FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Project Management (Aust) Pty Ltd [2019] FCA 47

File number:	VID 325 of 2018
Judge:	**MOSHINSKY J**
Date of judgment:	30 January 2019
Catchwords:	**CORPORATIONS** – disqualification from managing corporations – application for disqualification under s 206D of the *Corporations Act 2001* (Cth) – where ASIC and one defendant agreed on a period of disqualification – whether proposed order in respect of that defendant should be made – where another defendant did not participate in the proceeding – whether order sought by ASIC should be made
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), s 19 *Corporations Act 2001* (Cth), ss 206C, 206D, 206E, 206EAA, 206F, 601FC, 601FD, 920A
Cases cited:	*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 *Australian Securities and Investments Commission v Midland Hwy Pty Ltd (admin apptd)* (2015) 110 ACSR 203 *Francis v United Jersey Bank* 432 A2d 814 (NJ, 1981) *Murdaca v Australian Securities and Investments Commission* (2009) 178 FCR 119 *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80
Date of hearing:	17 September 2018
Date of last submissions:	26 October 2018
Registry:	Victoria

Division:	General Division
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Category:	Catchwords
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Counsel for the Plaintiff:	Mr T Clarke
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Sixth Defendant:	Mr S Rubenstein
Solicitor for the Sixth Defendant:	Logie-Smith Lanyon
Counsel for the First, Second, Third, Fourth, Fifth and Seventh Defendants:	The First, Second, Third, Fourth, Fifth and Seventh Defendants did not appear

ORDERS

VID 325 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**PROJECT MANAGEMENT (AUST) PTY LTD (ACN 151 902 126)** First Defendant
	BROOKFIELD RIVERSIDE PTY LTD (ACN 159 111 047) Second Defendant
	BILKURRA WEST PTY LTD (ACN 169 059 143) (and others named in the Schedule) Third Defendant

JUDGE:	**MOSHINSKY J**
DATE OF ORDER:	**30 JANUARY 2019**

THE COURT ORDERS THAT:

1. Pursuant to s 206D(1) of the *Corporations Act 2001* (Cth) (**Act**), the sixth defendant is disqualified from managing corporations for five years and six months from the date of this order.
2. Pursuant to s 206D(1) of the Act, the seventh defendant is disqualified from managing corporations for four years from the date of this order.
3. The matter be listed for mention on a date to be fixed in relation to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 By originating process, the plaintiff, the Australian Securities and Investments Commission (**ASIC**) seeks orders pursuant to s 206D of the *Corporations Act 2001* (Cth) disqualifying the sixth defendant, Michael Stefan Grochowski, and the seventh defendant, Ian Edward Stephens, from managing corporations for such period as the Court considers justified.

2 The originating process also sought orders for the winding up of the first to fifth defendants. That part of the application was heard separately, on 16 July 2018, and orders were made for the winding up of those defendants. Thus, these reasons concern only that part of ASIC's originating process by which it seeks orders that Mr Grochowski and Mr Stephens be disqualified from managing corporations.

3 By the time of the hearing of the disqualification aspect of ASIC's originating process, ASIC and Mr Grochowski had reached agreement as to a statement of agreed facts (**SOAF**) and as to a proposed period of disqualification. A copy of the SOAF appears as an appendix to these reasons. The proposed period of disqualification is five and a half years. For the reasons set out below, I consider there to be a proper basis to make an order disqualifying Mr Grochowski for that period and that it is appropriate for such an order to be made.

4 Mr Stephens filed a notice of address for service in this proceeding but has not otherwise participated. He did not file a concise statement in response to ASIC's concise statement, despite an order that he do so. He did not appear at the hearing in relation to ASIC's application for disqualification. In these circumstances, the matter proceeded on the basis that it was necessary for ASIC to establish its case for disqualification of Mr Stephens and it was for the Court to determine the appropriate period of any disqualification. In my view, for the reasons set out below, it is appropriate to order that Mr Stephens be disqualified for a period of four years (being the period contended for by ASIC).

