



Seawest International Pty Ltd (In Liquidation)
ACN 009 428 004
(Seawest)

Report to Creditors

I refer to the appointment of Rob Brauer and I as joint and several liquidators of Seawest on 11 January 2018 (**Liquidators**) and to the Liquidators' Statutory Report to Creditors dated 11 April 2018 (**Previous Report**).

The purpose of this report is to:

- provide you with an update on the progress of the liquidation and ongoing conduct of the Liquidators;
- advise you of the likelihood of a dividend being paid in the liquidation; and
- seek approval of the Liquidators' remuneration so that various avenues of enquiry and pursuit of legal claims can be progressed for the benefit of creditors.

This report should be read in conjunction with our Previous Report.

1 Liquidators' Declaration of Independence and Relevant Relationships (DIRRI)

In accordance with the Corporations Act 2001 (**Act**) and Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) Code, a DIRRI was enclosed with our circular to creditors dated 9 February 2018.

We have not previously considered that our prior involvement gave rise to any potential conflict of interest issues. Since our appointment as Liquidators on 11 January 2018, we have continued to assess whether our prior involvement had caused any potential conflict of interest issues to develop.

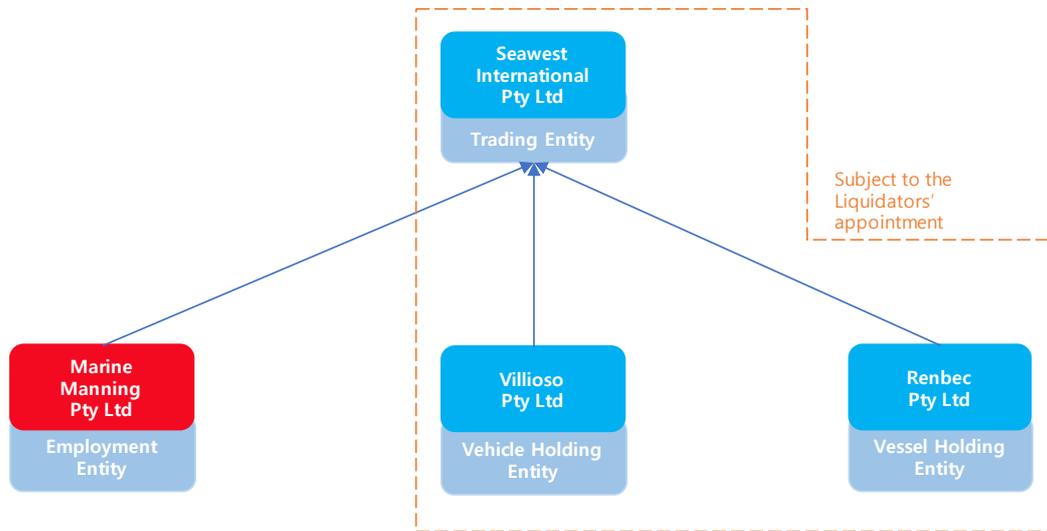
As discussed further at section 4.4, in August 2021, the Liquidators entered into a deed of indemnity with the Australian Taxation Office (**ATO**) to assist with legal proceedings being issued against the pre-appointment external corporate advisor to Seawest (**External Advisor**). The deed of indemnity includes an indemnity for adverse costs, which is required to be disclosed in a DIRRI under section 506A of the Act.

Accordingly, an updated DIRRI disclosing the Liquidators' indemnity from the ATO is enclosed with this report.

In our view, the above actions do not give rise to any potential conflicts of interest.

2 Background to Seawest and related entities

As briefly set out in our Previous Report, Seawest operated as the trading entity within a broader group of entities (**Seawest Group**), some of which are also subject to the Liquidators' appointment. The Seawest Group provided marine vessel charter and manning services in northwest Australia. A summary of the Seawest Group is provided overleaf.



