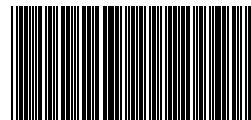




Filed: 12 August 2020 12:50 PM



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Form 2

## ORIGINATING PROCESS – COVERSHEET AND ACKNOWLEDGEMENT

IN THE MATTER OF FORCE CORP PTY LIMITED (IN LIQUIDATION)

### COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Corporations List
Registry	Supreme Court Sydney
Case number	2020/00234920

### TITLE OF PROCEEDINGS

First Plaintiff	DAVID LOMBE and VAUGHAN NEIL STRAWBRIDGE AS LIQUIDATORS OF FORCE CORP PTY LIMITED (IN LIQUIDATION)
Second Plaintiff	FORCE CORP PTY LIMITED (IN LIQUIDATION)

### FILING DETAILS

Filed for	DAVID LOMBE and VAUGHAN NEIL STRAWBRIDGE AS LIQUIDATORS OF FORCE CORP PTY LIMITED (IN LIQUIDATION), Plaintiff 1 FORCE CORP PTY LIMITED (IN LIQUIDATION), Plaintiff 2
Legal representative	Grant Bradley Whatley
Legal representative reference	
Telephone	02 9334 8843
Your reference	GBW:APN:769287

### HEARING DETAILS

This application will be heard at Supreme Court Sydney on 24 August 2020 at 10:00 AM

### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Originating process (Corporations Law) Other, along with any other documents listed below, were filed by the Court.

Corporations Law Originating Process (Form 2) (758503043\_1\_Originating Process (signed 12.08.20).PDF)  
Affidavit in Support of Originating Process (758528573\_1\_Affidavit of David Lombe sworn 11.08.20.PDF)

[attach.]

**ORIGINATING PROCESS**

IN THE SUPREME COURT OF NEW SOUTH WALES  
REGISTRY: SYDNEY  
DIVISION: EQUITY

No. 2020/

**IN THE MATTER OF FORCE CORP PTY LIMITED (IN LIQUIDATION) ACN 109 630 079**

**DAVID JOHN FRANK LOMBE AND VAUGHAN NEIL STRAWBRIDGE IN THEIR CAPACITY AS  
JOINT AND SEVERAL LIQUIDATORS OF FORCE CORP PTY LIMITED (IN LIQUIDATION)**  
First Plaintiffs

**FORCE CORP PTY LIMITED (IN LIQUIDATION)**  
Second Plaintiff

**A. DETAILS OF APPLICATION**

This application is made under Section 90-15 of the Insolvency Practice Schedule (Corporations), Schedule 2 of the *Corporations Act 2001 (Cth) (Act)*.

Nature of the proceeding: This is an application for directions by the First Plaintiffs, David John Frank Lombe and Vaughan Neil Strawbridge in their capacity as joint and several liquidators of Force Corp Pty Limited (in liquidation) (the **Liquidators**), under section 90-15 of the *Insolvency Practice Schedule (Corporations)* (being Schedule 2 of the Act), as to the manner of distribution of the assets of the Second Plaintiff, Force Corp Pty Limited (in liquidation) (**Force Corp**) to priority creditors.

On the facts stated in the supporting affidavit, the Plaintiffs seek the following relief:

1. A direction that the Liquidators would be justified in treating the amount of \$315,342.97 as being monies advanced by Lease Collateral Pty Ltd to the First Plaintiffs, in their capacity as the then joint and several administrators of Force Corp, 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.
2. A direction that the Liquidators would be justified in treating the amount of \$51,142.62 as being monies advanced by Lease Collateral Pty Ltd to the receivers and managers of Force Corp and to Force Corp, for the purpose of Force Corp paying pre-appointment wage entitlements to

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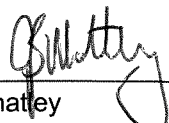
**HWL Ebsworth Lawyers**  
Level 14, Australia Square  
264-278 George Street  
SYDNEY NSW 2000

Tel: (02) 9334 8555  
Fax: 1300 369 656  
Bulk User No  
Ref: GBW:769287

employees of Force Corp, and as a debt or claim falling within sections 560 and 556(1)(e) of the Act.

3. A direction that, subject to paragraph 5 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:
  - (a) having been paid in accordance with section 433(3)(c) of the Act; and
  - (b) a debt or claim falling within section 556(1)(e) of the Act.
4. 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:
  - (a) 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
  - (b) having not been paid in accordance with section 433(3)(c) of the Act.
5. A direction that the Liquidators would be justified in setting-off the amount of \$546,563.81 from the amount of \$856,515.97 referred to in paragraph 3 above that would otherwise be payable to Lease Collateral Pty Ltd 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 paragraphs 3 and 4 above is \$309,952.16.
6. An order that the Plaintiffs' costs of the proceedings be costs in the winding up of Force Corp.
7. Such further or other order as the Court may deem fit.

Date: 12 AUGUST 2020

  
\_\_\_\_\_  
Grant Whatley  
Solicitor for the Plaintiffs

This application will be heard by the Supreme Court of New South Wales at the Law Courts Building, Queens Square, Sydney at \_\_\_\_\_ on \_\_\_\_\_

**B. NOTICE TO DEFENDANTS (IF ANY)**

TO: Not applicable.

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. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;

- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

*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**

Date of filing:

This originating process is filed by HWL Ebsworth Lawyers for the Plaintiffs.

### **D. SERVICE**

The Plaintiffs' address for service is C/- HWL Ebsworth Lawyers, Level 14, Australia Square, 264-278 George Street, Sydney NSW 2000.

It is intended to serve a copy of this originating process on each person listed below:

#### **I. Lease Collateral Pty Ltd**

c-/ Corrs Chambers Westgarth  
Level 17, 8 Chifley  
8-12 Chifley Square  
SYDNEY NSW 2000

#### **II. Christopher Clarke Hill and Brett Lord in their capacity as the former receivers and managers of the assets and undertaking of Force Corp Pty Limited (in liquidation)**

c-/ Allens Linklaters  
Level 28, Deutsche Bank Place  
126 Phillip Street  
SYDNEY NSW 2000

#### **III. Commonwealth of Australia (adminstrating the Fair Entitlements Guarantee Scheme)**

c-/ Hopgood Ganim Lawyers  
Level 8, Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000

**IV. Deputy Commissioner of Taxation**

**V. Australian Securities and Investments Commission**

**VI. Former employees of Force Corp**

AFFIDAVIT

IN THE SUPREME COURT OF NEW SOUTH WALES  
DIVISION: EQUITY  
REGISTRY: SYDNEY

No. 2020/

IN THE MATTER OF FORCE CORP PTY LIMITED (IN LIQUIDATION) ACN 109 630 079

DAVID JOHN FRANK LOMBE AND VAUGHAN NEIL STRAWBRIDGE IN THEIR CAPACITY AS  
JOINT AND SEVERAL LIQUIDATORS OF FORCE CORP PTY LIMITED (IN LIQUIDATION)  
First Plaintiffs

FORCE CORP PTY LIMITED (IN LIQUIDATION)  
Second Plaintiff

On 11<sup>th</sup> August 2020

I, David John Frank Lombe, of 225 George Street, Sydney NSW 2000, Liquidator, say on oath:

1. I am one of the First Plaintiffs and a joint and several liquidator of the Second Plaintiff, Force Corp Pty Limited (in liquidation) (*Force Corp*). I am a Special Principal with Deloitte Financial Advisory Pty Ltd (*Deloitte*) and I have worked as an insolvency practitioner for over 30 years.
2. Vaughan Neil Strawbridge (*Mr Strawbridge*) is also a liquidator of Force Corp, jointly and severally with me. I am authorised to make this affidavit on my own behalf in my capacity as a liquidator of Force Corp and I am also authorised to make this affidavit on behalf of Mr Strawbridge. I refer below to us collectively as the '*Liquidators*'.
3. I make this affidavit from my own knowledge and the books and records of Force Corp except where otherwise indicated. Where I make this affidavit from facts outside my personal knowledge, I am informed by the source stated and believe those facts to be true. Where I refer in this affidavit to an opinion being held by the Liquidators, I do so after having discussed the matter with Mr Strawbridge and having confirmed that he also holds the opinion deposed to.
4. Where I refer to "I", "me", "my", "we" or "our" (and, in some cases, "the Liquidators") throughout this affidavit, this also includes a reference to my staff at Deloitte who carried out investigations into the affairs of Force Corp under the Liquidators' direction and supervision.



## Application

5. I swear this affidavit in support of the application by the Liquidators for the following directions from the Court in relation to the manner of distribution of the proceeds received from recovery actions undertaken by the Liquidators pursuant to part 5.7B of the *Corporations Act 2001 (Cth) (Act)* to priority creditors (**Application**):
- (a) a direction that the Liquidators would be justified in treating the amount of \$315,342.97 as being monies advanced by Lease Collateral Pty Ltd in its capacity as trustee of the Specialised Finance Warehouse Trust 1 (**Lease Collateral**), to the First Plaintiffs, in their capacity as the then joint and several administrators of Force Corp, 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.

6. Details of the priority claims of Lease Collateral are set out in paragraphs 65 to 140 below.
7. In summary, the Liquidators' position on Lease Collateral's claims for priority in the winding up of Force Corp for which we respectfully seek the Court's directions can be summarised in the table below:

Description	Priority claim under the Act	Amount (\$)	Liquidators' comments
<b>Lease Collateral Indemnity</b>  (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.
Discussed at paragraphs 66 to 75 below			
<b>Total Wages Payment after set-off</b>  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	\$856,515.97 (amount paid out of circulating assets to which Lease Collateral has a right of subrogation)  less  \$546,563.81 (amount out of circulating	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.  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




Description	Priority claim under the Act	Amount (\$)	Liquidators' comments
Discussed at paragraphs 76 to 127 below		assets paid to Lease Collateral instead of employees)  <i>equals</i>  \$309,952.16	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 Payment is \$309,952.16.  There is some uncertainty surrounding the factual and legal position as to:  (a) 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  (b) 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 Payment.
<b>LeasePlus Payment</b>  (The amount paid by Lease Collateral for wages on behalf of Force Corp)	Section 556(1)(e) of the Act	\$51,142.62	There is some uncertainty surrounding the factual and legal position as to whether the LeasePlus Payment fulfils the requirements of section 560 of the Act.  However, the Liquidators are of the view that the LeasePlus 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 LeasePlus 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.

