

The purpose of this circular is to provide an important update on the special purpose receivership and to give notice of an application that I have filed in the Supreme Court of New South Wales seeking:

- Court approval of the settlement of all claims against:
 - Elliott Legal Pty Ltd, MCM (Mt Buller) Developments Pty Ltd, Decoland Holdings Pty Ltd, Alexander Christopher Elliott and Maximilian Elliott on behalf of the estate of Mr Mark Edward Elliott (**Elliott Entities**) for \$10 million;
 - Mr Michael Symons for \$250,000; and
 - Mr Tony Zita for \$95,000;
- Directions that I am justified in not pursuing potential claims against the Legal Practitioners Liability Committee (**LPLC**) or Portfolio Law Pty Ltd (**Portfolio Law**);
- Approval for me to make a final distribution to debenture holders of approximately **\$19.3m (Final Distribution)**;
- Directions that I am justified in paying my remuneration, costs and expenses incurred from the realisations in the special purpose receivership, and subsequently from unrepresented payments from previous distributions to debenture holders;
- Directions as to how I should deal with unrepresented payments from previous distributions to debenture-holders, which I propose to first apply in payment of my remuneration and expenses of the special purpose receivership, and to pay the balance to charity; and
- Approval of my remuneration incurred as SPR of Banksia from 1 March 2022 to 31 July 2024 in the sum of \$198,538 excl GST.

The application is listed for further directions at **9:15 am on 5 December 2024**. Details about the application and how you can express your views on the settlement are set out below.

If the Court makes the orders that are sought in the application, it will bring all matters relating to the Banksia Proceedings to an end, and the purpose of my appointment as SPR will be fulfilled. Once all necessary steps are taken, I would then apply to the Supreme Court of New South Wales seeking to be discharged from my appointment.

Copies of this circular and documents identified below are available on the Banksia Securities webpage <https://kpmg.com/au/en/home/creditors/banksia-securities-limited.html> (**Banksia Webpage**).

1. Background

As you know, on 11 October 2021 in *Bolitho v Banksia Securities Ltd (no 18) (Remitter)* [2021] VSC 666 (**Remitter Judgment**), the Supreme Court of Victoria ordered, amongst other things, that the defendants pay the following amounts to me on behalf of debenture holders:

- Compensation of approximately **\$11.7m (Compensation Component)**; and
- The following costs on an indemnity basis:
 - My costs of the Botsman Appeal and the Remitter; and
 - The Contradictor's costs of the Remitter, (**Costs Component**).

The Costs Component has not been taxed (the Court process for fixing the amount recoverable), but the costs actually incurred total approximately **\$10.6m**. On a taxation, I expect to recover at least 90% of the total amount of the costs actually incurred. Overall, it is reasonable to assume that up to approximately **\$9.54m** would be recoverable. This does not take into account any interest debenture-holders may be owed on the Costs Component. The Compensation Component and the Costs Component exceeds **\$20m**.

The defendants liable for both the Compensation Component and the Costs Component included the Australian Funding Partners Pty Ltd (in liquidation) (**AFP**) and Mr. Alexander Elliott. AFP was placed into liquidation shortly after the Remitter Judgment in January 2022. The liquidator of AFP has issued reports determining that AFP is insolvent and cannot make any contribution to the Compensation Component and Costs Component. The liquidator also concluded that he would need funding to undertake any further investigations to determine whether any viable claims exist against third parties, including AFP's legal advisors for the Remitter Judgment who received very substantial legal fees. Based on my inquiries, it also appears that the Estate of Mr. Mark Elliott and Mr. Alexander Elliott do not hold any assets I can enforce the Remitter Judgment against. Consequently, I have needed to pursue other entities associated with these primary wrongdoers for recovery of the Remitter Judgment.

On 1 March 2023, on my application, Dixon J made orders requiring the Elliott Entities to pay the Costs Component. Dixon J published his reasons on 31 July 2023 in *Lindholm v Elliott & Ors* [2023] VSC 442. The Elliott Entities are entities closely related to AFP, the late Mr. Mark Elliott and Mr. Alexander Elliott. The Supreme Court of Victoria determined that those entities were used by AFP and Mr. Mark Elliott in committing the fraud upon debenture-holders set out in the Remitter Judgment.