The material before the Court

5 In relation to the application that Mr Grochowski be disqualified, the material before the Court comprises the SOAF. ASIC also relied on an order made by ASIC on 27 April 2012 prohibiting

Mr Grochowski from providing any financial services for a period of four years, and the statement of reasons for that order.

6 In relation to the application that Mr Stephens be disqualified, ASIC relied on the following:

(a) two affidavits of Naomi Johnston, a senior lawyer in ASIC's Financial Services Enforcement Team; and

(b) two affidavits of Nicholas Martin, one of the joint and several liquidators appointed to certain relevant companies, namely Midland Hwy Pty Ltd (In Liquidation) (**Midland**), Bilkurra Investments Pty Ltd (In Liquidation) (**Bilkurra Investments**) and Foscari Holdings Pty Ltd (In Liquidation) (**Foscari**).

7 In the course of the hearing, counsel for ASIC handed up a folder comprising extracts of transcripts from examinations of Mr Stephens pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth). These transcripts were in evidence as part of an exhibit to Ms Johnston's first affidavit.

Applicable principles

8 The applicable principles as regards the making of orders by agreement were summarised by Gordon J in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [70]-[73] as follows:

> ***2.3.1 Orders sought by agreement***
>
> …
>
> 70 The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the [*Competition and Consumer Act 2010* (Cth)]: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at [18].
>
> 71 Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.

72 Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac's Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].

73 Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

9 Disqualification from managing corporations is dealt with in a number of provisions of the *Corporations Act*. The present application is brought under s 206D, which relevantly provides as follows:

Court power of disqualification—insolvency and non-payment of debts

(1) On application by ASIC, the Court may disqualify a person from managing corporations for up to 20 years if:

(a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and

(b) the Court is satisfied that:

(i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and

(ii) the disqualification is justified.

...

(2) For the purposes of subsection (1), a corporation fails if:

(a) a Court orders the corporation to be wound up under:

(i) section 459B of this Act; or

(ii) section 526-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;

because the Court is satisfied that the corporation is insolvent; or

(b) the corporation enters into voluntary liquidation and creditors are not fully paid or are unlikely to be fully paid; or

(c) the corporation executes a deed of company arrangement and creditors are not fully paid or are unlikely to be fully paid; or

(d) the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid; or

(e) a levy of execution against the corporation is not satisfied; or

(f) a receiver, receiver and manager, or provisional liquidator is appointed in relation to the corporation; or

(g) the corporation enters into a compromise or arrangement with its creditors under Part 5.1 (including that Part as applied by section 45-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*); or

(h) the corporation is wound up and a liquidator lodges a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Note: To satisfy paragraph (h), a corporation must begin to be wound up while the person is an officer or within 12 months after the person ceases to be an officer. However, the report under subsection 533(1) may be lodged by the liquidator at a time that is more than 12 months after the person ceases to be an officer. Sections 513A to 513D contain rules about when a company begins to be wound up.

…

(3) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

…

10 The power to disqualify in s 206D arises if, within the last seven years, the person has been an officer of two or more corporations when they have failed. The concept of a corporation having "failed" is defined for the purposes of s 206D(1) in s 206D(2). In addition to that precondition, it is necessary for the Court to be satisfied that:

(a) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and

(b) the disqualification is justified.

11 Under s 206D(3), in determining whether the disqualification is justified, the Court may have regard to: the person's conduct in relation to the management, business or property of *any* corporation (that is, not only the corporations that failed); and any other matters that the Court considers appropriate.

12 The primary purpose of the s 206D disqualification power is the protection of the public against the use of the corporate structure that is harmful or contrary to proper commercial standards,

and safeguarding the public interest in the transparency and accountability of companies and in the suitability of directors to hold office: see *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 at [56](i)-(iv) (in the context of ss 206C and 206E, but also applicable, in my view, to s 206D); see also *Murdaca v Australian Securities and Investments Commission* (2009) 178 FCR 119 at [101](b) (relating to the administrative disqualification power in s 206F of the *Corporations Act*). In contrast to ss 206C and 206E, s 206D is not premised upon the defendant, or a corporation of which the defendant was an officer, having committed contraventions of a civil penalty provision or of the *Corporations Act*. Rather than protection and deterrence against contravening conduct *per se*, the s 206D disqualification power may be seen as directed more specifically towards protection of the public against financial losses and other harm that may be caused by financial mismanagement and corporate insolvency. I note that the s 206D disqualification power (like s 206F administrative disqualification) is only available against a person who has been an officer of multiple companies that have failed: disqualification does not lie against a person for involvement in a one-off case of corporate insolvency.