Note: Notwithstanding that Marine Manning Pty Ltd was set up as the employing entity, the ATO determined that Seawest was the employing entity for taxation purposes (refer section 4.3.3 for further information).

They key entities within the Seawest Group were:

- Seawest – Trading entity and employing entity for taxation purposes;
- Renbec Pty Ltd (In Liquidation) (**Renbec**) – Vessel holding entity;
- Villioso Pty Ltd (in Liquidation) (**Villioso**) – Motor vehicle holding entity; and
- Marine Manning Pty Ltd (**Marine Manning**) – Set up to be the employing entity (refer section 4.3.3 for further information). Company deregistered in April 2019.

All entities entered external administration in January or February 2018. The Liquidators' are also appointed as Liquidators of Villioso and Renbec.

Evidence suggests that certain assets of Seawest were attempted to be transitioned to a related entity of Seawest in the months leading up to the liquidation of the company, largely to avoid garnishee actions that the ATO had enforced against Seawest in pursuit of material statutory liabilities.

As at the date of the appointment of the Liquidators on 11 January 2018, the Seawest business was not operating nor held any tangible and/or recoverable assets.

3 Update on the progress of the liquidation – Assets and liabilities

The Liquidators provide the following comments in relation to the assets of Seawest:

- The motor vehicles and marine vessels utilised by the Seawest Group were held by separate entities. The Liquidators' investigations did not disclose any physical assets available for realisation in Seawest.
- The ATO had issued garnishee notices to the customers of Seawest, which required that any outstanding debts be paid to the ATO. The Liquidators confirmed the validity of the garnishee notices and engaged with the ATO shortly following their appointment to determine if any funds were capable of repayment to Seawest. Noting the material debt owed to the ATO, no pre-appointment debtors were capable of recovery by the Liquidators.
- Seawest was historically the owner of a significant marine vessel which evidence suggests was transferred from Seawest to Renbec for no consideration in 2014. The Vessel was subsequently transferred to the secured creditor of the vessel, who held a valid and enforceable direct security interest over the vessel, rendering it unrecoverable for the benefit of creditors of Seawest.



Seawest's liabilities include the ATO (circa \$15.1 million), financiers (circa \$6.9 million) and ordinary trade creditors (circa \$0.5 million). Specific information in relation to the liabilities of Seawest is provided in the Previous Report.

4 **Update on the progress of the liquidation – Liquidators' investigations**

Since our Previous Report, the Liquidators have conducted substantial investigations into the affairs of Seawest, pursuant to their obligations as liquidators and also at the request of the corporate regulator, the Australian Securities and Investments Commission (**ASIC**).

An update in relation to the progress of these investigations is provided below.

4.1 *Liquidators' preliminary investigations and report to ASIC*

Pursuant to section 533(1) of the Act, the Liquidators conducted necessary investigations into the affairs of Seawest based on company records, which identified a number of potential contraventions of the Act by Mr Glenn Hawes (**Director**). A report in relation to the Liquidators' investigations was prepared and lodged with ASIC on 11 July 2018.

Following review of the Liquidators' report pursuant to section 533(1) of the Act, ASIC requested submission of a detailed supplementary report into the affairs of Seawest pursuant to section 533(2) of the Act (**Supplementary Report**). The Supplementary Report was also requested to incorporate Renbec.

The Liquidators were granted funding from ASIC pursuant to the Assetless Administration Fund to support:

- the conduct of public examinations of the Director and other parties in relation to the affairs of Seawest and Renbec, including document production orders; and
- the preparation of the Supplementary Report into the affairs of Seawest and Renbec, which was lodged with ASIC on 10 March 2020.

The reports lodged with ASIC pursuant to section 533 of the Act are confidential, and not available for release to creditors.

High level details of the findings of the investigations are provided below.

4.2 *Public examinations and document production orders*

The Liquidators' preliminary investigations identified a number of potential contraventions of the Act that warranted further enquiry.