8. 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, the Liquidators respectfully seek the directions set out in the Application that they would be justified in treating the above debts in




accordance with the manner set out above (or otherwise alternative guidance as to how to treat these claims).

### **Exhibits**

9. Exhibited to me at the time of swearing this affidavit is a bundle of paginated documents marked **Exhibit 'DL1'** to which I refer to in this affidavit. Where I refer to a document by page number in this affidavit, I am referring to a document in Exhibit DL1 commencing at that page.
10. Also exhibited to me at the time of swearing this affidavit and marked **Confidential Exhibit 'DL2'** is a bundle of documents to which I also refer to in this affidavit.
11. The documents in Confidential Exhibit DL2 are not presently in the public domain. These documents are confidential because they are agreements that contain confidentiality clauses. Thus, due to the confidential nature and commercial sensitivity of the documents in Confidential Exhibit DL2, I respectfully seek an order that Confidential Exhibit DL2 be marked confidential and not be disclosed to any person except by order of this Honourable Court.

### **Appointment as Liquidators**

12. On 13 July 2015, Mr Strawbridge and I were appointed joint and several administrators of Force Corp (**Administrators**). A company search of Force Corp dated 6 August 2020 is at page 1 of Exhibit DL1.
13. We were also appointed as joint and several administrators of the following six companies, which are each subsidiaries of Force Corp (collectively the "**Companies**" or the "**Force Corp Group**"):
  - Force Towers Pty Limited (In Liquidation);
  - English & Leeds Pty Limited (In Liquidation);
  - Equipment Rental Investments Pty Limited (In Liquidation);
  - S.A. Access Equipment Pty Limited (In Liquidation);
  - ACN 085 602 348 Pty Limited (In Liquidation); and
  - Minipickers Holdings Pty Limited (In Liquidation).



14. Our appointment as Administrators was made by Lease Collateral pursuant to section 436C of the Act. Challenger Limited is the ultimate parent entity of Lease Collateral. A company search of Lease Collateral is at **page 16 of Exhibit DL1**.
15. Simultaneous with our appointment as Administrators, Christopher Hill and Brett Lord of PPB Advisory (as it then was) were appointed Receivers and Managers of the assets and undertaking Force Corp (**Receivers**). The Receivers were appointed by Recfin Nominees Pty Limited in its capacity as trustee of the Recfin Series 2014-2 Trust (**Recfin Nominees**). Recfin Nominees is a subsidiary of AET SPV Management Pty Ltd and its ultimate parent company is IOOF Holdings Limited. The Deed of Appointment of the Receivers and the Deed of Indemnity provided by Recfin Nominees is at **page 1 of Exhibit DL2**.
16. At the date of our appointment as Administrators, Lease Collateral and Recfin Nominees were the first ranking secured charge holders of the Force Corp Group, having advanced funds to the Force Corp Group which were secured by security interests in the nature of various All Present and After Acquired Property (**ALLPAAP**) registrations on the Personal Property Securities Register (**PPSR**).
17. Force Corp had entered into the following finance agreements with Lease Collateral and Recfin Nominees:
  - (a) Senior Facility Agreement with Lease Collateral dated 17 October 2014 (at **page 19 of Exhibit DL1**). This agreement provided for the following funding:
    - (i) Tranche A Facility: a term loan facility of up to \$56 million;
    - (ii) Tranche B Facility: a term loan facility of up to \$6 million; and
    - (iii) CAPEX Facility: a loan facility of up to \$5 million to be used to reimburse Force Corp for capital expenditure in respect of equipment from time to time;
  - (b) Bridging Facility Agreement with Lease Collateral dated 17 October 2014 (at **page 147 of Exhibit DL1**). This agreement provided short-term funding of \$5 million to be used to refinance the group's existing facilities with the Commonwealth Bank of Australia and GE Capital Finance Pty Ltd (discussed further below) and which was repayable within three months.
  - (c) Receivables Purchase Agreement with Recfin Nominees dated 22 October 2014 (at **page 173 of Exhibit DL1**). This agreement provided a Receivables Purchasing



Facility of up to \$15 million (known as the Receivables Purchasing Facility) with respect to financing the majority of Force Corp's accounts receivable ledger.

(as defined above, these are together referred to as the **Challenger Facilities**).

18. On 12 November 2015, Mr Strawbridge and I finalised a Report to Creditors pursuant to section 439A of the Act as it then was (**439A Report**) following our appointment as Administrators. A copy of the 439A Report is at page 291 of Exhibit DL1. Since then, the Liquidators have carried out extensive investigations, which have included conducting public examinations pursuant to sections 596A and 596B of the Act and preparing reports for the Australian Securities & Investments Commission (**ASIC**) pursuant to section 533(2) of the Act.
19. On 23 November 2015, at the Second Meeting of Creditors of Force Corp, creditors resolved that Force Corp be wound up pursuant to section 439C(c) of the Act and that Mr Strawbridge and I be appointed as the Liquidators.
20. At the Second Meeting of Creditors of Force Corp held on 23 November 2015, the creditors of Force Corp also resolved to appoint a Committee of Inspection (**Committee**). There were originally six (6) and there are presently four (4) members of the Committee with respect to the winding up of Force Corp, as outlined in the table below:

Representative	Creditor
Sean Reil	Former employee
Simon James / Stuart Terry	Lease Collateral
Paul Sharples	Access Service Australia Pty Limited
Ian Johnson	Equity Trustees Limited ATF Helmsman Capital Fund IIB
Rick Mustillo	Independent Parts & Service Pty Limited (resigned from the Committee on 7 June 2020)
Julianne Ashburn	Former employee (resigned from the Committee on 15 August 2016)

21. On 21 February 2017, Brett Lord retired and ceased to act as one of the Receivers.
22. On 9 May 2019, Christopher Hill (**Mr Hill**) retired and ceased to act as the Receiver upon the finalisation of the receivership. At page 451 of Exhibit DL1 is correspondence received from Mr Hill dated 9 May 2019 confirming the finalisation of the receivership.




23. Apart from the distribution of the proceeds received from recovery actions undertaken by the liquidators pursuant to part 5.7B of the Act to unsecured priority creditors (which is the subject of this Application) and other administrative and statutory tasks, there is nothing further in the winding up of Force Corp for the Liquidators to complete.

#### **Background to Force Corp and our appointment as Administrators**

24. Force Corp was incorporated on 21 June 2004 and operated a business that specialised in the hire of working-at-height equipment, such as elevated work platforms, vertical lifts, and travel towers within the construction industry and maintained one of the largest specialist fleets in Australia. The business operated from 13 locations throughout Australia and distributed its hire access equipment across various metropolitan, regional and remote locations.
25. Force Corp expanded its business largely through acquisitions of rental equipment businesses with its secured borrowings growing from about \$49 million in August 2012 to a peak of about \$94 million in April 2013.
26. At the time of our appointment as Administrators, Force Corp employed 308 permanent staff and 17 casual staff.
27. On or around 18 September 2012, Force Corp entered into a syndicated facility agreement with Commonwealth Bank of Australia (*CBA*) and GE Capital Finance Pty Ltd as trustee of the GE Capital Commercial Real Estate Financing & Services (Australia) Unit Trust (*GE*) with an initial term of two years (*CBA/GE Facility*). The *CBA/GE Facility* comprised Force Corp's primary borrowings from 18 September 2012 to 27 October 2014. The initial total commitment under the *CBA/GE Facility* was \$107 million. The Force Corp Group's assets were pledged as security for the loans advanced by CBA and GE.
28. The secured loans were initially subject to expiration on 18 September 2014; however, the loan maturity dates were extended on several occasions, eventually to 31 October 2014, to allow a refinance with Lease Collateral and Recfin Nominees in accordance with the Challenger Facilities, which occurred on 27 October 2014 (*Refinance*).
29. The completion of various mining and resource projects and the subsequent contract run-off with its customers during 2013 and 2014 resulted in Force Corp suffering from excess equipment, increased under-utilisation of rental equipment and unsustainable fixed cost structure of the Company. In about September 2013, Force Corp began to experience systemic financial distress starting with breaches of financial covenants pursuant to the syndicated loan facilities. These breaches lasted for almost 12 months before the syndicated loan facilities were refinanced in October 2014.



30. On 27 October 2014, the Refinance with Lease Collateral and Recfin Nominees took place with total funds of \$77.76 million being advanced pursuant to the Challenger Facilities. Force Corp was breach of its debt covenants with the Challenger Facilities with the first reporting month following the Refinance.
31. It was apparent from the Liquidators' investigation into the Company's demise that the refinance of Force Corp's syndicated loan facilities only served to prolong the period that Force Corp continued to carry on business and incur debts that it was unable to pay. These factors combined with consecutive trading losses for the financial years ended 30 June 2013, 30 June 2014 and 30 June 2015, its inability to raise equity, its inadequate cash flow, its undercapitalisation, its unsustainable gearing levels, poor economic conditions, poor strategic management of the business and its inadequate cash flow, together had the effect of amplifying the financial distress of Force Corp, culminating in our appointment as Administrators to each of the Companies and the appointment of the Receivers on 13 July 2015.

#### **Recoveries from Insolvent Trading and Unfair Preference Claims**

##### ***Insolvent Trading Claim***

32. As a result of our investigations into the business and affairs of Force Corp, including information obtained from public examinations of the directors of Force Corp and other Force Corp personnel (***Public Examinations***), the Liquidators formed the view that the directors of Force Corp (***Directors***) had breached their duties pursuant to section 588G of the Act to prevent Force Corp from trading whilst insolvent.
33. On 14 March 2017, the Liquidators and Force Corp commenced proceeding number 2017/78336 in this Honourable Court alleging that the Directors had traded Force Corp whilst insolvent for the period 1 July 2014 to 13 July 2015 (inclusive), seeking compensation under section 588M of the Act totalling \$17,305,695.43 (***Insolvent Trading Proceeding***).
34. After significant steps in the proceeding, including the determination of various interlocutory applications and the filing of substantial lay and expert evidence, the Insolvent Trading Proceeding was listed for final hearing on 21 May 2019 for an estimated duration of twelve (12) days.
35. On or about 8 May 2019, prior to the final hearing, the Liquidators settled the Insolvent Trading Proceeding with the Directors.



