

27 September 2018



Ostwald Bros. Pty Ltd
ACN 099 115 009
(In Liquidation) (the Company)

STATUTORY REPORT TO CREDITORS

| Company Details | |
|-----------------------------|---|
| Name | Ostwald Bros. Pty Ltd (In Liquidation) |
| ACN | 099 115 009 |
| Date of Incorporation | 20 December 2001 |
| Date of Liquidation | 30 November 2017 |
| Directors Names | Daniel Ostwald, Brendan Ostwald, and Matthew Ostwald |
| Shareholder | Ostwald Bros Holdings Pty Ltd |
| Current Registered Office | FTI Consulting Level 20, 345 Queen Street, Brisbane, QLD, 4000 |
| Principal Place of Business | Lot 6, Winton Street, Dalby, QLD, 4405 |
| Nature of Business | Civil Engineering Contractor |
| Liquidator's Details | |
| Name | John Park and Kelly-Anne Trenfield |
| Contact | Paris Parasadi / Jeremy Dalais |
| Contact phone number | 07 3225 4927 / 07 3225 4925 |
| Contact email | Paris.Parasadi@fticonsulting.com / Jeremy.Dalais@fticonsulting.com |

1 KEY FINDINGS

| Description | Findings | Section of Report |
|--|---|-------------------|
| What happened to the Business? | After the Company went into Voluntary Administration and subsequently Liquidation, the former Liquidators traded the Company's business in some capacity until 10 May 2018, when the last contract was completed. | 2.1 |
| Estimated Amount of Assets and Liabilities | The majority of assets were realised by the former Liquidators. The exact value of the remaining assets and liabilities are still to be determined. | 4.1 |
| Investigations Undertaken to Date | To date, I have identified a number of potentially preferential transactions, which may be recovered for the benefit of the general body of creditors. Though there may also exist other avenues of recoveries, I have not progressed investigations into these matters as the Liquidation is currently entirely without funds. | 3.1, 3.2 and 3.3 |
| Investigations to be Undertaken | Subject to obtaining sufficient funding, I plan to commence my investigations into possible uncommercial transactions, unreasonable director related transaction, insolvent trading claim and breaches of director duties. | 3.4 |
| Likelihood of Dividend | At this stage of the liquidation, it is not expected there will be a dividend to ordinary, unsecured creditors of the Company. There may be a dividend to priority employees of the Company. | 4 |

John Park and I, Kelly-Anne Trenfield, were appointed replacement Liquidators of the Company by Order of the Supreme Court of Queensland on 29 June 2018.

Our appointment as Liquidators replaced the appointment of Derrick Vickers and Sam Marsden of PricewaterhouseCoopers (**PwC**) who were appointed Administrators on 25 August 2017 and subsequently Liquidators on 30 November 2017.

Since the commencement of our tenure as Liquidators, I have continued to liaise with PwC regarding the handover of books and records, continued the pursuit of debtor claims identified, attended to the ongoing correspondence and pursuit of preference claims, begun investigations into the Company's affairs, financial position and the reasons for its failure, and following is my report to creditors.

The purpose of this report is to:

- provide you with an update on the progress of the liquidation; and
- advise you of the likelihood of a dividend being paid in the liquidation.

Creditors are advised It is not my intention at this stage to seek the approval of my remuneration and disbursements. If recoveries are made, I will likely seek approval of my remuneration at that time from the Committee of Inspection or the general body of creditors.

2 UPDATE ON THE PROGRESS OF THE LIQUIDATION

I provide an update on the progress of the liquidation as follows:

2.1 Background

The Company was incorporated on 20 December 2001 in the state of Queensland with its current registered office being Williams & Partners, Level 19, 144 Edward Street, Brisbane QLD 4000 and principal place of business being Lot 6, Winton Street, Dalby, QLD, 4405. I have updated the registered office with the Australian Securities & Investments Commission (**ASIC**) to be my office.

My searches in respect to the Company suggest there has been three (3) Directors during the Company's existence. Daniel Ostwald and Brendan Ostwald have been Directors of the Company from inception, and Matthew Ostwald was appointed Director on 24 December 2007. All three (3) were Directors as at the date of Administration and subsequent Liquidation.

The Company is part of the Ostwald Group alongside the following other related entities:

- Ostwald Bros. Pty Ltd (In Liquidation);
- Ostwald Bros. Civil Pty Ltd (In Liquidation); and
- Ostwald Constructions and Materials Pty Ltd.

The Company, along with others in the Ostwald Group of Companies was established as a civil construction business. Its operations included contracting, mining services, construction materials, facilities and accommodation, transport and bulk haulage, and rural enterprise.

