**SUPREME COURT OF QUEENSLAND**

Registry: Brisbane
Number: 4023 of 2023

IN THE MATTER OF: **PCA (QLD) PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT)**

ACN: **141 148 245**

Applicants: **DESTINATION BRISBANE CONSORTIUM INTEGRATED RESORT OPERATIONS PTY LTD AS TRUSTEE FOR THE DESTINATION BRISBANE CONSORTIUM INTEGRATED RESORT OPERATING TRUST AND QWB RESIDENTIAL PRECINCT OPERATIONS PTY LTD AS TRUSTEE FOR THE QWB RESIDENTIAL PRECINCT OPERATIONS TRUST**

Respondents: **PCA (QLD) PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) AND OTHERS**

# SECOND RESPONDENTS' SUBMISSIONS IN SUPPORT OF THE INTERLOCUTORY APPLICATION FILED ON 19 DECEMBER 2023

## A. MATERIAL RELIED UPON BY THE SECOND RESPONDENTS

| | *Document* | *Filing date* | *CFI* |
|---|---|---|---|
| 1. | Interlocutory application | 19.12.23 | 27 |
| 2. | First affidavit of David Michael Orr | 07.06.23 | 10-11 |
| 3. | Affidavit of Patrick Xavier Robert Mackenzie | 16.06.23 | 13 |
| 4. | Second affidavit of David Michael Orr | 19.12.23 | 28-37 |
| 5. | Order made on 19 December 2023 | 10.01.24 | 39 |
| 6. | Third affidavit of David Michael Orr | 12.03.24 | |
| 7. | Second affidavit of Patrick Mackenzie | 12.03.24 | |

## B. SUBMISSIONS

### Introduction

1. The second respondents are the deed administrators of the deed of company arrangement to which reference is made in their interlocutory application (the **DOCA**). They seek

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judicial advice that they would be justified in convening a meeting of the creditors of the 16 companies subject to the DOCA to consider proposed resolutions to vary the DOCA under *Corporations Act 2001* (Cth) (**CA**), s.445A (and as to how such a meeting should be convened). Alternatively, the deed administrators seek relief under CA, s.447A.

2. On 6 March 2024, after conferral occurred as required by Order 2 made on 19 December 2023, the applicants filed an amended originating application, annexed to which is a proposed varied DOCA. To narrow the issues in dispute, the deed administrators seek judicial advice that they would be justified in convening a meeting of creditors to consider varying the DOCA in terms of the proposed varied DOCA exhibited to Mr Orr's third affidavit, not in terms of the proposed varied DOCA annexed to their interlocutory application. The proposed varied DOCA exhibited to Mr Orr's third affidavit is the proposed varied DOCA annexed to the amended originating application, together with additional proposed changes shown in blue underline and red strikeout.

3. A factual background is contained in the schedule to these submissions.

4. The issues for determination are as follows:
   (a) Does the Court have power to make orders under CA, s.445G as sought by the applicants (and, if it does, should it do so)?
   (b) Are the deed administrators entitled to seek the judicial advice?
   (c) Should the Court make an order under CA, s.447A to, in effect, vary the terms of the DOCA? Or should the Court allow creditors to vote upon whether and how the DOCA should be varied?

   These issues are addressed in turn below.

**Does the Court have power to make orders under CA, s.445G as sought by the applicants (and, if it does, should it do so)?**

5. As the applicants rely on s.445G, whether the section is engaged at all is an issue. That said however, that issue need not be determined if the Court finds that, even if s.445G were engaged, it is unnecessary to make an order under s.445G(2) declaring a provision of the DOCA void. The deed administrators submit that such a finding should be made because:
   (a) substantively, what the amended originating application seeks is orders varying clauses 1.1, 2.3, 10.1, 10.2, 10.3, 10.4, 14.11 and 15.3 of the DOCA in the terms set out in Annexure A thereto;

(b) it is uncontroversial that the Court has power under s.447A to order that the DOCA is to operate in relation to the deed companies as if the DOCA were so varied;

(c) what is controversial is the appropriateness of the Court making such an order under s.447A; in that, as the deed administrators submit below, because the proposed variations prejudice remaining creditors and because Pt.5.3A is creditor driven, the appropriate course is for the Court to allow creditors to decide whether the DOCA should be varied under s.445A;

(d) the primary issue the deed administrators have with the applicants' proposed variations to the DOCA is their contention that whether the DOCA should be so varied should be decided by creditors rather than by the Court; and

(e) in those circumstances, it is unnecessary for the Court to resort to s.445G to vary the DOCA.

6. If the Court wishes to decide whether s.445G is engaged, the deed administrators submit it should be found that it is not.

7. The section is not engaged unless there is doubt about whether the DOCA was entered into in accordance with Pt.5.3A or complies with Pt.5.3A: *Emanuele v Australian Securities Commission* (1995) 63 FCR 54 at 69 per the Court (Spender, von Doussa and Hill JJ). The matter said by the applicants to create such a doubt is that they were not given notice of the second meeting of creditors held on 30 June 2022. However, that matter, of itself, does not create such a doubt.