There have been appeals from the orders made by Dixon J by Mr. Alexander Elliott and Mr. Norman O'Bryan, but those appeals are now resolved. In short summary:

- On 2 May 2024, the Court of Appeal made orders of its own motion dismissing the appeal against the Remitter Judgment brought by Mr. Alexander Elliott.
- On 13 June 2024, the Court of Appeal made orders striking out an appeal filed by Mr O'Bryan challenging

certain findings made by Dixon J in his reasons for judgment granting non-party costs against the Elliott Entities.

Since the Remitter Judgment, I have recovered the following amounts on behalf of debenture-holders:

Source	Amounts Paid to SPR
LPLC (on account of Mr O'Bryan's insurance)	\$1,558,191.39
LPLC (on account of Mr Symons' insurance)	\$1,454,547.54
Portfolio Law	\$375,683.30
LPLC (on account of Portfolio Law's insurance)	\$464,828.83
Mr O'Bryan, Noysue and Noysy (O'Bryan Entities)	\$1,251,858.54
LPLC (on account of Mr Trimbos' insurance)	\$1,413,197.13
Mr Zita (instalments paid under the deed of settlement that is yet to be approved by the Court)	\$95,000.00
Total	\$6,613,306.73

Considering the realisations to date and interest on the Compensation Component, the current amount that is outstanding to debenture-holders under the Remitter Judgment is approximately \$17.1 million.

There are also several costs order of AFP and the Elliott Entities that have not been paid. The costs orders amount to approximately \$1 million.

If the settlements against the Elliott Entities, Mr Michael Symons and Mr Tony Zita are approved, it would take the recoveries to approximately \$17m from the enforcement steps I have undertaken over the last three years. I have spent approximately \$2.3million in undertaking those enforcement steps.

2. Settlement Approval

At various times, proposals to resolve all outstanding claims relating to the Banksia Proceedings have been made. However, no global settlement was reached. In his judgment in *In the matter of Banksia Securities Ltd (reca and mgrs. apptd) (in liq)* [2022] NSWSC 1106, Black J acknowledged that, while it was finely balanced, my decision to reject one such global settlement proposal was justified and reasonable in all the circumstances. Black J's judgment is available on the Banksia Webpage.

I subsequently entered into individual settlements with the O'Bryan Entities and the Trimbos Estate. The settlements were approved by Dixon J in the Supreme Court of Victoria on 31 July 2023. Dixon J's judgment is available on the Banksia Webpage.

I have now entered into conditional settlements with the Elliott Entities, Mr Zita and Mr Symons which, if approved, will bring the Remitter and enforcement of the Remitter Judgment to an end.

I consider that the settlements are in the interests of debenture holders. In my view, the receipt by debenture holders of the proceeds of these settlements soon is better than seeking to pursue potentially higher sums which may not be received for quite some time (possible years) and only after further considerable expense. It also allows for a final distribution to be made to debenture-holders in the near term ,and for the Banksia Proceedings and the special purpose

receivership to be finalised. I have had particular regard to the ageing demographic profile of debenture holders and the length and acute difficulty of the Banksia litigation in forming this view. I recognise that many debenture-holders may take the view that they should be paid the Remitter Judgment in full given the misconduct inflicted upon debenture-holders uncovered in the Remitter. I wish to reassure debenture-holders that I have taken many steps to enforce as much of the Remitter Judgment for them as possible. Ultimately, I have had to take into account the assets that are available for me to enforce the Remitter Judgment against and the time, cost and uncertainty in taking any further enforcement steps. I am satisfied that the level of recovery of approximately 70% of the total amount owing from the Remitter Judgment is appropriate in light of the time, cost and uncertainty in obtaining any further amount from further enforcement steps and the risk that even less, perhaps significantly less, would be available for distribution at a later time if I take further steps.

2.1 Elliott Settlement

I have agreed to settle all claims against the Elliot Entities for \$10m. The settlement sum includes a payment of \$2 million by the LPLC (guaranteed by the Elliott Entities). The settlement with the Elliot Entities is subject to court approval.