Creditors would be aware the Company was no longer trading at my appointment with the previous Liquidators having finalised their operation of the business on 10 May 2018. I refer creditors to the Report to Creditors dated 22 June 2018 by the former Liquidators for further details with respect trading operations.

The Company has issued and paid up capital of \$250,000 in Ordinary shares as follows:

| Table 1: Company Shareholdings | | | |
|---------------------------------------|--------------|----------------|---------------------------|
| Name | Class | Number | Issued and Paid Up |
| | | | \$ |
| Ostwald Bros Holdings Pty Ltd | Ordinary | 250,000 | \$250,000 |
| Total | | 250,000 | \$250,000 |

2.2 Conduct of Liquidation

The following matters have been attended to since the commencement of my appointment:

- Attended to all necessary statutory lodgements and reporting, accounting and administrative matters;
- Reviewed the Company’s asset position to determine whether any property remained available to realise for the benefit of creditors;
- Conducted searches, undertook and progressed investigations into the affairs of the Company concerning possible recoveries from voidable transactions;
- Liaised with former Liquidators regarding the handover of Company documents;
- Attended to external enquiries concerning the status of the liquidation;
- Negotiations with Pronto and RSA Contractors regarding the hosting of the Company’s electronic records;
- Liaised with the former Liquidators with regards to their claim to a lien over cash at bank held;
- Investigated the status of numerous bank guarantees and ascertaining the likelihood of recovery;
- Liaised with the auctioneers and asset agents with regards to storage containers owned by the Company containing extensive historical archival records;
- Perused the contents of these storage containers with a view to remove and deal with books and records to allow their sale;
- Reviewed the progress of the Seymour Whyte Constructions Pty Ltd (**Seymour Whyte**) claim and monitoring the appeal proceedings;
- Liaised with Nexus Delivery with regards to potential claims;

- Assessed the validity of the Australian Taxation Office's (**ATO**) garnishee notices;
- Liaised with the Liquidators of M2O Water Pty Ltd and Trustees of the Ostwald Construction Materials Creditors Trust with regards to the Company's claims against these entities;
- Reviewed the material provided in respect of potential claim against Position Partners Pty Ltd;
- Progressed the former Liquidators' investigations in respect of various potential preferential payments;
- Corresponded with the Committee of Inspection;
- Responded to creditor enquiries;
- Liaised with secured parties;
- Communicated with the Company's former employees; and
- Prepared a report to creditors.

2.3 Report as to Affairs

I advise the Directors completed a Report as to Affairs (**RATA**) on 7 September 2017 and submitted this document to the former Liquidators. I understand the RATA was subsequently submitted to ASIC by the former Liquidators. A summary of the RATA is shown below and I refer creditors to the Section 75-225 Report prepared by the former Administrators dated 23 November 2017 for details on each item disclosed and what steps they had undertaken in respect of each item.

| Table 2: Report as to Affairs Summary | |
|--|-----------------------------|
| | Directors' RATA ERV (\$) |
| Assets | |
| Interest in Land | Nil |
| Sundry Debtors | 7,258,867 |
| Cash on Hand and Cash at Bank | 1,346,789 |
| Stock | Nil |
| Work in Progress | 16,687,682 |
| Plant and Equipment | 2,412,551 |
| Other Assets | 1,107,038 |
| Subtotal | 28,812,927 |
| Assets subject to specific charges | 4,445,352 |
| Less: amounts owing | (2,235,223) |
| Add: contingent assets | 3,740,199 |
| Subtotal | 5,950,328 |
| Total estimated realisable assets | 34,763,255 |

| | |
|--|----------------|
| Liabilities | |
| Employee Entitlements | 3,317,180 |
| Secured Creditors | 30,000,000 |
| Preferential claims ranking behind secured creditors | Unknown |
| Partly Secured Creditors | Unknown |
| Unsecured Creditors | 26,249,044 |
| Contingent Liabilities | Nil |
| Total Liabilities | Unknown |
| <hr/> | |
| Net Surplus/ (Deficiency) subject to costs of the liquidation | Unknown |

2.4 Receipts and payments to date

There have not been any receipts and payments during the course of my appointment. To date all costs have been incurred on a speculative basis or funded by the Liquidators.

3 INVESTIGATIONS AND RECOVERY ACTIONS

3.1 Overview

As Liquidator of the Company, I am required to investigate the affairs of the Company. To date I have progressed my investigations to the point where I am able to make some preliminary conclusions in respect of my findings. The purpose of these investigations is to identify matters which require more detailed review, as well as determining any causes of action and other potential sources of recovery, such as loan accounts, that might be available for the benefit of creditors of the Company.