13 The s 206D disqualification power also stands apart from its companion provisions in that it is subject to a maximum period of disqualification of 20 years. In contrast, ss 206C, 206E and 206EAA are not subject to any maximum disqualification period.

Application of principles to the facts of this case – Mr Grochowski

14 The facts and circumstances are set out in the SOAF. It is not necessary to set out all those facts and circumstances in detail. Nevertheless, I set out some of the main aspects.

15 It is convenient to note at the outset that ASIC and Mr Grochowski agree that, based on the facts set out in the SOAF, the Court can be satisfied that:

(a) the jurisdictional requirements for a disqualification order against Mr Grochowski in respect of Bilkurra Investments and Foscari are established;

(b) the manner in which each of Bilkurra Investments and Foscari was managed was wholly or partly responsible for its failure;

(c) a disqualification is justified; and

(d) taking into account Mr Grochowski's conduct in relation to the management, business or property of Bilkurra Investments and Foscari and the other matters

outlined in the SOAF, it would be appropriate for the Court to order that Mr Grochowski be disqualified from managing corporations for a period of five and a half years.

16 I also note at the outset that the proceeding does not include any allegation that Mr Grochowski has contravened the *Corporations Act* or any other law relating to the management and affairs of Bilkurra Investments or Foscari or any other company. The application is not based on breach of the *Corporations Act*. There is no dishonesty alleged. Further, there is no allegation that Mr Grochowski or the first defendant, Project Management (Aust) Pty Ltd (**PMA**), breached project management agreements with Bilkurra Investments or Foscari or any other company.

17 Mr Grochowski has been the sole shareholder and director of PMA since its registration on 4 July 2011.

18 PMA entered into project management agreements (the **Project Management Agreements**) with, and opened and operated project bank accounts for, each of:

(a) Midland;

(b) Bilkurra Investments;

(c) Foscari;

(d) the second defendant, Brookfield Riverside Pty Ltd (**Brookfield**);

(e) the third defendant, Bilkurra West Pty Ltd (**Bilkurra West**); and

(f) the fifth defendant, Gillies Road Pty Ltd (**Gillies Road**).

19 Mr Grochowski was the sole signatory to each of those bank accounts. Through the operation of the bank accounts, Mr Grochowski had control of the money paid into the accounts for each project. In accordance with the Project Management Agreements, and through the operation of the bank accounts, Mr Grochowski was responsible for and had the oversight and ability to direct the property development activities of each of Midland, Bilkurra Investments, Foscari, Brookfield, Bilkurra West and Gillies Road.

20 Investors invested:

(a) approximately $23.8 million in option fees in the Bendigo Hermitage scheme, originally operated by Midland;

(b) approximately $858,000 in option fees and approximately $1.5 million in deposits for off-the-plan purchase contracts in the Foscari scheme, operated by Foscari;

(c) approximately $13 million in option fees and approximately $800,000 in deposits for off-the-plan purchase contracts in the Veneziane scheme, operated by Brookfield; and

(d) approximately $744,000 in deposits for off-the-plan purchase contracts for lots on the land that Bilkurra West had entered into contracts to purchase.

21 The Project Management Agreements provided that PMA was entitled to charge project management fees (of between $2,200 and $4,400 per lot) that became payable upon an investor entering into an option agreement or off-the-plan purchase contract with the relevant company. The project management fee was payable irrespective of whether the project was completed.

22 PMA received:

(a) at least $2.95 million in project management fees from Midland;

(b) around $387,600 in project management fees from Foscari; and

(c) around $973,000 in project management fees from Brookfield.