8. The relevant obligations for a meeting convened under CA, s.439A are found in r.75-225(1) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPRs**), which provides:

> The administrator of a company under administration must convene a meeting under:
>
> (a) section 439A of the Act (meeting to decide the future of company under administration); or
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> .....;
>
> by written notice given to as many of the company's creditors as reasonably practicable.

9. The notice must specify the matters identified in IPRs, rr.75-225(2) and 75-225(3).

10. In *Australian Guarantee Corporation Ltd v Lawrence* (1999) 17 ACLC 1226, an applicant sought to have declared void a deed of company arrangement pursuant to s.445G on the basis that it had not received notice of the second meeting of creditors. At [31], O'Brien J found that if the applicant did not receive the notice by post it was nevertheless fixed with notice of the meeting by the advertisement in "The Age".

11. In *Re Ansett Australia Ltd* (2002) 115 FCR 395 at [25], Goldberg J considered the meaning of the phrase "as reasonably practicable" in s.439A(3), an antecedent to IPRs, r.75-225, stating:

> I consider that the words "as reasonably practicable" in s 439A(3)(a) refer to the range of creditors to whom notice is to be given, rather than to the manner in which the notice is to be given. Notice is not to be given to all creditors without exception, but rather is to be given to what may turn out to be a lesser number, that is to say, as many as it is reasonably practicable to give notice.

12. In *Khoury v Zambena* (1997) 23 ACSR 344 at 351, Young J held that a "meeting will not be invalid because of the accidental omission to notify a person who might be a creditor".

13. According to Gaudron J in *Silvak v Lurgi (Aust) Pty Ltd* (2001) 205 CLR 304 at [53]:

> The words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts.

14. Her Honour considered that one of the general propositions to be discerned from the authorities is that the phrase 'reasonably practicable' means something narrower than "physically possible" or "feasible".

15. The applicants' argument that s.445G is engaged should be rejected. The deed administrators complied with r.75-225(1) by giving notice to all creditors they had identified as creditors or potential creditors from the review of the books of the companies and as otherwise identified in the conduct of the administrations.[1]

16. The administrations of the Probuild group of companies were extremely complex, involving 19 companies. Those companies were involved in three different business streams, being large commercial construction projects, earthworks and civil construction

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[1] First Orr Affidavit, [20]–[42], [72]-[80].

and specialised construction projects.[2] The commercial construction arm alone had 19 ongoing large-scale construction projects at the time the Administrators were appointed.[3]

17. Notice of the second meeting was given to more than 3,951 creditors, published on the ASIC notices website and made available over the Halo platform.[4]

18. In the circumstances, it cannot be said that the Administrators failed to give written notice of the meeting to as many of the company's creditors "as reasonably practicable".

19. Further, even if there had been non-compliance with the statutory requirements (which is denied), a finding that a deed of company arrangement may be declared void on the basis that a single creditor who was aware the company was in administration but had elected to not register as a creditor and, as a consequence, was not directly informed of the second creditors meeting would create significant uncertainty for future external administrations. That is particularly the case where, as here:

    (a) the administrators were not aware of the applicants' existence as a creditor seeking damages against PCAQ despite reasonable investigations of the companies' books and records and correspondence with the solicitors for the applicants;[5]

    (b) the applicants, knowing PCAQ was in administration, failed to take steps to be admitted to vote at either the first or second creditors' meeting;[6] and

    (c) even if the applicants had been admitted to vote and had done so, their vote would not have changed the outcome of the relevant resolution.[7]

**Are the deed administrators entitled to seek the judicial advice?**

20. The application by the deed administrators for judicial advice is made under CA, Sch.2 (Insolvency Practice Schedule (Corporations) (the **IPS**)), s.90-15(1), which provides:

> The Court may make such orders as it thinks fit in relation to the external administration of a company.

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2 First Orr Affidavit, [15].

3 First Orr Affidavit, [17].

4 First Orr Affidavit, [75]-[76].

5 First Orr Affidavit, [20]–[42], [48]-[57].

6 First Orr Affidavit, [48]-[57], [71], [78].

7 Mr Orr's evidence is that if DBC had submitted a proof of debt in relation to the DBC Claim, it would have been admitted at $1 for the purposes of voting: First Orr Affidavit, [69]. In those circumstances, a resolution cast by DBC would not have altered the outcome of the resolution of PCAQ in favour of the DOCA: First Orr Affidavit, [84], [85].

21. The section replaced CA provisions that allowed external administrators to seek directions (e.g., the former ss.447D, 479(3) and 511). The principles that applied to the exercise of discretion under those provisions remain applicable in the context of s.90-15: *Walley, Re Poles & Underground Pty Ltd (admins apptd)* [2017] FCA 486 at [41] (per Gleeson J). Courts have accepted, however, that s.90-15 "permits the courts to take a broader view of their power to determine substantive rights and is probably more extensive than the powers formerly available to the court under ss.479(3) and 511": *Re Australian Property Custodian Holdings Ltd (in liq)* (2021) 150 ACSR 565 at [35] per Sloss J.