I have also considered whether there are transactions where money, property or other benefits may be recoverable as Liquidator under Part 5.7B of the Corporations Act 2001 (Cth) (**the Act**). My investigations have focused on a number of areas pertaining to the following alleged conduct:

- Unfair preference payments;
- Uncommercial transactions;
- Unfair loans; and
- The liability of the Directors or others for insolvent trading.

A Liquidator may be able to recover on behalf of a company, compensation for any loss suffered by a company as a result of any breaches of duties owed to it by its Director.

At this stage, whilst I am not in a position to provide any final conclusions about alleged inappropriate conduct, or breaches of legislation that may have been committed, or amounts of money that may be recoverable, I am able to disclose some of my preliminary findings in respect of these matters.

I set out below details of my investigations undertaken to date and my findings in regard to same.

3.2 Investigations Undertaken

To date I have undertaken the following investigations into the Company's affairs:

- Met with the former Liquidators to discuss Company's affairs and reasons for the Company's failure;
- Reviewed the Company's books and records including the Company's electronic accounting package, financial accounts and other documents of the Company;
- Liaised with the Company's accounting software provider to gain access to essential reports and documents;
- Reviewed the Company's bank statements for any preferences or unusual and/or material transactions;
- Conducted independent searches including, but not limited to, internet searches, company searches, company and director searches;
- Extracted and reviewed extensive internal file notes to compile a timeline of events of the Company's dealings with various external parties; and
- Reviewed the former Liquidators' investigation files and continued carriage of these matters.

3.3 Findings and Possible Recoveries

Noted below are some of the findings of my investigations to date:

3.3.1 Voidable Transactions

As the Company has been placed into liquidation, certain transactions may be investigated. These include:

- Unfair Preferences;
- Uncommercial Transactions; and
- Unfair Loans.

3.3.1a Unfair Preferences

Various provisions of the Act enable the Liquidator to call back certain payments made prior to the Company being wound up. These transactions are referred to as unfair preferences where creditors received from the Company, in relation to an unsecured debt owed to the creditor, a greater amount than the creditor would have received in relation to the debt in the winding up of the Company. The Liquidator is able to look back at the preceding six (6) months to determine whether or not any such transactions occurred (i.e. the Liquidator is able to review transactions between the period 26 February 2017 to 25 August 2017).

Based on work done by the former Liquidators as well as my own investigations, I have identified payments totalling \$5,223,615.67 made by the Company to thirty-three (33) creditors, which may be recoverable pursuant to Section 558FA of the Act. The former Liquidators had referred a number of these matters to their solicitors

(Clayton Utz) but I have since re-taken carriage of the matters so I could reassess whether they are commercial to refer to my Solicitors (Dentons).

Since my appointment, I have investigated these claims and found that four (4) potential preferences totalling \$394,585.70 are either not feasible or otherwise uncommercial to pursue due to a variety of reasons.

I have referred six (6) of these potential preference recipients valued at \$1,459,617 to my solicitors (Dentons) and I am continually liaising with them in this regard.

The remaining twenty-three (23) potential preference recipients valued at \$3,369,413 are still subject to my investigations and are still feasible to recover. At this stage, however I am not able to comment on the likelihood of recovery in relation to these payments.

3.3.1b Uncommercial Transactions

An uncommercial transaction is, in short, a transaction that a reasonable person would not have entered into.

Creditors are advised given the Liquidation is entirely unfunded and there are minimal assets which could still be realised, the focus of my investigations to date has been on those matters which have the highest likelihood of generating some recovery.

Accordingly, although the former Liquidators have flagged the possibility of the existence of transactions which may be recoverable as an uncommercial transaction, I have not yet progressed my investigations in this regard. I am currently exploring options to secure funding to further progress these potential claims.

3.3.1c Unfair Loans

Essentially an unfair loan is a loan agreement where the consideration is considered to be excessive. I am unaware of any unfair loans entered into by the Company, and none were identified by the former Liquidators.

3.3.2 Insolvent Trading

A director can be held personally liable for company debts. The Act states, a director owes a duty of care not to incur debts at a time when the company is insolvent or would become insolvent by incurring the debt (Section 588G). If there are reasonable grounds for suspecting the company would become insolvent, then the director can be held personally liable for any debts incurred after that time.

The Act provides that a Liquidator may seek to recover compensation for such debts incurred from the director of the company.