Having regard to the lack of books and records maintained by the Seawest Group, the Liquidators issued public examination summonses and document production orders on a number of parties. At a high level, the purpose of the public examination and document production process was to better understand the asset and liability position of the Seawest Group and the nature of the numerous transactions between the Seawest Group entities, and additional related entities.

On 28 November 2018, the Liquidators filed an application for publication examination summonses and document production orders pursuant to sections 596A, 596B, 596D and 597(9) of the Act for the following parties:

- the Director.
- Ms Judith Hawes (wife of the Director).
- the External Advisor.
- the director of Malaga Properties Pty Ltd (**Malaga Properties**), 25% shareholder of Seawest and creditor of Seawest and Renbec.

In addition, an application for document production orders pursuant to section 597(9) of the Act to be issued to the following parties was filed:

- an advisor to the Director.
- the Director's solicitor, and that of the Seawest Group.



- the Department of Transport.
- various insurance agencies.
- a number of marine brokers and shipbuilders based in Western Australia.

The orders sought were granted by the Supreme Court of Western Australia on 28 November 2018.

4.2.1 Conduct of public examinations

The Liquidators' solicitors conducted preliminary public examinations of the director of Malaga Properties and the External Advisor on 8 May 2019.

Following consideration of all material obtained via the preliminary public examinations together with information obtained via document production orders, legal counsel engaged by the Liquidators conducted further public examinations of the External Advisor and the Director between August 2019 and December 2019.

4.2.2 Purpose of public examinations and document production orders

Due to the insufficient records kept by the Seawest Group, the purpose of the actions has been to better understand:

- the nature of the Seawest Group's affairs;
- the historical transfer of assets to related parties for little or no consideration;
- transactions that have been entered into by Seawest and/or Renbec which appear to have provided little or no benefit to the companies;
- the Director's breaches of the Act and evidence of underlying intent and/or knowledge of those breaches;
- Mrs Hawes' position and role in relation to the management of the affairs of Seawest (and related entities); and
- advice provided to Seawest, Renbec, and/or the Director by the External Advisor and the nature of dealings between the parties.

4.3 Investigation findings

A summary of the outcome of the Liquidators' investigations is provided below.

4.3.1 Insolvency

The Liquidators have substantially formed their view as to the insolvency of Seawest based on:

- information recovered from interested parties pursuant to the document production orders, including statutory financial statements prepared by the External Advisor;
- Seawest's unreconciled MYOB accounting files;
- information provided by the ATO; and
- a review of emails recovered from Seawest's computer server.

Information reviewed is indicative of a company that had been experiencing substantial financial stress for a number of years prior to the appointment of the Liquidators.

The Liquidators have formed the view that Seawest was insolvent from at least 1 July 2015, based on:

- a net liability position of circa \$5.9 million at 30 June 2015 (excluding outstanding ATO liabilities which were unreported);
- the lack of sufficient cash flow and liquidity to pay debts as and when they fell due;
- reporting and payment obligations to the ATO not being met from as early as 2013;



- Seawest operating at the limit or in excess of overdraft and funding facilities from at least January 2015; and
- the default on repayment obligations relating to finance facilities provided by Malaga Properties from September 2013.

As at 1 July 2015, running balance account information provided by the ATO discloses taxation liabilities, totalling circa \$3.7 million, were due and payable from Seawest. Company records including bank statements indicate the cash resources of the Seawest Group to address due and payable liabilities were only \$6,000 as at 1 July 2015.

The Liquidators would likely also be able to rely on the rebuttable presumption of insolvency pursuant to section 588E(4) of the Act, as Seawest did not keep adequate records for the seven years prior to the Liquidators' appointment.

4.3.1.1 Insolvent trading claim

The Liquidators estimate the quantum of an insolvent trading claim (comprising debts incurred by Seawest whilst insolvent that remain unpaid) to be at least circa \$0.9 million, excluding ATO interest, penalties, and debts which cannot be confirmed as incurred after 1 July 2015.