22. In *GDK Projects Pty Ltd v Umberto Pty Ltd (in liq)* [2018] FCA 541 at [33] Farrell J observed:

> The power to make orders conferred by s 90–15(1) contains no equivalent of s 511(2) which permitted the Court to accede to an application "if satisfied that … the exercise of power will be just and beneficial". The power is, in its terms, unconstrained. Section 90–15(4) lists some matters the Court is entitled to take into account but that list is expressed to be "[w]ithout limiting the matters which the Court may take into account when making orders". In *Walley, Re Poles & Underground Pty Ltd (admins apptd)* [2017] FCA 486 , Gleeson J observed at [41] that the question of whether to exercise the power under s 90–15 of Sch 2 can be answered by reference to principles that applied to the exercise of the discretion under the provisions previously contained in ss 479(3) and 511. I agree that those cases can be a useful guide. Despite the breadth of the power conferred by s 90–15(1), it is difficult to envisage circumstances where the power would be exercised if the Court could not be satisfied that it would be just and unless the applicant had demonstrated sufficient utility to the external administration.

23. The function of an application for directions is to give the external administrator advice as to the proper course of future action to take in the administration. In *Re MF Global Ltd (in liq)* [2012] NSWSC 994, a case concerning a liquidator's application for directions, Black J gave the following summary at [7]:

> The function of a liquidator's application for directions … is to give the liquidator advice as to the proper course of action for him or her to take in the liquidation … The Court may give directions that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion but will typically not do so where a matter relates to the making and implementation of a business or commercial decision, where no particular legal issue is raised and there is no attack on the propriety or reasonableness of the decision.

24. See also *Re Octaviar Ltd* [2020] QSC 353 at [13]-[23] per Bond J for a general discussion of the principles to be applied.

25. Where there exists controversy, dispute or acrimony, or the clear potential therefor, the Court will be more inclined to regard the case as an appropriate one for the giving of judicial advice: *Re Octaviar Ltd (in liq)* [2016] NSWSC 16 at [23] per Brereton J; *Re Octaviar Administration Ltd (in liq)* [2017] NSWSC 1556 at [6] per Black J. Here, the applicants (and perhaps some of the respondents) oppose any variation of the DOCA requiring them to contribute to the remuneration and expenses of the deed administrators which will be incurred after 21 July 2025 (being when the deed administrators identify that the DOCA would, but for the claims of insured creditors, have been effectuated). Indeed, Mr Orr is concerned that were the remaining creditors to resolve under CA, s.445A to vary the DOCA to require such contributions to be made by creditors pursuing claims to which insurance might respond, then some of the creditors pursuing those claims may seek to terminate the DOCA as so varied under CA, s.445D(1)(f) on the basis that it is oppressive or unfairly prejudicial.[8]

26. Given this controversy or potential controversy, the deed administrators appropriately seek judicial advice that they would be justified in convening a meeting of creditors to consider whether the DOCA should be varied, inter alia, to require contributions to their remuneration and expenses after 21 July 2025 to be made by creditors pursuing claims to which insurance might respond.

**Should the Court make an order under CA, s.447A to, in effect, vary the terms of the DOCA? Or should the Court allow creditors to vote upon whether and how the DOCA should be varied?**

27. The proposed DOCA variations are intended to achieve two key objectives:
    (a) To ensure that a claim against a deed company pursued by a creditor with leave to proceed to which an insurance policy may respond is preserved, i.e., not extinguished by the DOCA's operation until after it is finally determined by a court or settled.[9]
    (b) To minimise prejudice to the creditors as a whole by:
        (i) reducing what would otherwise be the level of the ongoing remuneration for and expenses of the deed administrators by having the DOCA effectuate for those deed companies against which no claim to which an insurance

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8 Third Orr Affidavit, [34]-[35].

9 See Third Orr Affidavit, Ex. DMO-3, tab 2, proposed definitions for "Amendment Date", "Claim to Which Clause 8.5 Applies", "Effectuation" and "Finally Determined".

policy may respond is being pursued by a creditor with leave to proceed;[10] with the unorthodox consequence that the remaining creditors of those companies will be paid a dividend after, rather than before or when, the DOCA is effectuated for those companies; and

(ii) requiring creditors with claims to which an insurance policy may respond pursuing those claims with leave to proceed (other than those with workers compensation claims) to fund the remuneration and expenses of the deed administrators after 21 July 2025, being the time the deed administrators identify as when the DOCA would, but for those claims, have been able to be fully effectuated (and thereby prevent the fund available for distribution to the remaining creditors being eroded by the remuneration and expenses of the deed administrators after 21 July 2025).[11]

28. While the proposed partial early effectuation variation to which reference is made in subparagraph 27(b)(i) is described as being of benefit to creditors generally (by reason that it would reduce the ongoing remuneration and expenses of the deed administrators), that description is less than accurate. That is so because such a variation is coupled with the proposed deferred effectuation of the DOCA as regards the remaining deed companies until all of the insured claims have been released, discharged, abandoned or finally determined and any amounts payable under the DOCA in respect of those claims have been paid. This variation would adversely affect the remaining creditors without claims to which an insurance policy may respond because those remaining creditors would, if that variation were made, receive a dividend much later than they would under the DOCA as it presently stands, during which time the fund will be eroded.[12]

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10 See Third Orr Affidavit, Ex. DMO-3, tab 2, proposed definitions for "Effectuation" and "Released Entities" and the proposed changes to clause 15.3.