Creditors should also be aware that in view of the decision of the Federal Court in *Re: ACN 007 537 000 Pty Ltd (In Liquidation); Robert Colin Parker 1997 1264 FCA* any successful claim may be set-off by the director against amounts due to that individual by way of unsecured advances or loan account.

3.3.2a Defences

The Act provides a number of possible defences to a director to a claim for insolvent trading. These defences are:

- At the time the debt was incurred, the director had reasonable grounds to expect and did expect the company was solvent and would remain solvent if it incurred that debt and any other debts that it had incurred at that time.
- At the time the debt was incurred, the director had reasonable grounds to believe and did believe a competent and reliable person was responsible for providing information about the company's solvency and that person was fulfilling that responsibility.
- The director through illness or some other good reason was not taking part in the management of the company at the time the debt was incurred.
- The director took all reasonable steps to prevent the company from incurring the debt.

3.3.2b Timing of Insolvency

The Act states a company is considered to be solvent if, and only if, the Company is able to pay its debts as and when they become due and payable. A company that is not solvent is insolvent. Accordingly, the test for insolvency is not a balance sheet test but rather a cash flow test.

3.3.2c Results of Investigations

To date, an exact date of insolvency has not been determined. However, based on work completed by the former Liquidators as well as my own initial review, it would appear the Company may have been insolvent from at least July 2016.

Creditors are advised I will need to conduct further analysis to determine whether an insolvent trading claim is available. As previously noted by the former Liquidators, at minimum I will need to:

- Conduct a more detailed solvency analysis and identifying an exact date of insolvency and;
- Calculate the extent of debts incurred after this date which remains outstanding in order to quantify the extent of damages caused by the Directors in their failure to prevent the Company from trading whilst insolvent.

Furthermore, as stated earlier, the Act provides a director with a number of defences to a claim for insolvent trading. I am unable to comment, at this stage, as to whether they would have any defences available to them. I have received correspondence from the Directors' solicitors disputing the preliminary conclusions of the former Liquidators.

In consideration of the above, I have postponed further investigations into possible insolvent trading claims until my investigations and recovery actions regarding unfair preferences are sufficiently progressed and some recoveries are made to fund this investigation. In the interim I am exploring options to secure funding to progress my investigations in this regard.

3.3.3 Breach of Director Duties

It is possible for a Liquidator to recover a loss to a company that is a result of an offence, proved or unproved, committed by a director for a breach of fiduciary duty under this section.

The former Liquidators have alleged several potential breaches of duties. It is my intention to investigate this matter further once my other investigations are sufficiently progressed.

If a breach has been committed by the Company's Directors, the penalty that could be imposed is a civil penalty.

3.3.4 Costs

In relation to pursuing the above investigations, money for the recovery of such actions would come from the assets of the Company or funding from creditors of the Company. Alternatively, the Liquidator could seek Litigation Insurance Funding.

I advise that I am currently unfunded in the Liquidation. As such, it would be appreciated if any creditor would advise me if they would be willing to fund the investigation and recovery of any of the above investigation avenues by **17 October 2018**.

Further, I intend to make a formal application to the Department of Jobs and Small Business, who operate the Fair Entitlements Guarantee (**FEG**) scheme, for funding certain other recovery avenues.

Please note there is no certainty those investigations will be successful. However, in the event they are successful, the Act provides the Court the power to make orders which can provide a creditor a preference to property recovered by a liquidator, where that creditor provides the liquidator funding or an indemnity for litigation costs that directly result in the recovery of that property. Creditors are advised they should seek separate legal advice in this regard.

3.4 Further Inquiries to be Undertaken

As noted above, subject to obtaining sufficient funding, I plan to undertake the following further investigations:

- Pursue the recovery of various potential unfair preferences identified;
- Progress investigations and potential recovery of uncommercial transactions, including unreasonable director related transactions;
- Review and consider the merits of pursuing an insolvent trading claim against the Directors; and
- Consider whether it is feasible to pursue the Directors for potential breaches of their fiduciary duties.

3.5 Offences in Relation to the Company – Section 533

Section 533 of the Act requires a liquidator to investigate any offences that may have been committed by the directors or persons who took part in the formation, promotion, administration management or winding up of a company and to lodge a report on his/her findings to ASIC.

The former Liquidators submitted their initial report under Section 533(1) of the Act and supplementary report under Section 533(2) of the Act on 25 January 2018. I intend to lodge my report with ASIC once my investigations are sufficiently progressed but within six (6) months of my appointment.

If creditors are aware of any other matters which require further investigation, please contact my office as soon as possible.

4 LIKELIHOOD OF A DIVIDEND

Based on the information presently available, the extent of the assets realised and the investigations undertaken to date, I do not expect there to be a dividend paid to ordinary, unsecured creditors of the Company.

