



McGrathNicol

Receivers and Managers' Supplementary Explanatory Memorandum

25 March 2025

Court	Federal Court of Australia
Proceeding	WAD 13 of 2024
Plaintiff	Australian Securities and Investments Commission
Defendant	Brite Advisors Pty Ltd (Receivers and Managers Appointed) (In Liquidation)

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Glossary

Term	Meaning
\$'000	Thousands of Australian Dollars
9 November Orders	Court orders dated 9 November 2023 in Federal Court Proceedings WAD 262 of 2023 as varied by subsequent orders
13 December Orders	Court orders dated 13 December 2023 in Federal Court Proceedings WAD 262 of 2023
13 December 2023 Data	The updated Raw Data which reports the value of each Beneficiaries' investment that they ought to have had with Brite Advisors as at 13 December 2023
21 December Orders	Court orders dated 21 December 2023 in Federal Court Proceedings WAD 262 of 2023
6 February Orders	Court orders dated 6 February 2024 in Federal Court Proceedings WAD 262 of 2023 and WAD 13 of 2024
5 June Orders	Court orders dated 5 June 2024 in Federal Court Proceedings WAD 13 of 2024
2 September 2024 Orders	Court orders dated 2 September 2024 in Federal Court Proceedings WAD 13 of 2024
16 December 2024 Orders	Court orders dated 16 December 2024 in Federal Court Proceedings WAD 13 of 2024
ACN	Australian Company Number
AFCA	Australian Financial Complaints Authority
AFSL	Australian Financial Services Licence
ASIC	Australian Securities and Investment Commission
Asset Preservation Orders	Asset Preservation Orders made by the Federal Court of Australia on 27 October 2023
ATO	Australian Taxation Office
AUD / AU\$ / \$	Australian Dollar
BAG	Brite Advisory Group Limited (HK) (Company number 2202650)
Beneficiaries / Beneficiary	Individuals whose superannuation and pension funds are under management by Brite Advisors
BHKL	Brite Hong Kong Limited (formerly Genesis Investment Management Limited) (Hong Kong Company number 16332233)
BML	BML Funds Management Pty Ltd (AUS) (Company number 664 470 991)
Brite Advisors	Brite Advisors Pty Ltd (AUS) (Company number 135 024 412)
Brite Group	BHKL and its subsidiaries and related/associated entities including Brite Advisors
Brite US	Brite Advisors USA, Inc. (USA) (Company number 98-0474981)
c.	circa
CAPM	Capital Asset Pricing Model
Client AuM or Trust Assets	Client assets under management by Brite Advisors, being all property, assets and undertakings held by Brite Advisors on trust for another
Consultation Period	The period from 4 December 2024 to 31 January 2025 in which the Receivers invited feedback from interested parties on matters set out in the Explanatory Memorandum
Corporate Trustees	Pension scheme administrators (in their capacity as the representatives appointed by trustees of pension schemes) purportedly acting on behalf of the Beneficiaries
Court	Federal Court of Australia
Court Orders	Orders made by the Federal Court of Australia in Federal Court Proceedings WAD 262 of 2023 and WAD 13 of 2024
Crowe US	Crowe LLP US
CSLR	Compensation Scheme of Last Resort
December Report	The Investigative Accountants' Report to the Federal Court dated 8 December 2023

Deficient Mixed Fund	Comprising the assets set out at section 2.1.2 of the Explanatory Memorandum
Directors	The directors of Brite Advisors, being Keith Sedergreen, Dean Clarke and John Lymer
Distributable Amount	As defined at section 4.2.7 of the Explanatory Memorandum
Distribution Methodology Application	The application the Receivers will file with the Court, following a consultation period with Interested Parties, which will ask the Court to approve the Receivers' proposed method of distributing the Client AuM
Entitlement Reference Date	The relevant date at which to assess Beneficiaries' entitlements as 13 December 2023, being the date of the Receivers' appointment, as set by the Federal Court of Australia in orders dated 5 June 2024
Excluded Assets	Comprising the assets set out at section 2.1.7 of the Explanatory Memorandum
Excluded Moventum Assets	Comprising the assets set out at section 2.1.7(a) of the Explanatory Memorandum
Exit Fee	A fee charged by Brite to a Beneficiary upon exiting the Brite Platform within five years of investment
Explanatory Memorandum / EM	The Receivers' Explanatory Memorandum dated 4 December 2024
FAQ	Frequently asked questions
FCA	Financial Conduct Authority
Feedback	Communications expressed to be feedback on matters set out in the Explanatory Memorandum and Fifth Report from: (i) six Corporate Trustees; (ii) 20 Beneficiaries; (iii) four other parties; and (iv) ASIC, the UK Financial Conduct Authority (FCA), the Malta Financial Services Authority (MFSA) and the Gibraltar Financial Services Commission (GFSC) (collectively referred to as Regulators).
Fifth Report	The Receivers' Report to the Federal Court dated 4 December 2024
Fourth Report	The Receivers' Report to the Federal Court dated 9 August 2024
FYXX	Financial year ended 30 June 20XX
GBG	GBG Plc, the entity who the Receivers appointed to verify the identity of the Beneficiaries
GBP	Great British Pound
GFSC	Gibraltar Financial Services Commission
HK	Hong Kong
IB Accounts / IB Platform	All identified accounts held by the Brite Group with IBA and IBHK
IBA	Interactive Brokers Australia Pty Ltd
IBA Accounts	Identified accounts held by Brite Advisors with IBA
IBHK	Interactive Brokers Hong Kong Limited
Interactive Brokers / IB	IBA, IBHK and affiliates
Interim Fund Manager	BML appointed as interim fund manager
Interested Parties	The Corporate Trustees and the Beneficiaries, as well as any other person with a legal or equitable interest in the Client AuM
Investigative Accountants	Linda Smith and Robert Kirman of McGrathNicol in their former capacity as investigative accountants of Brite Advisors
IRS	US Internal Revenue Service
January Report	The Receivers' Report to the Federal Court dated 24 January 2024
Late Investors	Beneficiaries who deposited cash into Brite Advisors' bank account on or after 16 October 2023 where those funds were not transferred to the Interactive Brokers platform
Liquidators	The Liquidators of Brite Advisors, being Linda Smith and Rob Kirman
m	Millions
March Report	The Receivers' Report to the Federal Court dated 4 March 2024

MFSA	Malta Financial Services Authority
Minerva	Minerva Lending Plc
Minerva Notes	10 Minerva Notes 6% June 2024 (Sedol: BYVKVX6) and one Minerva Note 6.00% Nov 2020 (Sedol: BF7P303)
Model Portfolio Assets	That portion of the Client AuM that are designated in the 13 December 2023 Data as model portfolio assets per the 13 December 2023 Data
Moventum	Moventum S.C.A.
Mr Donnelly	Mark Donnelly, CEO and Founder of the Brite Group
Previous Reports	Collectively, the December Report, January Report, March Report, Fourth Report and Fifth Report
Proceedings	Federal Court of Australia proceedings WAD 262 of 2023 and WAD 13 of 2024
Property	The property of Brite Advisors as defined in the 13 December Orders
QROP	Qualified Recognised Overseas Pension Schemes
Receivers	The Receivers and Managers of the Trust Assets, being Linda Smith and Rob Kirman of McGrathNicol
RoW	Rest of World (Brite Advisors' Beneficiaries excluding those located in the UK or the US)
SalesForce	SalesForce, Inc.
SalesForce Org	The 'org' held on SalesForce which Brite Advisors used to store client information and to report holdings and valuations to clients through a web portal
SEC	US Securities and Exchange Commission
SEC Complaint	SEC Complaint against Brite US (Case 1:23-cv-10212)
Seventh Affidavit of Linda Smith	The seventh affidavit of Linda Methven Smith affirmed on 17 May 2024
SIPP	Self-invested personal pensions
Sixteenth Affidavit of Linda Smith	The sixteenth affidavit of Linda Methven Smith affirmed on 11 February 2025
SMSF	Self-Managed Superannuation Funds
Supplementary EM / Explanatory Memorandum	This Supplementary Explanatory Memorandum dated 25 March 2025
Surrender Rebate	As defined in section 4.3 of the Fourth Report
Surrender Rebate Fees	As defined in section 4.3 of the Fourth Report
Trust Assets	The property, assets and undertakings held by Brite Advisors on trust for another
UK	United Kingdom
US / USA	United States / United States of America
USD\$'000	Thousands of United States Dollars
USD\$m	Millions of United States Dollars
USD / USD\$	United States Dollar
Valuation Date	The date at which the Distributable Amount will be determined by the Receivers
Valuation Notice	A notice released to each Beneficiary via SalesForce which sets out investments/money Brite Advisors should have held at 13 December 2023 for that Beneficiary
Verified Entitlement	The entitlement of each Beneficiary as calculated and verified in accordance with the Court Orders dated 2 September 2024
Westpac	Westpac Banking Corporation
Westpac Accounts	Westpac Client Accounts and Westpac Operating Accounts
Westpac Client Account(s) / Client Account(s)	Brite Advisors multi-currency bank accounts for managing client funds

Westpac Operating Account(s) / Operating Account(s)	Brite Advisors multi-currency bank accounts for managing operating funds
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Source: McGrathNicol

1 Introduction

1.1 Introduction

- 1.1.1 The Receivers published their Explanatory Memorandum on 16 December 2024, which can be accessed on the Receivers' website. That Explanatory Memorandum explained how the Receivers proposed to distribute the Client AuM held by Brite Advisors to allow Corporate Trustees, Beneficiaries and any third party asserting an interest in the Client AuM, to provide feedback on that proposal.
- 1.1.2 Since the Explanatory Memorandum was published, the Receivers have:
- (a) received and considered communications expressed to be feedback on matters set out in the Explanatory Memorandum and Fifth Report (**Feedback**) from:
 - (i) six Corporate Trustees;
 - (ii) 20 Beneficiaries;
 - (iii) four other parties; and
 - (iv) ASIC, the UK Financial Conduct Authority (**FCA**), the Malta Financial Services Authority (**MFSA**) and the Gibraltar Financial Services Commission (**GFSC**) (collectively referred to as **Regulators**).
 - (b) conducted further investigations and undertaken further work with respect to ongoing matters.
- 1.1.3 By orders made on 4 March 2025, the time by which the Receivers were required to file their final proposed distribution methodology orders, and any Supplementary Explanatory Memorandum, was extended to 25 March 2025.

1.2 Purpose of Supplementary Explanatory Memorandum

- 1.2.1 This Supplementary Explanatory Memorandum should be read together with the Explanatory Memorandum.
- 1.2.2 Together, these documents explain the approach the Receivers have recommended to the Court for distribution of the Client AuM.
- 1.2.3 In doing so, this Supplementary Explanatory Memorandum:
- (a) addresses the key Feedback provided during the consultation period (see section 2); and
 - (b) where the Receivers have changed or further developed their proposal for distribution of the Client AuM (in response to the Feedback or as a result of their further work), explains the basis for that change (see section 3).

1.3 Key topics addressed and material changes to proposed distribution methodology

Tax issues

- 1.3.1 The Receivers have formed a view on what they consider to be the most appropriate Australian tax treatment of the proposed distribution of the Deficient Mixed Fund. The Receivers will shortly put that view to the ATO and will seek a formal resolution of those matters. The Receivers will publish a memorandum setting out the Receivers' position in full shortly and will provide updates as the matter progresses towards resolution.
- 1.3.2 The Receivers have reached the view that non-Australian-resident clients of Brite Advisors (i.e. Corporate Trustees and direct Beneficiaries) should not be subject to any Australian tax on foreign sourced income nor should they be subject to any Australian tax on capital gains made on foreign assets or Australian shares. The overwhelming majority of assets held and income derived by Brite Advisors are foreign assets and foreign sourced income (that is, not Australian). See sections 2.2 and 3.2 below.
- 1.3.3 The Receivers expect there to be a withholding tax liability to the IRS. The recent notices received from the IRS note that there are liabilities owing to the IRS from Brite Advisors relating to three financial years totalling US\$1.9m. The Receivers continue to progress their work with Crowe US to identify the quantum of Brite Advisors' outstanding US withholding tax liability. See sections 2.3 and 3.3 below.

Potential recovery actions

- 1.3.4 The Receivers continue to investigate potential recovery actions against third parties and the directors and officers of Brite Advisors. Irrespective of their merits, any claims that might be available will only be pursued if there is likely to be a commercial return to Beneficiaries.
- 1.3.5 In order to avoid compromising any recovery actions, the Receivers are unable to disclose any further information as to the nature of the potential claims.
- 1.3.6 Once the Receivers' investigations and assessments are further advanced, if any potential recovery actions appear to be viable, the Receivers will need to (i) consider options for funding those actions, (ii) update and consult with Beneficiaries and Corporate Trustees as to those proposals, and (iii) seek appropriate orders from the Court before commencing any litigation which is deemed commercial to pursue. See section 2.4 below.

Trustee substitution process

- 1.3.7 The Receivers no longer propose to offer to delay distribution payments to a Beneficiary at their election to allow time for substitution of their Corporate Trustee. Instead, the Receivers propose to:
- (a) amend the Asset Preservation Orders in place as soon as possible to make clear that a Beneficiary can change their Corporate Trustee at any time; and
 - (b) implement a process whereby the Receivers can receive payment instructions, authorised by the substituted and original Corporate Trustees along with the Beneficiary, directing payment of the portion of the distribution payment relating to that Beneficiary to the substituted Corporate Trustee.
- 1.3.8 It is intended that this approach will remove any barriers to Corporate Trustees and Beneficiaries undertaking the substitution process themselves, without involvement of the Receivers. See further details at sections 2.11 and 3.7 below.

Retained Fund

- 1.3.9 The Receivers will be required to retain a portion of the Client AuM in the IBA Accounts and not distribute these funds as part of the initial distribution from the Deficient Mixed Fund, which will be retained as a provision for a number of liabilities and potential liabilities.
- 1.3.10 The Receivers have proposed to the Court that the quantum of the Retained Fund is an amount to be approved by the Court on application by the Receivers, prior to the Receivers commencing any distribution of the Client AuM. Any amount to be retained would need to be supported by affidavit evidence speaking to the need for that retention and supporting the quantum proposed. The quantum that the Receivers will propose to the Court for approval will be comprised of:
- (a) an amount reflecting a conservative estimate of the potential tax liabilities of the Receivers where there are unresolved tax issues at the time of determining the amount of any distribution;
 - (b) an amount reflecting the Receivers' costs in investigating and pursuing claims against third parties;
 - (c) an amount reflecting the Receivers' costs to resolve any other outstanding matter or a conservative estimate of any other potential liability identified at the time of determining the amount of any distribution; and
 - (d) an amount reflecting the Receivers' costs in managing the Retained Funds for the anticipated remaining length of the Receivership.
- 1.3.11 The Receivers also propose that the orders made permitting them to withhold the Retained Fund are effective for an initial period of four months. Extensions of this period will require an application to be made by the Receivers, accompanied by an update on progress, for further orders of the Court. See sections 2.16 and 3.4 below.

