

21 November 2022

**ACN 004 817 323 PTY LTD (IN LIQUIDATION)  
FORMERLY KNOWN AS LAURA ASHLEY (AUSTRALIA) PTY LTD  
ACN 004 817 323 (“COMPANY”)**

**REPORT TO CREDITORS**

I refer to my update to creditors dated 11 October 2021. The purpose of this report is to update creditors on the progress of the liquidation since my last report and seek approval from creditors of the Liquidators' current and future remuneration and disbursements, and to consider and approve the early destruction of the Company's books and records

Details of the Liquidators' remuneration and disbursements claimed are provided later in the report and outlined in the Remuneration Approval Report dated 18 November 2022.

This report will be discussed at the Meeting of Creditors which has been convened for Wednesday, 7 December 2022 at 10:00 AM AEST (the “**Meeting**”). Further details about the Meeting can be found in the notice of meeting.

This will likely be the final meeting of creditors, following which the distribution of available funds will be determined and effected in the short to medium term, and the liquidation finalised, subject to the remaining issues and variables in the liquidation as discussed below.

**1. Trading whilst insolvent claim (“TWI claim”)**

Creditors will recall the Liquidators commenced an insolvent trading action in the Supreme Court of Victoria (“**Court**”) against the director of the Company (“**Director**”) for debts incurred of approximately \$8.5 million.

Since the last update to creditors, the following material tasks were completed by the Liquidators:

- joined AIG Australia Limited (“**AIG**”) to the TWI proceedings. AIG had provided the Director with management liability insurance up to \$5 million. AIG filed a defence in which it denied liability on the basis of a conduct exclusion, that is, the Director had wilfully breached his duty to the Company by knowingly trading whilst insolvent;
- conducted a detailed review of and responded to the Director's disputes raised following service of a detailed Notice to Admit Facts and Documents by the Liquidators'; and
- critically analysed and responded to the expert solvency report prepared on behalf of the Director. The Director's expert refuted the Liquidators' evidence the Company was insolvent at all times from 15 May 2015 to 7 January 2016. Their view, however, was that the Company was insolvent from as early as 1 August 2015.

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A court ordered mediation was conducted between the Liquidators, AIG and the Director on 10 June 2022. The parties agreed at the mediation to settle the TWI claim with AIG agreeing to pay the Liquidators \$2.9 million in full and final settlement, inclusive of costs. Payment has since been received.

In assessing the opportunity to settle for a definite sum at the mediation versus continuing to litigate and in particular proceeding to trial, the Liquidators had regard to the following factors:

1. There was no evidence that the Director had the financial capacity to materially contribute to any settlement;
2. The policy limit of the AIG insurance policy was \$5m;
3. AIG was entitled to deduct an excess, as well as defence legal costs of the Director funded under the policy from the \$5 million policy limit. Circa \$300k had been incurred to the date as of the mediation and further significant costs were expected to be incurred if the matter proceeded to trial, reducing the maximum available payout under the policy;
4. There was no guarantee the Liquidators would achieve the same or better net outcome if the matter proceeded to trial, even if successful. The costs to be incurred by the Liquidators are not recoverable from the other parties, with legal costs also not being fully recoverable;
5. Although the Liquidators are comfortable with the merits of the claim, including the view formed on the insolvent trading date and the debts incurred, insolvent trading claims are inherently subjective and therefore uncertain. There was dispute from the Director's expert as to the exact date of insolvency and whether certain claims were incurred. It was therefore possible that the overall claim may be reduced, albeit the Liquidators' analysis indicated that the debts incurred likely remained above the \$5 million insurance threshold under most scenarios;
6. More relevantly, there were a number of complex legal issues to be considered and particularly defences raised by the insurer, such as the controversy over what constitutes conduct involving a "wilful breach" breach of duty in relation to the company under section 199B of the *Corporations Act 2001* (Cth) ("the Act"). Additionally, the Director sought relief under section 1317S of the Act, which gives the Court significant discretion. These factors, amongst others, heightened the uncertainty of achieving a positive outcome in the matter; and
7. Settlement will result in an earlier payment of a dividend for wages and superannuation. If the matter proceeded to trial, payment of any dividend would likely be 12 months after the original trial dates set from 24 to 31 October 2022.

Given the above factors, the Liquidators are of the view that the settlement amount is a commercially successful outcome and settling was in the best interests of creditors.

## **2. Funding of the TWI claim**

Creditors will recall that the Commonwealth of Australia (“**Commonwealth**”) provided funding and an indemnity to the Liquidators to pursue the TWI claim (“**Funding Agreement**”). Given the commercial sensitivity regarding the Funding Arrangement, the details of the funding agreement between the Commonwealth and the Liquidators cannot be disclosed.