11 See Third Orr Affidavit, Ex. DMO-3, tab 2, proposed definitions for "Direct Holding Costs", "Holding Costs", "Initial Insured Claim Contribution Notice", "Insured Claim", "Insured Claim Contribution Amount", "Insured Claim Contribution Default Notice", "Insured Claim Contribution Notice", "Insured Claim Election", "Insured Claim Notice", "Insured Claim Termination Notice", "Insured Creditor", "Longstop Date", "Net Holding Costs", "Notice Period" and 'Uniform Law", the new proposed clause 13.11, the proposed changes to clause 14.11 and the new proposed clause 14.15.

12 Third Orr Affidavit, [22].

29. The applicants oppose the proposed funding variation to which reference is made in subparagraph 27(b)(ii), but they ask the Court to make the other variations in paragraph 27 under CA, ss.445G or 447A. The Deed Administrators object to that course because:

(a) for the reasons given at paragraphs 7 to 19 above, s.445G's operation is not engaged;

(b) without the proposed funding variation to which reference is made in subparagraph 27(b)(ii) above, the fund available for distribution to remaining creditors will be eroded by the remuneration and expenses of the deed administrators after 21 July 2025 incurred as a consequence of the insured claims and the deferred effectuation of the DOCA for the remaining deed companies against which an insured claim is pursued;[13] and

(c) although the Court has power to make an order under s.447A, the practical effect of which would be to vary the DOCA, the appropriate course is that creditors, rather than the Court, should decide on whether to vary the DOCA in the ways that are proposed.

30. The only express mechanism in the CA enabling the variation of a DOCA is s.445A. Section 445A enables a variation by resolution passed at a meeting of creditors, provided the variation is not materially different from the variation proposed in the notice of meeting. However, the Court has power under CA, s.447A(1) to vary s.445A to empower the Court to vary a deed of company arrangement. In *Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd* [2018] FCA 1003 at [12], Besanko J observed:

> The Court's power to vary a deed of company arrangement pursuant to s 447A(1) is well — established. The power conferred by s 447A(1) is not subject to the limitations found in other sections within Part 5.3A of the Act. Relevantly, s 447A(1) of the Act grants the Court power to alter the operation of s 445A (or any other section in Part 5.3A), thereby empowering the Court itself to vary a deed of company arrangement: *Milankov Nominees Pty Ltd v Roycol Ltd* [1994] FCA 1276; (1994) 52 FCR 378 at 383 per Lee J; *Mulvaney v Rob Wintulich Pty Ltd* (1995) 13 ACLC 1649; (1995) 60 FCR 81 at 83 per Branson J; *Re Paradox Digital Pty Ltd (subject to Deed of Company Arrangement); Ex parte Smith (in his capacity as Deed Administrator)* [2001] WASC 182 at [13]–[15] per Owen J; *Re Ansett Australia Ltd (all admins apptd); Korda (as admins) v Ansett Australia Ground Staff Superannuation Plan Pty Ltd (as trustee)* [2002] VSC 114; (2002) 41 ACSR 598 at 602 and 604 per Warren J; *Pasminco Ltd (Subject to Deed of Company Arrangement) (No 2)* [2004] FCA 656; (2004) 49 ACSR 470, at 481 per Finkelstein J.

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[13] Second Orr Affidavit, [43].

31. Although the Court has this power under s.447A(1), it should not exercise it here because remaining creditors without claims to which an insurance policy may respond would be prejudiced by the proposed variations of the DOCA; as those remaining creditors would receive a dividend much later than they would under the DOCA as it presently stands and of a lower amount due to the additional costs associated with a prolonged DOCA period. That prejudice is all the more apparent if – as sought by the applicants – the DOCA were to be varied without adding the proposed funding variation to which reference is made in subparagraph 27(b)(ii) above.

32. In *Re Derwent Howard Media Pty Ltd* [2011] NSWSC 1164 at [12], Barrett J stated:

> Generally speaking, however, the court should be reluctant to exercise this power (and thereby to deprive creditors of their role under s 445A) except in circumstances that are uncontentious, in the sense that no prejudice to creditors is involved: *Re Paradox Digital Pty Ltd (subject to deed of company arrangement); Ex parte Smith (in his capacity as deed administrator)* [2001] WASC 182. ...

33. The role of creditors was highlighted by Master Sanderson in *Re Alinta Resources* [2020] WASC 430 at [30], where, after referring with approval to Barrett J's statement in *Re Derwent Howard Media Pty Ltd*, he observed:

> It is not difficult to see why this approach should be adopted. Part 5.3A of the *Corporations Act* (within which both sections 445A and 447A appear) is headed 'Administration of a Company's Affairs with a view to executing a Deed of Company Arrangement'. What is striking about this part of the Act is the way in which it is creditor driven. The administrators act as facilitators of any arrangement which must be approved by the creditors. The legislature could have required court approval before any DOCA was effected. But it did not do so. It left matters in the hands of the creditors so they and they alone could determine whether it was possible to salvage the company's business. That being so, there is an understandable reluctance on the part of judges to override or sideline creditors by making orders under s 447A. Far better for the creditors themselves to vary the DOCA under s 445A.