36. The terms of the settlement are subject to a settlement deed entered into by the parties that contain provisions regarding confidentiality. However, the settlement of the Insolvent Trading Proceeding led to a substantial recovery in the winding up. At page 28 of Confidential Exhibit DL2 is a copy of the Deed of Settlement and Release between the Directors and the Liquidators in relation to the Insolvent Trading Proceeding.

***Unfair preferences***

37. As a result of our investigations, the Liquidators also identified fifteen (15) creditors of Force Corp who had potentially received unfair preferential payments during the six (6) month relation-back period prior to our appointment as Administrators.
38. Of the fifteen (15) preferential creditors in total, the Liquidators successfully negotiated settlements with six (6) of those preferential creditors for the combined value of \$1,203,000 without having to commence proceedings. The terms of the settlement with each of the preference creditors are subject to separate settlement deeds entered into by the parties that contain provisions regarding confidentiality.
39. A further preferential creditor, Vision Forklifts Pty Ltd (in Liquidation) entered into liquidation on 19 March 2018. The Liquidators have made enquiries with the liquidator of this company and have been informed (and verily believe) that there is unlikely to be a dividend payable to unsecured creditors and therefore this claim has not been pursued further.
40. On 15 June 2018, the Liquidators and Force Corp commenced proceeding number 2018/185867 in this Honourable Court against the remaining eight (8) preferential creditors (***Unfair Preference Proceeding***) to recover alleged unfair preference payments made by Force Corp to each of those creditors in the six (6) month period prior to the appointment of Administrators pursuant to sections 588FA, 588FC, 588FE and 588FF of the Act.
41. During the Unfair Preference Proceeding, settlements were achieved with seven (7) of the alleged preferential creditors on a without admission basis for the combined value of \$770,500. The terms of the settlement with each of the preference creditors are subject to separate settlement deeds entered into by the parties that contain provisions regarding confidentiality.
42. The remaining preferential creditor, Shire Wide Towing Service Pty Ltd (in Liquidation) entered into liquidation during the course of the Unfair Preference Proceeding. The Liquidators have made enquiries with the liquidator of this company and have been informed (and verily believe) that there is unlikely to be a dividend payable to unsecured creditors and therefore this claim has not been pursued further.

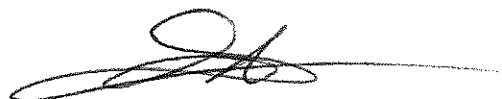




43. Total proceeds received by the Liquidators regarding the recovery of the alleged unfair preferential payments total \$1,973,500.
44. The Liquidators do not expect to make any additional recoveries in the winding-up of Force Corp.

**Litigation Funding - Litigation Lending Services Limited**

45. As at the date of our appointment as Administrators and then again as Liquidators, the assets of the Force Corp Group were in the process of being recovered by the Receivers (which were in any event substantially less than the amount owing to Lease Collateral), with the consequence that Mr Strawbridge and I were unfunded with respect to our appointment.
46. As a result, the Liquidators were unable to conduct the Public Examinations or pursue the insolvent trading and unfair preference claims without funding from a third party.
47. At a Committee meeting held on 29 August 2016, the members of the Committee resolved that the Liquidators enter into two (2) separate litigation funding agreements with Litigation Lending Services Limited (*LLS*) for the purposes of pursuing the insolvent trading claim and unfair preference claims (*Funding Agreements*).
48. The Funding Agreements provided, among other things, an indemnity for our exposure to any adverse cost orders if they arose in the Court proceedings and also a considerable portion of the costs of our solicitors, legal counsel and disbursements.
49. The Funding Agreements came into effect on 7 September 2016.
50. Pursuant to the Funding Agreements, following the receipt of the settlement monies from the Insolvent Trading Proceeding and the Unfair Preference Proceeding, the Liquidators reimbursed LLS for monies advanced under the Funding Agreements and also paid LLS a further additional sum based on a percentage of the gross settlement proceeds in accordance with the Funding Agreement (*Funding Amounts*). The Funding Amounts are confidential and so I do not disclose the overall sum in this affidavit.
51. Had it not been for the financial support and indemnity provided by LLS, the Liquidators would have been unable to pursue the insolvent trading and unfair preference claims.



**Amount available for distribution**

52. As a result of successful recovery actions, and after payment of the Funding Amounts and the Liquidators' approved remuneration (which includes the estimated future remuneration to completion of the winding up), expenses and disbursements, there are estimated funds available for distribution in the winding up of Force Corp in the amount of approximately \$2,322,099 (*Estimated Distribution Amount*).
53. The Estimated Distribution Amount takes into account the Liquidators' further remuneration and the estimated costs and expenses in relation to this Application. The Estimated Distribution Amount is outlined in the Estimated Statement of Position set out in paragraph 153 below.

**Return to ordinary unsecured creditors**

54. The assets and undertaking of Force Corp were subject to the first ranking security interests of Lease Collateral and Recfin Nominees over all present and after acquired property of Force Corp that are registered on the PPSR. The security interests relate to the cross-collateralised secured loan facilities provided to the Force Corp Group by the first ranking charge holders.
55. Accordingly, on the appointment of the Receivers, the assets and other property of the Companies (other than the claims belonging to the Liquidators) were realised by the Receivers and paid to Recfin Nominees and Lease Collateral.
56. The Receivers have confirmed there will be insufficient realisations to pay out first ranking secured charge holders, resulting in zero realisations available for the benefit of unsecured creditors.
57. Lease Collateral is one of the largest creditors in the winding up of Force Corp. Although I have not yet received a formal proof of debt from Lease Collateral, I am informed by David Anthony of Corrs Chambers Westgarth (*Corrs*), the solicitor representing Lease Collateral, and verily believe, that Lease Collateral claims to be owed approximately \$20.9 million by Force Corp as at 11 December 2018. At page 452 of Exhibit DL1 is a copy of an email from David Anthony dated 11 December 2018.
58. Based on my investigations, there is a substantial deficiency in the winding-up of Force Corp. For the reasons set out below, only the unsecured priority creditors outlined below will receive a dividend from the Estimated Distribution Amount in the winding up of Force Corp.



59. Other than Force Corp, there have been no recoveries made in the winding up of the other companies in the Force Corp Group and there will be no distribution to creditors of those companies.

***Unsecured Priority Creditor claims***

60. The Liquidators have been notified, and are currently aware, of four (4) potential groups of unsecured priority creditors in the winding up of Force Corp (together, ***Priority Creditors***), namely:
- (a) Lease Collateral;
  - (b) the Commonwealth / Attorney General's Department (***AGD***) administering the Fair Entitlements Guarantee Scheme (***FEG***);
  - (c) other Force Corp Employees (***Other Employees***); and
  - (d) the Australian Taxation Office (***ATO***).
61. On 20 August 2019, the Liquidators issued a Report to the Committee (***Third COI Report***). A copy of the Third COI Report is at page 453 of Exhibit DL1. The Third COI Report set out, among other things:
- (a) notice of the convening of the Committee meeting to be held on 10 September 2019;
  - (b) an update on the winding up of Force Corp, including recoveries from the insolvent trading and unfair preference claims;
  - (c) an estimate of the funds available for distribution to eligible Priority Creditors;
  - (d) Lease Collateral's claims for priority; and
  - (e) notice of the Liquidators' intention to make this Application for directions in relation to the manner of distribution of the Estimated Distribution Amount to Priority Creditors.
62. On 10 September 2019, a Committee meeting was held (***Third COI Meeting***). That meeting was attended by each of the Committee members and also a representative of the AGD as an observer in light of the quantum of its priority claims (discussed further below).





63. At the Third COI Meeting, and as foreshadowed in the Third COI Report, I indicated to the Committee that the Liquidators would write to all Priority Creditors:
- (a) regarding the Liquidators' preliminary position with regards to the distribution to unsecured Priority Creditors, which would form the basis of the Application;
  - (b) requesting any further information from each of the Priority Creditors regarding their claim for priority distribution; and
  - (c) inviting the Priority Creditors to form a view and if possible reach agreement with regards to the distribution to Priority Creditors.
64. At pages 505 to 1152 of Exhibit DL1 is a bundle of correspondence between the Liquidators (and / or their solicitors, HWL Ebsworth (*HWLE*)), the Receivers, Lease Collateral (and their solicitors, Corrs Chambers Westgarth (*Corrs*)) and the AGD (and or its solicitors, Hopgood Ganim (*Hopgood Ganim*)) in relation to the claims of the Priority Creditors. I refer to this bundle of correspondence in the subsequent paragraphs below.

**Lease Collateral's claim as a priority creditor**

65. As I explained above, Lease Collateral is a subsidiary of Challenger Limited. Accordingly, at various points, Lease Collateral is referred to as (or by some variant of) "Challenger". However, as far as the Liquidators are aware, the only dealings with the Force Corp made by Challenger Limited (from the perspective of a specific legal entity) were undertaken by Lease Collateral.