23 Under the Project Management Agreements, PMA was permitted to make interest-free loans of funds in the project bank accounts to other project companies and to itself. Significant transfers of funds were made:

(a) between project bank accounts

(b) from the project bank accounts to PMA; and

(c) from PMA to the project bank accounts.

24 Through the above mechanisms:

(a) PMA's financial affairs were inextricably bound up with the financial affairs of each of Midland, Bilkurra Investments, Foscari, Brookfield, Bilkurra West and Gillies Road;

(b) transfers of funds resulted in money paid by investors towards a particular property development being mixed with money paid by investors for other property developments; and

(c) money paid by investors towards a particular property development was utilised by other property developments without consideration given as to whether that money would be available to complete the particular project for which that money was raised.

25 Ultimately, none of the companies' schemes has been carried through to completion, and the companies have been wound up in circumstances in which three companies – Midland, Foscari and Brookfield – were unable to refund the option fees paid in by investors.

26 Section III of the SOAF sets out facts relating to Midland and the Bendigo Hermitage scheme.

27 Section IV of the SOAF deals with Bilkurra Investments. As set out in [45] of the SOAF, Bilkurra Investments was wound up on 15 April 2016 in insolvency and on the just and equitable ground. It is an agreed fact that, although not formally appointed a director, Mr Grochowski was an officer of Bilkurra Investments at all material times until it was wound up: SOAF, [46].

28 Section V of the SOAF sets out facts relating to Bilkurra Investments' 2015 deed of company arrangement (**DOCA**) proposal for Midland.

29 Section VI deals with Foscari and the Foscari scheme. As set out in [71] of the SOAF, on 15 April 2016 Foscari was wound up in insolvency and on the just and equitable ground. It is an agreed fact that, although not formally appointed a director, Mr Grochowski was an officer of Foscari at all material times until it was wound up: SOAF, [72].

30 Section VII of the SOAF deals with Brookfield and the Veneziane scheme. Although he was not formally appointed as an officer or director of Brookfield, Mr Grochowski exercised control over the financial affairs and project development activities of Brookfield pursuant to the relevant Project Management Agreement.

31 Section VIII of the SOAF sets out facts relating to Bilkurra West. Although he was not a director of Bilkurra West, Mr Grochowski exercised control over the financial affairs and project development activities of Bilkurra West under the relevant Project Management Agreement.

32 Section IX of the SOAF sets out facts relating to Gillies Road and the Gillies Road scheme. Although he was not a director of Gillies Road, Mr Grochowski exercised control over the

financial affairs and project development activities of Gillies Road under the relevant Project Management Agreement.

33 On the basis of the facts and matters set out in the SOAF, I find that, within the last seven years, Mr Grochowski has been an officer of two corporations (namely, Bilkurra Investments and Foscari) when they failed. I note that, in addition to the definition of failure in s 206D(2)(a), a corporation "fails" for the purposes of s 206D(1) if the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid: s 206D(2)(d).

34 Further, on the basis of the facts set out in the SOAF, I am satisfied that the manner in which each of those corporations was managed was wholly or partly responsible for the corporation failing.

35 There is an issue between the parties as to the relevance of the order made by ASIC on 27 April 2012 prohibiting Mr Grochowski from providing any financial services for a period of four years. The order relates to a company named Sovereign MF Limited (**Sovereign**) of which Mr Grochowski had been a director. Sovereign was the holder of an Australian Financial Services Licence, and the responsible entity of the Sovereign Aged Care Property Fund (the **Fund**). Sandhurst Trustees Ltd (**Sandhurst Trustees**) was the custodian of the Fund's assets.

36 Sovereign became trustee of the Fund on 12 September 2006 (replacing the former trustee, Viculus Aged Care Properties Pty Ltd (**VACP**)). The Fund became registered as a managed investment scheme on 29 September 2006, and Sovereign became its responsible entity.

37 VACP had entered into contracts of sale to acquire two aged care facilities for the Fund. The properties were transferred to VACP in March 2006 and April 2007.