34. Similarly, in *Re Longley (Deed Admin), Dixon Advisory & Superannuation Services Pty Ltd (subject to deed of company arrangement)* [2024] FCA 70 at [51], Beach J observed:

> Now whilst the Court should be reluctant to exercise its power under s 447A to vary a deed of company arrangement and thereby deprive the creditors of their role under s 445A, it may be justified in doing so where no prejudice to creditors is involved. In that context the Court needs to consider the effect on creditors and also the practical commercial consequences of what would happen if the variation of the DOCA was not made.

35. And see also *Re Flow Systems Pty Ltd (subject to deed of company arrangement)* [2019] NSWSC 888 at [12] per Black J.

36. *Brandrill v Newmont Yandal* (2006) 24 ACLC 1,179, on which the applicants rely as authority for the making of orders under s.447A, is distinguishable. In *Brandrill*, as Austin J observed at [52]-[53], the DOCA had been largely performed and the proposed amendments could only benefit creditors. Here, Pool C is yet to be distributed and the proposed variations involve prejudice for the remaining creditors, at the very least by reason of how they will delay any distribution of Pool C.

37. This is not a case where the remaining creditors should be sidelined. They should be given the opportunity to decide whether and how to vary the DOCA at a meeting of creditors. At a hearing on 13 June 2023, senior counsel for the applicants, with respect, rightly acknowledged that this case is "definitely in that realm" of case which "shouldn't be dealt with by the court and should just go back to creditors".[14]

38. The proposed funding variation to which reference is made in subparagraph 27(b)(ii) above is an appropriate variation for creditors to consider; because:

    (a) it would operate in such a way as to require creditors with claims to which an insurance policy may respond pursuing those claims with leave to proceed (other than those with workers compensation claims) to fund the remuneration and expenses of the deed administrators after 21 July 2025, being the time the deed administrators identify as when the DOCA would, but for those claims, have been able to be fully effectuated;

    (b) it would not be unfair for the remaining creditors to vary the DOCA to require the creditors pursuing those claims to do this; because, with that variation, the DOCA would work, as Lee J said in *Matheson Property Group Pty Ltd v Virgin Australia Holdings Limited* (2022) 165 ACSR 550 at [26], "in such a way that costs and expenses or judgments are not visited upon the Deed Companies as a consequence of proceedings against the Deed Companies …";

    (c) the prejudice which would otherwise be suffered by the remaining creditors can be ameliorated by requiring those creditors which benefit from the delayed effectuation of the DOCA to make payments to preserve the fund to be distributed to the remaining creditors (being Pool C); and

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14 Transcript, 1-10, lines 34 to 37.

(d) CA, s.435A identifies an object of Pt.5.3A as being to facilitate a better return for the company's creditors generally, not just for a few of them with claims to which insurance might respond.

39. If the submission made in the preceding paragraph is accepted, then its consequence is that a meeting of creditors should be convened to permit them to consider varying the DOCA. Once that point is reached, creditors should logically be permitted to consider **all** the proposed variations. As the costs of convening a meeting are relatively fixed,[15] there are no costs savings to be achieved by the Court first making an order under s.447A for some variations. This case is unlike *Re Longley (Deed Admin), Dixon Advisory & Superannuation Services Pty Ltd (subject to deed of company arrangement)*, where the Court's making orders under s.447A obviated the need for there to be a meeting of creditors. Also, there is the further problem that the variations proposed by the applicants would necessarily require further variation if creditors were to vary the DOCA in the way described at subparagraph 27(b)(ii) above.[16]

**Conclusion**

40. Directions should be made in terms of those sought by the deed administrators in respect of the proposed varied DOCA exhibited to Mr Orr's third affidavit.

C.A. Wilkins and V. Bell

Counsel for the second respondents (deed administrators)

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15 Third Orr Affidavit, [24].

16 Third Orr Affidavit, [26]-[27].

## SCHEDULE TO THE SUBMISSIONS OF THE SECOND RESPONDENTS: RELEVANT BACKGROUND

### Appointment of administrators and deed of company arrangement

1. On 23 February 2022, Salvatore Algeri, Jason Tracy, Matthew Donnelly and David Orr, (all partners of Deloitte) were appointed as joint and several voluntary administrators (together, the **Administrators**) pursuant to s.436A in respect of various companies within the **Probuild Group**.[1] At a meeting held on 30 June 2022, creditors of the following 16 companies (together referred to as the **Deed Companies**) voted in favour of the execution of a deed of company arrangement (the **DOCA**), which appointed the Administrators as the deed administrators (the **Deed Administrators**):[2]
   (a) The first respondent (**PCAQ**).
   (b) WBHO Australia Pty Ltd (**WBHO**).
   (c) WBHO Construction Australia Pty Ltd.
   (d) Northcoast Holdings Pty Ltd.
   (e) Probuild Constructions (Aust) Pty Ltd (**Probuild**).
   (f) Probuild Civil Pty Ltd (formerly Probuild Civil (QLD) Pty Ltd).
   (g) Probuild Constructions (NSW) Pty Ltd.
   (h) Probuild Constructions (VIC) Pty Ltd.
   (i) Probuild Constructions (WA) Pty Ltd.
   (j) Probuild Constructions (QLD) Pty Ltd.
   (k) ACN 098 866 794 Pty Ltd (formerly Probuild Constructions (NSW) Pty Ltd).
   (l) Contexx Holdings Pty Ltd.
   (m) Contexx Pty Ltd.
   (n) Prodev Murphy Pty Ltd.
   (o) Prodev Investments 4 Pty Ltd.
   (p) Monaco Hickey Pty Ltd.