**Funding on Appointment**

66. As at the date of our appointment as Administrators, the administrations had no funds and Mr Strawbridge and I were unfunded with respect to our appointments.
67. For the purposes of our appointment as Administrators on 13 July 2015, Lease Collateral agreed to advance funds to Mr Strawbridge and I to indemnify us for the following (**Lease Collateral Indemnity**):
- (a) our professional fees for the amount of \$250,000 (excluding GST and disbursements) for the conduct of the voluntary administrations to enable the administrations to proceed; and



- (b) our professional fees, expenses and disbursements associated with our application to the Court for an extension of the convening period for the second meeting of creditors of Force Corp Group pursuant to section 439A of the Act.
68. The 439A Report and the Administrators' Declaration of Independence, Relevant Relationships and Indemnities in accordance with section 436DA of the Act disclosed the salient terms of the Lease Collateral Indemnity. The Lease Collateral Indemnity was not the subject of a formal executed agreement. However, on 24 November 2015, the Liquidators sent a letter to Corrs confirming the terms of the Lease Collateral Indemnity. A copy of the letter dated 24 November 2015 is at **page 505 of Exhibit DL1**.
69. Although the letter to Corrs refers to the "Challenger Financial Services Group", as I explained above, Challenger Limited is the ultimate parent company of Lease Collateral and, as set out below, the Administrators ultimately issued invoices to Lease Collateral for the amounts that were subject of the Lease Collateral Indemnity.
70. It was a term of the Lease Collateral Indemnity that in the event that the Liquidators received any recoveries from any insolvent trading claim or unfair preference claims, Lease Collateral would be reimbursed for the monies it advanced to the Administrators in accordance with the Lease Collateral Indemnity.
71. In accordance with the Lease Collateral Indemnity, Lease Collateral advanced the total amount of \$338,416.85 including GST (or \$307,651.68 excluding GST ) to the Administrators in respect of remuneration and expenses incurred during the administration period for payment of our professional fees and disbursements as follows:
- (a) professional fees in the amount of \$265,231 excluding GST; and
- (b) reimbursement of expenses in the amount of \$42,420.68 excluding GST.
72. At **page 508 of Exhibit DL1** are copies of the invoices sent by the Administrators to Lease Collateral in relation to professional fees and disbursements for the administration of Force Corp, which are summarised in the table below:

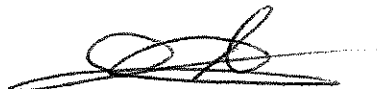


Invoice Number	Invoice Date	Administrators Professional Fees \$	Administrators Disbursements \$	GST \$	Invoice Amount \$
1-1985720	25/09/2015	Nil	22,738.43	2,273.84	25,012.27
1-1990076	14/10/2015	13,182.00	Nil	1,318.20	14,500.20
1-1986164	28/09/2015	250,000.00	Nil	25,000.00	275,000.00
1-1999386	24/11/2015	2,049.00	19,682.25	2,173.13	23,904.38
<b>Total</b>		<b>265,231.00</b>	<b>42,420.68</b>	<b>30,765.17</b>	<b>338,416.85</b>


73. These amounts were received by Deloitte after the invoices were issued.
74. My solicitors HWLE have been advised by Corrs that in relation to the GST component of the above invoices, Lease Collateral claimed and received a GST credit in the amount of \$23,073.88 from the ATO. This amount represents 75% of the GST component of the four invoices totalling \$30,765.17 which I understand is the maximum amount which could be claimed by Lease Collateral in relation to a financial supply. At page 515 of Exhibit DL1 is a letter from Corrs to HWLE dated 5 June 2020 which annexes, among other things, screenshots of the GST refunds Lease Collateral received totalling \$23,073.88 in relation to the above invoices.
75. Based on the above, the Liquidators are of the view that the amounts advanced by Lease Collateral for our professional fees and disbursements in the amount of \$315,342.97 (being the amount of our invoices totalling \$338,416.85 less the GST credit in the amount of \$23,073.88 received from the ATO) is repayable to Lease Collateral and is a debt incurred in the administration of Force Corp for which the Administrators have a right of indemnity under section 443D, which takes priority over other debts and falls within section 556(1)(c) of the Act.

***Wages Paid from Circulating Assets***

76. On 12 July 2016 I wrote to the Receivers requesting, among other things:
- (a) a breakdown of the circulating and non-circulating assets recovered during the receivership; and
  - (b) whether there were any circulating asset recoveries available for the benefit of priority creditors in accordance with section 433 of the Act.
77. At page 519 of Exhibit DL1 is a copy of my letter to the Receivers dated 12 July 2016.




78. On or about 25 July 2016, I received a letter from the Receivers in response to my letter dated 12 July 2016. At **page 529 of Exhibit DL1** is a copy of the letter from the Receivers dated 25 July 2016. In that letter, the Receivers advised that:
- "\$682,799.58 was recovered from circulating asset [sic], including \$673,672.70 from pre-appointment bank accounts, \$1,096.55 from petty cash and \$8,030.33 from other circulating assets. \$856,515.97 was paid to employees in relation to pre-appointment wage entitlements in the payrolls paid on 14 July 2015 and 15 July 2015."*
79. On 16 August 2016, Christopher Wollinski (**Mr Wollinski**), an Account Director employed by Deloitte who has assisted Mr Strawbridge and me throughout our appointment as Administrators and Liquidators, sent an email to Hannah Aynsley and Suzy Underwood (**Ms Underwood**) of the Receivers' office enquiring as to *"whether Challenger / Lease Collateral / Refin Nominees or any other associated party have either subrogated or alternatively advanced payments to employees pursuant to Section 560 of the Corporations Act 2001"*. At **page 535 of Exhibit DL1** is a copy of the email from Mr Wollinski to the Receivers' office dated 16 August 2016.
80. On 17 August 2016, Mr Wollinski received an email from Ms Underwood in response to his email dated 16 August 2016. In that email Ms Underwood advised that *"the \$856,515.97 that we referred to in our letter for payment of unpaid wages was not pursuant to Section 560 of the Corporations Act. However, we note that there was a payment of unpaid wages pursuant to Section 560 of the Corporations Act in relation to outstanding novated lease payments. An amount of \$51,142.65 was advanced to LeasePLUS by Lease Collateral for this payment."* At **page 535 of Exhibit DL1** is a copy of the email from Ms Underwood to Mr Wollinski dated 17 August 2016.
81. On 17 August 2016, Mr Wollinski sent an email to Ms Underwood requesting confirmation as to *"how the difference in employee wages was funded of \$182,843.27 (being \$856,515.97 pre-appointment wage entitlements paid on 14 July 2015 and 15 July 2015 and \$673,672.70 from circulating assets)?"*. At **page 534 of Exhibit DL1** is a copy of the email from Mr Wollinski to Ms Underwood dated 17 August 2016.
82. On 17 August 2016, Mr Wollinski received an email from Ms Underwood in response to his email dated 17 August 2016. In that email Ms Underwood advised that *"Challenger provided us with funding for trading at appointment."* At **page 534 of Exhibit DL1** is a copy of the email from Ms Underwood to Mr Wollinski dated 17 August 2016.
83. Based on the information provided to us by the Receivers at the time, the Liquidators were of the understanding that payments totalling the amount of \$856,515.97 were made by the



Receivers to employees for pre-appointment wages or superannuation benefits on 14 and 15 July 2015 and that, of this amount, the amount of \$682,799.58 was paid by the Receivers from the circulating assets of Force Corp recovered by the Receivers in accordance with section 433 of the Act that would have otherwise been recoverable by Lease Collateral pursuant to its circulating assets securities (*Wages Paid from Circulating Assets*).

84. It was our preliminary view at the time (*Preliminary Position*) that, in accordance with the principles set out in *Re Divitkos (as liquidator of EXDVD Pty Ltd (in liq))* (2014) 223 FCR 409, Lease Collateral was therefore entitled:
- (a) to be subrogated to the rights of those employees who were paid their pre-appointment wages by the Receivers out of circulating assets to the extent of the amount of \$682,799.58, on the basis that that amount would have otherwise been payable to Lease Collateral pursuant to its security interests (including over the circulating assets of Force Corp); and
  - (b) to priority for the Wages Paid from Circulating Assets pursuant to section 556(1)(e) of the Act.
85. On 4 October 2019 I instructed HWLE to write to each of the Priority Creditors (and or their solicitors) setting out, among other things:
- (a) the Preliminary Position of the Liquidators (based on the information available to us at the time) in relation to Lease Collateral's claims for priority distribution, including for the Wages Paid from Circulating Assets; and
  - (b) a request for any further information or documentation from the Priority Creditors to support their claims for priority.
86. At page 539 of Exhibit DL1 is a copy of the letter from HWLE to the Priority Creditors (and or their solicitors) dated 4 October 2019 (*HWLE October Letter*).
87. On 24 October 2019, HWLE received a letter from Corrs in response to the letter dated 4 October 2019. That letter indicated that Lease Collateral was agreeable to the Liquidators' Preliminary Position on the proposed order for distribution to Priority Creditors as outlined in the letter from HWLE dated 4 October 2019; however, the letter from Corrs did not provide any supporting information to explain the Preliminary Position. At page 547 of Exhibit DL1 is a copy of the letter from Corrs to HWLE dated 24 October 2019.