Liquidation of the Deficient Mixed Fund and inability to provide in specie distribution

- 1.3.12 The Receivers do not consider a non-cash transfer of the Deficient Mixed Fund to a new Fund Manager or to Corporate Trustees/Beneficiaries to be a viable option. The Receivers consider there to be a number of practical difficulties with a non-cash distribution resulting in it likely being more complex, costly and time consuming.
- 1.3.13 The Receivers' view is that a true *in specie* transfer of assets to all Beneficiaries is impossible. This is because there is a deficiency of assets within a mixed fund. Even if the Receivers offered, for instance, a non-cash option where Beneficiaries could elect to receive securities to the value of their distribution entitlement that broadly aligned with the portfolio they thought they held according to the 13 December 2023 Data, from a legal perspective this is not

the same as returning that Beneficiary's assets. It is simply a non-cash distribution (which in itself is difficult to implement). Similarly, issuing units in a reconstituted fund of the remaining assets, although providing an interest in securities, is not returning the Beneficiary's own assets. From the Receivers' perspective, the conduct of Brite Advisors in misappropriating and mixing assets, which led to the Deficient Mixed Fund, is a dealing in the assets which had already occurred prior to the Receivers' appointment, and which rendered a true *in specie* distribution to Corporate Trustees and Beneficiaries simply not possible. The Receivers are aware that this dealing, by way of misappropriation and mixing, may have tax consequences for some Beneficiaries. But seeking to provide a non-cash distribution in an attempt to mimic a true *in specie* distribution does not undo or remedy this dealing. See section 2.18 below.

Other matters addressed

- 1.3.14 The Receivers also address a number of other matters on which Feedback was provided as follows:
- (a) Corporate Trustee documentation – see sections 2.5 and 3.6 below;
 - (b) the assertion of segregation arguments – see section 2.6 below;
 - (c) the assertion of equitable tracing claims to particular assets within the Deficient Mixed Fund – see section 2.7 below;
 - (d) the date for calculating Beneficiaries' entitlements (being 13 December 2023) – see section 2.8 below;
 - (e) allocation of growth in the Client AuM after 13 December 2023 among Beneficiaries – see section 2.9 below;
 - (f) the approach to valuing the entitlements of Beneficiaries who held Minerva Notes – see section 2.10 below;
 - (g) the Receivers' approach to Surrender Rebates – see section 2.12 below;
 - (h) the currency risks faced during the receivership and the currency of payments on distribution – see sections 2.13 and 3.5 below;
 - (i) direct payments to Beneficiaries – see section 2.14 below;
 - (j) the Receivers' approach to setting off loans made to Beneficiaries – see section 2.15 below;
 - (k) the insurance affairs of Brite Advisors – see section 2.17 below; and
 - (l) the availability of government compensation schemes – see section 2.19 below.

1.4 Update on Client AuM

- 1.4.1 As at 21 March 2025, the Receivers estimate Brite Advisors holds circa USD\$703.9m in Client AuM and has an estimated USD(\$17.9) (or 2.4%) shortfall to Beneficiaries' claims as at 13 December 2023, excluding the impact of potential taxation liabilities. **The Receivers stress that the quantum of the shortfall varies with time and may materially change due to a number of factors.** The table below summarises the movement in the estimated shortfall to 21 March 2025.

Movement in estimated total shortfall to 21 March 2025

USD\$m	13-Dec-23	Movement	21-Mar-25
Client AuM held			
Client AuM at 13 December 2023	653.7		
Add: Growth in portfolio		91.3	
Less: Funds withdrawn to process pension withdrawals		(28.0)	
Less: Withdrawals for trading & Receivers' costs		(13.1)	
Total Client AuM	653.7	50.1	703.9
Add: Funds withdrawn to process pension withdrawals	-	28.0	28.0
Add: Recovery of Beneficiary Loans	-	1.5	1.5
Total Client AuM (gross of pension withdrawals)	653.7	79.7	733.4
Estimated Beneficiary entitlements			
Beneficiary entitlements at 13 December 2023	(751.3)		(751.3)
Estimated total shortfall (USD\$m)	(97.6)	79.7	(17.9)
Estimated shortfall (%)	13.0%		2.4%
Source: Westpac Account Statements, IB Account Statements, Moventum Account Statement, 13 December 2023 Data			

1.4.2 The Receivers note the following in relation to the movement in the estimated shortfall to 21 March 2025:

- (a) the shortfall analysis presented above has been conducted on an aggregated basis and does not consider the impact of differing legal entitlements of Beneficiaries to certain Client AuM as set out in the Explanatory Memorandum;
- (b) whilst Client AuM on the IB Platform has performed favourably following aggregated growth in the portfolio of USD\$91.3m (or 14.0%) to 21 March 2025, the Receivers note the portfolio is highly sensitive to global market movements and stress that the estimated shortfall will similarly vary as a result;
- (c) this shortfall excludes a provision for the potential outstanding tax liabilities which the Receivers are continuing to investigate;
- (d) as at 21 March 2025, the Receivers have processed withdrawals from the IB Platform totalling USD(\$41.1m) as follows:
 - (i) funds withdrawn to process pension withdrawals which have been utilised to administer over 910 pension withdrawals totalling circa USD(\$28.0m). The balance of the funds are held on trust in the bank accounts used exclusively for the Brite Advisors receivership. Those funds are designated to be utilised for future pension withdrawals. Interest earned on these funds accrues and forms part of the Client AuM; and
 - (ii) withdrawals totalling USD(\$13.1m) have been utilised to fund both Brite Advisors' trading costs USD(\$2.0m) and the Receivers' costs and expenses USD(\$10.3m). The funds withdrawn have been excluded from the Client AuM figures above as these funds have been utilised (or the Receivers anticipate these funds being utilised in the short-term) for costs and expenses;
- (e) trading costs paid to date primarily relate to insurance costs and costs associated with contractors assisting the Receivers with responding to Beneficiary queries and data collection and interpretation, and maintaining access to investment and portfolio management systems; and
- (f) Receivers' costs and expenses paid to date relate to the Receivers' and Liquidators' remuneration and costs incurred by solicitors, Counsel and other professional advisory fees. Prior to payment of any of the Receivers' costs and expenses, approval is obtained from the Court following submission of detailed and itemised remuneration reporting and all Corporate Trustees are notified of the respective amounts.

2 Feedback received on Explanatory Memorandum

2.1 Introduction and overview of Feedback received

- 2.1.1 On 16 December 2024, pursuant to the 16 December 2024 Orders, the Receivers published the following documents on the Receivers' website:
- (a) Explanatory Memorandum dated 4 December 2024;
 - (b) Receivers' Fifth Report to the Court dated 4 December 2024 (**Fifth Report**); and
 - (c) An Update to Corporate Trustees and Beneficiaries, providing information in relation to the Explanatory Memorandum and Fifth Report.
- 2.1.2 Since publishing the Explanatory Memorandum and Fifth Report, the Receivers have received and considered Feedback received during the Consultation Period.
- 2.1.3 Feedback received was provided to the Court on 11 February 2025 annexed to the Sixteenth Affidavit of Linda Smith and the Eighteenth Affidavit of Linda Smith, and will continue to be provided to the Court.
- 2.1.4 As set out in the Sixteenth Affidavit of Linda Smith, the Receivers advised the Court that they were in the process of considering and responding to the Feedback. Since then, the Receivers have:
- (a) published an FAQ on the Receivers' website specifically in response to common queries (or at times, misconceptions) received during the Consultation Period;
 - (b) commenced issuing responses to each piece of Feedback where queries have been raised, or where the Feedback has revealed a misunderstanding of the Receivers' position, to clarify the position, and otherwise considered each piece of Feedback in preparing this Supplementary Explanatory Memorandum; and
 - (c) prepared this Supplementary Explanatory Memorandum which (i) sets out the Feedback on key topics, (ii) explains the Receivers' reasoning as to what, if any, amendments were required in light of that Feedback, and (iii) expands on matters set out in the Explanatory Memorandum which were subject of the Feedback.
- 2.1.5 The Receivers provide an update and/or further information on the key or common matters raised in the Feedback in the following sections 2.2 to 2.19. The Receivers provide a summary of the nature of the Feedback for information only. The summaries of Feedback provided in this Supplementary Explanatory Memorandum are not intended to be exhaustive. The Receivers have provided all Feedback to the Court behind Tab 6 of Exhibit LMS-79 to the Sixteenth Smith Affidavit, the confidential Eighteenth Smith Affidavit and in the Ninth Affidavit of Jemma Leigh Huntsman.

2.2 Tax issues – Australian

What we have previously advised

- 2.2.1 The Explanatory Memorandum outlined a number of tax issues that the Receivers continue to work through with specialist tax advisors.
- 2.2.2 The Receivers identified that the Australian tax issues are two-fold:
- (a) firstly, understanding whether Brite Advisors has any pre-appointment tax liabilities under Australian tax laws, arising from its operations and affairs prior to the Receivers' appointment; and
 - (b) secondly, what Australian tax implications may arise from the Receivers' proposed method of distribution of the Client AuM, specifically, the proposed liquidation of the Client AuM and distribution of the Deficient Mixed Fund *pari passu* in respect of those Beneficiaries who are entitled to participate in it.

Nature of Feedback received

- 2.2.3 The general theme of Feedback received in relation to Australian tax issues was that:
- (a) a number of Beneficiaries have expressed the view that they consider liquidation of the Client AuM (which is what the Receivers propose in respect of the assets that form part of the Deficient Mixed Fund) may trigger adverse tax consequences for Beneficiaries in that it is likely to crystallise a capital gains tax liability for some or all of them;

- (b) a Beneficiary representing a number of Beneficiaries and a Regulator has expressed the view that the Receivers should seek advice on behalf of and consider the tax implications of the proposed distribution for Beneficiaries in key jurisdictions;
- (c) a Beneficiary has expressed the view that a Beneficiary's transfer of Corporate Trustee before distribution could have taxation implications; and
- (d) in addition to the above, a number of Beneficiaries, including a Beneficiary representing a group of Beneficiaries, and a Corporate Trustee, have expressed general concern with the tax matters addressed at section 4.5 of the EM, including the possibility of an Australian tax liability and the proposal to retain funds to cover any liability.

Receivers' response to Feedback

- 2.2.4 It is clear to the Receivers that the tax consequences of the proposed distribution is a key area of concern for Beneficiaries.
- 2.2.5 A great deal of the Feedback received on this topic has been given without fully appreciating that a true *in specie* distribution of the Client AuM (except in the limited circumstances of the Excluded Assets) is simply not possible in the Receivership. This impossibility is an inevitable consequence of the shortfall and mixing events caused by Brite Advisors' conduct prior to the Receivers' appointment. This is further addressed at section 2.18 below.
- 2.2.6 Further work on the Australian tax issues has been undertaken since publication of the Explanatory Memorandum. At section 3.2 below, we outline:
 - (a) the Receivers' present views on the Australian tax issues that are likely to apply to the Receivers and Brite Advisors;
 - (b) how the tax consequences of the distribution ought to be treated under Australian tax law; and
 - (c) the roadmap that the Receivers will shortly propose to the ATO to reach a resolution of Brite Advisors' Australian tax liability and to obtain certainty and assurance as to the ATO's treatment of distributions proposed to be paid in the receivership.
- 2.2.7 The Receivers are not in a position to consider the individual tax circumstances of Beneficiaries and strongly encourage Beneficiaries to seek their own professional financial and tax advice.

Tax issues – US

What we have previously advised

- 2.3.1 The EM outlined a number of tax issues that the Receivers continue to work through with specialist tax advisors, including ascertaining potential US tax liabilities arising from the large portion of US assets that comprise the Client AuM.
- 2.3.2 The Receivers identified that the US tax issues are two-fold:
 - (a) firstly, understanding whether Brite Advisors has any pre-appointment tax liability under US tax laws arising from its operations and affairs prior to the Receivers' appointment; and
 - (b) secondly, what US tax implications may arise from the Receivers' proposed method of distribution of the Client AuM, specifically, the proposed liquidation of the Client AuM and distribution of the Deficient Mixed Fund *pari passu* in respect of those Beneficiaries who are entitled to participate in it.

Nature of Feedback received

- 2.3.3 The general theme of Feedback received in relation to US tax issues was that:
 - (a) a Beneficiary has expressed the view that due to an agreement between the IRS and Malta, the liquidation and distribution of the Client AuM will result in a capital gain liability being crystallised for US resident Beneficiaries of a Malta QROPs and has requested that the Receivers obtain tax advice on this issue; and
 - (b) a financial advisor representing a number of US Beneficiaries has provided some Feedback regarding taxation and jurisdictional matters in respect of liquidation of the Client AuM and distribution, as they relate to the US Beneficiaries.

Receivers' response to Feedback

- 2.3.4 A significant proportion of the Feedback received on this topic was similar in nature to that relating to the Australian tax issues. The Receivers repeat the matters set out at paragraph 2.2.5 above.
- 2.3.5 The Receivers have engaged Crowe US to provide tax advice on various tax matters. Those matters include what US withholding tax liabilities Brite Advisors had and whether IRS reporting requirements were met.
- 2.3.6 Crowe US's preliminary findings are set out below:
- (a) Brite Advisors certified on US tax forms that it was a qualified intermediary being responsible for US tax withholding in the financial years for 2020, 2021, 2022 and 2023;
 - (b) Brite Advisors filed US tax forms to report US source income and withholding tax due in the financial years for 2020, 2021 and 2022, with a total reported tax liability of US\$1.0m. The Receivers understand that these returns were filed late in October 2023 and remain unpaid. The recent notices received from the IRS note that there are liabilities owing to the IRS from Brite Advisors relating to these three financial years totalling US\$1.9m;
 - (c) Brite Advisors did not file any US tax forms to report US source income and withholding tax due in the financial year 2023 or 2024. We understand that IBA did not withhold any US withholding taxes in the financial year 2023 or for part of financial year 2024, which will mean that there is likely to be a withholding tax liability due by Brite Advisors, which is yet to be quantified; and
 - (d) The Receivers have instructed Crowe US to prepare and lodge the outstanding tax forms for financial year 2023 and 2024 with the IRS, in order for any withholding tax liability due by Brite Advisors to be quantified.
- 2.3.7 At section 3.3 below, we outline:
- (a) the Receivers' present views on the US tax issues;
 - (b) how the Receivers propose to obtain certainty as to Brite Advisors' liability for US withholding tax; and
 - (c) what the Receivers understand to be the US tax position on the query raised around crystallising capital gains tax liability in the US.
- 2.3.8 The Receivers are not in a position to consider the individual tax circumstances of Beneficiaries and strongly encourage Beneficiaries to seek their own professional financial and tax advice.

