

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/11/2021 1:55:58 PM AWST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Interlocutory process (Rule 2.2): Federal Court (Corporations) Rules 2000 form 3
File Number:	WAD481/2018
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v CHRIS MARCO & ORS
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 24/11/2021 9:39:00 AM AWST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 3

## Interlocutory process

(rule 2.13(4))

No. WAD 481 of 2018

Federal Court of Australia

District Registry: Western Australia

Division: General

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

### CHRIS MARCO and the others named in the Schedule

Defendants

#### A. DETAILS OF APPLICATION

This application is made under section 90-15 of Schedule 2 – Insolvency Practice Schedule (Corporations) to the *Corporations Act 2001* (Cth), sections 579E, 579G and 601EE(2) of the *Corporations Act 2001* (Cth), rule 2.13 of the *Federal Court (Corporations) Rules 2000*, section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court.

This is an application by Robert Conry Brauer and Robert Michael Kirman in their capacity as joint and several liquidators (**Liquidators**) of the 'Scheme' (described in the orders made by the Honourable McKerracher J on 7 December 2020) and AMS Holdings (WA) Pty Ltd (receivers and managers appointed) (in liquidation) (**AMS**), and by AMS, for directions and orders about the manner in which the net proceeds of realisation of the property of the Scheme and AMS should be distributed, and other ancillary orders.

On the facts stated in the supporting affidavit(s), the Liquidators and AMS seek the following relief:

#### Operation of the Scheme in the period from September 2002 to 31 December 2013

1. Further to and for the purposes of orders 12, 14(a), 17 and 20 - 23 of the orders made by the Honourable McKerracher J on 7 December 2020, references to 'the **Scheme**' include the managed

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Filed on behalf of (name & role of party)	Robert Conry Brauer and Robert Michael Kirman as Liquidators and AMS Holdings (WA) Pty Ltd		
Prepared by (name of person/lawyer)	Adrian Chai		
Law firm (if applicable)	Ashurst Australia		
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investment scheme operated by the First Defendant in the period from September 2002 to 31 December 2013.

2. Alternatively to order 1, pursuant to s 90-15 of Schedule 2 – Insolvency Practice Schedule (Corporations) to the *Corporations Act 2001* (Cth) (**IPS**), s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in treating persons who:

- (a) in the period from September 2002 to 31 December 2013, provided monies to the First Defendant by depositing funds in one or more "Scheme Accounts" (as described in the report at Annexure "RCB-1" to the affidavit of Robert Conry Brauer sworn 23 November 2021 (the **Liquidators' Report**)), in return for a right to receive interest payments;
- (b) were told by or agreed with the First Defendant that the monies would be used for investments or to fund investments, with a view to generating a profit out of which interest payments promised were to be paid to them; and
- (c) have made claims in the winding up of the Scheme in respect of the monies they provided and/or their right to receive interest payments,

as if and on the basis that they are persons (**Investors**) entitled to make claims in the winding up of 'the **Scheme**' (as described in the orders made by the Honourable McKerracher J on 7 December 2020) and AMS Holdings (WA) Pty Ltd (**AMS**), or to make claims as beneficial owners of the assets and property of the Scheme and AMS.

### **Pooling orders and directions**

3. Further to order 17 of the orders made by the Honourable McKerracher J on 7 December 2020 and pursuant to:

- (a) s 579E(1) and s 601EE(2) of the *Corporations Act 2001* (Cth), it is determined that the group comprised of the Scheme and AMS is a pooled group;



- (b) s 579E(8) and s 579G(1)(d) of the *Corporations Act 2001* (Cth), the application of s 579E(5) and s 556 of the *Corporations Act 2001* (Cth) to the Scheme and AMS are modified so that they only apply subject to these orders;
- (c) s 579G(1)(d) and s 579G(1)(e) of the *Corporations Act 2001* (Cth), the Liquidators are to apply and distribute the assets and property of the pooled group as a single fund (the **Fund**) in the following order of priority:
- (i) first, all unpaid remuneration, costs and expenses of the "Interim Receivers", the "Receivers" and the "Liquidators" pursuant to the orders of the Honourable McKerracher J on 7 December 2020 and 28 January 2021; and
  - (ii) next, to Investors as the beneficial owners of the assets and property of the Scheme, with the entitlements of Investors to the Fund to be determined and calculated in accordance with paragraphs 7 and 8 below.
4. Pursuant to s 90-15 of the IPS, s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in treating the proceeds of realisation of the following property held in the name of the First Defendant, as if and on the basis that they are assets and property of the Scheme:
- (a) the "Cash at bank" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;
  - (b) the "Debtors and loans" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;
  - (c) the real "Property" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;
  - (d) the "Investments" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;



(e) the "Motor vehicles" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report; and

(f) the "Plant and equipment" described in Appendix G of the Liquidators' Report.