38 On 4 October 2006, Sovereign issued a product disclosure statement (**PDS**) offering interests in the Fund. The PDS identified the two aged care facilities as assets of the Fund. However, neither property was ever registered in the name of Sovereign or Sandhurst Trustees.

39 The two properties were sold in February 2008 and May 2009, with the latter property sold by the mortgagee in possession. No proceeds of either sale went to the Fund.

40 On 27 April 2012, a delegate of ASIC found that, as director of Sovereign, Mr Grochowski failed to comply with his obligation under s 601FD(1)(b) of the *Corporations Act* to exercise reasonable care and diligence as officer of a responsible entity of a registered scheme by failing to ensure that, among other matters:

(a) Sovereign complied with its disclosure obligations in relation to the PDS, and with its continuous disclosure obligations;

(b) the aged care facilities were registered in the name of Sandhurst Trustees; and

(c) Sovereign complied with the Fund's compliance plan and its s 601FC(1)(i) obligation to identify and hold scheme property separately.

41 The delegate made an order under s 920A of the *Corporations Act* that Mr Grochowski be prohibited from providing any financial service for a period of four years. In so ordering, the delegate observed that Mr Grochowski's conduct demonstrated a lack of understanding of the obligations imposed on persons in the financial services industry under the Act.

42 ASIC submits that the order dated 27 April 2012 is relevant to the Court's assessment of the appropriateness of the length of disqualification that the parties propose. Mr Grochowski contends that the fact that he was subject to an earlier financial services ban is not relevant to the making of a disqualification order under s 206D. Mr Grochowski relies on the following matters: a ban from provision of financial services under s 920A is based upon different jurisdictional requirements from those found in s 206D; the underlying rationale for each type of ban is different; the fact of the earlier ban under s 920A says nothing about the propensity or likelihood that Mr Grochowski might engage in conduct involving the management of an insolvent company; and there is no suggestion that Mr Grochowski or PMA dealt with the assets of the development projects inconsistently with the terms of the project documents.

43 In my view, the order made on 27 April 2012 is relevant in considering the appropriate period of disqualification. Under s 206D(3), the Court may have regard to "any other matters that the Court considers appropriate". Although the circumstances that formed the basis of the 27 April 2012 order were quite different from the circumstances relating to the failure of Bilkurra Investments and Foscari, they are nevertheless relevant in considering the appropriate period of disqualification, keeping in mind the protective purposes of s 206D as described above.

44 On the basis of the matters set out in the SOAF, and having regard to the 27 April 2012 order, I am satisfied that disqualification of Mr Grochowski for a period of five and half years (the period agreed between the parties) is justified. In forming this view, I have taken into account Mr Grochowski's willingness to engage with ASIC from the outset of this proceeding to resolve both the disqualification application and the winding up of PMA by consent.

45 In my view, it is appropriate in the circumstances to make an order under s 206D(1) that Mr Grochowski be disqualified from managing corporations for a period of five and a half years.

Application of principles to the facts of this case – Mr Stephens

46 For the purposes of the application to disqualify Mr Stephens, the SOAF is, of course, not relevant. The application is based on the affidavit material referred to above. I first set out my findings based on that affidavit material, and then consider whether a disqualification order should be made.

Overview

47 Mr Stephens has been the sole director of Bilkurra Investments and Foscari since 1 October 2014 and was the sole director of Brookfield, Bilkurra West and Gillies Road (the **Project Companies**) from October 2014 until his resignation, which was notified in April 2018. I note that, when notifying his resignation as director in April 2018, Mr Stephens purported to resign retrospectively as from the original date of his appointment as director of each Project Company in October 2014. However, on the basis of the material before the Court, I find that he was a director throughout the period October 2014 to the date of notification.

Mr Stephens's appointment as director of Bilkurra Investments, Foscari and the Project Companies

48 From various dates between June 2012 and April 2014, Benjamin Skinner, a partner of Evans Ellis, was appointed sole director of Bilkurra Investments, Foscari and each of the Project Companies. During Mr Skinner's directorship, each company entered into a Project Management Agreement with PMA, and deposited revenues into a project bank account maintained in PMA's name and operated by Mr Grochowski.