2.4 Potential Recoveries***What we have previously advised***

- 2.4.1 As set out in sections 1.7 and 4.6 of the EM, in accordance with their duties, the Receivers have taken and continue to take steps to protect the interests of the Beneficiaries, such as investigating potential recovery actions against third parties, including IBA.
- 2.4.2 In order to avoid compromising any recovery actions, the Receivers are unable to disclose further information as to the nature of potential claims (in the Explanatory Memorandum or this Supplementary Explanatory Memorandum).

Nature of Feedback received

- 2.4.3 The nature of the Feedback received in relation to potential recovery actions claims is summarised below:
- (a) A number of Beneficiaries have expressed views in respect of the IBA margin loan;
 - (b) A number of Beneficiaries, including a Beneficiary representing a group of Beneficiaries, have expressed the view that they do not wish to have any of their funds retained to pursue litigation against third parties and have suggested that the Receivers provide the option to 'opt out' of future recoveries (i.e. receiving a full distribution earlier but foregoing potential future returns);
 - (c) Several Beneficiaries, including a Beneficiary representing a group of Beneficiaries, has requested additional information regarding any proposed recovery actions, including quantum of any potential recovery, litigation prospects, timing and costs and how any recovery funds will be distributed; and

- (d) IBA has expressed the view that sufficient funds and/or assets should be retained by the Receivers to discharge the outstanding liabilities owed by Brite Advisors to IBA and to address the consequences of potentially commencing proceedings against IBA, the nature of those proceedings and their cost. Further, IBA says that the sufficiency of those funds is unable to be assessed unless the nature and basis of the potential claims that are being investigated are disclosed to IBA, and have said that the Receivers should make that disclosure now or abandon the potential claims.

Receivers' response to Feedback

Potential recovery actions against IBA

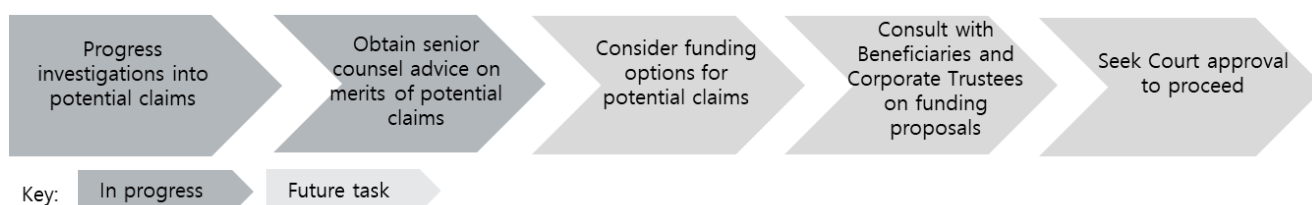
- 2.4.4 The Receivers continue to progress their investigations into potential claims that Brite Advisors or the Receivers may have against IBA. As outlined in the Explanatory Memorandum, the Receivers will only consider pursuing claims against third parties where those claims have merit and there are reasonable prospects of recovering funds for the benefit of Beneficiaries.
- 2.4.5 While the Receivers cannot provide any details as to the nature of the claims that are being considered and investigated with respect to IBA, they acknowledge that many Beneficiaries and Corporate Trustees have expressed views as to IBA's conduct both before and after the Receivers' appointment.
- 2.4.6 The Receivers disagree with the view expressed by IBA that they must disclose the nature and basis of the potential claims in order to form views as to the sufficiency of the proposed Retained Fund. The Receivers also reject the view that, failing that disclosure, they must abandon the potential claims.
- 2.4.7 While the Receivers continue to investigate whether any of their concerns as to the circumstances surrounding the establishment and use of the margin loan sound in potential claims against IBA, IBA's position must be preserved so that it is not prejudiced by the distribution of the Client AuM. The Receivers are presently considering how that may be achieved in a way that is least disruptive to the distribution of the Client AuM. The Retained Fund is discussed further in section 2.16 and 3.4 below.

Other potential recovery actions

- 2.4.8 The Receivers continue to investigate potential recovery actions against third parties and the directors and officers of Brite Advisors.
- 2.4.9 Irrespective of their merits, any claims that might be available will only be pursued if there is likely to be a commercial return to Beneficiaries.
- 2.4.10 In order to avoid compromising any recovery actions, the Receivers are unable to disclose any further information as to the nature of the potential claims in this Supplementary Explanatory Memorandum.

Receivers' roadmap towards finalising recommendations on potential recovery actions

- 2.4.11 Once the Receivers' investigations and assessments are further advanced, if any potential recovery actions appear to be viable, the Receivers will need to (i) consider options for funding those actions, (ii) update and consult with Beneficiaries and Corporate Trustees as to those proposals, and (iii) seek appropriate orders from the Court before commencing any litigation which is deemed commercial to pursue.



2.5 Corporate Trustee documentation

What we have previously advised

- 2.5.1 As set out in section 4.3 of the Explanatory Memorandum, the Receivers' current proposed distribution methodology contemplates that additional documentation will be required be put in place between Brite Advisors and Corporate Trustees to govern the distribution payments made to Corporate Trustees.

- 2.5.2 The Receivers consider this is required for all Corporate Trustees, regardless of whether they had a Platform Agreement with Brite Advisors or not.

Nature of Feedback received

- 2.5.3 The nature of the Feedback received in relation to the additional documentation required between Corporate Trustees and Brite Advisors prior to a distribution to the Corporate Trustees is summarised below:
- (a) two Corporate Trustees requested specifics regarding the documentation which the Receivers contemplated;
 - (b) a Corporate Trustee objected to the use of such an agreement to attempt to control the relationship between the Corporate Trustee and its Beneficiaries;
 - (c) a Beneficiary requested further information regarding the process the Receivers would follow if a Corporate Trustee did not agree to the terms of the additional documentation required by the Receivers prior to a distribution being made; and
 - (d) several Beneficiaries sought comfort that the additional documentation required by the Receivers would ensure the "safety" of Beneficiaries' Client AuM upon distribution, including in relation to Corporate Trustees' fees.

Receivers' response to Feedback

- 2.5.4 The proposed documentation between the Receivers and the Corporate Trustees is intended to govern the manner in which the Receivers distribute the significant sums of Client AuM to Corporate Trustees in respect of their Beneficiaries.
- 2.5.5 The key terms of the proposed documentation are directed at:
- (a) confirming that the distribution payments are made to the Corporate Trustees by the Receivers in their capacity as Receivers of Brite Advisors and not in a personal capacity;
 - (b) confirming that the distribution payments are received by the Corporate Trustee for and on behalf of the relevant Beneficiaries and that the distribution payments will be dealt with by the Corporate Trustee in accordance with the pension arrangements between them and the relevant Beneficiaries (including contractual documentation, scheme trust deeds and scheme rules, within the relevant pension regime);
 - (c) confirming that in causing the distribution payments to be made, the Receivers are not in any way adopting any pre-appointment agreements between the Corporate Trustees and Brite Advisors (such as the Platform Agreements) or assuming any personal liability for the obligations owed by Brite Advisors under those documents (where they exist) or any other obligations arising at law from the relationship between Brite Advisors and the Corporate Trustees; and
 - (d) confirming that the distribution payments extinguish the Corporate Trustees and Beneficiaries' Verified Entitlements in the Receivership, but do not otherwise extinguish any claims that the Corporate Trustees and Beneficiaries have arising from pre-appointment conduct of Brite Advisors (which is directed at preserving those parties' rights to seek recourse from third parties in respect of any shortfall or other loss and damage suffered by them arising from Brite Advisors' pre-appointment conduct).
- 2.5.6 The Receivers are not seeking to control the relationship between the Corporate Trustee and its Beneficiaries. For this reason, the Receivers cannot ensure the safety or security of Beneficiaries' Client AuM after it has been paid to the Corporate Trustee, including in relation to the Corporate Trustees' fees. In relation to those fees, the Receivers have previously published the Corporate Trustees' responses to questions regarding how their fees would apply (see section 6 and Document 08 of the Fifth Report) and their stance on substituting Corporate Trustee prior to distribution (in relation to which, please see sections 2.11 and 3.7 below).

2.6 Segregation

What we have previously advised

- 2.6.1 As set out in section 6.3 of the Receivers' Fourth Report to Court, sections 5.3 to 5.5 of the Receivers' Fifth Report to the Court, and section 5.4 of the Explanatory Memorandum, the Receivers do not consider that the separation of assets into different IBA Accounts to constitute an effective segregation of Beneficiaries' interests in a legal sense nor did it give rise to a ring fencing of assets to protect certain accounts from the shortfall.

2.6.2 The Receivers have reached this view based on:

- (a) the omnibus nature of the IBA Accounts;
- (b) the security facility agreement between Brite Advisors and IBA which ostensibly provided that all funds in the different IBA Accounts served as collateral for the margin loan(s) across all other IBA Accounts;
- (c) the existing shortfall in the Client AuM at the time of each transfer of Client AuM to give effect to the purported segregation;
- (d) the Client AuM was comingled in the IBA Accounts prior to the transfers and designation of ownership of securities held by Beneficiaries across jurisdictions post transfer was largely arbitrary;
- (e) all IBA Accounts were held in the name of Brite Advisors and there was otherwise no legal mechanism or instrument which implemented any true segregation; and
- (f) the majority of payments made to Brite US being made from funds originating from IBA Accounts arbitrarily designated as holding RoW and/or UK Beneficiaries' funds, despite there being no contractual arrangements between Brite US and these Beneficiaries which would entitle Brite US to payment from RoW Beneficiaries' Client AuM.

Nature of Feedback received

2.6.3 The nature of the Feedback received from certain Beneficiaries, Financial Advisors to Beneficiaries, and from Brite US in relation to the Receivers' determinations in relation to the purported segregation of Client AuM not being effective is summarised below:

Feedback in support of segregation

- (a) Brite US has asserted that the use of an omnibus account structure does not automatically negate segregation, and that the decision was made to use an omnibus structure for its investment benefits.
- (b) Brite US and a number of Beneficiaries have asserted that the transfers of Client AuM to different IBA Accounts to attempt to demonstrate segregation to US and UK regulatory bodies is a matter that ought to impact the Receivers' views on the effectiveness of the segregation of the Client AuM (and queried whether the Receivers' determination has been brought to the attention of the US and UK financial regulatory bodies).
- (c) Brite US has asserted that US Beneficiaries' assets are segregated and traceable.
- (d) Based on the '*Acknowledgement of Omnibus Usage and Risks*' disclosure, Brite US has asserted that Brite Advisors agreed to legally segregate the Client AuM of US Beneficiaries from those of other Beneficiaries, which was a result of the diligence of Brite US. Brite US says that it monitored the account designated as holding Client AuM for US Beneficiaries.
- (e) Brite US has asserted that the Receivers can identify the shortfall down to the individual account level, due to being able to identify the margin loan applicable in each IB account. Therefore, according to Brite US, the Receivers should be able to identify which Beneficiaries the shortfall ought to apply to due to the purported segregation by region due to US and UK regulatory bodies mandating segregation.

Feedback in opposition to recognition of segregation

- (a) A group of Beneficiaries have said that recognising the segregation would unfairly impact RoW Beneficiaries, as the misappropriation of Client AuM disproportionately affects the RoW Beneficiaries.
- (b) A Beneficiary has referred to the SEC Complaint against Brite US, drawing attention to the fact that after June 2021, US Beneficiaries were notified of the omnibus structure of the IBA Accounts as well as the risks associated with the structure of the accounts through an '*Acknowledgement of Omnibus Usage and Risks*' disclosure. This is in contrast to the position of other Beneficiaries, including RoW Beneficiaries, who it appears had not been made aware of the structure of the accounts or risks associated with such accounts.

Receivers' response to Feedback

2.6.4 The Receivers remain of the view that the separation of funds into different IBA Accounts does not constitute an effective segregation which would provide any legal protection or ring fencing. None of the Feedback provided in support of segregation detracts from the conclusions reached. The Receivers supplement the explanations previously provided as follows to clarify why they do not consider that the action taken by Brite Advisors gave rise to any ring fencing as between IBA Accounts.

- 2.6.5 The term 'segregation' generally refers to the separation of one client's assets from other clients' assets in the context of providing custody of financial assets. This concept is recognised and implemented in Australian law by protection of client assets using trusts law.
- 2.6.6 The position under Australian law is that mere segregation into separate accounts is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder. A declaration of trust over the funds or assets in that account is needed to protect those funds. Accordingly, segregation on its own is insufficient to provide protection. Equally, a declaration of trust, where a client's money or assets have been so mixed so as to preclude tracing, is insufficient to provide protection. When both elements are present, they work together to give protection required in a custodial relationship.
- 2.6.7 Under Australian law, a trust requires certainty of intention (i.e. an intention to create a trust), subject matter (i.e. the property of a trust must be defined and identifiable), and object (i.e. in favour of definite beneficiaries, ascertained or capable of ascertainment). A trustee is under a duty to segregate a beneficiary's property from the trustee's own property, as well as from the property of other beneficiaries, unless pooling arrangements are authorised by legislation or the terms of the trust instrument. Where such pooling arrangements are authorised, that does not necessarily negate any trust arrangement, it merely alters the content of the duty of the trustee.
- 2.6.8 In the context of an AFSL holder, pooling arrangements (referred to as using an omnibus account) are permissible. However, the licensee must implement operational segregation, which requires, among other things, the following.
- (a) The AFSL holder always maintains adequate records showing the individual entitlement of clients in the assets held in the omnibus account.
 - (b) The AFSL holder performs reconciliation procedures on each business day for the assets held in the omnibus account.
 - (c) The AFSL holder has safeguards in place to ensure that the omnibus account will never fail to have sufficient funds to meet the entitlements of the client, and any other person in relation to the assets not held separately for more than two business days.
- 2.6.9 Without this relief, the requirement to hold the assets on trust and keep assets of Beneficiaries separate from one another stands.
- 2.6.10 When the circumstances identified by the Receivers in paragraph 2.6.2 above are considered in the context of the requirements under Australia law, the Receivers' view is that it is clear that the protection sought by those proponents of 'segregation' of the US accounts cannot be sustained.