The Director was declared bankrupt on 2 April 2019, and no dividend was payable from the bankrupt estate. Accordingly, the Liquidators did not pursue an insolvent trading claim against the Director and therefore no recovery is available for creditors.

4.3.2 Transfer of assets and phoenix activity

Evidence obtained by the Liquidators via company records, document production orders and public examination of the Director and External Advisor disclosed that the Director transferred debtors totalling circa \$116,000 to related entity, Seawest Australia Pty Ltd (**Seawest Australia**). The debtors were transferred in an attempt to circumvent ATO garnishee orders, which required the debtors of Seawest be paid direct to the ATO. The Liquidators' investigations identified that it was unlikely that Seawest Australia had any assets or funds to meet a claim by the Liquidators to recover these amounts, and accordingly, the Liquidators have not further pursued this potential claim.

Seawest was historically the owner of a significant marine vessel which evidence suggests was transferred from Seawest to Renbec for no known consideration in around 2014. The Vessel was subsequently transferred to the secured creditor of the vessel, who held a valid and enforceable direct security interest over the vessel, rendering it unrecoverable for the benefit of creditors of Seawest.

It is noted that, whilst not expressly relevant to the creditors of Seawest, the Liquidators identified a number of marine vessels transferred from Renbec to related parties, for no known benefit to the Seawest Group. The Liquidators, in their capacity as liquidators of Renbec, have investigated and in some instances pursued and recovered such vessels.

The information identified by the Liquidators has been reported to ASIC.

4.3.3 Non-payment of superannuation guarantee charge (SGC) and Pay as You Go Withholding (PAYG) tax obligations

The ATO commenced an audit into the taxation affairs of Seawest in April 2017, which concluded shortly following the Liquidators' appointment in January 2018.

The liability to the ATO from Seawest is a result of unreported and unpaid PAYG and SGC (i.e. employment related taxes). Whilst the Director has previously contended these amounts are due and payable from the employing entity within the Seawest Group, Marine Manning, rather than Seawest, the ATO determined that these amounts are owed by Seawest, as:

- Marine Manning did not make any payments to the ATO;
- Marine Manning did not operate a bank account;
- payments to employees were made from Seawest's bank account; and



- pursuant to Taxation Ruling TR 2005/16 "*If the payment is a payment of salary, wages, commission, bonus or allowance then the entity that made the payment will be required to withhold.*"

The ATO's audit identified widespread non-compliance with reporting and payment obligations. Conclusions reached by the ATO include the following:

- Seawest (and related entities) made no contributions to meet employee superannuation obligations from at least 1 July 2013, and estimated unpaid SGC totalled circa \$1.7 million.
- Seawest made significantly no contributions to PAYG from at least 1 July 2013, and estimated unpaid PAYG totalled circa \$5.0 million.
- The Director's intention was to evade the operation of taxation laws in a deliberate manner by not notifying and paying PAYG.
- The Director knowingly reported false amounts on Business Activity Statement (**BAS**) and income tax returns.
- The Director was fully aware of his obligations and deliberately chose not to comply with these obligations.
- The Director took steps to prevent or obstruct the ATO from determining the outstanding SGC liability though repeated failure to supply information without an acceptable reason.
- The Director acted dishonestly in his affairs and behaviour.
- The Director has previously undertaken similar behaviour to avoid taxation obligations across entities under his control.

The Liquidators' investigations indicate that over a period of at least five years, the Director, with the assistance of the External Advisor, failed to conduct the affairs of the Seawest Group in compliance with taxation laws. Separate entities were incorporated to report Seawest's tax liabilities without payment. In fact, Seawest was liable for those liabilities, and should have reported to the ATO accordingly.

The misreporting to the ATO caused Seawest to incur significant taxation penalties and general interest charges following the ATO's audit in 2017.

