

Our Ref: GBW:APN:769287

12 August 2020

To whom it may concern

Dear Sir /Madam

**In the matter of Force Corp Pty Limited (In Liquidation) (the Company or Force Corp)**

1. We act for Mr David John Frank Lombe and Mr Vaughan Neil Strawbridge in their capacities as the joint and several liquidators of Force Corp (**Liquidators**). The Liquidators were appointed on 23 November 2015. Prior to their appointment as Liquidators, the Liquidators were appointed as the joint and several Administrators of Force Corp on 13 July 2015.
2. The initial appointment of the Administrators was made by Lease Collateral Pty Limited (**Lease Collateral**) pursuant to Section 436C of the *Corporations Act* 2001 (Cth) (**Act**).

**Proposed dividend to eligible unsecured priority creditors**

3. As a result of successful recovery actions taken by the Liquidators for the insolvent trading and voidable transaction claims (as those claims were identified in the Liquidators' report to creditors dated 15 January 2018), the Liquidators intend to declare a first and final dividend to eligible unsecured priority creditors of the Company.
4. Prior to the declaration of a dividend to eligible unsecured priority creditors (which includes monies advanced and/or paid by Lease Collateral and monies advanced to employees via the Fair Entitlements Guarantee scheme), it is necessary for the Liquidators to seek directions from the Supreme Court of NSW (**Court**) as to the potentially competing priorities that exist and how the monies should be distributed (**Application**), specifically in relation to the unsecured priority claims of Lease Collateral.

**Unsecured Priority Claim of Lease Collateral**

5. In summary, the Liquidators' position on Lease Collateral's claims for priority in the winding up of Force Corp for which they seek the Court's directions can be summarised in the table below:

Adelaide  
Brisbane  
Canberra  
Darwin  
Hobart  
Melbourne  
Norwest  
Perth  
Sydney

Nature of Claim	Priority claim under the Act	Amount (\$)	Liquidators' comments
Administrators' remuneration and disbursements which were paid by Lease Collateral pursuant to an indemnity)	Section 556(1)(c) of the Act	\$315,342.97	The Liquidators are of the view that the indemnity for the Administrators' remuneration and disbursements for the amount of \$315,342.97 should be treated as a debt falling within section 556(1)(c) of the Act.
Payments by the receivers and managers of Force Corp for Pre-Appointment Wages and Superannuation Benefits out of Circulating Assets	Section 556(1)(e) of the Act	<p>\$856,515.97</p> <p>(amount paid out of circulating assets to which Lease Collateral has a right of subrogation)</p> <p>less</p> <p>\$546,563.81</p> <p>(amount out of circulating assets paid to Lease Collateral instead of employees)</p> <p>equals</p> <p>\$309,952.16</p>	<p>The Liquidators are of the view that the total amount of \$856,515.97 paid by the receivers to employees of Force Corp for pre-appointment wages, PAYG tax on those wages and superannuation benefits, which were paid from circulating assets, is a claim that Lease Collateral is entitled to make by way of rights of subrogation in accordance with <i>Re Divitkos, in the matter of ExDVD Pty Ltd (in liquidation)</i> (2014) 223 FCR 409 and should be treated as a debt falling within section 556(1)(e) of the Act (<b>Total Wages Payments</b>).</p> <p>The Liquidators are also of the view that the circulating assets not paid by the Receivers to employees of Force Corp, which the Liquidators accept as being the amount of \$546,563.81, is a claim for which Lease Collateral is liable and should be set-off against the priority amount of \$856,515.97 such that the amount payable to Lease Collateral in priority in respect of the Total Wages Payments is \$309,952.16.</p> <p>There is some uncertainty surrounding the factual and legal position as to:</p> <ol style="list-style-type: none"> <li>1. the operation of section 433(3)(c) of the Act regarding the requirement (if any) of a receiver to 'trace' each dollar of circulating assets recovered to the payments of pre-appointment wages and superannuation or any timing obligations to pay those circulating assets at the time when they 'come into the hands' of the receiver; and</li> <li>2. whether the Liquidators would be entitled to recover the amount of circulating assets not paid to employees and, if so, whether the Liquidators may do so by setting off this sum against Lease Collateral's priority claim in relation to the Total Wages Payments.</li> </ol>
The amount paid by Lease Collateral for wages on behalf of	Section 556(1)(e) of the Act	\$51,142.62	There is some uncertainty surrounding the factual and legal position as to whether the Lease Payment fulfils the requirements of section 560 of the Act.