2.7 Equitable tracing claims

What we have previously advised

- 2.7.1 In section 5.2 of the Explanatory Memorandum, the Receivers noted that there are certain assets on the IB Platform that are identifiable as assets that were to be held on behalf of individual Beneficiaries according to the 13 December 2023 Data, but that any attempt by or on behalf of a Beneficiary to establish a proprietary claim to those assets in the circumstances would be hindered by the circumstances that justify treating those assets as having been "mixed" in a legal sense.

Nature of Feedback received

- 2.7.2 A number of Beneficiaries continue to assert that they have proprietary claims to certain assets which can be established by way of equitable tracing. The Receivers have considered further information provided by or on behalf of those Beneficiaries, and have also provided further information and explanation to those persons asserting those claims.

Receivers' response to Feedback

- 2.7.3 Ultimately, the Receivers remain of the views expressed in the Explanatory Memorandum. That is, it remains the case that the Receivers have not identified any proprietary claims to assets in the Deficient Mixed Fund from the forensic work undertaken to date and do not propose to undertake further work to attempt to identify such claims. The Receivers believe that this approach is justified on the basis that any potential tracing claim will be hindered by the following matters:

- (a) Those assets have benefited from the misappropriation of other Beneficiaries' assets and cash to repay the margin loan. The benefit derived is through a reduced exposure to the security interest under that margin loan and justifies treating these funds as mixed.
- (b) The securities are likely to have been purchased with cash which had already been mixed with other cash in the deficient fund. Mixing in this case could be exacerbated if, for instance, the securities were purchased using the proceeds of the sale of other assets on the platform.

2.8 Entitlement Reference Date

What we have previously advised

- 2.8.1 The Federal Court of Australia made orders on 5 June 2024 setting the relevant date at which to assess Beneficiaries' entitlements as 13 December 2023, being the date of the Receivers' appointment (**Entitlement Reference Date**).
- 2.8.2 Paragraphs 10 – 20 of the Seventh Affidavit of Linda Smith provides further context for the selection of this date.

Nature of Feedback received

- 2.8.3 The nature of the Feedback received in relation to the Entitlement Reference Date of Beneficiaries' entitlements is summarised below:
 - (a) A number of Beneficiaries have suggested the 13 December 2023 date is arbitrary and lacks a legal basis.
 - (b) A number of Beneficiaries and Financial Advisors of certain Beneficiaries have suggested that the Entitlement Reference Date should be moved closer to the date of distribution, or the date when rebalancing of Model Portfolio Client AuM began.
 - (c) A number of Beneficiaries have asserted that it would not be difficult or impractical to revalue each Beneficiaries' entitlements as at the point of distribution.

Receivers' response to Feedback

- 2.8.4 It is important to understand the distinction between the valuation of Beneficiaries' entitlements in the receivership (which is the subject of the Valuation Notices) and the distribution payment that will be made to Beneficiaries.
- 2.8.5 Valuation of Beneficiaries' entitlements at a point in time is necessary to establish the relative interests of Beneficiaries in the assets available for distribution. Those entitlements are then used as an input into the calculation of the distribution payments to be made in respect of each Beneficiary, using the formula set out at section 4.2.7 of the Explanatory Memorandum.
- 2.8.6 Using 13 December 2023, being the date of the Receivers' appointment, as the Entitlement Reference Date is consistent with trusts law and insolvency law principles, and there is Australian precedent in support of the approach. This precedent was relied upon when orders were sought from the Court to set 13 December 2023 as the relevant date.
- 2.8.7 In relation to the Feedback that an alternate date could be used, please see further section 2.9 immediately below.

2.9 Distribution of post-appointment growth

What we have previously advised

- 2.9.1 As set out in section 4.2.7 of the Explanatory Memorandum, the Receivers' proposed distribution methodology contemplates a distribution to Beneficiaries who have a claim to the Deficient Mixed Fund (i.e. the vast majority of Beneficiaries) determined by the value of their entitlements as at the Entitlement Reference Date as a portion of the total value of Client AuM that forms part of the Deficient Mixed Fund held as at the date of distribution (or shortly before).
- 2.9.2 The practical effect of this approach to distribution means that any growth in the Client AuM from 13 December 2023 to the date of distribution (or shortly before) will be distributed among Beneficiaries in accordance with the value of their entitlements as at 13 December 2023 rather than attributing the growth of the Client AuM based on performance of specific assets which Brite Advisors purported to hold for individual Beneficiaries.

Nature of Feedback received

- 2.9.3 The nature of the Feedback received in relation to the distribution of the total growth among all Beneficiaries is summarised below:
- (a) A number of Beneficiaries have said that the approach proposed does not take into account the fact that Beneficiaries made individual investment decisions, including accepting different levels of risk, which unfairly prejudice Beneficiaries who may have had a higher risk appetite and who would have otherwise experienced higher growth rates during the period from 13 December 2023.
 - (b) One suggestion to partly address the inequity said to arise was to move the Entitlement Reference Date (see section 2.8 immediately above) to a date later in time, for instance when rebalancing of the model portfolios recommenced (i.e. 17 June 2024) or a date in the future shortly before distribution.

Receivers' response to Feedback

- 2.9.4 The Receivers have, in consultation with the Interim Fund Manager, BML Funds, given consideration to (i) alternate Entitlement Reference Dates, and (ii) alternate approaches to allocation of growth post Entitlement Reference Date, to consider whether there is a more appropriate approach which addresses the Feedback received. The Receivers have reached the view that the approach proposed in the Explanatory Memorandum remains appropriate. An overview of the potential alternatives is set out below. The Receivers will outline these matters for the Court, so that the Court understands the feasible alternatives and their respective advantages and disadvantages when making final distribution orders.

Later Entitlement Reference Date

- 2.9.5 Australian case law establishes the following propositions which have guided the Receivers' approach to selection of the Entitlement Reference Date:
- (a) A single date must be adopted to value entitlements.
 - (b) Fairness only requires that the same date be applied to all Beneficiaries and all accounts.
 - (c) Whatever date is used will possess a degree of arbitrariness and will be more beneficial or detrimental to some Beneficiaries.
 - (d) The weight of authority identifies the appointment date of the Receivers as having strong support in trust law generally and in insolvency.
- 2.9.6 The Receivers are cognisant of the fact that Beneficiaries have not been able to adjust their investment risk profile during the Receivership. Accordingly, the risk level and asset selection which existed as at 13 December 2023 was in effect locked in. That remains the case in relation to model portfolios and a majority of bespoke investments (noting that there are now certain bespoke investments where there is a capacity to close positions).
- 2.9.7 The Receivers are also cognisant of the fact that Brite Advisors did not in fact hold all investments it purported to hold, meaning the aggregate gains on each portfolio which determines a Beneficiary's entitlement will necessarily deviate from the gains made on the assets which were actually held by Brite Advisors.
- 2.9.8 The Receivers have already undertaken work to calculate entitlements as at 13 December 2023. This was done in accordance with orders from the Court made on 2 September 2024. The effect of these orders was explained by circular to all Beneficiaries on 12 November 2024.
- 2.9.9 Considering the case law on selection of a reference date to value entitlements and the circumstances of the Brite Advisors receivership, the Receivers remain of the view that 13 December 2023 is an appropriate date for valuation.

Risk-based adjustment to allocation of post-Entitlement Reference Date returns

- 2.9.10 The Receivers have considered whether post-Entitlement Reference Date returns could be adjusted to account for Beneficiaries' risk profiles as at 13 December 2023. Such an approach allows for recognition of the differing risk profiles of Beneficiaries while mitigating some of the drawbacks of setting a later Entitlement Reference Date. The Receivers have developed and considered this approach in collaboration with BML Funds. With advice from BML Funds, the Receivers have reached the conclusion that it is not an appropriate substitute for the existing proposed distribution method.
- 2.9.11 By way of background:
- (a) The fundamental tenet of finance is that investors are compensated with higher returns for taking higher risk.

- (b) The Receivers could assume that Beneficiaries directed their assets into higher risk products with the expectation that their valuations would be more volatile, with greater profits if markets rose, and greater losses if markets fell. Conservative investors would have directed funds into safer products, which would result in lower returns in rising stock markets, and lower losses in falling markets.
 - (c) The relationship between risk and return is described by the Capital Asset Pricing Model (**CAPM**), where the expected return of an investment is determined by the systematic investment risk, known as beta. The CAPM is the most prominent financial model and use of it is widespread, particularly for valuing assets. The beta of a stock is a numerical measure of how the investment moves compared to the overall market and, as a result, tells us whether an investment is riskier or less risky than the market. Individual stocks will also have idiosyncratic risk or unsystematic risk, which is the risk unique to that specific stock. This risk is not accounted for in the beta of a stock.
 - (i) If a stock has a beta of 1, the returns are expected to be in line with the broader stock market. If the market goes up 10%, the stock is expected to go up 10%. If the market goes down 10%, the stock is expected to go down 10%.
 - (ii) If a stock has a beta of greater than 1, for instance 1.5, the stock is more volatile than the market. If the market goes up 10%, the stock is expected to go up more than the market, and vice versa.
 - (iii) If a stock has a beta of less than 1, for instance 0.75, the stock is less volatile than the market. If the market goes up 10%, the stock is expected to go up less than the market, and vice versa.
 - (d) The beta can be seen as a statistical measure of the market risk of a stock or portfolio of stocks and, as a result, an indicator of the expected return of the portfolio.
- 2.9.12 One approach which could be adopted in respect of allocating post-Entitlement Reference Date gains or losses among Beneficiaries is to apply a risk based modifier to each Beneficiary using the individual Beneficiary's risk tolerance / expected as at 13 December 2023. The impact of this would be to assign a greater portion of the gains (or, if there is a market downturn, the losses) to those Beneficiaries who had riskier portfolios as at 13 December 2023. This would be irrespective of how each Beneficiary's specific portfolio would have performed post 13 December 2023. That is, only the systematic risk would be considered, not the unsystematic risk. This is on the basis that applying unsystematic risk would be equivalent to setting a later Entitlement Reference Date, which is considered in the previous section.
- 2.9.13 BML Funds has the underlying data to calculate the risk profile and expected returns for Beneficiary holdings as at 13 December 2023 (i.e. the assets which Brite Advisors should have held for each Beneficiary).
- 2.9.14 A worked example of how this would operate in practice is set out below:
- (i) For the purposes of this worked example we assume the following. These numbers are chosen for simplicity and clarity.
 - (A) There is an aggregate portfolio return of 15% for the Client AuM from 13 December 2023 to the date of distribution.
 - (B) The beta for the aggregate portfolio is 70%.
 - (C) The asset deficiency is 10% of assets representing the variation in actual assets from expected value. Therefore actual net assets are 3.5% greater than expected assets as at 13 December 2023.
 - (D) The risk free rate over the period is assumed to be 4%.
 - (ii) Assume that Investor A had a valuation of \$100,000 on 13 December 2023 with a beta preference of 50%. Their expected return is 11.9% from the CAPM for a valuation of \$100,671, which is \$2,829 less than they would have received under a uniform treatment.
 - (iii) Investor B had a valuation of \$100,000 with a beta of 90%, their expected return would be 18.1% and their payout \$106,329, which is \$2,829 more than they would have received under a uniform approach.
 - (iv) If the entire portfolio was just these two investors we can see that the economic effect of applying a beta modified is that there is a wealth transfer from A to B to recognise that B had a higher risk tolerance.

Worked example

	Beta	Entitlement	Shortfall	Starting cash	Return	End cash	Unadjusted	Variation
Omnibus	70%	200,000	10%	180,000	15.0%	207,000		
Investor A	50%	100,000	10%	90,000	11.9%	100,671	103,500	(2,829)
Investor B	90%	100,000	10%	90,000	18.1%	106,329	103,500	2,829

2.9.15 The advantages of the above approach include the following:

- (a) It provides a basis on which to allocate the gains/losses incurred after the Entitlement Reference Date to reflect the general risk appetite of individual beneficiaries as at 13 December 2023.
- (b) It is a more attractive alternative to deferring the Entitlement Reference Date to some point in the future, given the issues arising from doing so discussed in the previous section.
- (c) As a result, it may provide a basis to mitigate perceived inequity in allocating gains/losses post-Entitlement Reference Date.

2.9.16 The disadvantages of the above approach include the following:

- (a) The approach still has results which may be perceived as inequitable, for instance:
 - (i) A Beneficiary with bespoke investments may have been concentrated in higher risk equities (e.g. with a beta of 1.5) which significantly outperformed the market (i.e. the return from the idiosyncratic risk component of the stock was significant). Under this approach, that Beneficiary will receive an increased share of the gains post-Entitlement Reference Date, however, would still receive less than what the portfolio they thought they held would have actually returned.
 - (ii) A Beneficiary with bespoke investments may have been concentrated in higher risk equities which significantly *underperformed* the market (i.e. the return from the idiosyncratic risk component of the stock was significantly negative). Under this approach, that Beneficiary will receive an increased share of the gains post-Entitlement Reference Date, even though the portfolio they thought they had would have returned *less* and potentially have even resulted in net *losses*.
- (b) It is true different Beneficiaries had different risk profiles as at 13 December 2023. However, individual risk preferences are arguably outweighed by the risks imposed on all Beneficiaries equally because of Brite Advisors' conduct and the resultant Receivership. In applying the fundamental tenet of finance, that investors receive higher returns for higher risk, the expressed risk profiles as at 13 December 2023 are less significant given the existence of the shortfall, lack of liquidity, loss of control and imposition of uncertainty which all Beneficiaries have faced equally as a result of Brite Advisors' misconduct. Viewed in this way, applying a risk-based modifier focused on investment preferences as at 13 December 2023 could be viewed as inequitable.
- (c) Applying a beta modifier is a financially sophisticated approach and may be difficult for some Beneficiaries to understand.
- (d) The approach imposes a particularly significant cost on Beneficiaries who desired a low-risk investment strategy, who would face (i) a reduction on their assets due to misappropriation, (ii) a reduction on the return generated by the Client AuM as a whole due to their low risk profile as at 13 December 2023, and (iii) potentially, difficulty understanding the method by which their potential return has been reduced to benefit others.
- (e) Although beta is a statistical measure and the approach has a degree of objectivity, the CAPM has limitations. While the CAPM is the dominant model in valuing financial assets under uncertainty, many financial experts would dispute the use of CAPM and beta in this manner. The CAPM is the dominant model because no superior method has been established, not because it is universally respected. Therefore, whether it is appropriate to apply CAPM in the unusual circumstances faced in the Receivership is open to debate.
- (f) In the event of a market crash, resulting in post-Entitlement Reference Date *losses*, those losses would be disproportionately assigned to Beneficiaries with a higher risk appetite as at 13 December 2023. The imposition of disproportionate losses on this group, irrespective of the idiosyncratic risk of individual portfolios, poses similar risks of inequity.