The settlement was also subject to an independent financial accountant verifying the accuracy of representations made by the Elliot Entities during negotiations about their financial position. I appointed Mr Nick Mellos of Grant Thornton as the financial accountant for that purpose. Mr Mellos produced two reports to me and, on the basis of those reports, I am satisfied that the financial position of the Elliott Entities is substantially consistent with the representations they have made to me.

My assessment is that the benefits of settling with the Elliott Entities now for the settlement sum outweigh the benefits of taking further enforcement steps which, although might result in a higher sum for debenture holders, are complex, risky and will potentially take significant time and cost to resolve. More specifically:

- Most of the Elliott Entities' assets are held on trust. The Elliott Entities have raised complicated legal issues to assert that I would not be able to access the substantial assets held by them on trust to meet debenture-holders claims. There is a risk that if those arguments were successful, the return to debenture holders from enforcement steps would be minimal.
- An independent financial accountant has confirmed that in his view, the Elliott Entities' net asset position in respect of assets that are not held on trust is substantially less than the \$10m offered. However, I note that their total assets held of trust are significantly greater than \$10 million.
- In deciding not to pursue further enforcement steps against the Elliot Entities, I have taken into account matters including the following:
 - The detailed legal advices of Senior Counsel and junior counsel;
 - the Elliott Entities are likely to vigorously defend further enforcement steps taken against them given their historical conduct in the Banksia proceedings and the considerable resources available to them. Debenture holders would face further costs and delay without a guarantee of securing any additional satisfactory return;
 - the likely significant delay, in a higher interest rate economic environment, may result in a lesser return to debenture holders than an earlier distribution that can be made if the claims are settled;
 - any further litigation involves material risk; and

- the offer is the result of extensive negotiations and represents the highest possible amount that can be obtained at this time without further court proceedings.

2.2 Symons Settlement

I have agreed to settle all claims against Mr Symons for \$250,000. I acknowledge that this sum is low, but my assessment is that the settlement with Mr Symons will result in debenture holders receiving a greater return from Mr Symons than continuing to pursue enforcement steps against him. More specifically:

- As noted above, I have already received the balance of Mr Symons' insurance policy (\$1,454,547.54).
- Mr Symons is bankrupt and all claims against him are stayed in accordance with the *Bankruptcy Act 1996* (Cth). Mr Symons does not appear to me to have any assets and there is no obvious greater source of financial recovery for debenture holders than the settlement sum in the present circumstances, particularly as the insurance proceeds have been received.
- Mr Symons' trustee in bankruptcy has confirmed that the prospect of any dividend to unsecured creditors is uncertain.

2.3 Zita Settlement

I have agreed to settle all claims against Mr Zita for \$95,000. I acknowledge that this sum is very low, but my assessment is that the settlement with Mr Zita will result in debenture holders receiving a greater return from Mr Zita than what would be received if I took steps to bankrupt Mr Zita. More specifically:

- As noted above, I have already received the balance of Portfolio Law's insurance policy (\$464,828.83). That policy applies to claims against Mr Zita.
- The offer represents a larger potential return than the potential dividend in any bankruptcy in view of the likely costs that would be involved in any bankruptcy administration of Mr Zita.

2.4 Directions not to pursue further claims

I am seeking directions that I am justified in:

- not pursuing any further enforcement steps against Portfolio Law; and
- not pursuing any claims that debenture-holders may have against the LPLC.

While I have not settled the claims of debenture holders against Portfolio Law, I have received \$840,512.13 (including the proceeds of its insurance policy) from or on behalf of Portfolio Law towards the Remitter Judgment. From my investigations, Portfolio Law is of little or no value and there is little prospect of me receiving any further funds if I were to apply to wind-up Portfolio Law.

Whilst debenture-holders have claims against the LPLC in relation to the insurance policies held by Mr O'Bryan, Mr Symons, Mr Zita, and Elliott Legal, I also consider that the costs, delay and uncertainty of pursuing any further potential claims against the LPLC outweigh the potential benefits. Those claims have material risk and will be resisted.

3. Final Distribution

I propose to make a final distribution of approximately \$19.3 million (**Final Distribution**) which includes the proposed settlement proceeds (i.e \$10,345,000) as well as the following:

- \$7,663,666.67 held by Maddocks as the balance of the funds from the Trust Co Settlement and the amounts received from and on behalf of Portfolio Law, the O'Bryan Entities and Trimbos Estate; and
- \$1,359,405.54 as the 'SPR Litigation Fund', being the account from which I am funded by the orders of Black J.