The Liquidators have since reimbursed the funding provided by the Commonwealth, from the settlement proceeds recovered.

## **3. Early Destruction of Books and Records**

The Liquidators hold in excess of 60 boxes of books and records which are required to be maintained for five (5) years after the finalisation of the Liquidation and deregistration of the Company, unless creditors, and then ASIC, approve the early destruction of the books and records.

The cost of retaining the Company’s books and records for five (5) years is a substantial cost to the Liquidation and would reduce the potential dividend for unsecured creditors. The Liquidators are therefore proposing creditors resolve to approve the early destruction of the records.

## **4. Estimated return to creditors**

There will be no dividend to unsecured creditors in the Liquidation. Subject to the comments below, after allowing for the costs of the liquidation, a surplus will exist for a distribution for priority employee wage and superannuation claims.

As the Commonwealth assumed the risk of indemnifying and funding the Liquidators for the TWI claim, they are considering making an application to the Court pursuant to section 564 of the Act. In accordance with the Act, on the application of a relevant party, the Court has the power to grant a creditor who has financially supported litigation which has led to a recovery, an advantage over other creditors in consideration of the risk assumed by them.

The Commonwealth has requested more time to consider their position and thus they have not advised as to their final intentions to date. A successful application by the Commonwealth will in effect give it a priority uplift ahead of other creditors from the net proceeds available from the TWI claim at an amount considered appropriate by the Court. If an application is made, it is expected that the Commonwealth would only be seeking a priority to effectively receive a reimbursement up to the amount of the prior funding of outstanding employee entitlements of c.\$1.1m following the liquidation of the Company, ahead of other claims.

The potential for, timing and outcome of an application will influence the timing and quantum of a dividend for employees with respect to the outstanding wages and superannuation, which now forms part of claim by the Australian Taxation Office as a Superannuation Guarantee Charge.

After allowing for the current outstanding fees and costs, it is estimated there is \$2.7m available for distribution. An estimated return for wages and superannuation under two scenarios is outlined in the tables overleaf.

Scenario 1 assumes that the Commonwealth makes an application and is successful resulting in a priority uplift of \$1,133,209 to the Commonwealth.

Scenario 2 assumes that the Commonwealth does not proceed with the application.

<b>Estimated return for wages and superannuation</b>				
	<b>Scenario 1</b>		<b>Scenario 2</b>	
	<b>The Commonwealth obtain uplift</b>		<b>No uplift</b>	
		Recovery		Recovery
	(\$)	(%)	(\$)	(%)
Cash balance as at 18 November 2022	2,974,123		2,974,123	
<i>Less:</i>				
Liquidators' remuneration for the period 1 October 2021 to 13 November 2022	(170,756)		(170,756)	
Liquidators' remuneration for the period 14 November 2022 to completion	(70,000)		(30,000)	
Estimated legal fees in relation to the Commonwealth's s564 application	(20,000)		0	
Estimated legal disbursements in relation to the Commonwealth's s564 application	(7,000)		0	
Contingency for other costs	(3,000)		(1,000)	
<b>Funds available for distribution</b>	<b>2,703,368</b>		<b>2,772,368</b>	
<b>Amounts owing to the Commonwealth for priority uplift</b>				
Wages	268		0	
Annual leave	253,810		0	
Long service leave	260,997		0	
PILN	172,042		0	
Redundancy	446,092		0	
<b>Total amounts owing to the Commonwealth</b>	<b>1,133,209</b>		<b>0</b>	
<b>Priority return to the Commonwealth</b>	<b>1,133,209</b>	100%	<b>0</b>	-
<b>Surplus cash available for distribution</b>	<b>1,570,159</b>		<b>2,772,368</b>	
<b>Amounts owing to other wages and superannuation creditors</b>				
Wages - the Commonwealth	0		268	
Wages - other	4,457		4,457	
Superannuation	2,936,707		2,936,707	
<b>Total amounts owing to wages and superannuation creditors</b>	<b>2,941,164</b>		<b>2,941,432</b>	
<b>Amounts distributed to wages and superannuation creditors</b>	<b>1,570,159</b>	53%	<b>2,772,368</b>	94%

The table below summarises the return to each class of priority creditors.