2. Prior to the Administrators' appointment, the Probuild Group provided project management, building and infrastructure construction services across Australia.[3] At the time of their appointment, the Probuild Group had 19 active commercial and public sector

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1 First Orr Affidavit, [2].
2 First Orr Affidavit, [3].
3 First Orr Affidavit, [13].

projects in varying stages of development in Melbourne, Sydney, Brisbane and Perth.[4] PCAQ's demolition, shoring and excavation works for the development at Queens Wharf, Brisbane, the subject of the applicants' application, were concluded on or about 3 September 2020.[5]

**Initial identification of and notice to creditors**

3. On the day of their appointment, the Administrators instructed their staff to review the books and records of the 19 companies to which they had been appointed to identify potential creditors. 1,533 potential creditors were identified through this process.[6]

4. Deloitte staff then liaised with the Probuild Group's finance team to identify further potential creditors from the Probuild Group's books. Neither of the applicants were identified as a creditor or potential creditor of PCAQ as part of this process.[7]

5. The Administrators published a notice on the ASIC Insolvency Notices website, giving notice of their appointment and details of the first meeting of creditors to be held on 4 March 2022.[8] They also set up a public website containing information regarding the administration of the Probuild Group (the **Deloitte Probuild webpage**), including a link to the Halo Platform where creditors could lodge a proof of debt.[9]

6. On 24 February 2022, an initial circular to creditors was sent to creditors who had been identified through the initial review process to their email address as recorded in the books and records of the Probuild Group.[10]

7. The appointment generated significant media attention. Searches undertaken by the solicitors for the Deed Administrators have identified 53 press articles about the administrations in the period from 22 February 2022 to 22 May 2022; including in *The Australian Financial Review*, *The Australian*, *Sydney Morning Herald*, *The Guardian* and the *ABC*.[11]

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4 First Orr Affidavit, [17].
5 First Orr Affidavit, [19].
6 First Orr Affidavit, [20].
7 First Orr Affidavit, [21], [22].
8 First Orr Affidavit, [23].
9 First Orr Affidavit, [27], [29].
10 First Orr Affidavit, [25].
11 First Orr Affidavit, [31].

**Communications from the applicants**

8. On 24 February 2022, Carter Newell sent an email to 'webenquiry@deloitte.com.au', a generic inbox attaching a letter on behalf of the applicants (the **24 February letter**). The letter foreshadowed the applicants having recourse to security held by it in satisfaction of 'the costs it had incurred and considered it will incur in the future' arising out of its claims against PCAQ.[12] The applicants were aware that PCAQ was in administration, but took no steps to lodge a proof of debt or to ascertain when the meetings of creditors were to be held.

9. On 3 March 2022, the Administrators became aware that the applicants had called on insurance bonds totalling $5,237,754.53 they held as security for the works carried out by PCAQ for the development at Queens Wharf, Brisbane.[13] In the course of correspondence with the applicants on this issue, the 24 February letter was sent to the Administrators on 23 March 2022.[14] It was the first time the Administrators were aware of it.[15] In any event, neither the 24 February letter nor the correspondence relating to the bonds stated that the applicants intended to pursue any outstanding claim against PCAQ for any amount in excess of the bonds.[16]

**Second creditors' meetings**

10. On 23 June 2022, the Administrators gave notice of the second meeting to the creditors by email (where they had an email address for the creditor), by uploading the notice of meeting to the Deloitte Probuild webpage and by uploading the details to the ASIC Insolvency Notices website.[17]

11. The second meetings of creditors were held for the Deed Companies on 30 June 2022. At the meetings, which were held concurrently, the creditors of the Deed Companies overwhelmingly resolved in favour of executing the DOCA.[18]

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[12] First Orr Affidavit, [48].
[13] First Orr Affidavit, [52].
[14] First Orr Affidavit, [49], [54].
[15] First Orr Affidavit, [49], [54].
[16] First Orr Affidavit, [56].
[17] First Orr Affidavit, [75].
[18] First Orr Affidavit, [82] – [83].

12. In relation to PCAQ, 12 of its 14 creditors, representing approximately 91.2% of the value of admitted claims against PCAQ, voted in support of the resolution under s.439C. No creditors of PCAQ voted against the s.439C resolution, and only two creditors of PCAQ, representing approximately 8.8% of the value of admitted claims against PCAQ, abstained.[19]

13. Had the applicants lodged a proof of debt in the administration of PCAQ, Mr Orr's evidence is that he would have likely admitted the claim to proof to the value of $1 for voting purposes,[20] and the applicants' vote would not have altered the outcome in favour of the DOCA.[21]

14. The DOCA was executed on 21 July 2022.[22]

**Notification of the applicants' claim against PCAQ after the second creditors' meeting**

15. It was not until 17 March 2023, in a letter from Carter Newell, that the applicants advised the Deed Administrators of the intended claim and their intention to make this application.[23]

16. On 20 March 2023, under cover of a letter from the applicants to PCAQ (care of the Deed Administrators), the applicants served a notice of dispute on PCAQ pursuant to the relevant contract. This was the first articulation of the applicants' claim (the **DBC Claim**) provided by the applicants to PCAQ and the Deed Administrators since the date of their appointment.[24] The first time the applicants quantified their claim was in a letter to the Deed Administrators' solicitors sent 1 June 2023.[25] The Deed Administrators caused their staff to register the applicants on the Halo Platform on 6 June 2023.[26]

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19 First Orr Affidavit, [83].