88. On 24 October 2019, HWLE also received a letter from the AGD requesting further information, including in relation to Lease Collateral's claim to priority with respect to the amount of the Wages Paid from Circulating Assets. At page 548 of Exhibit DL1 is a copy of the letter from the AGD to HWLE dated 24 October 2019 and enclosures. For privacy reasons, I have not included in Exhibit DL1 those documents enclosed with the letter containing confidential employee information.
89. On 30 October 2019, I instructed HWLE to write to Corrs repeating my request that Lease Collateral and / or the Receivers provide to the Liquidators all relevant information and documentation to substantiate its claim for priority distribution with respect to the amount of the Wages Paid from Circulating Assets and advising that, without such information, the Liquidators may be unable to maintain the Preliminary Position. At page 596 of Exhibit DL1 is a copy of the letter from HWLE to Corrs dated 30 October 2019.
90. On 19 November 2019, HWLE received a letter from Corrs in response to the letter dated 30 October 2019 enclosing various information. At page 600 of Exhibit DL1 is a copy of the letter from Corrs to HWLE dated 19 November 2019 and enclosures (*Corrs November Letter*). For privacy reasons, I have not included in Exhibit DL1 those documents enclosed with the Corrs November Letter containing confidential employee information.
91. In the Corrs November Letter, Lease Collateral, among other things, maintained its claim for priority for the Wages Paid from Circulating Assets in the amount of \$682,799.58 on the basis that the "payment of \$682,799.58 in wages and superannuation entitlements to employees diminished the value of Challenger's security".
92. Based on our review of the information provided in the Corrs November Letter, whilst various of the matters raised in the Corrs November Letter required further clarification and supporting information, it appeared to the Liquidators that:
- (a) subject to further evidence supporting the breakdown of the payments, the Receivers made payments totalling \$856,515.97 to employees of Force Corp on 14 and 15 July 2015 for pre-appointment wages or superannuation benefits;
  - (b) the amounts said to have been recovered from circulating assets totalling \$682,799.58 were only recovered in the period commencing on or about 20 July 2015;
  - (c) accordingly, the amounts said to have been recovered from circulating assets did not form part of the payments of \$856,515.97 made by the Receivers to employees for pre-appointment wages or superannuation benefits on 14 and 15 July 2015 but, rather it appeared that these payments were funded and paid directly out of the amount of



\$720,280.20 paid into Force Corp's trading account on 14 July 2015 and an amount of \$1,000,000 said to have been advanced to the Receivers by Lease Collateral (or another entity associated with Challenger) on 14 July 2015 (*Receiver Loan*); and

- (d) Lease Collateral therefore did not have a right of subrogation based on the decision in *Re Divitkos*, because the Receivers did not make any payments pursuant to section 433(3)(c) of the Act out of circulating assets (but, instead, the payments were made out of the Receiver Loan).
93. Based on the information set out in the Corrs November Letter, the Liquidators were unable to maintain the Preliminary Position and were of the view that Lease Collateral would not be afforded priority in the winding up of Force Corp for the amount of \$682,799.58, being the Wages Paid from Circulating Assets.
94. On or about 16 December 2019 I instructed HWLE to write to Corrs, among other things:
- (a) advising that the Liquidators were unable to maintain the Preliminary Position in light of the information provided in the Corrs November Letter;
  - (b) seeking clarification of various matters set out in the Corrs November Letter; and
  - (c) requesting confirmation as to whether the amount of \$682,799.58 recovered from the circulating assets of Force Corp was paid by the Receivers directly to employees in accordance with section 433(3)(c) of the Act or, if not, how this amount was applied by the Receivers.
95. At page 719 of Exhibit DL1 is a copy of the letter from HWLE to Corrs dated 16 December 2019 (*HWLE December Letter*).
96. On 28 January 2020, HWLE received a letter from Hopgood Ganim, as the solicitors for the AGD, setting out, among other things, the AGD's position in relation to the Wages Paid from Circulating Assets. At page 726 of Exhibit DL1 is a copy of the letter from Hopgood Ganim to HWLE and Corrs dated 28 January 2020 (*Hopgood January Letter*).
97. On or about 26 February 2020, I instructed HWLE to write to Corrs again requesting the clarifications and information set out in the HWLE December Letter. At page 732 of Exhibit DL1 is a copy of the letter from HWLE to Corrs dated 26 February 2020.
98. On 23 March 2020, HWLE received a letter from Corrs in response to the HWLE December Letter and the Hopgood January Letter and enclosing various information. At page 734 of



Exhibit DL1 is a copy of the letter from Corrs to HWLE and Hopgood Ganim dated 23 March 2020 and the enclosures to that letter (*Corrs March Letter*). For privacy reasons, I have not included in Exhibit DL1 those documents enclosed with the Corrs March Letter containing confidential employee information.

99. In the Corrs March Letter, Lease Collateral, among other things:
- (a) maintained that the Receivers paid the amount of \$856,515.97 to employees for pre-appointment wages (and PAYG tax on those wages) and superannuation benefits arising out of wage events that occurred on 14 and 15 July 2015;
  - (b) contended that the payment of the amount of \$856,515.97 to employees for pre-appointment wages and superannuation was paid, in part, from an amount of \$720,280.20 in cash obtained by the Receivers by drawing down available cash from Force Corp's Receivables Purchasing Facility held with Recfin Nominees on or about 14 July 2015 (*the Receivables Drawdown*) with the balance coming from the Receiver Loan (however as set out below, Lease Collateral ultimately do not contend that the Receiver Loan was utilised for the payment of pre-appointment employee entitlements);
  - (c) contended that the Receivables Drawdown was a circulating asset available to the Receivers that was used to pay pre-appointment wages or entitlements under section 433(3)(c) of the Act that would have otherwise been payable to it pursuant to its securities;
  - (d) for the reasons above, was accordingly proposing to amend its claim for priority under section 433 and 556 of the Act for the full amount of the Receivable Drawdown in the amount of \$720,280.20.
100. Based on our review of the information provided in the Corrs March Letter, whilst various of the matters raised in the Corrs March Letter required further clarification and supporting information and / or were only raised for the first time in that letter (namely, the existence of and the alleged payment out of the Receivables Drawdown), it appeared to the Liquidators that:
- (a) subject to further evidence supporting the wage events that occurred on 14 and 15 July 2015, the Receivers made payments totalling \$856,515.97 to employees of Force Corp for pre-appointment wages (and PAYG tax on those wages) and superannuation benefits;



- (b) the amount of \$720,280.20 was paid, from the Receivables Drawdown, by the Receivers to employees for pre-appointment wages and superannuation;
  - (c) the Receivables Drawdown was a circulating asset recovered by the Receivers that would have otherwise been payable to Lease Collateral pursuant to its securities;
  - (d) Lease Collateral was entitled to be subrogated to the rights of those employees who were paid their pre-appointment wages by the Receivers out of circulating assets to the extent of the amount of \$720,280.20 on the basis that that amount would have otherwise been payable to Lease Collateral pursuant to its security interests (including over circulating assets); and
  - (e) Lease Collateral was entitled to priority for the amount of \$720,280.20 pursuant to section 556(1)(e) of the Act.
101. As set out above, the Corrs March Letter was the first time that Lease Collateral had raised the proposition that the amount of \$720,280.20 was paid from the Receivables Drawdown by the Receivers to employees for pre-appointment wages and superannuation. Up until that stage, Lease Collateral had contended that the payments totalling \$856,515.97 to employees of Force Corp for pre-appointment wages (and PAYG tax on those wages) and superannuation benefits was made from the amount of \$682,799.58 said to have been recovered from the circulating assets of Force Corp and the balance from the Receiver Loan.
102. Lease Collateral did not, however, appear to provide an explanation in the Corrs March Letter as to whether the amount of \$682,799.58 recovered from the circulating assets of Force Corp in the period commencing on or around 20 July 2015 was paid by the Receivers directly to employees in accordance with section 433(3)(c) of the Act or, if not, how this amount was applied by the Receivers.
103. Based on our investigations, the Receivers had recovered circulating assets in the amount of \$1,403,079.78 comprising of \$720,280.20 (from the Receivables Drawdown on 14 July 2015) plus \$682,799.58 (from Force Corp's general bank accounts, petty cash and other circulating assets on or about 20 July 2015). In the period commencing on or around 20 July 2015, there remained the following outstanding pre-appointment wages and superannuation entitlements that was owing to employees of Force Corp (that is, even after payment of the amount of \$720,280.20 from the Receivables Drawdown):
- (a) pre-appointment wages in the amount of \$48,622.72; and



- (b) pre-appointment superannuation outstanding (excluding superannuation guarantee charge liability and superannuation on payment in lieu of notice) in the amount of \$610,057.43.
104. It appeared to the Liquidators, therefore, that in the absence of any further information, Lease Collateral benefited from having received from the Receivers certain recovered circulating assets in the amount of \$682,799.58 in circumstances where this amount should have been remitted to employee creditors by the Receivers in accordance with section 433(3)(c) of the Act.
105. The Liquidators therefore considered that, in those circumstances, if there was a contravention of section 433(3)(c) by the Receivers then:
- (a) a claim may be available to be brought against the Receivers (and, possibly, also Lease Collateral to the extent that it received the money) for repayment of the amount of \$682,799.58 for the benefit of employee creditors;
  - (b) a right of set-off may be available to set-off the amount of \$682,799.58 against the amount of \$720,280.20 otherwise payable to Lease Collateral such that the value of any priority in favour of Lease Collateral is limited to the sum of \$37,480.62; and
  - (c) such a claim either belonged to the Liquidators / Force Corp or to the employees of Force Corp (including the AGD administering the FEG scheme on the basis of its right to be subrogated to the rights of the employees of Force Corp).
106. On or about 22 April 2020, I instructed HWLE to write to Corrs and Hopgood Ganim to advise the parties that, among other things, it was the Liquidators' view that:
- (a) the Receivables Drawdown was a circulating asset recovered by the Receivers for the purposes of section 433 of the Act that would have otherwise been payable to Lease Collateral pursuant to its securities;
  - (b) the amount of \$720,280.20 was paid from the Receivables Drawdown by the Receivers to employees for pre-appointment wages pursuant to section 433 of the Act;
  - (c) Lease Collateral was entitled to be subrogated to the rights of those employees who were paid their pre-appointment wages by the Receivers out of circulating assets to the extent of the amount of \$720,280.20 in accordance with the principles set out in *Re Divitkos* and therefore entitled to priority for that amount pursuant to section 556(1)(e) of the Act;