<b>Estimated return to priority creditors</b>					
Priority Creditors	Claim (\$)	<b>Scenario 1</b>		<b>Scenario 2</b>	
		<b>The Commonwealth obtain uplift</b>	<b>Recovery</b>	<b>No uplift</b>	<b>Recovery</b>
		Recovery (%)	Recovery (\$)	Recovery (%)	Recovery (\$)
<b>Wages &amp; Superannuation</b>					
Wages – the Commonwealth	268	100%	268	94%	253
Wages - other	4,457	53%	2,379	94%	4,201
Superannuation	2,936,707	53%	1,567,780	94%	2,767,914
<b>Total Wages &amp; Superannuation</b>	<b>2,941,432</b>	<b>53%</b>	<b>1,570,427</b>	<b>94%</b>	<b>2,772,368</b>
<b>Leave Entitlements</b>					
Annual leave - the Commonwealth	253,810	100%	253,810	0%	0
Annual leave - other	249,139	0%	0	0%	0
Leave loading - other	6,033	0%	0	0%	0
Long service leave - the Commonwealth	260,997	100%	260,997	0%	0
Long service leave - other	107,876	0%	0	0%	0
<b>Total Leave Entitlements</b>	<b>877,854</b>	<b>59%</b>	<b>514,807</b>	<b>0%</b>	<b>0</b>
<b>Termination</b>					
PILN - the Commonwealth	172,042	100%	172,042	0%	0
PILN - other	183,458	0%	0	0%	0
Redundancy - the Commonwealth	446,092	100%	446,092	0%	0
Redundancy - other	210,189	0%	0	0%	0
<b>Total Termination</b>	<b>1,011,781</b>	<b>61%</b>	<b>618,134</b>	<b>0%</b>	<b>0</b>
<b>Total estimated returns</b>	<b>4,831,067</b>	<b>56%</b>	<b>2,703,368</b>	<b>57%</b>	<b>2,772,368</b>

The Liquidators are unable to advise creditors the timing of the distribution as they are awaiting the advice of the Commonwealth as to whether they intend to make an application. If they do, the exact requirements of the application including by the Liquidators, and associated timing, is yet to be determined. If no application is made, the Liquidators anticipate they would be in a position to make a distribution within a month of being advised of same.

Should the Commonwealth make the application, creditors will be notified accordingly.

## **5. Liquidators' remuneration**

### **5.1. Past remuneration to 13 November 2022**

The Liquidators have incurred fees of \$170,755.50 plus GST between 1 October 2021 to 13 November 2022.

The work performed by the Liquidators during this period primarily relates to:

- addressing the TWI claim;
- preparing for and convening the meeting of creditors on 28 October 2021;
- preparing reports to creditors;
- reporting to the Commonwealth on the status of the TWI claim;
- dealing with creditor enquiries;
- adjudicating on outstanding wage and superannuation claims; and
- various administrative tasks.

### **5.2. Future remuneration to finalisation**

The Liquidators will continue to incur further general fees and fees to:

- convene the meeting of creditors;
- if necessary, tasks associated with any application by the Commonwealth;
- pay the dividend for wages and superannuation; and
- finalise the liquidation.

Further fees would also be necessarily incurred in the event that the Commonwealth make an application to the Court pursuant to section 564 of the Act.

Therefore the Liquidators are seeking remuneration approval of \$70,000 excluding GST from creditors for time incurred from 14 November 2022 to completion of the liquidation. In the event that an application is made by the Commonwealth, the steps required by the Liquidators with regard to the application are yet to be confirmed. Therefore the remuneration approval sought for future remuneration is an estimate at the upper range.

It is possible that the fees actually incurred may be less than this amount, however the current estimate should provide the Liquidators with sufficient remuneration approval to deal with any application by the Commonwealth and aims to avoid any further requests for remuneration approval.

Should no application be made, the Liquidators estimate that they will likely only incur future fees of circa \$30,000 excluding GST.

Further details regarding the Liquidators' remuneration, associated tasks and time incurred to date are available in the Remuneration Approval Report.

## **6. Meeting of Creditors**

Creditors are advised that a meeting of the creditors of the Company will be held on **Wednesday, 7 December 2022 at 10:00 AM AEDT** at the Liquidators' office and by videoconference.

Creditors intending to attend the meeting by videoconference must pre-register to attend, and submit certain documents in advance of the meeting.

Further details regarding the meeting of creditors are provided in the "Circular to Creditors" dated 18 November 2022.

## **7. Outstanding matters to finalisation**

The Liquidators intend to focus on the following matters in finalising the liquidation:

- convening and holding the upcoming meeting of creditors;
- if necessary, tasks associated with any application by the Commonwealth under section 564 of the Act;
- making the distribution of the dividend; and
- proceed and to statutory requirements in formally finalising the liquidation.

Should you have any queries in relation to this update, please do not hesitate to contact our office by email at [LauraAshleyCreditors@fticonsulting.com](mailto:LauraAshleyCreditors@fticonsulting.com) or by telephone on (03) 9604 0600.

Yours faithfully



**Ross Blakeley**  
**Liquidator**