4.1 Statement of Position

Table 3: Estimated Statement of Position

| Detail | Note | Pessimistic \$ | Optimistic \$ |
|---|------|-------------------|-------------------|
| <u>Assets & Other Recoveries</u> | | | |
| Cash at Bank | 1 | Nil | Unknown |
| Bank Guarantees | 2 | Nil | Nil |
| Property, Plant and Equipment | 3 | 4,228 | 4,728 |
| Debtors | 4 | 10,000 | 2,799,609 |
| Recovery Actions - Preferential Payments | 5 | Nil | Unknown |
| Recovery Actions - Uncommercial Transactions | 6 | Nil | Unknown |
| Recovery Actions - Insolvent Trading | 7 | Nil | Unknown |
| Recovery Actions - Breach of Director Duties | 8 | Nil | Unknown |
| Total Assets | | 14,228 | Unknown |
| <u>Liabilities</u> | | | |
| Liquidator's Expenses | 9 | (24,750) | Unknown |
| Liquidators' Remuneration and Disbursements to 16 September 2018 | 10 | (131,178) | (131,178) |
| Liquidators' Future Remuneration and Disbursements | 10 | (275,000) | (175,000) |
| Total Liabilities | | (411,223) | 5,278,018 |
| <u>Estimated Net Asset Realisations and Recoveries</u> | | Nil | Unknown |
| <u>Estimated Monies for Distribution to Priority Creditors - Employees</u> | | | |
| Employee Entitlements | 11 | 11,841,360 | 11,841,360 |
| Distribution to Priority Creditors (cents in \$) | | Nil | Unknown |
| <u>Estimated Monies for Distribution to Secured Creditors</u> | | | |
| Shortfall to Secured Creditor | 12 | 21,603,000 | Unknown |
| <u>Estimated Monies for Distribution to Unsecured Creditors</u> | | | |
| Unsecured Creditors | 13 | 22,072,906 | 22,072,906 |
| Estimated Deficiency | | 55,517,266 | 33,914,266 |
| Distribution to Unsecured Creditors (cents in \$) | | Nil | Nil |

Notes:

The notes set out below should be read in conjunction with the above table.

1. Cash at Bank

The former Liquidators have disclosed a bank account balance of \$1,229,861.84 in their Annual Administration Return. In this regard however, creditors are advised they have claimed a lien over these funds for their remuneration and disbursements claim which is expected to exceed this amount.

Given these factors I am unable to confirm at this stage what, if any of these funds will be recoverable.

Creditors should also be aware I dispute the former Liquidators’ claim over an amount of \$27,000 paid to them by Newlands Civil Construction Pty Ltd after my appointment and have requested these funds be released to the Liquidators.

2. Bank Guarantees

I am aware the Company held thirty-two (32) bank guarantees with a combined value of \$6,931,271.62. I note twenty-four (24) of these bank guarantees totaling \$5,000,371.17 have either been called or returned leaving eight (8) bank guarantees valued at \$1,930,900.45 still active. I do not anticipate any of these bank guarantees will ultimately result in funds being recovered by the Liquidators.

3. Property, Plant and Equipment

The majority of the Company’s property, plant and equipment had been sold by the former Liquidators. At the time of my appointment, there were nine (9) storage containers owned by the Company containing significant quantities of historical books and records. These containers were valued at approximately \$2,000 per container.

Seven (7) of the containers were sold at auction on 18 September 2018 with gross proceeds of \$14,750 being achieved. Two (2) containers remain to be sold at a future auction. The auctioneer’s costs for sales completed to date totals \$11,522.50.

I estimate the remaining two (2) containers will achieve a sale price between \$4,000 and \$5,000 at a further cost of between of between \$3,000 and \$3,500. Taking the above into consideration, I anticipate the total net recovery to be made from these assets to be between \$4,227.50 and \$4,727.50.

4. Debtors

The Company has potential claims against numerous entities, a summary of these claims is provided below:

| Table 4: Summary of Claims | | | |
|---|-------|-------------------------|------------------------|
| Debtor | Note | Pessimistic Amount (\$) | Optimistic Amount (\$) |
| Seymour White | (i) | Nil | 2,675,609 |
| Nexus Delivery | (ii) | Nil | Nil |
| M20 Water Pty Ltd (In Liquidation) | (iii) | 10,000 | 34,000 |
| Position Partners Claim | (iv) | Nil | 90,000 |
| Ostwald Constructions Materials Creditors Trust | (v) | Nil | Unknown |
| Total Debtors | | 10,000 | 2,799,609 |

(i) Seymour Whyte

Creditors would be aware the former Liquidators obtained a judgment on 18 May 2018 against Seymour Whyte in the amount of \$5,351,218.83. This judgment however is subject to an appeal to be heard on 29 and 30 October 2018. I have continued to work with the appointed solicitors, King & Wood Mallesons to file material and prepare for the appeal.