2.9.17 Considering the above, the Receivers have formed the view that a risk-based modifier should not be applied to post-Entitlement Reference Date gains or losses.

- 2.9.18 We note that a Corporate Trustee provided feedback on the possibility of a risk weighted allocation of gains, which was referred to in the affidavit of Linda Smith dated 26 February 2025. That Corporate Trustee indicated that a simple *pari passu* distribution would be more appropriate.

2.10 Approach to Minerva Note valuation

What we have previously advised

- 2.10.1 As outlined in section 2.2.39 to 2.2.45 of the Explanatory Memorandum, the Receivers have valued the Minerva Notes still held by the Beneficiaries at cost price and propose to treat this as an entitlement to the Deficient Mixed Fund. To the extent that there is any realisable value from the Minerva Notes, this will be contributed to the Deficient Mixed Fund.

Nature of Feedback received

- 2.10.2 The nature of the Feedback received in relation to the treatment of Minerva Notes is summarised below:
- (a) A representative of Brite US has said that (i) the proposal results in US clients being subject to losses as a result of matters which do not relate to the US clients, and (ii) the legal and equitable basis for valuing the Minerva Notes at cost for the Beneficiaries who still held them at 13 December 2023 has not been outlined by the Receivers.
 - (b) A Corporate Trustee has said that the valuation of Minerva Notes at cost, as well as allowing Beneficiaries who 'sold out' their Minerva Notes to retain the benefit of that 'sale' at cost, is not equitable in circumstances where Minerva was in clear financial difficulty and Beneficiaries who held no investments in the Minerva Notes would be 'subsidising' the loss in value of the Minerva Notes attributable to the Minerva Beneficiaries' decision to invest in a high risk asset. The Corporate Trustee considers the appropriate valuation for the purposes of the distribution should be nil noting the Minerva beneficiaries' rights to claim against their Corporate Trustee for any breach in the terms of their engagement.
 - (c) The legal and equitable basis for valuing the Minerva Notes at cost for the Beneficiaries who still held them at 13 December 2023 has not been outlined by the Receivers.
 - (d) On the day of filing this Supplementary Explanatory Memorandum, the Receivers received correspondence from a Corporate Trustee providing detailed feedback in respect of the Receivers' proposed approach with the Minerva Notes Beneficiaries. Given the timing of receipt, the Receivers have not had the opportunity to substantively consider this feedback and have not taken it into consideration in the Receivers' proposed approach set out at [2.10.3] to [2.10.7] below. The Receivers will consider this feedback and provide Beneficiaries with an update via circular by 8 April 2025, including whether the feedback changes the Receivers' proposed approach set out at [2.10.3] to [2.10.7] below. The Receivers have also provided the feedback to the Court in the Ninth Affidavit of Jemma Leigh Huntsman.

Receivers' response to Feedback

- 2.10.3 The circumstances surrounding Brite Advisors' investment in the Minerva Notes and the on-selling of those notes is detailed in the Receivers' Fourth Report at [5.6.52] – [5.6.71] and Appendix A4 and paragraph 34 to 45 of the Twelfth Smith Affidavit.
- 2.10.4 To reiterate, the key facts which impact the Receivers' view in relation to the treatment of the Minerva Notes are as follows:
- (a) BAG entered into a finance facility with Round Hill International in August 2017 which Mr Donnelly and entities related to Brite Advisors guaranteed. A term of the facility was that BAG would commit to an investment of not less than GBP8,850,000 of Minerva Notes.
 - (b) Between September 2017 and October 2018, Brite Advisors invested funds from both Corporate Trustee deposits and Interactive Brokers deposits totalling GBP8.9m in debt securities issued by Minerva (i.e. the Minerva Notes).
 - (c) Between September 2017 and August 2019, Beneficiaries invested in Minerva Notes for a total of GBP8.3m. The Receivers' analysis to date has been unable to conclusively attribute Brite Advisors' purchase of the Minerva Notes to specific Beneficiaries in all instances.

- (d) On and before February 2020, around 72 Beneficiaries either voluntarily sold their interest in the Minerva Notes or, in effect, systematically had their interest in the Minerva Notes sold back to Brite Advisors. The consideration (i.e. cash) credited to these Beneficiaries' accounts was equal to the amount those Beneficiaries had initially paid to Brite Advisors to obtain their interests in the Minerva Notes. As a result, these Beneficiaries no longer have any Minerva Notes in their portfolio which require valuation at 13 December 2023. The effect of the Minerva Notes being 'sold out' is that the Beneficiaries' cash balance increased. These Beneficiaries subsequently bought and sold other securities (Model Portfolio or otherwise) from their cash balance, however there is not necessarily a direct link between cash credited as a result of the sale of the Minerva Notes and the purchase of specific securities (noting Beneficiaries may have already held cash).
 - (e) As at 13 December 2023, 37 Beneficiaries, with total investments of GBP0.5m remained invested in the Minerva Notes. The Receivers verified that the purchase price for these notes was paid for by the 37 Beneficiaries through deposits made to the Westpac Accounts, with those funds later being transferred into IBA.
- 2.10.5 The Receivers remain of the view that the most appropriate way to value the Minerva Notes still held by Beneficiaries is as per the amount those Beneficiaries had initially paid to Brite Advisors to obtain their interest in the Minerva Notes, as was afforded to the Beneficiaries who already divested the Minerva Notes. The Receivers' view on the valuation of the Minerva Notes is a separate matter to the ultimate distribution methodology for the Minerva Notes, which is explained below.
- 2.10.6 Because of conflicts of interest which Brite Advisors appeared to have in the circumstances around its purchase of the Minerva Notes originally, combined with the lack of disclosure to Beneficiaries, it appears that the Minerva Notes were likely sold to Beneficiaries in breach of Brite Advisors' fiduciary duties. As the funds paid by the Beneficiaries in the impugned transactions were paid into the IBA Accounts, the Receivers consider those Beneficiaries would likely have a claim against the Deficient Mixed Fund.
- 2.10.7 The legal basis that underpins the Receivers' proposed approach can be summarised as follows.
- (a) Brite Advisors appears to have engaged in misconduct in its marketing and sale of the Minerva Notes, which among other things, appears to give rise to a breach of fiduciary duty. Such a breach would give impacted Beneficiaries a right to compensation from Brite Advisors (not necessarily a right to any funds in the Deficient Mixed Fund though).
 - (b) Fiduciary duties are strict and the fact of breach and the remedies available are not impacted by the prudence of any investment decision made to invest in the instruments.
 - (c) Because the funds paid by Beneficiaries in the impugned transactions was paid into the IBA Accounts, seemingly to replenish funds which Brite Advisors had misappropriated from that account to purchase the Minerva Notes in the first place (seemingly as principal rather than agent), this gives the note holders a basis to claim against the Deficient Mixed Fund.

2.11 Trustee substitution process

What we have previously advised

- 2.11.1 As outlined in sections 4.2 and 4.3 of the Explanatory Memorandum, the Receivers intend to seek an Order from the Court that upon a request from a Beneficiary, the Receivers will not distribute funds to their Corporate Trustee, until they provide consent to do so. This was intended to allow for time for the Beneficiary to arrange to change their Corporate Trustee should they wish to do so.
- 2.11.2 The Receivers proposed to withhold distribution to the Corporate Trustee for a period of up to twelve months from the Valuation Date while the Beneficiary made appropriate arrangements to substitute their Corporate Trustee.
- 2.11.3 The Receivers have made clear that they consider that the relationship between Beneficiaries and Corporate Trustees is a matter for them, and that the Beneficiaries who have concerns about their Corporate Trustee should seek their own advice and take steps to address that concern as appropriate.

Nature of Feedback received

- 2.11.4 The nature of the Feedback received in relation to the substitution or change in Corporate Trustee is summarised below:
- (a) Further information was sought by a number of Beneficiaries in relation to the mechanism which would allow the change of Trustee, whether the Receivers would be involved in that process, and whether the process can be begun prior to the distribution.
 - (b) A Beneficiary requested further information in relation to how a Beneficiary's funds would be invested or otherwise treated by the Receivers for the period of up to 12 months whilst the Beneficiary arranges for the change in Trustee, and if the process of changing Trustee is delayed by the outgoing Corporate Trustee, would the Receivers consider extending the 12-month period allowed.
 - (c) A number of Corporate Trustees and Regulators had understood the Receivers' proposal to involve direct payments to Beneficiaries despite those Beneficiaries having a Corporate Trustee (which it does not and the Receivers have since corrected that misunderstanding). On this basis the Feedback given was that unauthorised payments made directly to Beneficiaries may trigger severe, adverse consequences to those Beneficiaries, as the owner of the assets are the Corporate Trustees.
 - (d) The Feedback received from Regulators also highlighted that the movement of a Beneficiary's funds to another scheme may also have adverse tax implications and that transition to a new Corporate Trustee needs to take careful account of the UK pensions regulation.
 - (e) Certain Corporate Trustees and Regulators raised concerns that the proposed orders were not justified and could be used by Beneficiaries to avoid paying fees or to circumvent the terms of a Court Order (in the case of Corporate Trustees subject to external administration).
 - (f) A number of Beneficiaries were supportive of the proposed order and further information was sought to clarify how the transfer would be carried out should a Beneficiary wish to move to an alternate Corporate Trustee.

Receivers' response to Feedback

- 2.11.5 The Receivers maintain the position that the relationship between Beneficiaries and Corporate Trustees is a matter for them, and that the Beneficiaries who have concerns about their Corporate Trustee should seek their own advice and take steps to address that concern as appropriate.
- 2.11.6 Consistent with this position, combined with the concerns raised regarding (i) the complexity of the UK pension regulatory environment, and (ii) the potential for this mechanism to be used to avoid paying fees or adhering to Court Orders, the Receivers have decided to alter their approach. The Receivers will no longer offer to delay payment as a matter of course at the election of a Beneficiary.
- 2.11.7 To facilitate the process of Beneficiaries transferring to a new Corporate Trustee, the Receivers propose to:
- (a) at the next hearing seek an amendment to the Asset Preservation Orders to expressly permit a change of trustee under those orders; and
 - (b) implement a process, documented in the agreement to be entered into with each Corporate Trustee prior to distribution, whereby a Corporate Trustee, a new third party trustee (the **Substituted Corporate Trustee**) and a Beneficiary can jointly issue to the Receivers a payment instruction, directing the payment of the portion of the distribution which represents the Beneficiary's entitlement to the Substituted Corporate Trustee. The Receivers will establish a process for Corporate Trustees and Beneficiaries to use to notify the Receivers of these changes.
- 2.11.8 The Receivers will not be taking responsibility for facilitating any transfer of Corporate Trustee, nor will it be formally recognising any substitution of Corporate Trustee in accordance with UK pensions regulations or entering into any new platform agreements or other trust documents with Substituted Corporate Trustees. The proposed approach is intended to remove any barriers to Corporate Trustees and Beneficiaries undertaking this process themselves.
- 2.11.9 Although the Receivers no longer propose to delay distribution as a matter of course to facilitate changes in Corporate Trustee, if at some point shortly before distribution a Beneficiary is having difficulty giving effect to a change of Corporate Trustee, they should contact the Receivers at that point to enable the Receivers to consider the particular circumstances.

2.12 Surrender Rebates

What we have previously advised

- 2.12.1 As outlined in section 3.2.1 to 3.2.5 of the Explanatory Memorandum, to the extent a Beneficiary has not repaid their Surrender Rebate, the balance of the Surrender Rebate will be a deduction in the calculation of the Beneficiary's total entitlement.
- 2.12.2 As outlined at paragraph 44(a) of the Sixteenth Smith Affidavit, a number of Beneficiaries raised disputes in relation to Surrender Rates via the Valuation Notices disputes process. The Receivers intended to seek Orders to confirm their entitlement to deduct the Surrender Rebate, but ultimately did not do so.

Nature of Feedback received

- 2.12.3 Feedback has been received from Corporate Trustees, Beneficiaries and advisors in relation to the treatment of Surrender Rebates. The nature of the Feedback which has been received as part of the consultation process, as well as the disputes which have been raised by certain Beneficiaries, their advisors and Corporate Trustees as part of the Valuation Notice process are set out below:
- (a) A suggestion has been made that Surrender Rebates should not be set-off as a negative account balance because there is nothing in the documentation Beneficiaries entered into which sets out the position if Brite Advisors "exited the arrangement" earlier than the 10 year period provided for repayment, rather than the Beneficiary exiting the arrangement.
 - (b) Given the Surrender Rebates were repayable over 10 years, if they are to be off-set for the purposes of calculating entitlements in circumstances where the term had not yet expired as at 13 December 2023, a suggestion has been made that there should be an adjustment to the amount to be set-off as a negative balance to account for the time value of money.
 - (c) As result of the Receivership, it has been alleged that Brite Advisors has breached its obligations to the Beneficiary by not allowing the Beneficiary sufficient time to repay the Surrender Rebate.
 - (d) Some Feedback from Beneficiaries has been provided on the mistaken basis that the Surrender Rebate is an 'exit fee' which Brite Advisors is charging them to leave Brite Advisors (which it is not and the Receivers are in the process of writing to the relevant parties to correct this misunderstanding, where it has not already been done).
 - (e) It has been suggested that the terms and conditions applicable to Brite Advisors limits Brite Advisors' ability to make a claim against the Beneficiaries for the consequences of Brite Advisors' 'own negligence, wilful default, fraud or breach of ASIC Rules'. The Feedback suggests that as a result of this limitation of liability, Brite Advisors should have no right to claim against the Beneficiaries with respect to the Surrender Rebates.
 - (f) It has been suggested that the investment guidelines for certain QROPS explicitly prohibit loans to members which would prevent the set off of the Surrender Rebate.
 - (g) Certain Beneficiaries have said that they should be treated differently to other Beneficiaries due to the nature of their onboarding with Brite Advisors. Specifically, they were compelled to move from their prior pension fund to Brite Advisors as a result of the Brite Group purchasing their prior fund.