- (d) a claim may be available against the Receivers (and, possibly, also Lease Collateral) for repayment of the amount of \$682,799.58 not remitted to employee creditors by the Receivers in accordance with sections 433(3)(c) of the Act;
  - (e) alternatively or additionally, a right of set-off may be available to set-off the amount of \$682,799.58 against the amount of \$720,280.20 otherwise payable to Lease Collateral such that the value of any priority in favour of Lease Collateral is limited to the sum of \$37,480.62; and
  - (f) seeking the views of the AGD with regards to whether such a claim ought to be pursued by the Liquidators or the AGD on behalf of the employees of Force Corp.
107. At page 749 of Exhibit DL1 is a copy of the letter from HWLE to Corrs and Hopgood Ganim dated 22 April 2020 (*HWLE April Letter*).
108. On 4 May 2020, HWLE received a letter from Corrs in response to their HWLE April Letter. At page 754 of Exhibit DL1 is a copy of the letter from Corrs to HWLE and Hopgood Ganim dated 4 May 2020 (*Corrs 4 May Letter*). In the Corrs 4 May Letter, Lease Collateral requested various information regarding the balance of pre-appointment wages and superannuation that was owing to Force Corp employees as at 20 July 2015 and contended that the correct calculation of any set-off with regards to the amount of \$682,799.58 not remitted to employee creditors by the Receivers in accordance with sections 433(3)(c) of the Act was as follows (*Proposed Set-off Calculation*):
- (a) the total amount of circulating assets recovered by the Receivers in the amount of \$1,403,079.78, being \$720,280.20 (from the Receivables Drawdown on 14 July 2015) plus \$682,799.58 (from Force Corp's general bank accounts, petty cash and other circulating assets on or about 20 July 2015);
  - (b) less the amount paid by the Receivers towards pre-appointment wages or entitlements, being \$856,515.97
  - (c) showing the amount of circulating assets potentially not paid towards pre-appointment entitlements as \$546,563.81; and
  - (d) the amount of \$546,563.81 be set off against Lease Collateral's priority claim.
109. Based on the information available to the Liquidators at the time, we did not agree to the Proposed Set-off Calculation for the main reason that at that stage it did not appear, nor was it



contended by Lease Collateral, that the sum of \$682,799.58 recovered by the Receivers from Force Corp's general bank accounts, petty cash and other circulating assets (which were not the subject of the Receivables Purchasing Facility) in the period commencing on or around 20 July 2015 (or any part of it) was in fact used to pay pre-appointment employee wages and superannuation entitlements of Force Corp's employees.

110. On 7 May 2020 I instructed HWLE to write to Corrs and the AGD in response to the Corrs 4 May Letter providing the requested information in relation to the balance of pre-appointment wages and superannuation that was owing to Force Corp employees as at 20 July 2015 and to advise the parties that, among other things, based on the information available the Liquidators did not agree to the Proposed Set-Off Calculation. At page 756 of Exhibit DL1 is a copy of the letter from HWLE to Corrs and AGD dated 7 May 2020 (*HWLE May Letter*).
111. On 14 May 2020, HWLE received a letter from Hopgood Ganim advising that, among other things, it was the AGD's position that:
- (a) it agreed with the Liquidators that the monies paid on account of wages and unpaid superannuation from the Receivables Drawdown by the Receivers should be treated as a debt falling within the scope of section 556(1)(e) of the Act;
  - (b) it considered that the Receivers may have breached their obligations under section 433 by paying the proceeds derived from the recovery of circulating assets (being the amount of \$682,799.58) to Lease Collateral rather than to Force Corp's employees on account of wages and superannuation which were unpaid at the time;
  - (c) that it agreed with the Liquidators' calculation of the set-off set out in the HWLE April Letter and not the Proposed Set-Off Calculation; and
  - (d) it considered that the Liquidators and Force Corp (rather than the AGD) were the proper parties to pursue such a claim or set-off.
112. At page 913 of Exhibit DL1 is a copy of the letter from Hopgood Ganim to HWLE and Corrs dated 14 May 2020 (*Hopgood May Letter*).
113. On 25 May 2020, HWLE received a letter from Corrs in response to their HWLE May Letter. At page 917 of Exhibit DL1 is a copy of the letter from Corrs to HWLE and Hopgood Ganim dated 25 May 2020 (*Corrs 25 May Letter*). Whilst the Corrs May Letter was expressed to be on a without prejudice, HWLE received an email from Corrs on 24 July 2020 consenting to the disclosure of the Corrs 25 May Letter for the purposes of this Application. At page 924 of Exhibit DL1 is a copy of the email from Corrs to HWLE dated 24 July 2020.



114. In the Corrs 25 May Letter, Lease Collateral, among other things, contended that:

- (a) on 14 and 15 July 2015 and 28 October 2015, the Receivers paid the total amount of \$856,515.97 to employees for pre-appointment wages, PAYG tax on those wages, and superannuation benefits arising out of wage events that occurred on 14 and 15 July 2015;
- (b) the payment of the amounts totalling \$856,515.97 to employees for pre-appointment wages and superannuation was paid out of the Receivers' trading account (*Receivers' Trading Account*) that, at the time of the payments on 14 and 15 July 2015 and 28 October 2015, consisted of, among other amounts:
  - (i) an amount of \$720,280.20 in cash drawn by the Receivers from the Receivables Drawdown on or about 14 July 2015; and
  - (ii) an amount of \$682,799.58 (or at the very least an unused portion of that amount totalling \$365,000) recovered by the Receivers from Force Corp's general bank accounts, petty cash and other circulating assets (which were not the subject of the Receivables Purchasing Facility) in the period commencing on or around 20 July 2015;
- (c) throughout the period July 2015 to October 2015, the balance of the Receivers' Trading Account was at least \$365,000;
- (d) there was no requirement on the Receivers to 'trace' each dollar of circulating assets to make payments of pre-appointment wages or other employee entitlements and make any such payment at the time when they 'come into the hands' of the Receivers;
- (e) there were sufficient circulating assets under the Receivers' control, and in the Receivers' Trading Account, when each of the payments comprising the amount of \$856,515.97 was made;
- (f) the amount of circulating assets not paid to employees was therefore \$546,563.81 (being \$1,403,079.78 less \$856,515.97) and accordingly that should be the amount of any set-off; and
- (g) it therefore would only claim the amount of \$309,952.16 in priority for pre-appointment wages and entitlements paid from circulating assets (being \$856,515.97 less \$546,563.81).





115. On 3 June 2020, I instructed HWLE to write to Corrs seeking clarification and further supporting information of the matters set out in the Corrs 25 May Letter. At page 925 of Exhibit DL1 is a copy of the letter from HWLE to Corrs dated 3 June 2020.
116. On 5 June 2020, HWLE received a letter from Corrs in response to their letter dated 3 June 2020. At page 927 of Exhibit DL1 is a copy of the letter from Corrs to HWLE and Hoggood Ganim dated 5 June 2020 (*Corrs June Letter*). For privacy reasons, I have not included in Exhibit DL1 those documents enclosed with the Corrs June Letter containing confidential employee information.
117. On 10 June 2020, Mr Wollinski sent an email to Ms Underwood seeking further information in support of various of the matters raised in the Corrs June Letter. At page 999 of Exhibit DL1 is a copy of the email from Mr Wollinski to Ms Underwood dated 10 June 2020 (excluding attachments).
118. On 12 June 2020, Mr Wollinski received some further information from the Receivers' office by way of email in support of the position stated in the Corrs June Letter. At page 1001 of Exhibit DL1 is a copy of the email from the Receivers' office dated 12 June 2020 (*Receivers' June Email*). For privacy reasons, I have not included in Exhibit DL1 those documents enclosed with the Receivers' June Email containing confidential employee information.
119. Based on our review of the information provided in the Corrs 25 May Letter, the Corrs June Letter and the Receivers' June Email, it appeared to the Liquidators that:
- (a) the circulating assets recoveries in the amount of \$720,280.20 and \$682,799.58 totalled \$1,403,079.78;
  - (b) on 14 and 15 July 2015, the Receivers paid the total amount of \$569,284.76 to employees for pre-appointment wages, and effectively deferred, to October 2015, the payment of the PAYG tax and superannuation benefits referable to those wages;
  - (c) on 28 October 2015, the Receivers paid the deferred PAYG tax of \$207,954.24 and superannuation benefits of \$74,309.76 (together totalling \$282,264.00) referable to the wages referred to in subparagraph (a) above;
  - (d) the Receivers had also made deductions from the wage event that occurred on 14 and 15 July 2015, in the amount of \$4,967.25, that were said by the Receivers to be in relation to: (i) child support amounts of \$2,332.21; (ii) a loan repayment by an employee for the amount of \$2,591.56; and (iii) other deductions for \$43.48. It appears to the



Liquidators that the child support amounts of \$2,332.21 were paid on 31 July 2015, however, the Liquidators have not been provided with further particulars from the Receivers regarding the loan and the other deduction amounts;

- (e) the payments in subparagraphs (b)-(d) above total \$856,515.97 (together, *the Total Wages Payments*) and represent the amount paid to employees for pre-appointment wages and superannuation out of the Receivers' Trading Account (I note that the amounts referred to subparagraphs (b) - (d) above total \$856,516.01 – the 4c rounding error is attributable to differing figures from various source documents);
  - (f) in the absence of any obligation requiring a receiver to 'trace' each dollar of circulating assets recovered into the payments of pre-appointment wages or entitlements or to pay those circulating assets at the time when they 'come into the hands' of the receiver (as opposed to a convenient and appropriate juncture throughout the receivership), the Total Wages Payments made by the Receivers were made from the circulating assets of Force Corp (held in the Receivers' Trading Account) in circumstances where:
    - (i) at the time of the payments in the amount of \$569,284.76 to employees for pre-appointment wages made on 14 and 15 July 2015, the Receivers' Trading Account comprised an amount of \$720,280.20 in cash drawn by the Receivers from the Receivables Drawdown on or about 14 July 2015; and
    - (ii) at the time of the payments totalling \$282,264 for PAYG tax and superannuation paid on 28 October 2015, and the deductions for \$4,967.25 in relation to the wage events that occurred on 14 and 15 July 2015 (see subparagraph (c) and (d) above), the balance of the amount in the Receivers' Trading Account was at least \$365,000 and comprised the balance of the Receivables Drawdown and the amount of \$682,799.58 recovered by the Receivers from Force Corp's general bank accounts; petty cash and other circulating assets (which were not the subject of the Receivables Purchasing Facility) commencing in the period on or around 20 July 2015.
120. Based on the above, whilst not free from doubt, it appears to us that the better view was that the Total Wages Payments in the amount of \$856,515.97 that were paid by the Receivers to employees for pre-appointment wages and superannuation benefits, have been paid out of circulating assets in accordance with section 433 of the Act (and that, in the absence of those payments, the amounts would otherwise have been payable to Lease Collateral pursuant to its securities including over circulating assets, such that it is entitled to be subrogated to the employees who were paid those funds).