The ATO subsequently concluded an audit into the taxation affairs of Renbec, which delivered similar findings.

Further information in relation to the potential claim arising from the above findings is provided below.

4.3.4 Unfair preference payments and uncommercial transactions

Unfair preference claims are transactions between Seawest and an unsecured creditor, resulting in that creditor receiving a greater amount than it would have received in the winding up of Seawest. These transactions must have occurred (i) within 6 months of the application for the winding up of Seawest (i.e. 12 June 2017), and (ii) when Seawest was insolvent or caused Seawest to become insolvent.

Noting that Seawest largely ceased operations in around August 2017, no unfair preference payments were identified.

Except for the transactions summarised at section 4.3.2, no uncommercial transactions capable of recovery were identified by the Liquidators.

4.4 Recovery action against the External Advisor

4.4.1 Background to claim

The Liquidators have identified, and are pursuing, a material damages claim against the External Advisor in relation to negligence and breach of contract, and the duty of care owed, regarding services provided to Seawest (**Claim**). A high level summary of the Claim is provided below:

- The External Advisor provided accounting, taxation, company secretarial and business advisory services to the Seawest Group from (at the latest) 2013 to the appointment of external administrators.



- The External Advisor owed a duty of care to Seawest to act with the degree of care, skill and diligence expected of an accountant possessing particular skill and knowledge of taxation matters.
- The Liquidators consider that the External Advisor breached the terms of their engagement and the duty of care owed to Seawest, by:
 - failing to advise Seawest that it was continuing as an employer of employees and was incurring superannuation and withholding tax liabilities, given the External Advisor's knowledge that (i) Seawest was paying wages and salary direct to employees, and (ii) Seawest intended to restructure its affairs in such a way that would result in a related entity (i.e. Marine Manning) being responsible for payment of PAYG and SGC liabilities;
 - preparing and lodging BAS statements that (i) failed to report the wages and salary that Seawest had paid to its employees, (ii) understated Seawest's taxable sales and GST collected by Seawest, in circumstances in which the External Advisor knew, or ought to have known, that Seawest's total sales greatly exceeded what was reported, and (iii) stated that Seawest had made 'creditable acquisitions', and had paid GST on those creditable acquisitions, on the basis that payments of wages and salary were creditable acquisitions in circumstances where the External Advisor knew, or ought to have known, that payments to employees were not creditable acquisitions;
 - failing to advise Seawest to lodge revised BAS statements at any time; and
 - preparing and lodging income tax returns on behalf of Seawest for the 2013, 2014 and 2015 taxation years (in 2014 and 2016) which reported that Seawest had taxable losses, when in fact Seawest had received significant amounts of taxable income in the 2013 and 2015 taxation years. The External Advisor knew, or ought to have known, that Seawest had received that taxable income, due to their access to Seawest's accounts and their preparation of and possession of Seawest's financial statements.
- Those breaches caused Seawest to incur loss and damage.

4.4.2 *Prospects of Claim*

The Liquidators' review of the evidence in relation to the Claim supports there being strong prospects of the Claim's success. Based on current information, we understand that the claim is likely supported by a public liability insurance policy of the defendant.

4.4.3 *Quantum of Claim*

The outcome of the ATO's audit into the affairs of Seawest was that Seawest incurred additional liabilities payable to the ATO of circa \$19.1 million, relating to PAYG, SGC, GST, income tax, penalties and interest over a period of approximately six years, pursuant to the advice of the External Advisor.

Accordingly, Seawest incurred loss and damage to the value of the additional liabilities incurred, and a claim exists against the External Advisor for circa \$19.1 million (**Claim**) as a result.