The Final Distribution amounts to approximately 3 cents in the dollar owed to each debenture holder and would bring the recoveries for debenture holders to approximately 94.5 cents in the dollar of principal invested.

Your dividend will be deposited into your nominated bank account or, if this is not possible, a cheque will be sent to your last known address. Please notify any change of address or circumstances to Link on (02) 8767 1029 or by writing to banksia@linkmarketservices.com.au. If you know of any debenture holder who has changed address, please bring this letter to their attention.

3.1 Unpresented Payments

The previous nine distributions have been undertaken by Link Market Services (**Link**) to all debenture holders on a *pari passu* basis. To date, \$4,088,401, or 0.7% of the total amount distributed, has not been claimed by certain debenture holds (**Unpresented Payments**). Despite attempts, I have not been able to locate or contact those debenture holders about their unclaimed entitlements.

Should you have any queries in relation to previous distributions, please contact Link on (02) 8767 1029 or by writing to banksia@linkmarketservices.com.au.

I have engaged Link to conduct skip tracing exercises in respect of those debenture holders who have Unpresented Payments with a value of greater than \$3,000. To date, these activities have located 204 debenture holders with Unpresented Payments totalling approximately \$2.1m.

Despite undertaking the steps set out above, I anticipate that a significant balance of Unpresented Payments will remain of approximately \$1.5 million. I have considered how these proceeds should be dealt with, including whether they should be paid into the ASIC Unclaimed Moneys Fund. However, in my view, it is unlikely that much, if any, of the funds would ever be claimed if I were to pay those funds to ASIC.

Another option is to distribute the Unpresented Payments rateably to active debenture-holders that have participated in recent distributions.

I consider the most appropriate course is to, subject to Court approval:

- pay my further expenses and remuneration of the special purpose receivership from those funds so that I can

- distribute the maximum amount as part of the Final Distribution;
- request Link to return the balance of the unrepresented payments; and
- pay the remaining balance to a registered charitable organisation.

I invite the views of debenture holders in relation my proposed treatment of the remaining unrepresented funds.

4. Funding to conclude the special purpose receivership

I have previously received funding from Banksia's formers Receivers in accordance with orders made by the Supreme Court of New South Wales.

I have subsequently incurred significant costs in taking a range of enforcement steps. However, if the settlements summarized above are approved by the Court, there will be only limited steps remaining in the special purpose receivership.

The funding that I have received from the Receivers is exhausted, and I have been funded since April 2023 from the proceeds recovered from the LPLC on behalf of Mr O'Bryan and Mr Symons. I will seek directions from the Court in relation to my past funding, and that I would be justified in funding any further remuneration and expenses from the remaining balance of the Unrepresented Payments. This will ensure that my further remuneration and expenses do not impact the dividend debenture holders who been claiming funds from distributions.

5. Notice to debenture holders

The application is listed for further directions at a hearing scheduled for 9:30 am on 5 December 2024. Copies of all non-confidential material filed in support of the approval application will be available on the Banksia Webpage, including the submissions in support of the application.

The Committee has resolved to support my application on the basis that it would bring the Banksia Proceedings to a close and facilitate the Final Distribution being made as soon as possible. The views of the Committee and any debenture holders will form part of the material put before the Supreme Court of New South Wales.

If you would like to express any view on orders sought which you would like communicated to the Court, including to object to any or all or the orders sought, please contact Hannah McConalogue by:

- Telephone: (03) 9288 6461;
- Email: hannah1@kpmg.com.au; or
- Post: GPO Box 2291U, Melbourne, VIC 3001

I ask that any comments or views on the application be sent to KPMG by no later than **5pm on 29 November 2024**.

Should any debenture holder wish to be heard in respect of the application, you are requested to provide notice to KPMG so that arrangements can be made with the Court.

If you would like to receive any of the confidential material you can contact Ms McConalogue, but because it is

confidential you will need to enter into a confidentially undertaking.

Should you know of any debenture holder who has changed address, please bring this letter to their attention.

Yours faithfully

Banksia Securities Limited



John Lindholm

Special Purpose Receiver