In addition to the above, the Company records reflect another approximate \$6,000,000 claim against Seymour Whyte, which may be able to be pursued.

Furthermore, as noted in the former Liquidators' Report dated 22 June 2018, Seymour Whyte has sought to claim a set-off against the judgment pursuant to Section 553C of the Act. To this end, they have submitted a proof of debt asserting Seymour Whyte is a net creditor in the sum of \$543,576.12. At this stage I have not adjudicated on this Proof of Debt.

In consideration of the above circumstances, it is my intention to await the outcome of the appeal hearing and consider future steps.

a. ATO Garnishee – Seymour Whyte

The ATO issued a garnishee notice to Seymour Whyte on 15 August 2017 directing them to pay 50% of any amount outstanding to the Company to the ATO up to a total of \$5,021,576.39 to partly satisfy the amount owed by the Company to the ATO.

My initial review indicates this garnishee notice is likely valid and so, in the event Seymour Whyte is required to pay the full judgment amount, 50% of this amount will be redirected to the ATO.

In this regard, I understand the former Liquidators had engaged their in-house tax department to investigate the Company's eligibility to claim various tax credits which may be available. Based on my initial discussions, it is likely any available tax credits will only serve to offset the ATO's claim against the Company.

I have received material from the former Liquidators and will shortly contact the other accounting firms engaged to undertake a similar review to obtain further information. Any amounts identified will reduce the ATO's claim and increase the potential return from the Seymour Whyte claim outlined above.

I will consider the relevant costs to undertake a review of Company records and file lodgements with the ATO before undertaking any significant steps.

b. IOR Petroleum Pty Ltd Claim

IOR Petroleum Pty Ltd (**IOR**) have asserted they have a priority security interest over amounts due from Seymour Whyte to the Company in the sum of \$789,920.43.

Given the uncertainty surrounding whether Seymour Whyte judgment, I have not formed a final view as to the validity of IOR's claim to priority. Further investigations are required to confirm the validity of this security, however if their claim is found to be valid, the amount recoverable by the Company will be reduced by a further amount of \$789,920.43

(ii) Nexus Delivery

The Company's records indicate an amount of \$4,131,363.65 is due from Nexus Delivery (**Nexus**) in relation to works completed on the Toowoomba Second Range Crossing under the July 2017 and August 2017 Progress Claims and the presentation of two (2) bank guarantees.

Nexus issued two (2) Payment Schedules dated 5 September 2017 claiming material variations in relation to the above contracts for incomplete or non-confirming works and liquidated damages. These various include significant estimated costs which would not have been known at the time.

Following my preliminary assessment and correspondence, Nexus provided a high level final accounting of the amounts due and payable under the contract. This final accounting indicated an amount of \$10,299,504.14 due to Nexus as a result of actual costs to remedy incomplete or non-confirming works and liquidated damages.

While it is believed there is still some prospects the actual loss to Nexus may be reduced, it is not commercially feasible to suggest any reduction in those costs is likely to be so significant so as to make any amount payable to the Company.

Given the above, I do not expect there to be any recovery to be made from Nexus Delivery.

Creditors are also advised the ATO has also issued a garnishee notice to Nexus, so even in the event of a recovery, 50% of the amount recovered would be redirected to the ATO in reduction of their debt.

(iii) M2O Water Pty Ltd (In Liquidation)

The Company's records indicate there remains an amount of \$847,549.52 is owed by M2O Water Pty Ltd (In Liquidation).

A Proof of Debt for this amount has been submitted on behalf of the Company against the winding up and I am currently liaising with the Liquidators of this entity with regards to the Proof of Debt and dividend prospects. Based on my dealings with them, I estimate a dividend of between \$10,000 and \$34,000 for the claim in a pessimistic and optimistic scenario.

(iv) Position Partners Claim

The former Liquidators advised, during one of the auctions of the Company's plant, property and equipment, three (3) GPS Units with a combined value of approximately \$90,000 mounted on certain equipment was removed by Position Partners Pty Ltd.

Position Partners Pty Ltd justified their action by asserting they hold security interests over these GPS Units under the agreement with the Company. I am still reviewing the material provided by PwC to determine if a claim exists and whether that claim should be pursued.