4.4.4 *Recovery of Claim*

A summary of the steps taken to date by the Liquidators to recover the Claim is provided below:

- The Liquidators investigated in detail the role of the External Advisor in relation to the affairs of Seawest and its reporting to, and lodgements with, the ATO.
- A letter of demand to the External Advisor in relation to the Claim was issued in October 2020. Following receipt of the demand, the External Advisor obtained legal representation to act on their behalf.
- The Liquidators (via their legal advisors) have corresponded extensively with the External Advisor's solicitors in relation to the Claim, including the provision of underlying documentation.
- Noting the liquidation is unfunded, the Liquidators engaged with the ATO (being the largest creditor of Seawest) in relation to litigation funding to pursue the Claim (refer section 4.4.4.1 for further particulars).



Following a detailed submission setting out the merits of the Claim, the Liquidators entered into a deed of indemnity with the ATO (**Deed of Indemnity**).

- In conjunction with the Deed of Indemnity, the Liquidators obtained an agreement from Seawest's first-ranking secured creditor in relation to the relinquishing of the priority status of a substantial portion of its remaining claim in the liquidation, which materially preserves the likelihood of a return to employees (in relation to SGC) and unsecured creditors, in the event the Claim is successful and a material recovery is made.
- Since executing the Deed of Indemnity, the Liquidators (and their legal advisors) have:
 - obtained approval for the Deed of Indemnity from the Court pursuant to section 477(2B) of the Act;
 - dealt with various information requests and requests for further and better particulars from the defendants;
 - addressed the defendants' concerns in respect of security for adverse costs;
 - prepared and issued further correspondence to the External Advisor's solicitors in relation to their response, including an invitation to settle the matter without incurring further costs in accordance with the principles identified in *Calderbank v Calderbank* [1975] 3 All ER 333; and
 - prepared and filed the statement of claim with the Court.

The defendants will be required to file their defence to the Claim by approximately 22 April 2022, depending on when the defendants are formally served with the Claim, unless the Court grants them additional time.

4.4.4.1 Deed of Indemnity and reporting

The Liquidators entered into a deed of indemnity with the ATO in respect of the Liquidators' costs and that of their legal advisors, which also includes an indemnity for adverse costs to pursue claims against the External Advisor for the benefit of maximising returns to Seawest's creditors.

The agreement with the ATO affords the ATO a priority to any claim recoveries, equal to the amount of legal and Liquidator costs funded to pursue and monetise the Claim. Importantly, the ATO's funding is not subject to a premium or interest rate that would otherwise be the case with a commercial litigation funder.

Under the agreement with the ATO, the Liquidators (i) regularly consult with the ATO regarding overall strategy, Court filings and general conferral with the defendant, and (ii) provide regular reports to the ATO on the status of the Claim, and the Liquidators' and legal advisors' costs.

4.4.4.2 Capacity of the External Advisor to respond to the Claim

The Liquidators' investigations indicate the External Advisor's professional indemnity insurance policy is likely to respond to the Claim, up to a limit of at least \$5.0 million.

Any recovery above this amount will be subject to the personal asset position of the External Advisor.

4.5 ASIC reporting and conduct

As detailed at section 4.1 above, the Liquidators prepared a detailed and confidential Supplementary Report which was lodged with ASIC in relation to the affairs of Seawest of Renbec. The Supplementary Report included information in relation to the Liquidators' investigations regarding potential contraventions of the Act.

The Liquidators understand that, following receipt of the Supplementary Report, ASIC are considering further action in relation to the conduct of the Director.

5 Likelihood of a dividend

A number of factors generally affect the likelihood of a dividend being paid to creditors, including:

- the size and complexity of the liquidation;



- the amount of assets realisable and the costs of realising those assets;
- the outcome of detailed investigations and recovery proceedings, together with ability of defendants to satisfy any liquidator recovery claims;
- the statutory priority of certain claims and costs;
- the value of various classes of claims including priority and unsecured creditor claims, and
- the volume of enquiries by creditors and other stakeholders.