Receivers' response to Feedback

- 2.12.4 Surrender Rebates are explained in paragraphs 4.3.17, 4.6.21 - 4.6.22, 5.2.5, and 5.6.9 of the Receivers' Fourth Report, paragraphs 3.2.1 to 3.2.5 of the Explanatory Memorandum and again at paragraph 44(a) and 46 to 53 of the Sixteenth Smith Affidavit.
- 2.12.5 To reiterate and for context, Surrender Rebates are explained below:
- (a) Beneficiaries seeking to roll over their pension assets from a prior pension provider to Brite Advisors would be charged a surrender or exit fee by the prior pension provider. This fee would be deducted from the value of the pension assets at the time of roll over, such that the pension assets received by Brite Advisors on behalf of that Beneficiary were reduced by the fee.

- (b) Brite Advisors offered Beneficiaries in these circumstances what essentially amounted to an interest free loan to "top up" the rolled over investment by the amount of the surrender or exit fee charged by the prior pension provider. This arrangement did not attract interest and was repayable by the Beneficiary to Brite Advisors in monthly instalments (by way of deduction from the value of the Beneficiary's pension assets) over a 10-year period. This arrangement was referred to within Brite Advisors as a 'Surrender Rebate'.
- (c) The investment information that Beneficiaries were able to view via Salesforce prior to the Receivers' appointment did not show the outstanding balance of a Beneficiary's Surrender Rebate. However, that information would have shown the monthly repayments being made to Brite Advisors in respect of the Surrender Rebate.

2.12.6 The Receivers make the following comments on the Feedback received on the treatment of the Surrender Rebates:

- (a) Order 9(b) of the Framework Distribution Orders permits the Receivers to set-off positive balances and investment values against negative account balances or debts. The amounts owing under the Surrender Rebate are properly characterised as a negative account balance or debt.
- (b) Approximately 54% of Beneficiaries (who are owed entitlements) by number are subject to a Surrender Rebate. If the Surrender Rebates are not set-off against positive investment balances of the Beneficiaries who held them, the burden of the approximately USD\$16.7m owing to Brite Advisors by this subset of Beneficiaries would simply be spread across the entire Beneficiary population in proportion to the size of each Beneficiary's entitlement.
- (c) The Surrender Rebate represents cash that Brite Advisors in effect loaned to the Beneficiary for investment on an interest free basis. Beneficiaries who took advantage of this were able to use the Surrender Rebate funds for investment purposes and generate returns. If the amount owing under the Surrender Rebate is not set off against each Beneficiary's positive entitlement, then Beneficiaries who received the benefit of a Surrender Rebate will, essentially, have their entitlement to the Deficient Mixed Fund inflated by cash they never contributed to the Deficient Mixed Fund.
- (d) Beneficiaries entered into documentation when they moved to Brite Advisors which referenced and explained the Surrender Rebate. That is, they were aware of the nature of the Surrender Rebate when they were onboarded. This includes the Beneficiaries who moved to Brite Advisors because of an acquisition by the Brite Group.
- (e) Whilst the Receivers have referred to the Surrender Rebate as a 'loan', this is to assist in explaining the economic effect of the Surrender Rebate (i.e. as funds which were available to the Beneficiary for their investment use) rather than a conclusion as to how the Surrender Rebate is to be classified under any regulations or guidelines. The Receivers have not been directed to any specific regulation or guideline which would prevent the set off as proposed.
- (f) The debt owing by Beneficiaries in respect of Surrender Rebates is not a "claim" that arises from Brite Advisors' "negligence, wilful default, fraud or breach of ASIC Rules". It is a negative account balance or debt that exists because funds were advanced by Brite Advisors to Beneficiaries, with a requirement that the funds be repaid over time. The Receivers are of the view that the limitation of liability clause identified in the Feedback does not prevent the Receivers from applying the amount owed under the Surrender Rebates as a "negative account balance or debt" contemplated by Order 9(b) of the Orders made on 2 September 2024 in WAD 13/2024.
- (g) The Receivers do not propose to make any adjustments for the time value of money arising from the loan terms having not yet expired.

2.12.7 The Receivers remain of the view that it is appropriate that the Surrender Rebates are to be set-off against the positive value of the Beneficiaries' investments in calculating their entitlements. This is particularly in the context of the alternative, which as outlined above, is for the burden of circa USD \$16.7m owing to Brite Advisors being spread across the entire Beneficiary population in proportion to the size of their entitlement.

2.12.8 The Receivers consider the alternative to be a considerably less equitable and principled course of action than the one currently proposed.

2.12.9 Noting that Surrender Rebate disputes had been raised by a number of Beneficiaries, the Receivers decided to proactively bring the Surrender Rebate position and disputes raised to the Court's attention in the first instance, with a view to streamlining the process and avoiding the need for multiple Beneficiaries applying to the Court to be heard in relation to their dispute. The Receivers intended to seek orders to confirm that the Receivers are entitled to deduct the Surrender Rebates as proposed at a hearing on 19 February 2025. The Receivers did not ultimately seek those orders in relation to the Surrender Rebate disputes, in view of (i) feedback received from certain

Beneficiaries and advisors which the Receivers needed time to consider, and (ii) a suggestion from ASIC that Beneficiaries needed further time to consider the matter after the Receivers clarified ASIC's role in the matter.

- 2.12.10 Ultimately, the Receivers must take steps to resolve the matter in a cost effective and fair manner. Accordingly, the Receivers do not intend to seek separate orders from the Court on this matter, unless requested by one or more Beneficiaries who have raised a dispute. Accordingly, if, after considering the Receivers' explanation set out above, Beneficiaries still disagree with the Receivers' determination in relation to the treatment of Surrender Rebates and would like the Receivers to bring the matter to the Court's attention and seek orders to resolve the matter, the Receivers will aim to bring the matter to the Court's attention at the 7 May 2025 hearing. The Receivers would seek to have procedural orders made on this date to allow the matter to be heard at a later date, rather than seeking to resolve the substance of the dispute. The Receivers will separately write to the Beneficiaries who have raised disputes to advise them of this process.

2.13 Currency on distribution

What we have previously advised

- 2.13.1 As outlined briefly at section 4.2.7 of the Explanatory Memorandum, where a Beneficiary is to be paid their distribution in a currency other than USD, the Receivers proposed to convert such funds to the Beneficiary's nominated currency as required on or shortly after the Valuation Date at the prevailing exchange rate where necessary.

Nature of Feedback received

- 2.13.2 The nature of the Feedback received in relation to the treatment of currency is summarised below:
- (a) An advisor has queried whether Beneficiaries will receive the 'reporting currency' of their account or if they will receive the underlying asset currency. The advisor was concerned that Beneficiaries with portfolios containing assets in multiple currencies may face unfavourable costs associated with currency conversion; and
 - (b) Beneficiaries have asked (i) if assets denominated in certain currencies will be held in that currency when sold (without currency conversation), (ii) if they can choose/change their 'nominated currency' (noting the 'default' currency per Salesforce records is not always representative of a Beneficiaries current situation), and (iii) what exchange rates will be used to calculate the entitlement to the Deficient Mixed Fund and the ultimate distribution.

Receivers' response to Feedback

- 2.13.3 Beneficiaries' portfolios can comprise of multiple Financial Accounts, denominated in different currencies and/or with different Corporate Trustees. Beneficiaries then have a 'Client Account' which is the level their Valuation Notice is presented to them in which effectively "rolls up" all Financial Accounts for the Beneficiary. The 'reporting currency' or the 'nominated currency' is the currency which Beneficiaries' Valuation Notice has been presented to them in (**Reporting Currency**).
- 2.13.4 The proposed distribution orders contemplate a process for Corporate Trustees and Beneficiaries (only where they do not have a Corporate Trustee) identifying the currency or currencies in which they are to receive a distribution in accordance with a process to be established by the Receivers. The Receivers are in the process of consulting with the Corporate Trustees to identify the practicalities of making payments, which will be used to inform that process. The currency that Beneficiaries receive from their Corporate Trustee is a matter to be determined between the Corporate Trustees and their Beneficiaries.
- 2.13.5 The Receivers propose to deal with currency as follows:
- (a) Beneficiaries' entitlement to the Deficient Mixed Fund will be calculated by (notionally) converting their Valuation Notice to USD at the 13 December 2023 rates which the Receivers have consistently used at 13 December 2023.
 - (b) Once the Deficient Mixed Fund has been liquidated, the cash on hand will be (notionally) converted to USD to determine Beneficiaries' total entitlement to it (or the Corporate Trustees' total entitlements, being the aggregate of relevant Beneficiary entitlements) in USD (i.e. the Distributable Amount) at the prevailing exchange rate at the time (i.e. as at the Valuation Date).
 - (c) Once Beneficiaries' entitlement to the Deficient Mixed Fund is known in USD, the Receivers will calculate the total cash they require in various currencies and arrange for the liquidated cash to be (actually) converted where required at the prevailing exchange rate at the time.

- (d) As a result of the above, the Receivers will have multiple cash accounts in different currencies in which to make the payments from.
- 2.13.6 As a result of the above, most Beneficiaries are exposed to currency risk at two key points in time, being:
- (a) The exchange rate at 13 December 2023, i.e. the Entitlement Calculation Date of the currency pair(s) between, (i) the denominated currency of any assets by reference to which a Beneficiary's Verified Entitlement was calculated (if it is a currency other than USD), and (ii) USD. This exchange rate is a historic one and therefore fixed. This is used to calculate Beneficiaries' entitlement to the Deficient Mixed Fund; and
 - (b) To the extent a Corporate Trustee or Beneficiary is to receive a distribution in a currency, and as a result of the liquidation there is insufficient cash in that currency to make the distribution, the exchange rate at that time between the desired currency and a currency in which the Receivers have a surplus of cash when considering the distribution needs (more likely to be USD).
- 2.13.7 We note that where Beneficiaries have made withdrawals, in calculating each Beneficiary's distribution amount these withdrawals will be brought to account using their value in USD as at the date of the withdrawal.
- 2.13.8 We note that Beneficiaries with an interest in the Deficient Mixed Fund do not have an interest to specific assets. Accordingly, the currency risk to individuals arising from holding assets with differing base currencies which was raised in the Feedback above does not arise.

2.14 Direct payment to Beneficiaries

What we have previously advised

- 2.14.1 As set out at section 4.2.8 to 4.2.11 of the Explanatory Memorandum, where a Beneficiary has a Corporate Trustee in respect of an account with Brite Advisors in relation to which their entitlement arises, the Receivers propose to make the distribution payment or transfer the asset, as applicable, to that Corporate Trustee. Where a Beneficiary has an account with Brite Advisors without an intermediary Corporate Trustee, the Receivers propose to make the distribution payment or transfer the asset, as applicable, directly to that Beneficiary.

Nature of Feedback received

- 2.14.2 The nature of the Feedback received in relation to payment being made via the Corporate Trustees is summarised below:
- (a) Regulators have advised the Receivers of their expectation that payments will be made via the Corporate Trustees in accordance with local regulations, as well as the significant tax consequences that may be triggered by making a payment directly to Beneficiaries. A number of Corporate Trustees and Regulators had understood the Receivers' proposal to contemplate direct payments to Beneficiaries despite those Beneficiaries having a Corporate Trustee (which it does not and the Receivers have since corrected that misunderstanding).
 - (b) A Corporate Trustee has advised that certain Beneficiaries who are classified as 'direct' investors in Brite Advisors' records actually have a connection to a Corporate Trustee and as a result, their funds should be distributed via the Corporate Trustee because such Corporate Trustees has outstanding costs purportedly in connection with those Beneficiaries which need to be deducted before the Beneficiary receives the funds.
 - (c) Certain Beneficiaries have advised that they do not want their distribution to be made via their Corporate Trustee and want to have the distribution directed to themselves and/or other investment vehicles.

Receivers' response to Feedback

- 2.14.3 The Receivers wish to emphasise that they **do not** propose to make any distribution payment directly to Beneficiaries where they have a Corporate Trustee. **Where a Beneficiary has a Corporate Trustee, the Receivers intend to make distribution payments to the Corporate Trustees or otherwise in accordance with valid instructions provided by Corporate Trustees.**
- 2.14.4 Beneficiaries who do not want distribution payments relating to their entitlements paid to their existing Corporate Trustee should take any steps available to them within their relevant pension scheme regime to change their Corporate Trustee. In relation to those Beneficiaries identified as direct investors according to the records of Brite Advisors and which a Corporate Trustee has suggested are in fact intermediated through a Corporate Trustee, the Receivers are investigating this matter and will work with the Corporate Trustees to resolve the issue.

- 2.14.5 See sections 2.11.5 to 2.11.9 above for further information about the Receivers' proposal to facilitate Beneficiary-led substitution of Corporate Trustees.

2.15 Loans made to Beneficiaries

What we have previously advised

- 2.15.1 As outlined at section 3.3.11 to 3.3.14 of the Explanatory Memorandum, the Receivers proposed that any amount paid to a Beneficiary as a distribution would be reduced by the outstanding amount owed by them under a Beneficiary Loan. As outlined in the below sections, the Receivers have changed this proposal as a result of Feedback received.

Nature of Feedback received

- 2.15.2 The nature of the Feedback received in relation to payment being made via the Corporate Trustees is summarised below:
- (a) a Corporate Trustee expressed concern around the legal basis for the proposed treatment of these loans (noting that the loans in some cases were made by BAG, albeit with funds misappropriated from funds held on trust by Brite Advisors); and
 - (b) a Corporate Trustee has expressed concern that any reduction in the distribution to Beneficiaries in connection with a loan would represent an Unauthorised Member Payment (as defined by UK HM Revenue and Customs) which would have negative tax consequences.