121. On that basis, of the total circulating assets recovered by the Receivers in the amount of \$1,403,079.78, the realised circulating assets that were not paid to employees are calculated to be \$546,563.81 (namely the sum of \$1,403,079.78 minus \$856,515.97) and, accordingly, that should be the amount of any set-off against the amount of \$856,515.97 otherwise payable to Lease Collateral with respect to the Total Wages Payments, such that the amount payable to Lease Collateral in priority in respect of the Total Wages Payments is \$309,952.16.
122. On or about 15 June 2020, I instructed HWLE to write to Corrs and Hopgood Ganim to advise the parties, among other things, that it was the Liquidators' view that it appeared that:
- (a) the total amount of \$856,515.97 was paid or withheld by the Receivers to employees for pre-appointment wages, PAYG tax deferred on those wages, and superannuation benefits on 14 and 15 July 2015 and 28 October 2015 and that those payments arose out of wage events that occurred on 14 and 15 July 2015;
  - (b) the payments of the amounts totalling \$856,515.97 to employees were paid out of the Receivers' Trading Account (at the time of the payments on 14 and 15 July 2015 and 28 October 2015), which sum consisted of the Receivables Drawdown and an amount of \$682,799.58 recovered from other circulating assets commencing in the period on or about 20 July 2015 (or, at the very least, a portion of that amount totalling \$365,000);
  - (c) the total amount of \$856,515.97 paid by the Receivers to employees for pre-appointment wages, PAYG tax deferred on those wages, and superannuation benefits, appears therefore to have been paid out of circulating assets in accordance with section 433 of the Act (and that, in the absence of those payments, the sum of \$856,515.97 would otherwise have been payable to Lease Collateral pursuant to its securities including over circulating assets, such that it is entitled to be subrogated to the employees who were paid those funds);
  - (d) the Liquidators therefore proposed to treat the subrogated claim of Lease Collateral in respect of the Total Wages Payments in the amount of \$856,515.97, as a debt falling within section 556(1)(e) of the Act;
  - (e) on that basis, the amount of circulating assets not paid by the Receivers to employees is therefore \$546,563.81 (calculated as total circulating asset recoveries in the amount of \$1,403,079.78 less \$856,515.97) and, accordingly, that should be the amount of any set-off against the amount of \$856,515.97 otherwise payable to Lease Collateral with respect to the Total Wages Payments, such that the amount payable to Lease Collateral in priority in respect of the Total Wages Payments is \$309,952.16;



- (f) because the legal position was far from determinative, the Liquidators proposed to approach the Court for directions on this matter.
123. At page 1082 of Exhibit DL1 is a copy of the letter from HWLE to Corrs and Hopgood Ganim dated 15 June 2020 (*HWLE June Letter*).
124. On 24 June 2020, HWLE received a letter from Hopgood Ganim advising, among other things, that the AGD agreed with the Liquidators' position as set out in the HWLE June Letter. At page 1086 of Exhibit DL1 is a copy of the letter from Hopgood Ganim to HWLE and Corrs dated 24 June 2020.
125. On 1 July 2020, HWLE received a letter from Corrs advising, among other things, that the AGD agreed with the Liquidators' position as set out in the HWLE June Letter. At page 1143 of Exhibit DL1 is a copy of the letter from Corrs to Hopgood Ganim and HWLE dated 1 July 2020.
126. On or about 6 July 2020, I instructed HWLE to write to Corrs and the AGD to advise the parties, among other things, that it remained the Liquidators' intention to make this application for directions. At page 1144 of Exhibit DL1 is a copy of the letter from HWLE to Corrs and Hopgood Ganim dated 6 July 2020.
127. The Liquidators therefore propose to approach the Court for directions that they would be justified in:
- (a) treating the subrogated claim of Lease Collateral in respect of the Total Wages Payment paid by the Receivers from the circulating assets of Force Corp in the amount of \$856,515.97, as a debt falling within section 556(1)(e) of the Act; and
  - (b) setting off the amount of \$546,563.81, being the amount not paid by the Receivers to employees of Force Corp out of the circulating assets, against the amount of \$856,515.97 that would otherwise be payable to Lease Collateral as a priority creditor under subsection section 556(1)(e) of the Act such that the amount payable to Lease Collateral in priority pursuant to 556(1)(e) of the Act in relation to the Total Wages Payments is limited to the amount of \$309,952.16.

#### ***LeasePlus Payment***

128. I refer to paragraph 80 above and to the email from Ms Underwood dated 17 August 2016 referred to in that paragraph. In her email, Ms Underwood advised that "there was a payment of unpaid wages pursuant to Section 560 of the Corporations Act in relation to outstanding novated lease payments. An amount of \$51,142.65 was advanced to LeasePLUS by Lease

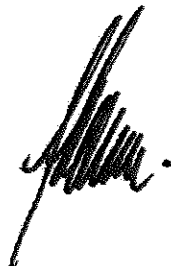


Collateral for this payment" (*LeasePlus Payment*). At page 535 of Exhibit DL1 is a copy of the email from Ms Underwood to Mr Wollinski dated 17 August 2016.

129. The LeasePlus Payment represents a claim by Lease Collateral that it advanced monies to pay LeasePlus (*LeasePlus*) for payments to employees for pre-appointment liabilities of Force Corp in the form of salary sacrifice amounts withheld from pre-appointment wages for novated lease payments.
130. On 13 September 2019, Mr Wollinski sent an email to Ms Underwood seeking further information and clarification with regards to the LeasePlus Payment. At page 1147 of Exhibit DL1 is a copy of the email from Mr Wollinski to Ms Underwood dated 13 September 2019 (excluding attachments).
131. On 18 September 2019, Mr Wollinski received an email from Ms Underwood in response to his email dated 13 September 2019 attaching various information. At page 1148 of Exhibit DL1 is a copy of the email from Ms Underwood to Mr Wollinski dated 18 September 2019 (excluding attachments). In her email Ms Underwood stated, among other things that on "12 August 2015 - \$51,142.62 was paid to Lease Plus for the pre-appointment debt - I cannot see payment of this in our system, therefore I assume this was paid by the secured creditor. The email also indicates that it was advanced by the secured creditor and will step into the shoes of the employees as a priority creditor in accordance with section 560."
132. Based on our review of the information provided in the email from Ms Underwood dated 18 September 2019, it appeared to the Liquidators at that time that whilst we understood that it was claimed by Lease Collateral that it had advanced the amount of \$51,142.62 for the purposes of making the LeasePlus Payment, it was unclear from the information provided whether the LeasePlus Payment was:
- (a) actually advanced by Lease Collateral; and
  - (b) if so, advanced to the Receivers or paid to LeasePlus directly.
133. Based on the available information at that time, the Liquidators did not consider that the LeasePlus Payment was caught by section 560 of the Act in that it did not appear to have been advanced by Lease Collateral to the Receivers or Force Corp for the specific purpose of Force Corp making payments of wages, superannuation contributions, leave entitlements and termination entitlements to employees. There was also a doubt about whether the payments were made by Force Corp (rather than merely at its direction).



134. I refer to paragraphs 85 and 86 above and to the HWLE October Letter. On 4 October 2019, I instructed HWLE to write to Priority Creditors advising, among other things, that the Liquidators proposed to treat the LeasePlus Payment as having no priority under sections 556 and 560 of the Act. At page 539 of Exhibit DL1 is a copy of the HWLE October Letter.
135. I refer to paragraph 90 above and to the Corrs November Letter received by HWLE in response to their HWLE October Letter.
136. In the Corrs November Letter, Lease Collateral, among other things:
- (a) maintained its claim for priority for the Lease Collateral Lease Payment;
  - (b) provided to the Liquidators a copy of a Short Term Funding Agreement between Lease Collateral, Force Corp and the Receivers dated 10 August 2015 (*Short Term Funding Agreement*); and
  - (c) claimed that pursuant to the Short Term Funding Agreement Lease Collateral advanced the LeasePlus Payment directly to LeasePlus at the directions of the Receivers.
137. Based on the further information set out in the Corrs November Letter, it appeared to the Liquidators that:
- (a) the LeasePlus Payment in the amount of \$51,142.62 was paid from an advance by Lease Collateral to Force Corp pursuant to the Short Term Funding Agreement;
  - (b) based on the terms of the Short Term Funding Agreement it appeared that the specific purpose of the advance was for Force Corp to make payments to LeasePlus on account of wages comprising amounts owing under certain novated leases;
  - (c) the LeasePlus Payment was paid by Lease Collateral to LeasePlus on or about 12 August 2015 at the written direction of the Receivers (*Direction*);
  - (d) whilst there may be an argument that, by reason of the Direction, the LeasePlus Payment was not made by Force Corp, the better view was that the LeasePlus Payment was caught by section 560 of the Act based on the principles in *Re Dalma No 1 Pty Limited (in liquidation)* [2013] NSWSC 1335.
138. On or about 16 December 2019 I instructed HWLE to write to Corrs advising, among other things, that:



- (a) based on the information set out in the Corrs November Letter, the Liquidators proposed to treat the LeasePlus Payment in the amount of \$51,142.62 as a debt falling within section 556(1)(e) of the Act on the basis that Lease Collateral is entitled to be subrogated to the rights of those employee priority creditors whose wage entitlements were paid from the LeasePlus Payment; and
- (b) because of the potential uncertainty surrounding the factual and legal position of the Direction, the Liquidators proposed to seek the directions of the Court on the claim.

139. At page 719 of Exhibit DL1 is a copy of the letter from HWLE (*HWLE December Letter*).

140. The Liquidators therefore propose to approach the Court for directions that they would be justified in treating the LeasePlus Payment as a debt falling within section 556(1)(e) of the Act on the basis that Lease Collateral is entitled to be subrogated in accordance with section 560 of the Act to the rights of those employee priority creditors whose wage entitlements were paid from the LeasePlus Payment.