Nature of Claim	Priority claim under the Act	Amount (\$)	Liquidators' comments
Force Corp (Lease Payment)			The Liquidators are of the view that the Lease Payment in the amount of \$51,142.62 should be treated as a debt falling within section 556(1)(e) of the Act. This is because, among other things, the Lease Payment was paid "on behalf of" Force Corp unlike the situation in <i>Re Dalma No 1 Pty Limited (in liquidation)</i> [2013] NSWSC 1335.

6. Due to the uncertainty regarding the priority of the debts that are the subject of the claims made by Lease Collateral in the winding up of Force Corp, we propose to seek the following directions from the Court that the liquidators would be justified in treating the debts in accordance with the manner set out in the table above (**Directions**):
- (a) a direction that the Liquidators would be justified in treating the amount of \$315,342.97 as being monies advanced by Lease Collateral to the Administrators, for their remuneration and disbursements during the administration of Force Corp, and as a debt or claim falling within section 556(1)(c) of the Act;
  - (b) a direction that the Liquidators would be justified in treating the amount of \$51,142.62 as being monies advanced by Lease Collateral to the receivers and managers of Force Corp and to Force Corp, for the purpose of Force Corp paying pre-appointment wage entitlements to employees of Force Corp, and as a debt or claim falling within sections 560 and 556(1)(e) of the Act;
  - (c) a direction that, subject to (e) below, the Liquidators would be justified in treating the amount of \$856,515.97 as being monies paid by the receivers and managers of Force Corp to the employees of Force Corp out of the circulating assets of Force Corp, and as:
    - (i) having been paid in accordance with section 433(3)(c) of the Act; and
    - (ii) a debt or claim falling within section 556(1)(e) of the Act;
  - (d) a direction that the Liquidators would be justified in treating the amount of \$546,563.81 as being monies realised by the receivers and managers of Force Corp, and as:
    - (i) having not been paid by the receivers and managers of Force Corp to the employees of Force Corp out of the circulating assets of Force Corp; and
    - (ii) having not been paid in accordance with section 433(3)(c) of the Act; and
  - (e) a direction that the Liquidators would be justified in setting-off the amount of \$546,563.81 from the amount of \$856,515.97 in (c) above that would otherwise be payable to Lease Collateral as a priority creditor under section 556(1)(e) of



the Act such that the amount payable to Lease Collateral in priority in conformity with (c) and (d) above is \$309,952.16.

7. The Liquidators' have received correspondence from the Attorney General's Department (**AGD**) who administer the Fair Entitlements Guarantee Scheme, that materially supports the Liquidators' current position and the Directions sought.

#### **Estimated funds available for eligible priority creditors**

8. Once the Application has been heard and directions subsequently given by the Court, the Liquidators will be in a position to declare a first and final dividend to certain classes of unsecured priority creditors of the Company in accordance with Section 556 of the Act.
9. Detailed below is the estimate of monies available for eligible classes of unsecured priority creditors and claimants, assuming the Directions sought in the Application are made:

	<b>Amount (\$)</b>
<b>Estimated funds available for eligible unsecured priority creditors and claimants</b>	<b>2,322,099</b>
<b>s 556(1)(c) indemnity for Administrators' fees and expenses</b>	
• Lease Collateral Indemnity Claim	(315,343)
<b>Estimated s556(1)(c) creditor claims</b>	<b>(315,343)</b>
<b>Balance available after distribution of s556(1)(c) creditor claims</b>	<b>2,006,756</b>
<b>s 556(1)(e) wages and superannuation claims</b>	
• AGD (FEG) claim (for wages)	(40,138)
• Lease Collateral claim:	
- LeasePlus Payment: \$51,143 <i>plus</i>	
- Total Wages Payments after set-off: \$309,952	(361,095)
(\$856,515 for the Total Wages Payments <i>less</i> \$546,563 for amounts not paid out of circulating assets in breach of s 433(3)(c) of the Act)	
• Australian Taxation Office (for superannuation)	(826,702)
• Residual employee claims (wages \$8,484 and superannuation \$12,612)	(21,096)
<b>Estimated s 556(1)(e) creditor claims</b>	<b>(1,249,031)</b>
<b>Balance available after distribution of s 556(1)(e) creditor claims</b>	<b>757,725</b>
<b>s556(1)(g) leave entitlement claims</b>	
• AGD (FEG) claim (annual leave and leave loading \$1,016,853 and long service leave \$656,350)	(1,673,203)
• Residual employee claims (annual leave, leave loading and long service leave)	(268,769)
<b>Sub-total: s 556(1)(g) creditor claims</b>	<b>(1,941,972)</b>
<b>Estimated distribution for s 556(1)(g) leave entitlement claims c/\$</b>	<b>0.3902</b>

10. Subject to the directions provided by the Court in respect of the Application, it is expected that:
- (a) a dividend will be paid in full for outstanding pre-appointment wages and superannuation
  - (b) a dividend of less than 100 cents in the dollar will be paid for annual leave; leave loading and long service leave employee entitlements and
  - (c) all other entitlements relating to payment in lieu of notice and redundancy are not likely to be paid a dividend regardless of the outcome of the Application.
11. Subject to the Court directions from the Application, a summary of the estimated amounts to be paid to unsecured priority creditors is outlined in the table below:

Description	Section in Act	Total Claims (\$)	Dividend c/\$	Dividend Amount (\$)
<b>Lease Collateral</b>				
Indemnity for Administrators' fees and expenses	s556(1)(c)	315,343	100c	315,343
Wages and Superannuation claims	s556(1)(e)	361,095	100c	361,095
<b>Sub-Total: Lease Collateral claim</b>				<b>676,438</b>
<b>All Other Unsecured Priority Creditor Claims (receiving a dividend)</b>				
<b>Outstanding Wages</b>				
Attorney Generals Department	s556(1)(e)	40,138	100c	40,138
Residual employee claims	s556(1)(e)	8,484	100c	8,484
<b>Sub-Total: Outstanding Wages</b>				<b>48,622</b>
<b>Superannuation</b>				
Australian Taxation Office (for employees)	s556(1)(e)	826,702	100c	826,702
Residual employee claims	s556(1)(e)	12,612	100c	12,612
<b>Sub-Total: Superannuation</b>				<b>839,314</b>
<b>Annual leave; leave loading; long service leave entitlements</b>				
Attorney Generals Department	s556(1)(g)	1,673,203	39.02c	652,856
Residual employee claims	s556(1)(g)	268,769	39.02c	104,869
<b>Sub-Total: Annual leave; leave loading; long service leave entitlements</b>				<b>757,725</b>
<b>Total estimated funds to be distributed</b>				<b>2,322,099</b>

12. No dividend will be paid to ordinary unsecured creditors of the Company.

## Application

13. We advise that the Application has now been filed with the Court
14. The Court has listed the Application for a first directions hearing at the Supreme Court of New South Wales at **10.00 am** on **24 August 2020**.
15. A copy of the Application and the Liquidators' Affidavit in support is available at the following website: **<https://www2.deloitte.com/au/en/pages/finance/articles/force-corp.html>**
16. Please contact the Liquidators' office separately if you require a copy of exhibit DL1 to the Liquidators' Affidavit.
17. Subject to the Court's availability, it is the Liquidators' intention to seek that the Application be listed for a final hearing on that date.
18. If you have any issues or concerns relating to the Liquidators' Application, including whether you wish to appear at the Application or otherwise be heard as to the relief sought, please contact the writers on or before **5.00pm** on **21 August 2020**.

Yours sincerely



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