(v) *Ostwald Construction Materials Creditors Trust*

The Company has a claim against the Ostwald Constructions Materials Creditors Trust (**OCM**). The former Liquidators calculated this claim to be to \$2,211,950.84 and have submitted a Proof of Debt with OCM Trust for this amount.

I have reviewed the material attached to the Proof of Debt and the Company records available and confirm an amended Proof of Debt will be filed shortly with OCM. The quantum of realisation in relation to this matter is presently unknown as it is subject to the level of funds which will become available for distribution by the Creditors Trust.

5. Recovery Actions – Preferential Payments

As discussed in Section 3.3.1a of this report, payments made by the Company totalling \$5,223,615.67 have been identified as potentially recoverable pursuant to s588FA of the Act. At this stage however, I am not in a position to quantify the extent of likely recoveries which could be made in this regard.

6. Recovery Actions – Uncommercial Transactions

As discussed in Section 3.3.1b of this Report, given the Liquidation is presently unfunded, my investigations have primarily focused on those matters which have the highest likelihood of generating some recovery.

Accordingly, although the former Liquidators have flagged the possibility of the existence of transactions which may be recoverable as an uncommercial transaction, I have not yet progressed my investigations in this regard.

7. Recovery Actions – Insolvent Trading

To date, the earliest possible date of insolvency appears to be 2016 as detailed in Section 3.3.2c of this Report. As noted however, further investigations will need to be conducted in order to determine whether pursuing an insolvent trading claim against one or more of the Directors is feasible.

8. Recovery Actions – Breach of Director Duties

As noted in Section 3.3.3 of this Report, should the Directors be found to have breached their obligations as prescribed by various sections of the Act, it is possible for the Company to seek compensation orders pursuant to Section 1317J of the Act against the Directors. I intend to investigate this matter further once I have obtained sufficient funding to do so.

9. Liquidators' Expenses

Data Hosting Costs

The Company's electronic records are significant and is presently hosted remotely at a cost of \$550 per month. In an optimistic scenario, I will only require these records to be hosted for another six (6) months whereas the pessimistic case estimates the records will need to be hosted for a further twelve (12) months.

Legal Expenses

The quantum of legal expenses which will need to be incurred will depend largely on the outcome of the preferential preference claims and Seymour Whyte claims. At present, my solicitors are acting on a speculative basis with the Liquidators treating counsel costs as a disbursement where required.

I estimate the legal fees for the Seymour Whyte appeal to total circa \$15,000 with current counsel costs totalling \$18,150. I am unable to provide an estimate of the total costs involved in that entire claim past that point. The legal fees for the pursuit of preferential payments are currently estimated at approximately \$10,000.

The pessimistic case scenario assumes neither the Seymour Whyte claim nor the referred preferential payments claims referred to my solicitors are recoverable, meaning the fees they have incurred on a speculative basis will not be payable. In the optimistic scenario is not feasible to estimate these costs as it is contingent on the extent of preference recoveries, the Seymour Whyte claim as well as any other legal action I may take in the future.

10. Liquidators’ Remuneration and Disbursements

Pursuant to Section 556 of the Act, a Liquidator’s remuneration and disbursements are paid in priority to employee and unsecured creditor claims, in this instance creditors are advised this priority is also afforded to the claims by the former Liquidators and Administrators with regards to their remuneration and disbursements.

For the period 29 June 2018 to 16 September 2018 my remuneration and disbursements total \$126,134.80 (inclusive of GST) and \$5,042.59 (inclusive of GST) respectively. An outline of tasks performed to date is provided in Section 2 of this Report.

Due to the work involved in reviewing the Company’s as well as the former Liquidators’ extensive records, investigating and potentially pursuing additional claims identified in my investigations, I estimate my future remuneration and disbursements to be between \$175,000 and \$275,000 (inclusive of GST).

11. Employee Entitlements

I am aware of the following employee entitlements owed by the Company:

| Table 5: Employee Entitlements | | |
|---------------------------------------|----------------------------|---|
| | Number of Employees | Amount of Employee Entitlements \$ |
| Wages & Superannuation (inc SGC) | 347 | 5,096,797 |
| Leave of absence | 340 | 2,064,685 |
| Retrenchment | 266 | 4,679,879 |
| Total Employee Entitlements | | 11,841,360 |

Pursuant to Section 560 of the Act, any payments of employee entitlements made as a result of an advance of money, will allow the entity who advanced said money to stand in the position of the paid-out employees and rank as a priority creditor in the winding up.