Receivers' response to Feedback

- 2.15.3 The Receivers note that these funds were misappropriated from the Client AuM and advanced as loans to certain Beneficiaries. If the amounts owing under these agreements are not brought to account in the Receivership, this will simply increase the shortfall which impacts the Beneficiaries as a whole.
- 2.15.4 The Receivers acknowledge the risk of the prior proposal giving rise to an Unauthorised Member Payment. Accordingly, to avoid any risk of making an Unauthorised Member Payment the Receivers will engage with the Beneficiaries who have a Beneficiary Loan (of which there is only a small number) to seek repayment of the Beneficiary Loans in the first instance. If payment is not made by the Beneficiary, the Receivers will apply the loan as a negative account balance which is to be set off against the positive value of the Beneficiary's entitlement (as opposed to deducting it from the distribution).
- 2.15.5 In relation to the legal basis for Brite Advisors asserting a right to enforce the loans, the Receivers are of the view that:
- (a) BAG holds the contractual rights under the loan agreement on trust for Brite Advisors, enabling Brite Advisors to exercise those rights; and
 - (b) If, for any reason that could not be sustained, Brite Advisors has a direct right of recovery against the Beneficiaries founded upon the fact that the funds advanced were misappropriated trust funds.

2.16 Retained Fund

What we have previously advised

- 2.16.1 As set out at section 4.2.16 of the Explanatory Memorandum, the Receivers will be required to retain a portion of the Client AuM and not distribute these funds as part of the initial distribution from the Deficient Mixed Fund.
- 2.16.2 The Retained Fund will be for the purposes of providing for (i) any estimated taxation liabilities of Brite Advisors or the Receivers that has not been resolved at the time of any initial distribution, (ii) security for the repayment of the IBA margin loan facility in accordance with Court orders, (iii) any historic liabilities relating to the period of the Receivers' appointment (including operational liabilities), (iv) costs of maintaining the Retained Fund, and (v) future costs and expenses of the Receivership (including the costs of pursuing any further recoveries). Upon the conclusion of the Receivership, a further distribution will be made of any remaining funds retained.

- 2.16.3 Separately, as set out in sections 2.1.5 and 3.3 of the Fourth Report, as an interim measure, orders were made by the Court on 5 June 2024 which (among other things):
- (a) sought to restrict IBA from continuing to set-off any receipts of dividends and bond maturities generated from Client AuM against the remaining margin loan liability;
 - (b) sought to hold IBA to account to the Receivers for the set-off of interest accrued on cash balances held in three relevant IBA Accounts against interest which accrued on the margin loan liability (pending resolution of this matter); and
 - (c) provided that (i) cash equal to the value of the short cash balances plus an amount to cover projected interest charges and foreign exchange changes for a period of 24 months, and (ii) securities to the value of USD\$20.0m, were to be retained in the relevant IBA Accounts.
- 2.16.4 The 5 June Orders were an interim measure undertaken by the Receivers to preserve the Client AuM, pending resolution of outstanding matters with IBA surrounding the validity of the set-off. To the extent the 5 June Orders remain in place as at the date of any interim distribution, the retention of the funds specified by the Court above in (c) must be adhered to by the Receivers.

Nature of Feedback received

- 2.16.5 The Feedback received by the Receivers in relation to the proposal to retain funds from the initial distribution includes:
- (a) Several Beneficiaries, including a Beneficiary representing a number of Beneficiaries, have queried whether Beneficiaries can opt out from further recovery actions and the associated further costs and, in such circumstances, whether a proportion of the retained funds can be returned. Concerns were raised regarding the following in this context:
 - (i) The potential taxation consequences of receiving staged payments rather than having the distribution in a single payment;
 - (ii) For smaller pensions, the ongoing Receivership costs could surpass the recoverable amount, making it impractical for beneficiaries to pursue recovery;
 - (iii) Beneficiaries may be exploring more cost-effective alternative methods of recovery, including litigation and class actions; and
 - (iv) Beneficiaries may wish for closure and would prefer to forego future returns to have the matter concluded sooner.
 - (b) Several Beneficiaries, including a Beneficiary representing a number of Beneficiaries, has queried whether Beneficiaries can be provided with additional information on the amount of funds proposed to be retained, quantum of any potential recovery, litigation prospects and costs and how any recovery funds will be distributed.
 - (c) A Beneficiary has expressed the view that:
 - (i) There should be a stipulated maximum retention, that Beneficiaries should have the opportunity to challenge prior to its imposition, rather than giving the Receivers unfettered discretion.
 - (ii) The maximum retention cannot be approved without justification being provided to the Beneficiaries. The Court and Beneficiaries should be given detailed working papers and third party agreements to support the proposed maximum retention.
 - (iii) Beneficiaries should be provided with a written legal opinion from a reputable third party lawyer concerning the viability and extent of a claim against IBA in order to evaluate the cost and proposed retention of funds against the likelihood of any recovery.
 - (iv) The Receivers and ASIC should provide a detailed explanation of why there has been no legal or regulatory action to date and why a retention of funds from the distribution is justified given the absence of any legal or regulatory action against IBA since October 2023.
 - (d) A Corporate Trustee has expressed the view that:
 - (i) Taxation liabilities should be agreed prior to the distribution being made, minimising the retention of funds relating to tax.

- (ii) The Receivers should seek to quantify and resolve the trading liability position.
- (iii) If there is a cost to maintain the Retained Fund, the Retained Fund should be as small as necessary.
- (e) A Corporate Trustee has queried the reason the Receivers need to retain any portion of the Client AuM to fund pre-litigation workstreams and that to the extent that work is not covered by pre-litigation funding, the Receivers should act on a contingent fee basis.

Receivers' response to Feedback

- 2.16.6 The Receivers' proposal to withhold a Retained Fund from the Client AuM will enable an interim distribution to be made as soon as possible.
- 2.16.7 The Receivers are not yet able to propose the amount to be withheld in the Retained Fund. That is because there are a number of variables that need to be resolved before the proposed amount can be determined.
- 2.16.8 The Receivers have proposed to the Court that the quantum of the Retained Fund is an amount to be approved by the Court on application by the Receivers, prior to the Receivers commencing any distribution of the Client AuM. Any amount to be retained would need to be supported by affidavit evidence speaking to the need for that retention and supporting the quantum proposed.
- 2.16.9 The quantum that the Receivers will propose to the Court for approval will be comprised of:
 - (a) an amount reflecting a conservative estimate of the potential tax liabilities of the Receivers where there are unresolved tax issues at the time of determining the amount of any distribution;
 - (b) an amount reflecting the Receivers' costs in investigating and pursuing claims against third parties;
 - (c) an amount reflecting the Receivers' costs to resolve any other outstanding matter or a conservative estimate of any other potential liability identified at the time of determining the amount of any distribution; and
 - (d) an amount reflecting the Receivers' costs in managing the Retained Funds for the anticipated remaining length of the Receivership.
- 2.16.10 These are amounts that the Receivers are not presently able to estimate with a sufficient level of certainty. In that regard we refer to:
 - (a) section 3.2 below where the steps the Receivers intend to take to reach a resolution of the Australian tax position are set out;
 - (b) section 3.3 below where the steps the Receivers intend to take to reach a resolution of the US tax position are set out; and
 - (c) section 2.4 above where the steps the Receivers intend to take to reach a view as to whether any potential recovery actions should be pursued are set out.
- 2.16.11 These workstreams are important and necessary steps for the Receivers to take in the receivership, but they ought not delay commencement of the distribution phase. The Receivers remain of the view that it is in the Corporate Trustees and Beneficiaries' interests that the Retained Fund be established so that an interim distribution can be paid as soon as possible, while also enabling the Receivers to progress these important workstreams.
- 2.16.12 The Receivers propose that the Retained Funds be managed by the Interim Fund Manager. The Retained Funds will remain assets that are held on trust for the Beneficiaries who are entitled to participate in a distribution of the Deficient Mixed Fund.
- 2.16.13 The Receivers have also proposed that the direction authorising them to withhold the Retained Fund has effect for four months and that any longer period will require further orders of the Court to extend the operation of the direction. The purpose of this is to ensure transparency and accountability with respect to the Retained Fund, by requiring the Receivers to report to the Court as to their progress with the outstanding tax, litigation and general receivership matters on a regular basis, and to justify the ongoing withholding of the Retained Fund.

2.17 Insurance

What we have previously advised

- 2.17.1 A number of Beneficiaries have enquired whether Brite Advisors held an insurance policy which could respond to the conduct which has occurred resulting in the shortfall identified in the Client AuM. The Receivers have not

identified any insurance policy held by Brite Advisors that would respond to the conduct which has occurred to cover the shortfall.

Nature of Feedback received

- 2.17.2 The nature of the Feedback received in relation to insurance policies held by Brite Advisors to respond to the conduct of Brite Advisors resulting in the shortfall in the Client AuM is summarised below:
- (a) A number of Beneficiaries requested further information in relation to what professional indemnity (or other) insurance cover Brite Advisors held prior to the appointment of the Receivers which could respond to a claim for the shortfall in the Client AuM.
 - (b) A number of Beneficiaries queried whether it is the Receivers' intention to make a claim against any pre-appointment insurance policies held by Brite Advisors.

Receivers' response to Feedback

- 2.17.3 Brite Advisors held Financial Institutions Insurance which included cover for professional liability.
- 2.17.4 The Receivers have taken all steps to preserve any ability Brite Advisors or its directors, officers or employees may have, to claim on any insurance cover that may be available to them.

2.18 *In specie distribution*

What we have previously advised

- 2.18.1 As set out in section 4.2.3 of the Explanatory Memorandum, the Receivers do not consider an *in specie* transfer of the Deficient Mixed Fund to a new Fund Manager or to Corporate Trustees/Beneficiaries to be a viable option. The Receivers consider there to be a number of practical difficulties with an *in specie* distribution (as set out in section 4.2 of the Explanatory Memorandum) resulting in it likely being more complex, costly, and time consuming.
- 2.18.2 The Receivers consider the liquidation of the Deficient Mixed Fund and transfer of the proceeds to the Corporate Trustees/Beneficiaries to be the most efficient and effective way to return the Deficient Mixed Fund to Beneficiaries.

Nature of Feedback received

- 2.18.3 The nature of the Feedback received in relation to *in specie* transfers of Beneficiaries' assets to an alternative platform or Fund Manager is summarised below:
- (a) A Beneficiary and Corporate Trustee have raised that the tax consequences of liquidating and distributing the Client AuM should be known to the Receivers prior to proceeding with this methodology over an *in specie* transfer of Beneficiaries' assets due to the negative tax consequences which may occur by favouring a liquidation instead of *in specie* transfer.

Receivers' response to Feedback

- 2.18.4 The Receivers are working towards a resolution of the tax issues as described in sections 2.2 and 2.3.
- 2.18.5 The Receivers' position in relation to the *in specie* transfer of the Deficient Mixed Fund to a new Fund Manager or to the Corporate Trustees/Beneficiaries remains that, regardless of how the tax issues are resolved, this will remain not a viable option. The matters outlined in 4.2.3 of the Explanatory Memorandum are not mitigated, alleviated or made more palatable by the tax treatment of the fund.
- 2.18.6 The Receivers' view is that a true *in specie* transfer of assets to all Beneficiaries is impossible. This is because there is a deficiency of assets within a mixed fund. Even if the Receivers offered, for instance, a non-cash option where Beneficiaries could elect to receive securities to the value of their distribution entitlement that broadly aligned with the portfolio they thought they held according to the 13 December 2023 Data, from a legal perspective this is not the same as returning that Beneficiary's assets. It is simply a non-cash distribution (which in itself is difficult to implement). Similarly, issuing units in a reconstituted fund of the remaining assets, although providing an interest in securities, is not returning the Beneficiary's own assets. From the Receivers' perspective, the conduct of Brite Advisors in misappropriating and mixing assets, which led to the Deficient Mixed Fund, is a dealing in the assets which had already occurred prior to the Receivers' appointment, and which rendered a true *in specie* distribution to Corporate Trustees and Beneficiaries simply not possible. The Receivers are aware that this dealing, by way of misappropriation and mixing, may have tax consequences for some Beneficiaries. But seeking to provide a non-cash distribution in an attempt to mimic a true *in specie* distribution does not undo or remedy this dealing.

2.19 CSLR

What we have previously advised

- 2.19.1 As set out in Question 32 of the Receivers' FAQs published on the Receivers' website, the Receivers are aware of the CSLR scheme and have been considering the availability of this scheme to the Beneficiaries of Brite Advisors.
- 2.19.2 The eligibility criteria to access the CSLR scheme, and the interaction between administration of the CSLR scheme and the distribution of the Client AuM within the Federal Court Proceedings, are complex matters which the Receivers have been working through with their legal advisers and the Australian regulators.

Nature of Feedback received

- 2.19.3 The nature of the Feedback received in relation to compensation schemes available to Beneficiaries is summarised below:
 - (a) A number of Beneficiaries have requested further information in relation to any government or other schemes which the Receivers have identified which would respond to a claim by Brite Advisors or Beneficiaries for any losses caused by the conduct of Brite Advisors.
 - (b) A number of Beneficiaries have requested further information in relation to the availability of any investor protection schemes that exist in the various jurisdictions of each Corporate Trustee.

Receivers' response to Feedback

- 2.19.4 The Receivers continue to liaise with AFCA and the CSLR as to the potential availability of the CSLR scheme to certain Beneficiaries including whether the Receivers may assist in streamlining the application process where a Beneficiary may be eligible.
- 2.19.5 The Receivers intend to publish an FAQ shortly which addresses the CSLR in the context of the Receivership.

3 Revision to the proposed approach to distribution

3.1 Introduction

- 3.1.1 The purpose of this section is to set out and explain the ways in which the proposed distribution methodology has been revised and updated since the Explanatory Memorandum was published.
- 3.1.2 Following on from the Feedback received during the Consultation Period, and as a result of further work progressed by the Receivers since the Explanatory Memorandum, the Receivers have formed the view that the following amendments should be made to the proposed distribution.