49 In October 2014, Mr Stephens was appointed sole director of Bilkurra Investments, Foscari and each of the Project Companies in place of Mr Skinner.

50 Mr Stephens qualified as a chartered accountant in 1992. He subsequently held a number of management accounting and Chief Financial Officer roles in the food and beverage industry in New Zealand, Fiji, Papua New Guinea and Australia before he became involved with Bilkurra Investments, Foscari and the Project Companies.

51 On returning to Australia, in around March 2014, Mr Stephens set up an accounting firm, GPTAA Pty Ltd (**GPTAA**). Mr Stephens was introduced to Mr Grochowski through Daniel

Clarke of Evans Ellis. From around August 2014, GPTAA began to provide accounting services to Bilkurra Investments, Foscari and the Project Companies.

52 When he was initially engaged, Mr Stephens was instructed to bring the companies' existing financial records up to date and to introduce an improved accounting system. Mr Grochowski told Mr Stephens that he wanted to move to a more robust account system in order to attract larger investors.

53 In October 2014, Stephens was asked to assume the directorship of the companies in place of Mr Skinner because Mr Grochowski wanted to improve the companies' accounting practices, in order to impress potential investors in the companies, with a view to eventually seeking a listing. GPTAA continued to provide accounting services to the companies following Mr Stephens's appointment as director.

54 Although he was the sole appointed director of each of Bilkurra Investments, Foscari and the Project Companies from October 2014, Mr Stephens conceived of his own role as being equivalent to a Chief Financial Officer role for the group of companies, and stated that Mr Grochowski effectively operated as Chief Executive Officer of the group.

Bilkurra Investments

55 From 28 June 2013, Bilkurra Investments carried on the Bendigo Hermitage project, notwithstanding that a purported assignment of optionholders' contracts with Midland had not been effectively carried out.

56 Mr Skinner was subsequently appointed as sole director of Bilkurra Investments, from 25 November 2013 until 1 October 2014.

57 On 12 December 2013, Bilkurra Investments entered into a Project Management Agreement with PMA.

58 In December 2013, together with Foscari, Bilkurra Investments obtained a loan from Adelaide Properties and Lezak Nominees (**Adelaide/Lezak**) at a "discounted" interest rate of 12.75% per annum and an "agreed rate" of 18.75% per annum.

59 Bilkurra Investments also received related-party transfers (in net terms) of around $550,000 from PMA, around $700,000 from Foscari, and around $621,500 from Brookfield.

60 Mr Stephens was appointed director of Bilkurra Investments on 1 October 2014.

61 After administrators were appointed to Midland in 2015, Bilkurra Investments put forward a DOCA proposal for Midland on 29 July 2015 and 12 October 2015.

62 On 16 October 2015, Bilkurra Investments circulated a letter from Mr Stephens to investors in the Bendigo Hermitage scheme, urging them to vote in favour of Bilkurra Investment's DOCA proposal. Evans Ellis, as solicitors for Bilkurra Investments, consulted with and obtained approval from both Mr Grochowski and Mr Stephens in relation to that communication.

63 When setting aside the DOCA and ordering that Midland be wound up, Beach J found that the communication to members was misleading in relation to optionholders' rights and the effect that entry into the DOCA would have on those rights. Justice Beach also observed that the primary purpose or effect of the DOCA appeared to be to limit if not hinder a full investigation of entities and persons concerned in the Bendigo Hermitage scheme: *Australian Securities and Investments Commission v Midland Hwy Pty Ltd (admin apptd)* (2015) 110 ACSR 203 at [48], [80].

64 Bilkurra Investments was wound up in insolvency, and on the just and equitable ground, on 15 April 2016. In so ordering, Beach J observed that it was not possible to have confidence in the financial statements that Mr Stephens had prepared, including because of uncertainty as to whether amounts paid to Bilkurra Investments by Midland were properly recorded as equity or debt: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [13], [77]-[82].