20 First Orr Affidavit, [69] - [70].

21 First Orr Affidavit, [84], [85].

22 First Orr Affidavit, [88]. The DOCA is exhibited to the affidavit of Mr Rodighiero filed on 31 March 2023 at pp. 36-133 of Ex. DJR-1.

23 First Orr Affidavit, [58].

24 First Orr Affidavit, [59].

25 First Orr Affidavit, [66] and [68]. The letter stated that as at 20 March 2023, the applicants anticipated that their claim against PCAQ was $27,221,854 plus further sums in the vicinity of $85 million.

26 First Orr Affidavit, [42].

17. Solicitors' correspondence followed.[27]

**The DOCA**

18. The key features and purpose of the DOCA are:[28]

(a) the assets of the Deed Companies are pooled, such that, from 16 September 2022:

(i) the assets of the Deed Companies and any other amounts received by the Deed Companies during the deed period are pooled (and inter-company liabilities are extinguished);

(ii) the Deed Companies are treated as a single company (namely, as if the Deed Companies were Probuild); and

(iii) a creditor of any deed company is treated as a creditor of the Deed Companies as a whole (clause 5.1);

(b) WBHO Construction (Pty) Ltd, a South African company, contributed a cash contribution of $9,080,000 to create a deed fund, which is augmented by other assets, for distribution to creditors;

(c) the deed fund is comprised of four pools, as follows:

(i) **Pool A:** Available assets are all monies and asset realisations of the Deed Companies, except for the Pool B amount. Pool A is applied to the Administrators' liabilities, then to employee entitlements, then to Pool D then to Pool C.

(ii) **Pool B:** Pool B contains $2,500,000 to be paid pro-rata to creditors with total claims against the Deed Companies of $25,000 (incl. GST) or less. Surplus funds are paid to Pool A.

(iii) **Pool C:** Available assets are the remaining amounts in Pool A after the Pool A payments have been made. Pool C is applied to the Deed Administrators' liabilities and the remainder pro rata to all unsecured creditors and insurance bond creditors.

(iv) **Pool D:** Available assets are the proceeds of the asset realisations that the Commissioner of Taxation (**ATO**) would have access to in liquidation as the only (known) potential creditor of certain of the Deed Companies. Pool D

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[27] First Orr Affidavit, [60] – [67].

[28] First Orr Affidavit, [89].

will be applied to pay the ATO in respect of GST and income tax claims in respect of those entities; and

(d) insured claims were intended to have the benefit of the operation of s.562, through clause 8.5 of the DOCA which provided:

> *Subject to the terms of this Deed, section 562 of the Corporations Act is to be incorporated into this Deed as if references to a liquidator were references to the Deed Administrators and with any other amendments as necessary in the context of this Deed.*

**DOCA distributions**

19. Since the commencement of the DOCA, the Deed Administrators have made the following distributions to creditors:[29]

    (a) Pool A Fund distribution of $12,044,647.62 made to employees.

    (b) Pool B Fund distribution of $1,764,992.70 made to approximately 230 Admitted Small Creditors (as that term is defined in the DOCA).

20. The remaining distributions to be made prior to effectuation of the DOCA are the distribution of the Pool C and Pool D Funds. On 6 December 2023, the Deed Administrators informed creditors that the estimated distribution to Pool C Creditors in a low case scenario is $13.6m on the assumption that the DOCA can be amended so as to provide the Deed Administrators with certainty as to the coverage of costs associated with the various insurance recovery proceedings.[30]

21. In the circumstances, the Deed Administrators have undertaken to provide two months' notice to creditors before any Pool C or Pool D distributions are made.[31]

22. It is unlikely any Pool D distributions will ever be made, as the Deed Administrators have not identified any assets for a distribution to Pool D creditors.[32]

**Other insured claims**

23. There are a number of ongoing proceedings against certain Deed Companies in respect of which leave to proceed has been granted pursuant to s.444E on the basis that the Deed Company may hold responsive insurance. Those proceedings include:[33]

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[29] First Orr Affidavit, [96].

[30] Second Orr Affidavit, [18].

[31] First Orr Affidavit, [102].

[32] Second Orr Affidavit, [53].

[33] Second Orr Affidavit, [26] and Third Orr Affidavit, [13]-[15].

(a) 14 personal injury / workers compensation claims;

(b) two proceedings in respect of allegedly defective works (namely, the DBC Claim and the Werribee Claim); and

(c) one proceeding in respect of allegedly defective works in which confined leave to proceed has been granted (limited to the production of certain books and records).