3.2 Tax resolution – Australian taxes

- 3.2.1 The Receivers will shortly present the Australian Taxation Office with a position paper outlining the Receivers' views on the Australian tax consequences of the receivership and distribution.
- 3.2.2 In summary, the Receivers' view is that the Australian tax consequences of the receivership should follow the facts and commercial reality of the receivership and that the distribution of the Deficient Mixed Fund should be treated as follows:
 - (a) Each "Client"¹ of Brite Advisors should be treated as having received the amounts and types of income shown in their Salesforce data before 13 December 2023.
 - (b) All Clients will be treated as receiving a share of each item of income derived from the Client AuM after 13 December 2023 in proportion to their verified entitlements (as set out in the accepted Valuation Notices).
 - (c) Each Client will make a capital gain or loss when the Client AuM is liquidated and distributed. That capital gain or loss will be calculated as the difference between the original cost base of the assets and the total distribution to them (other than income distributions).
- 3.2.3 It is important to note that, while the capital gain or loss will crystallise upon liquidation and distribution of the Deficient Mixed Fund, this outcome is an unavoidable and inevitable consequence of the misappropriation and other mixing events, which have meant that a true *in specie* distribution is not possible. Please see section 4.2.3 of the Explanatory Memorandum and section 2.18 above for the Receivers' explanation as to why a true *in specie* distribution is not possible.
- 3.2.4 Whether, and to what extent, a Client is actually subject to tax on that income depends on the Client's circumstances and the category of income.
- 3.2.5 The Receivers' view is that Australian resident Clients will be taxable in the usual way on all income/gains. However, they might be entitled to foreign tax credits if, for example, withholding tax was paid in a foreign jurisdiction.
- 3.2.6 For non-residents of Australia, the Receivers' view is as follows.
 - (a) First, they should not be subject to any Australian tax on foreign sourced income.
 - (b) Second, they should not be subject to any Australian tax on capital gains made on foreign assets or other assets that are not 'taxable Australian property'. The Receivers' current expectation is that none of the assets in the Deficient Mixed Fund are 'taxable Australian property'.
 - (c) Third, they are prima facie subject to withholding tax on Australian sourced income but there are a number of potential exceptions that may apply.
- 3.2.7 The overwhelming majority of assets held and income derived by Brite Advisors are foreign assets and foreign sourced income (that is, not Australian).
- 3.2.8 The Receivers have not yet finalised their views on the Australian tax treatment of their proposed method of distribution of the Excluded Moventum Assets and the return of Late Investors' Funds. As these Excluded Assets account for less than 0.5% of the Client AuM, the Receivers have prioritised resolution of the tax treatment of distribution of the Deficient Mixed Fund.

¹ "Clients" are the direct beneficiaries of Brite Advisors, being the Corporate Trustees and the direct Beneficiaries.

3.3 Tax resolution – US taxes

- 3.3.1 As noted above, the Receivers now understand that Brite Advisors has outstanding US withholding liability for the 2020, 2021 and 2022 US tax years in the amount of approximately USD\$1.9m. The Receivers are working with Crowe US to quantify the outstanding US withholding liability for the 2023 and 2024 US tax years.
- 3.3.2 The Receivers do not intend, and do not consider it an appropriate use of the Client AuM, to obtain advice as to the tax consequences of the proposed distribution methodology in each jurisdiction represented by the Beneficiaries.
- 3.3.3 However, noting the specific query raised in the Feedback as to US capital gains tax liability, the Receivers note their understanding that, similarly to the Australian position, the crystallisation of a capital gain is an inevitable consequence of the shortfall and mixing of the Client AuM, which has resulted in the inability to provide a true *in specie* distribution in the Receivership.

3.4 Retained Fund

- 3.4.1 The Receivers have proposed a mechanism for quantifying the proposed Retained Fund which requires them to make an application to the Court for approval of that quantum, supported by evidence, prior to commencing any distribution of the Client AuM.
- 3.4.2 As noted above, the Receivers are to propose the quantum of the Retained Fund by reference to:
 - (a) an amount reflecting a conservative estimate of the potential tax liabilities of the Receivers where there are unresolved tax issues at the time of determining the amount of any distribution;
 - (b) an amount reflecting the Receivers' costs in investigating and pursuing claims against third parties;
 - (c) an amount reflecting the Receivers' costs to resolve any other outstanding matter or a conservative estimate of any other potential liability identified at the time of determining the amount of any distribution; and
 - (d) an amount reflecting the Receivers' costs in managing the Retained Funds for the anticipated remaining length of the receivership.
- 3.4.3 The Receivers have proposed that the retained fund can only be maintained for a period of up to four months from the orders of the Court. That period can then be extended on application to the Court and following an update on progress on outstanding matters.

3.5 Currency

- 3.5.1 The proposed distribution orders contemplate a process for Corporate Trustees and Beneficiaries (only where they do not have a Corporate Trustee) identifying the currency or currencies in which they are to receive a distribution in accordance with a process to be established by the Receivers. The Receivers intend to consult with the Corporate Trustees to identify the practicalities of making payments, which will be used to inform what that process is.

3.6 Documentation with Corporate Trustees

- 3.6.1 The Receivers' proposal is that Corporate Trustees be required to sign a simple agreement as a prerequisite to receiving distribution payments.
- 3.6.2 The proposed terms of this agreement will be shared with the Corporate Trustees and are directed at providing the Receivers with various warranties and protecting the Receivers from any personal liability. Further details as to the nature of the proposed terms are set out at section 2.5 above.
- 3.6.3 To be clear, the proposed terms of the agreement are not intended to, and in the Receivers' view do not, alter or cut across the pension arrangements as between Corporate Trustees and their Beneficiaries.

3.7 Corporate Trustee substitution

- 3.7.1 The Receivers have decided to not seek any order which permits a Beneficiary to delay payments being made to their Corporate Trustee. Instead, the Receivers will seek amendment of the Asset Preservation Orders to ensure that these are not a barrier to Beneficiaries changing their Corporate Trustee.

- 3.7.2 The Receivers have also proposed that the Court authorise them to pay distributions in the receivership to third parties in accordance with joint instructions provided by a Beneficiary and Corporate Trustee.
- 3.7.3 This proposal reflects the Receivers' position that the substitution of Corporate Trustees is a matter for Beneficiaries and Corporate Trustees and is intended to remove any barriers to Corporate Trustees and Beneficiaries undertaking this process themselves in accordance with the relevant pension regime.

4 Next steps with distribution

4.1 Overview

- 4.1.1 The Receivers' approach to the distribution was set out in detail at section 4 of the Explanatory Memorandum.
- 4.1.2 The next steps to progress the distribution include (i) dealing with the Distribution Methodology Application, (ii) determining the quantum of the Retained Fund and funds available for distribution, (iii) determining tax implications, (iv) agreeing Beneficiary entitlements, (v) liquidating the Client AuM, (vi) calculating Beneficiaries' entitlement to the Deficient Mixed Fund, (vii) dealing with currency, (viii) agreeing documentation, and (ix) processing payments to distribute funds. Below is an overview of each of these steps.
- 4.1.3 Some of the steps outlined above can be progressed simultaneously, whereas certain others are dependent on the completion of prior tasks. It is difficult to estimate the time that each step will take, given the large number of variables which are outside of the Receivers' control and factors which are still unknown. The Receivers will be in a position to provide an update on timing following the next Court hearing scheduled for 7 May 2025.

4.2 Detailed next steps for distribution

- 4.2.1 A high-level overview of each of the steps outlined above are explained below.

Distribution Methodology Application

- 4.2.2 Once this Supplementary Explanatory Memorandum has been filed and published, together with the Receivers' proposed orders to give effect to the distribution, Beneficiaries, Corporate Trustees or other interested parties who wish to be heard at the Receivers' Distribution Methodology hearing on 7 May 2025 are required to file an application to the Court to seek leave to be heard at the hearing by 22 April 2025.
- 4.2.3 If any such parties make an application, the Court will program out proceedings in order to deal with the application. Without knowing if any Beneficiaries and/or interested parties intend to make such an application, what the nature of that application would be (and how complex it is), the Receivers cannot reasonably predict how the Court might program out the proceedings and how long any matter would take to be resolved.

Determine the quantum of the Retained Fund and funds available for distribution

- 4.2.4 As set out in detail at section 4.2.16 of the Explanatory Memorandum and above at section 2.16, the Receivers will be required to retain a portion of the Client AuM in the IBA Accounts and not distribute these funds as part of the initial distribution from the Deficient Mixed Fund (i.e. the Retained Fund). The Receivers will need to determine the quantum of the Retained Fund and apply to the Court for approval to retain that amount.

Determine tax implications

- 4.2.5 As set out at section 2.2 and 2.3 of this Supplementary Explanatory Memorandum there are number of tax issues that the Receivers continue to work through with specialist tax advisers.

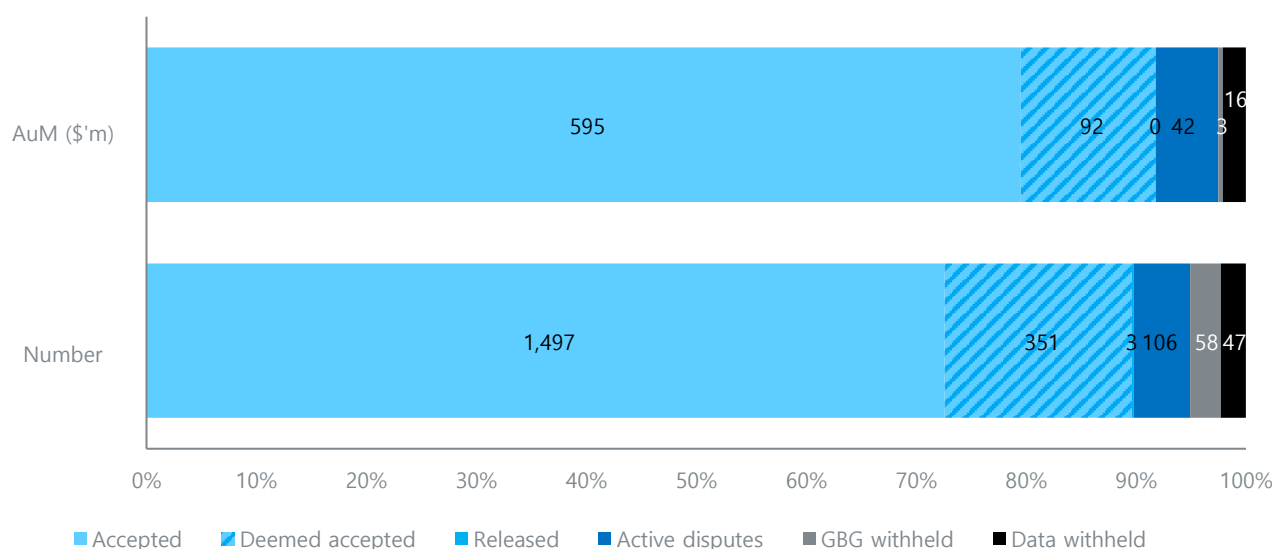
Agree Beneficiary entitlements

- 4.2.6 The Receivers are finalising the determination of all Beneficiaries' entitlements. This includes resolving all Valuation Notice disputes and investigations being conducted by the Receivers in relation to entitlements of the Beneficiaries.
- 4.2.7 The status of the Receivers' ongoing process to verify Beneficiaries' entitlements (which is now based on the total number of Beneficiaries with a positive Valuation Notice), as at 21 March 2025, is set out below:
- 1,497 Beneficiaries totalling USD\$595.2m have accepted their Valuation Notice.
 - 106 Beneficiaries totalling USD\$42.4m have disputed their Valuation Notice.
 - 3 Beneficiaries totalling USD\$0.2m have received access to Salesforce but have not accepted or disputed their Valuation Notice.
 - 351 Beneficiaries totalling USD\$91.9m have not responded to their Valuation Notices within the 21 day period that the 2 September 2024 Orders required them to. As a result, the Receivers will proceed with the process on the basis that the entitlements for these Beneficiaries are as set out in their Valuation Notice.
 - 58 Beneficiaries totalling USD\$3.1m have not yet completed the GBG identity proofing process; and

- 47 Beneficiaries totalling USD\$15.7m have not received access to Salesforce yet as there are outstanding matters that must be resolved, this includes (i) the Receivers are continuing investigations into those Beneficiaries' entitlements, or (ii) those Beneficiaries are deceased estates, or (iii) those Beneficiaries have requested not to be contacted by the Receivers.

4.2.8 The following graph sets out the categories outlined at section 4.2.7 above:

Status of Beneficiary verification at 21 March 2025



4.2.9 The nature of Beneficiary disputes are the same as they were set out at section 4.4.23 of the Fifth Report. The Receivers are considering each of the disputes raised by Beneficiaries on a case-by-case basis. Due to the complexity of certain disputes received, the Receivers are continuing to investigate and provide responses to disputes and sufficient time is required to thoroughly assess the disputes, and provide comprehensive, considered and consistent responses. As set out in the 2 September 2024 Orders, if the Receivers reject a Beneficiary's dispute, the Beneficiary will have 21 days to make an application to the Court to object to the Receivers' determination.

Liquidate the Client AuM portfolio

4.2.10 Section 4.2.4 to 4.2.6 of the Explanatory Memorandum sets out the process for the liquidation of the Deficient Mixed Fund and funds transfer.

Calculate Beneficiaries' entitlement to the Deficient Mixed Fund

4.2.11 Section 4.2.7 of the Explanatory Memorandum sets out a detailed calculation which the Receivers will perform to determine each Beneficiaries' proportionate entitlement to the Deficient Mixed Fund, which will act as the input to determining the Beneficiaries' Deficient Mixed Fund Distribution.

4.2.12 Where a Beneficiary has received a pension withdrawal or owes or has tax attributable to them personally, this will be set-off from the amount to be distributed to them or to their Corporate Trustee. Refer to section 2.15.4 for what is proposed where a Beneficiary owes an amount under a loan.

Convert cash and currency

4.2.13 As set out at section 2.13 of this Supplementary Explanatory Memorandum, the proposed distribution orders contemplate a process for Corporate Trustees and Beneficiaries (only where they do not have a Corporate Trustee) identifying the currency or currencies in which they are to receive a distribution in accordance with a process to be established by the Receivers. The Receivers intend to consult with the Corporate Trustees to identify the practicalities of making payments, which will be used to inform what that process is.

4.2.14 Once the Deficient Mixed Fund has been liquidated, the Interim Fund Manager will convert the cash held into the currencies required for the distribution.

Agree documentation between Brite Advisors and the Corporate Trustees

- 4.2.15 As set out at section 1.11 of the Explanatory Memorandum and further outlined at section 2.5 of this Supplementary Explanatory Memorandum, before any funds are distributed to Corporate Trustees, additional documentation will be put in place between Brite Advisors and Corporate Trustees to clarify the terms of the trust arrangement and to govern the distribution back to Corporate Trustees.

Process payments to distribute funds to Corporate Trustees / Beneficiaries

- 4.2.16 The final step in the distribution process is actually making the distribution payments, which requires a number of logistical, practical steps including confirming bank details, processing and preparing payments and issuing correspondence.