Foscari and the Foscari scheme

65 Foscari was incorporated in May 2012.

66 On 29 May 2012, David Bracka entered into a purchase contract for the Foscari land, for $3.3 million. Foscari was subsequently nominated as the purchaser, and completed the purchase in July 2013.

67 Mr Skinner was appointed as Foscari's sole director, from 8 June 2012 until 1 October 2014.

68 On 11 June 2012, Foscari entered into a Project Management Agreement with PMA.

69 The Foscari scheme attracted around 149 investors, of whom:

(a) 41 investors entered into option deeds, investing around $858,000 in option fees; and

(b) 108 investors entered into off-the-plan purchase contracts, paying around $1.5 million in purchase deposits.

70 In December 2013, together with Bilkurra Investments, Foscari obtained a loan from Adelaide/Lezak at a "discounted" interest rate of 12.75% per annum and an "agreed rate" of 18.75% per annum.

71 Foscari received inter-company transfers, in net terms, of approximately $5.8 million from Midland, and $1.5 million from Brookfield.

72 Between May 2012 and April 2016, Foscari paid approximately:

(a) $5.0 million to Evans Ellis;

(b) $1.3 million to Market First Property Consulting Pty Ltd, which was engaged to promote and market the scheme to investors;

(c) $1.38 million to PMA (in net terms), which included payment of project management fees under the Project Management Agreement;

(d) $700,000 (in net terms) to Bilkurra Investments; and

(e) $8.1 million in site development costs.

73 Further, on 16 October 2014, Foscari paid $400,000 to Evans Ellis's trust account, towards the deposit on a land purchase contract that was entered into by the fourth defendant, Bilkurra South Pty Ltd.

74 Mr Stephens was appointed as Foscari's sole director, in place of Mr Skinner, on 1 October 2014. It appears that all or substantially all of the investments in the Foscari scheme were made prior to that date.

75 From December 2014, Foscari experienced difficulties in meeting its loan commitments. It extended and increased its existing loan facilities (including its facility with Adelaide/Lezak) and entered into a loan agreement with NWC Finance Pty Ltd. Adelaide/Lezak issued a notice of default to Foscari on 25 September 2015, and NWC Finance Pty Ltd appointed receivers to Foscari's assets on 30 November 2015.

76 As of November 2015, Foscari had not obtained endorsed plans or met the further requirements for development approval. Foscari had encountered contamination issues affecting the site.

77 As a consequence, Foscari became unable to complete the redevelopment of the Foscari land, in circumstances where it was also unable to refund the $858,000 in option fees that had been invested by optionholders.

78 Foscari was wound up in insolvency and on the just and equitable ground, together with Bilkurra Investments, on 15 April 2016. The remarks of Beach J noted at [64] above in relation to Bilkurra Investments' financial statements were also made in respect of Foscari: *Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd* at [13], [77]-[82].

Brookfield and the Veneziane scheme

79 Brookfield was incorporated on 21 June 2012.

80 Mr Skinner was appointed as Brookfield Riverside's sole director, and remained in that role until 1 October 2014.

81 On 6 July 2012, Brookfield entered into a Project Management Agreement with PMA (the **Brookfield Project Management Agreement**). The agreement provided that PMA was responsible for completing accounts for the project for each financial year, and specified a project management fee of $3,300 per lot.

82 In accordance with the Brookfield Project Management Agreement, PMA opened two project bank accounts in respect of Brookfield, of which the primary account was the Brookfield 5318 account.

83 Between June and October 2012, Mr Bracka entered into three purchase contracts and a deed of put and call option in relation to four parcels of land in Brookfield (the **Brookfield land**). On the day after he entered into each agreement, Mr Bracka nominated Brookfield as the purchaser or option holder. The aggregate consideration under those contracts was $27 million, with settlement due to occur between April 2016 and July 2017. Aggregate deposits of $4.2 million were payable in respect of the three contracts of sale. In July 2015, Brookfield paid the option fee in respect of the fourth parcel of the Brookfield land, and entered into a purchase contract for that land, settlement of which was due to occur on 30 April 2016.