141. Whilst the Liquidators, Lease Collateral and the AGD have reached an agreed position regarding the unsecured priority claims of Lease Collateral (*Agreed Position*), the Liquidators remain of the view that the directions of the Court as set out in Application are required for the following reasons, among others:

- (a) there are other unsecured priority creditors (namely eligible employees whose claims have not been paid out by the Commonwealth and the ATO) who stand to be affected by the Liquidators' treatment of Lease Collateral's priority claims; and
- (b) there remains a sufficient level of uncertainty on how the Liquidators should treat Lease Collateral's claim for priority, given:
  - (i) the complicated factual matrix underlying Lease Collateral's claim for priority that has changed significantly overtime;
  - (ii) that the Liquidators cannot be certain that there is no other information "out there" which could affect the correctness of the agreed position especially as, in practical terms, the Receivers were in control of Force Corp at a time when the payments in question were made; and
  - (iii) the residual uncertainty in the law concerning various aspects of the priority claims.



**The Commonwealth's claim as a priority creditor**

142. On 10 October 2019, the AGD lodged a proof of debt for amounts advanced under the FEG scheme (**AGD POD**). At page 1151 of Exhibit DL1 is a copy of the AGD POD.
143. On 16 October 2019, the Liquidators wrote to the AGD setting out our adjudication of the AGD POD.
144. Based on our investigations and the AGD POD, we have ascertained that the amount of \$5,467,481.76 was advanced under the FEG scheme for outstanding employee entitlements which is summarised in the table below:

<b>Category of Entitlement</b>	<b>Priority under the Act</b>	<b>Amount (\$)</b>
Unpaid Wages (including salary sacrifice superannuation)	556(1)(e)	40,138.42
Annual Leave (including Leave Loading)	556(1)(g)	1,016,852.82
Long Service Leave	556(1)(g)	656,350.22
Payment-in-lieu of Notice	556(1)(h)	1,448,954.83
Redundancy	556(1)(h)	2,305,185.47
<b>Total amount paid via the FEG scheme</b>		<b>5,467,481.76</b>

145. The Liquidators accept that the AGD is entitled to be subrogated to those employees in respect of whom the payments in the table above were made and that, accordingly, the amount of:
- (a) \$40,138.42 is owing to AGD is a debt or claim under section 556(1)(e) of the Act;
  - (b) \$1,673,203.04 is owing to AGD is a debt or claim under section 556(1)(g) of the Act; and
  - (c) \$3,754,140.30 is owing to AGD is a debt or claim under section 556(1)(h) of the Act; and
146. As explained further below, because of the quantum of the claims of unsecured priority creditors, and the Estimated Distribution Amount, there will be no payment of debts to those creditors whose claims rank lower than subsection 556(1)(g) of the Act in the distribution waterfall.





**Other Employees and the ATO's claims as priority creditors**

147. Based on our investigations, the Liquidators have ascertained that the following additional employee entitlement claims under section 556(1)(e) of the Act are outstanding:

<b>Category of Entitlement</b>	<b>Amount (\$)</b>
Unpaid Wages (including salary sacrifice superannuation)	8,484.30
Superannuation (including SGC and superannuation on payment in lieu)	839,313.47
<b>Total amount</b>	<b>847,797.77</b>

148. The outstanding superannuation component in the amount of \$839,313.47 includes superannuation payable to the ATO in the amount of \$826,701.68.
149. The additional unpaid wages were not paid by FEG as these amounts related to either wage entitlements of employees who did not participate in the FEG scheme; or residual wage amounts over and above the FEG indexed maximum weekly wage cap threshold that did not qualify for FEG assistance.

**Estimated Statement of Position**

150. As set out in paragraph 60 above the Liquidators have identified and been aware of four (4) potential groups of priority creditors in the winding up of Force Corp, namely:
- (a) Lease Collateral;
  - (b) the AGD;
  - (c) Other Employees; and
  - (d) the ATO.
151. The claims of each of the Priority Creditors above will be affected by the directions sought in this Application as to the Liquidators treatment of the priority claims of Lease Collateral.
152. The Liquidators have caused to be prepared an Estimated Statement of Position (*ESOP*) that has been prepared on the basis that the directions are given by this Honourable Court in accordance with the proposed directions sought in the Application.



153. The ESOP below sets out the Estimated Distribution Amount after taking into account the costs and expenses of the Liquidators in relation to the Application and an amount for contingencies in the winding up as follows:

	Amount (\$)
<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 plus	
- Total Wages Payments after set-off: \$309,952	(361,095)
(\$856,515 for the Total Wages Payments less \$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>




154. Based on the ESOP:

- (a) priority debts/ claims under section 556(1)(e) of the Act will be paid in full; and
- (b) priority debts/ claims under section 556(1)(g) of the Act will be paid 39c in the dollar.

**No opposition from any of Force Corp's unsecured priority creditors and proposed further notice to priority creditors**

155. On 4 October 2019, the Liquidators caused a copy of the letter from HWLE of that date to be sent to each known priority creditor indicating our intention to make this Application for directions pursuant to section 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the Act. At page 1153 of Exhibit DL1 is a copy of a statement of posting of the letter from HWLE dated 4 October 2019 from Kwik Kopy Printing dated 9 October 2020, which sets out, among other things, the names and addresses of each of the priority employee creditors to whom the letter was sent. For privacy reasons, the address of each of the priority employee creditors has been redacted.
156. To date, the Liquidators have not received any response to the letter in which an objection has been made by any creditor.
157. I refer to paragraph 124 above. On 24 June 2020, HWLE received a letter from Hopgood Ganim advising, among other things, that the AGD agreed with the directions proposed to be sought by the Liquidators in relation to the unsecured priority claims of Lease Collateral.
158. I refer to paragraph 125 above. On 1 July 2020, HWLE received a letter from Corrs advising, among other things, that Lease Collateral agreed with the directions proposed to be sought by the Liquidators in relation to the unsecured priority claims of Lease Collateral.
159. I refer to paragraph 126 above. On 6 July 2020, HWLE wrote to Corrs and Hopgood Ganim advising of the Liquidators' intention to proceed with the application for the directions in relation to the priority claims of Lease Collateral.
160. On 1 June 2020, the Liquidators issued a Report to the Committee of Inspection (*Fourth COI Report*). A copy of the Fourth COI Report is at page 1168 of Exhibit DL1. The Fourth COI Report, among other things:
- (a) notice of the convening of the Fourth Committee of Inspection meeting to be held on 16 June 2020;



- (b) set out an estimate of the funds available for distribution to eligible Priority Creditors;
  - (c) provided an update on the Liquidators' position in relation to Lease Collateral's claims for priority as at 1 June 2020 based on the further information received from Lease Collateral since the Third COI Meeting (which significantly changed the Liquidators' position) up until the date of the Fourth COI Report on 1 June 2020 (therefore excluding the information received by the Liquidators after 1 June 2020 that the Liquidators ultimately relied on in forming their position as set out in the HWLE June Letter); and
  - (d) gave notice of the Liquidators' intention to make this Application for directions from the Court in relation to the manner of distribution of the Estimated Distribution Amount to Priority Creditors.
161. On 16 June 2020, a meeting of the Committee was held (*Fourth COI Meeting*). That meeting was attended by each of the members of the Committee (still serving at the time) and also a representative of the AGD (as an observer) in light of the quantum of its priority claims. At the meeting the Agreed Position was discussed and presented in a slide show. A copy of the presentation slides presented at the Fourth COI Meeting is at page 1226 of Exhibit DL1.
162. At the Fourth COI Meeting, and as foreshadowed in the Fourth COI Report, I advised the Committee of, among other things:
- (a) the Liquidators' final updated position with regards to the priority claims of Lease Collateral. This position reflected the Agreed Position as set out in the HWLE June Letter; and
  - (b) our intention to make this Application and the directions to be sought by the Liquidators.
163. At page 1245 of Exhibit DL1 is a copy of the minutes of the Fourth COI Meeting.
164. At the Fourth COI Meeting there was no opposition to the Liquidators' final updated position with regards to the priority claims of Lease Collateral or to our foreshadowed Application.
165. Nevertheless, I intend to provide notice of this Application to:
- (a) Lease Collateral;
  - (b) the former Receivers;
  - (c) the AGD;



- (d) the ATO;
- (e) ASIC; and
- (f) the Other Employees.

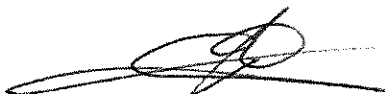
### Conclusion

166. In summary, the Liquidators are of the view that:

- (a) The Lease Collateral Indemnity for the amount of \$315,342.97 should be treated as a debt falling within section 556(1)(c) of the Act;
- (b) the Total Wages Payments in the 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 and should be treated as a debt falling within section 556(1)(e) of the Act;
- (c) 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 Payment is \$309,952.16; and
- (d) the LeasePlus Payment in the amount of \$51,142.62 should be treated as a debt falling within section 556(1)(e) of the Act.

167. Whilst the Liquidators, Lease Collateral and the AGD have reached the Agreed Position, the Liquidators remain of the view that the directions of the Court as set out in Application are required for the following reasons, among others:

- (a) there are other unsecured priority creditors who stand to be affected by the Liquidators' treatment of Lease Collateral's priority claims; and
- (b) there remains a sufficient level of uncertainty on how the Liquidators should treat Lease Collateral's claim for priority, given:



- (i) the complicated factual matrix underlying Lease Collateral's claim for priority that has changed significantly overtime;
- (ii) the Liquidators cannot be certain that there is no other information "out there" which could affect the correctness of the Agreed Position; and
- (iii) the residual uncertainty in the law concerning various aspects of Lease Collateral's priority claims.

SWORN at


Sydney

Signature of deponent

Name of witness

Address of witness

Capacity of witness

  
 \_\_\_\_\_  
 Andrew Ng  
 Level 14 Australia Square, 264-278 George St, Sydney  
 NSW 2000  
 Solicitor / Justice of the Peace

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

1. I saw the face of the deponent.
2. I have known the deponent for at least 12 months.


Signature of witness

  
 \_\_\_\_\_

Endorsement by witness

This affidavit was signed in counterpart and witnessed over audio visual link in accordance with clause 2 of Schedule 1 to the *Electronic Transactions Regulation 2017*

Signature of witness

  
 \_\_\_\_\_