Creditors are advised prior to the appointment of the Administrators, wages and superannuation totalling \$4,125,382 were paid from a facility provided by Australia and New Zealand Banking Group Limited (ANZ). Accordingly, pursuant to Section 560 of the Act, ANZ have the capacity to rank as a priority creditor for this amount.

Employees with a priority claim in the Liquidation are eligible for the Fair Entitlements Guarantee (FEG), a government scheme which provides eligible employees with outstanding entitlements who have been terminated due to their employer becoming insolvent. To date a significant number of claims have been made to FEG and as a result, FEG has paid out these claims. A summary of the entitlements paid out by FEG is summarised in Table 5 below:

| Table 6: Employee Entitlements Paid out by FEG | |
|---|-----------------------|
| | Amount Paid \$ |
| Wages | 431,707 |
| Leave of absence | 1,644,357 |
| Retrenchment | 3,652,176 |
| Total Employee Entitlements | 5,728,240 |

Table 5 above includes those employee entitlements which has been paid out by the FEG as well as wages and superannuation amounts of claimed by ANZ pursuant to Section 560.

12. Shortfall to Secured Creditor

The former Liquidators have advised the only remaining secured creditor in the winding up is the ANZ and I have not received any information which suggest otherwise. Creditors are advised the ANZ holds a cross-collateralised security interest registered in the names of the Company and its related entities.

Due to the extent of cross collateralisation and the unknown level funds still held by the former Liquidators which they still intend to account to ANZ, I am not able to advise creditors of the exact level of shortfall owed to the ANZ. In this regard however, the most recent estimate provided by the former Liquidators suggest the amount owed to the ANZ to be in vicinity of \$21,603,000. While this amount will be reduced once the former Liquidators fully account the funds they hold, it is believed any future reduction will not be significant.

Given the Company’s current level of indebtedness to the ANZ, even in the best possible case scenario, it is unlikely there will be sufficient funds to allow for a distribution to ordinary unsecured creditors of the Company.

13. Unsecured Creditors

I am currently aware of three hundred and ninety-three (393) unsecured creditor claims of \$22,072,906.20, however I understand there may be additional creditors. To date, I have received Proof of Debts in the amount of \$1,169,292.10. I have not adjudicated upon the validity of any claims at this stage.

5 LIQUIDATOR'S REMUNERATION

I advise that FTI Consulting charge professional fees based on time spent by the Liquidator and staff at rates reflecting their level of experience.

At this stage it is not my intention to seek approval of my remuneration and internal disbursements. Once my investigations have progressed further and some recoveries are made, I will approach the Committee of Inspection or the general body of creditors with the intention of seeking their approval for my remuneration and internal disbursements at that time.

6 MEETING OF CREDITORS

Unless creditors should see fit, I do not intend to call a meeting of creditors at this stage due to the lack of funds to pay the costs, estimated at \$11,000, including advertising, postage, printing and staff time. However, in accordance with the *Insolvency Practice Schedule (Corporations)* (the IPS) Section 75-15, an external administrator must call a meeting of creditors whenever:

- a) The creditors direct so by a special resolution;
- b) Requested in writing by at least one quarter in value of all creditors; or
- c) Requested in writing by less than one quarter in value of creditors, being creditors(s) who have lodged with the Trustee sufficient security for the cost of holding the meeting.

The IPS Section 75-10 states an external administrator may convene a meeting of creditors of the Company at any time.

7 WAY FORWARD

The following actions are required to proceed with the liquidation, including:

- Continue to liaise with the former Liquidators with regards to the handover of books and records;
- Sell the remaining assets (storage containers);
- Pursue remaining outstanding debtors including OCM, Seymour Whyte and M20 Water Pty Ltd (In Liquidation);
- Continue my investigations into the Company's affairs and other claims identified above;
- Commence and continue initiating recovery actions, including legal proceedings;
- Complete my reporting to ASIC;
- Liaise with the Committee of Inspection with respect to my remuneration and internal disbursements; and
- Any other matters relevant to the liquidation.

Please note that if I receive a request for a meeting that complies with the guidelines set out in the initial information provided to you, I will hold a meeting of creditors.

I will write to you again with further information on the progress of the liquidation.

I expect to have completed this Liquidation within one (1) to two (2) years from the date of this report.

You can access information which may assist you on the following websites:

- ARITA at www.arita.com.au/creditors
- ASIC at <http://www.asic.gov.au> (search for “insolvency information sheets”).

Should you have any further queries please contact Jeremy Dalais of my office on (07) 3225 4925 or Jeremy.Dalais@fticonsulting.com should you require further information.

Dated this 27th day of September 2018.



Kelly-Anne Trenfield
Liquidator



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