5. Alternatively to orders 3 and 4, pursuant to s 90-15 of the IPS, s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in:

(a) treating the proceeds of realisation of the following property held in the name of the First Defendant, as if and on the basis that they are assets and property of the Scheme:

(i) the "Cash at bank" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;

(ii) the "Debtors and loans" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;

(iii) the real "Property" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;

(iv) the "Investments" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report;

(v) the "Motor vehicles" described in and categorised as "Scheme property" in Appendix G of the Liquidators' Report; and

(vi) the "Plant and equipment" described in Appendix G of the Liquidators' Report;

(b) treating all of the assets and property of AMS, whether held legally or beneficially, as if and on the basis that they are assets and property of the Scheme; and

(c) treating any debt payable by AMS to Chris Marco as if and on the basis that it is extinguished.



6. Alternatively to orders 3 and 4, and further to order 5, pursuant to s 90-15 of the IPS, s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in:
- (a) treating the proceeds of realisation of the assets and property of the Scheme and AMS, whether held legally or beneficially, held by them as if and on the basis that they comprise a single fund (the **Fund**);
  - (b) applying and distributing the Fund in the following order of priority:
    - (i) first, all unpaid remuneration, costs and expenses of the "Interim Receivers", the "Receivers" and the "Liquidators" pursuant to the orders of the Honourable McKerracher J on 7 December 2020 and 28 January 2021; and
    - (ii) next, to Investors as the beneficial owners of the assets and property of the Scheme, with the entitlements of Investors to the Fund to be determined and calculated in accordance with paragraphs 7 and 8 below.

#### **Method of distribution**

7. Pursuant to s 90-15 of the IPS, s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in adjudicating each Investor's claim against the Fund and calculating the Investor's entitlement to a distribution payable from the Fund in accordance with:
- (a) the "Pari Passu (a)" distribution method (including the assumptions on which that method is based) as described in sections 8.8.5 and 8.8.6 of the Liquidators' Report;
  - (b) the "Pari Passu (b)" distribution method (including the assumptions on which that method is based) as described in sections 8.8.7 and 8.8.8 of the Liquidators' Report;



- (c) the "*Courtenay House* Net Investment" distribution method (including the assumptions on which that method is based) as described in sections 8.8.10 and 8.8.11 of the Liquidators' Report;
  - (d) the "*Courtenay House* Preliminary Dividend" distribution method (including the assumptions on which that method is based) as described in sections 8.8.12 to 8.8.17 of the Liquidators' Report;
  - (e) the "*Courtenay House* Formula" distribution method (including the assumptions on which that method is based) as described in sections 8.8.18 to 8.8.21 of the Liquidators' Report;
  - (f) the "*Letten* Net Investment" distribution method (including the assumptions on which that method is based) as described in sections 8.8.22 and 8.8.23 of the Liquidators' Report;
  - (g) the "*Letten* Preliminary Dividend" distribution method (including the assumptions on which that method is based) as described in sections 8.8.24 and 8.8.25 of the Liquidators' Report;
  - (h) the "*Letten* Formula" distribution method (including the assumptions on which that method is based) as described in sections 8.8.27 to 8.8.29 of the Liquidators' Report; or
  - (i) such further or other distribution method as the Court may direct.
8. Pursuant to s 90-15 of the IPS, s 601EE(2) of the *Corporations Act 2001* (Cth), section 92 of the *Trustees Act 1962* (WA), order 26 of the orders made by the Honourable McKerracher J on 7 December 2020 and the implied/inherent jurisdiction of the Court, the Liquidators would be acting properly and are justified in:
- (a) treating any amounts recorded as an investment in the name of or to the account of an Investor (the transferee) which were transferred from another Investor (the transferor) (reflected as a debit on the account of the transferor and a credit on the account of the transferee, and in respect of which the transferee has made no cash deposit) as comprised of capital of the transferee only to the extent the transfer is determined as such under subparagraphs 8(c), 8(d) or 8(e) as applicable;