24. In addition, there are eight further proceedings / claims in relation to allegedly defective works that the Deed Administrators are aware of in which leave to proceed against a DOCA Company may be sought.[34]

25. One of the proceedings relating to alleged defective works is a claim made by the fourth respondents for between $314 million and $339 million in relation to the Pacific Werribee Shopping Centre (the **Werribee Claim**).[35] A writ and statement of claim were filed in that proceeding and served on Probuild on 14 March 2023.[36]

26. A preliminary discovery application in relation to the Werribee Claim was determined by Barrett AJ of the Supreme Court of Victoria on 29 June 2023. That judgment has since been appealed. However, as Probuild is not named as a respondent in the appeal, the Deed Administrators are not aware of the status of the appeal.[37]

27. On 20 October 2023, the Werribee claimants served on the Deed Administrators an originating application in the Supreme Court of Queensland Proceeding BS 13331/23 seeking materials in respect of Probuild's professional indemnity insurance.[38] Subsequently, Probuild's primary insurers and excess insurers have sought leave to intervene in that Queensland proceeding.[39]

28. The Deed Administrators consider that given their size and complexity, the Werribee Claim and the DBC Claim could each take 5 - 6 years, if not longer, to be finally determined.[40]

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[34] Second Orr Affidavit, [26] and Third Orr Affidavit, [15].

[35] First Orr Affidavit, [113].

[36] Second Orr Affidavit, [32(a)].

[37] Second Orr Affidavit, [32(b)].

[38] Second Orr Affidavit, [32(c)].

[39] Second Orr Affidavit., [32(d)]

[40] First Orr Affidavit, [116] – [119] and Second Orr Affidavit, [35].

29. The effect of the insured litigation on the administration of the DOCA is significant. As at 12 December 2023, the Deed Administrators had incurred approximately $292,000 in expenses for legal fees relating to ad hoc queries and providing assistance to the Deed Administrators in their various responses to the insured litigation.[41]

30. Additionally, a significant amount of time and cost for which they are entitled to be remunerated has been incurred by the Deed Administrators and their staff in dealing with the litigation. Those costs are often not covered in full by the Deed Companies' insurers as defence costs.[42]

31. At present, only two of the Deed Companies are defendants to litigation brought by creditors with leave to proceed (namely, Probuild and PCAQ).[43]

32. If the Deed Administrators resolve to delay the Pool C distributions, they will incur holding costs in maintaining the Deed Companies in the DOCA (**holding costs**). The holding costs relate to tasks such as: maintaining accounts, ASIC lodgements, bank reconciliations, preparation of Australian Taxation Office Business Activity Statements, file reviews, creditor correspondence, final adjudications, dealing with ongoing and new insurance claims and reporting.[44] If the proposed varied DOCA is approved by creditors, then only three Deed Companies will remain subject to the DOCA: Probuild, PCAQ and WBHO. In that scenario, the Deed Administrators estimate that the ongoing holding costs will be approximately $96,000 per year.[45]

33. In addition to the holding costs, the Deed Administrators will continue to incur direct costs in relation to particular insured claims (**direct holding costs**).[46] The remuneration and expenses being incurred by the Deed Administrators in respect of the insured litigation is currently approximately $600,000 per year.[47] This is likely to increase in circumstances where the Werribee Claim and the DBC Claims are in their early stages and steps including discovery and evidence are yet to be undertaken.[48]

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41 Second Orr Affidavit, [35].

42 Second Orr Affidavit, [36], [71]-[72].

43 Second Orr Affidavit, [28] and Third Orr Affidavit, [14].

44 First Orr Affidavit, [133].

45 Second Orr Affidavit, [67].

46 Second Orr Affidavit, [71].

47 Second Orr Affidavit, [39].

48 Second Orr Affidavit, [40].

34. The direct holding costs will have to be borne by the Pool C fund, thereby reducing the funds available to those creditors. This affects the interests of all Pool C creditors of the Deed Companies given the pooled nature of the DOCA.[49] The Deed Administrators consider that they will be unlikely to make any, or any substantial, interim distributions to Pool C creditors as they will need to withhold sufficient funds to meet the direct holding costs.[50] Further, the Deed Administrators consider that if the Revised Amended DOCA does not become effective, there is a real risk that the direct holding costs will significantly reduce, and potentially entirely expend, the assets available for distribution to Pool C creditors under the DOCA.[51]

35. Absent the insured litigation, the Deed Administrators anticipate that they would be in a position to make a distribution to Pool C creditors and to finalise the DOCA within 12 to 18 months, subject to the resolution of some final recoveries.[52]

**Recent notifications to creditors**

36. On 6 December 2023, the Deed Administrators issued a report to creditors which, amongst other things, provided creditors with an update on the DOCA (including the outstanding matters and the expected timing to finalisation), this proceeding and convened a meeting of creditors on 13 December 2023.[53]

37. On 13 December 2023, the creditors' meeting was held at which creditors with given an update on the DOCA (including the actual asset realisations to date and expected) and creditors approved resolutions for the Administrators' and Deed Administrators' remuneration.[54]

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[49] First Orr Affidavit, [137].

[50] First Orr Affidavit, [138].

[51] Second Orr Affidavit, [43].

[52] Second Orr Affidavit, [17] and [45].

[53] Second Orr Affidavit, [14].

[54] Second Orr Affidavit, [15] – [16].