The Liquidators are not in a position to provide a detailed estimated return for the liquidation of Seawest at this time due to the uncertainty of (i) the outcome (net of costs) of potential recoveries arising from the Liquidators' investigations, in particular the Claim, (ii) the willingness and ability of the defendants to engage in commercial settlement discussions, and (iii) the defendants' ability to satisfy the Claim.

Notwithstanding, based on the merits of the Claim and potential avenues of recovery, pursuit of the Claim provides for the best and only prospect of a return to priority and unsecured creditors (should quantum allow).

If a dividend is to be paid, you will be contacted before that happens and, if you have not already done so, you will be asked to lodge a proof of debt. This formalises the record of your claim in the liquidation.

6 Cost of the liquidation

We enclose a detailed report on the Liquidators' remuneration, called a Remuneration Report.

We propose to have our remuneration approved by a proposal and without a meeting. Information about passing resolutions without holding a meeting of creditors and voting forms with regard to each resolution is enclosed.

Creditors should note that no prior remuneration of the Liquidators has been sought for approval in the liquidation, due to it being assetless and unfunded.

In accordance with our enclosed Remuneration Report, the Liquidators are seeking approval of their remuneration totalling \$418,219 (excluding GST) for the period from 11 January 2018 (appointment) to completion of the liquidation, comprising:

- retrospective (actual) remuneration for the period from 11 January 2018 to 25 March 2022 totalling \$218,219 (excluding GST); and
- prospective remuneration for the period from 26 March 2022 to completion of the liquidation totalling \$200,000 (excluding GST).

The Liquidators note that, except for remuneration funded by the ATO pursuant to the Deed of Indemnity, payment is dependent on the success of recovering the Claim.



The key tasks comprising the Liquidators' remuneration request is set out in detail in the enclosed Remuneration Report. In summary, the Liquidators have performed the following key tasks since their appointment:

- Investigated the assets and liabilities of Seawest.
- Conducted public examination and document production processes to assist with their investigations and to set the platform for claim recoveries.
- Investigated the affairs of Seawest, the findings of which are summarised in this report and the Previous Report.
- Prepared and issued confidential reports to ASIC in relation to the affairs of Seawest and the conduct of the Director and External Advisor.
- Pursued the Claim for the benefit of creditors, including engagement with the ATO in relation to funding the Claim.
- Reported to creditors as required.
- Attended to the Liquidators' ongoing statutory reporting and lodgement obligations.

7 **What happens next?**

We will proceed with the liquidation, which will include:

- pursuing the Claim for the benefit of creditors which will likely include (i) further engagement with the External Advisor's solicitors in relation to a potential commercial resolution, (ii) attendance at the court assisted mediation process, (iii) document discovery process, and (iv) trial (if required);
- reporting to the ATO on the progress of the Claim;
- preparation for and payment of distributions to creditors (if recoveries permit), including the lodgement of SGC statements, adjudication of claims and statutory dividend procedures; and
- attending to our continuing reporting obligations to the corporate insolvency regulator, ASIC, as necessary.

The timing of the completion of the liquidation will be dependent on several factors, including the time that may be required to pursue the identified litigation.

8 **Where can you get more information?**

You can access information which may assist you on the following websites:

- ARITA at www.arita.com.au/creditors.
- ASIC at www.asic.gov.au (search for "insolvency information sheets").

If you have any queries, please contact Antoine Cleuet on (08) 6363 7635.

Dated: 1 April 2022

Rob Kirman
Liquidator



Enclosures:

- 1 DIRRI dated 1 April 2022
- 2 Proof of Debt (Form 535)
- 3 Proof of Debt Guidance Notes
- 4 Remuneration Report
- 5 Notice of Proposal – Retrospective fees
- 6 Notice of Proposal – Prospective fees
- 7 ARITA Information Sheet – Offences, Recoverable Transactions & Insolvent Trading
- 8 ARITA Information Sheet – Approving remuneration of an external administrator
- 9 ARITA Information Sheet – Proposals without meetings