- (b) for the purposes of the "*Courtenay House Net Investment*", "*Courtenay House Preliminary Dividend*" and "*Courtenay House Formula*" distribution methods, treating any amounts representing interest accrued on maturity of an investment in the Scheme that is not withdrawn or paid to the Investor but is instead re-invested in the Scheme, as capital;
- (c) for the purposes of the "*Courtenay House Net Investment*", "*Courtenay House Preliminary Dividend*" and "*Courtenay House Formula*" distribution methods, where Investors have made cash withdrawals from their investments and received payments from the Scheme, or where Investors (the transferor) have transferred amounts to another Investor (the transferee) (reflected as a debit on the account of the transferor and a credit on the account of the transferee, and in respect of which the transferee has made no cash deposit), but the Investors are unable to provide evidence to the reasonable satisfaction of the Liquidators as to whether the withdrawal and payment or transfer (as the case may be) was made in respect of the Investor's capital or interest accrued on their maturing investment, treating the withdrawal and payment or transfer as comprised of:
- (i) interest earned on the maturing investment up to the maximum amount accrued according to the terms of the relevant investment; and
  - (ii) capital in respect of any remaining balance;
- (d) for the purposes of the "*Pari Passu (b)*", "*Letten Net Investment*", "*Letten Preliminary Dividend*" and "*Letten Formula*" distribution methods, where an Investor has made cash withdrawals from their investments in respect of which they have received payments, or where an Investor (the transferor) has transferred amounts to another Investor (the transferee) (reflected as a debit on the account of the transferor and a credit on the account of the transferee, and in respect of which the transferee has made no cash deposit), irrespective of whether the withdrawal or transfer (as the case may be) was nominated by the Investor to be in respect of the Investor's capital or interest, treating the withdrawal or transfer as comprised of:
- (i) capital up to the maximum amount to the account of the Investor making the withdrawal or transfer; and





(ii) in respect of any remaining balance, interest earned or accrued on the Investor's investment;

(e) for the purposes of the "Pari Passu (b)", "*Letten* Net Investment", "*Letten* Preliminary Dividend" and "*Letten* Formula" distribution methods, where at maturity of their investment an Investor has made cash withdrawals from their investment in respect of which they have received payments, and contemporaneously, the Investor (the transferor) has also transferred amounts to another Investor (the transferee) (reflected as a debit on the account of the transferor and a credit on the account of the transferee, and in respect of which the transferee has made no cash deposit), irrespective of whether any part of either the withdrawal or transfer (as the case may be) was nominated by the Investor to be in respect of the Investor's capital or interest, applying the treatment in sub-paragraph (d) to the withdrawal first followed by the transfer.

9. Such further or other orders as the Court considers just and necessary.

10. The Liquidators' and AMS' costs of the application be costs in the winding up of the Scheme.

Date: 23 November 2021.

A handwritten signature in blue ink, appearing to read "Adrian Chai", written over a horizontal dotted line.

Signature of Adrian Chai

Applicants' Legal Practitioner

This application will be heard by the Federal Court of Australia at Commonwealth Law Courts Building,  
1 Victoria Avenue, Perth, Western Australia at \_\_\_\_\_ am / pm on \_\_\_\_\_ 2021.



**B. NOTICE TO PARTIES**

TO: Australian Securities and Investments Commission

AT: Level 1, 11 Mounts Bay Road

Perth WA 6000

TO: Chris Marco

AT: c/- MGM O'Connor Lawyers

Level 7, 140 St George Terrace

Perth WA 6000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence.

Before appearing before the Court, you must, except if you have already done so or you are the plaintiff in this proceeding, file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff in the originating process.

*Note* Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

**C. FILING**

This interlocutory process is filed by Adrian Chai for the applicants.

**D. SERVICE**

The applicants' address for service is Ashurst, Level 10 Brookfield Place Tower II, 123 St Georges Terrace, Perth WA 6000.

It is intended to serve a copy of this interlocutory process on the plaintiff and the first defendant.



## Schedule

No. WAD 481 of 2021

Federal Court of Australia

District Registry: Western Australia

Division: General

### Defendants

Second Defendant: AMS HOLDINGS (WA) PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 164 700 485)

Third Defendant: AMS HOLDINGS (WA) PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 164 700 485) AS TRUSTEE FOR AMS HOLDINGS TRUST

### Applicants

First Applicant: ROBERT CONRY BRAUER AND ROBERT MICHAEL KIRMAN IN THEIR CAPACITIES AS JOINT & SEVERAL LIQUIDATORS OF THE SCHEME AND AMS HOLDINGS (WA) PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION)

Second Applicant: AMS HOLDINGS (WA) PTY LTD (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 164 700 485)