84 Between 2012 and 2014, the Veneziane scheme attracted 359 investors, of whom:

(a) 247 investors entered into option contracts, and paid around $13 million in option fees; and

(b) 112 investors entered into off-the-plan sale contracts.

85 Between June 2012 and July 2016, Evans Ellis paid around $12.3 million into the Brookfield 5318 account.

86 Mr Stephens was appointed sole director of Brookfield from 1 October 2014. Substantially all of the investment in the Veneziane scheme occurred prior to that date.

87 Brookfield never completed any of its purchase contracts for the Brookfield land, and so never became the registered proprietor of the land on which the Veneziane scheme was to be conducted. Brookfield was not in a position to meet its obligation to refund the $13 million in option fees it received from investors who entered into option contracts for the Veneziane scheme. All of the option fees invested in the scheme and received by Brookfield have been expended.

88 In June 2017, pursuant to instructions given by Mr Stephens, Evans Ellis commenced refunding deposits to off-the-plan investors in the Veneziane scheme. To November 2017, Evans Ellis had refunded around $280,000 in deposits paid by off-the-plan investors.

89 Brookfield was wound up in insolvency, and on the just and equitable ground, on 16 July 2018.

90 ASIC submits, and I accept, that Brookfield "failed" within the meaning of s 206D(2)(d) – that is, it ceased to carry on business and its creditors were not fully paid and were unlikely to be fully paid – prior to April 2018, when Mr Stephens tendered his resignation as director. Accordingly, Mr Stephens was a director of Brookfield when it failed.

Bilkurra West

91 Bilkurra West was incorporated on 11 April 2014.

92 Mr Skinner was appointed as Bilkurra West's sole director, and remained in that role until 23 October 2014.

93 On around 30 April 2014, Bilkurra West entered into a Project Management Agreement, which was in substantially identical terms to the Brookfield Project Management Agreement, save that PMA was required to deposit revenues into the already-established Bilkurra Investments project management account, of which Mr Grochowski was the sole signatory.

94 On 14 November 2013, Mr Bracka entered into contracts of sale for three parcels of land (the **Bilkurra West land**). The aggregate price for the land was $8 million.

95 On 11 April 2014, Mr Bracka signed nomination forms nominating Bilkurra West as the purchaser under each contract.

96 Between July 2014 and February 2015, 47 investors entered into off-the-plan purchase contracts with Bilkurra West.

97 Mr Stephens was appointed sole director of Bilkurra West from 23 October 2014. The overwhelming majority of investments in the Bilkurra West land were made prior to Mr Stephens's appointment.

98 Bilkurra West did not complete its purchases of the Bilkurra West land when settlement fell due and so never became registered proprietor of the land that investors were invited to invest in.

99 In June 2017, pursuant to instructions given by Mr Stephens, Evans Ellis commenced refunding deposits to off-the-plan investors in relation to the Bilkurra West land. To November 2017, Evans Ellis had refunded around $654,000 in deposits paid by investors who entered into off-the-plan purchase contracts.

100 Bilkurra West was wound up in insolvency, and on the just and equitable ground, on 16 July 2018.

101 ASIC submits, and I accept, that Bilkurra West ceased to carry on business prior to April 2018, when Mr Stephens tendered his resignation as director, and its creditors were (and are) unlikely to be fully paid. Accordingly, Mr Stephens was a director of Bilkurra West when it failed.

Gillies Road

102 Gillies Road was incorporated on 21 May 2013.

103 Mr Skinner was appointed as Gillies Road's sole director, which role he retained until 1 October 2014.

104 On around 3 June 2013, Gillies Road entered into a Project Management Agreement with PMA on materially identical terms to the Brookfield Project Management Agreement.

105 In accordance with the Project Management Agreement, PMA opened two project accounts in respect of Gillies Road, of which the primary account was the Gillies 7489 account.

106 Between 12 June 2013 and 11 January 2016, approximately $673,500 was deposited into, and withdrawn from, the Gillies 7489 account.

107 On or around 30 May 2013, Gillies Road entered into an option to purchase deed and a contract of sale in relation to two adjoining properties on Gillies Road, Miners Rest (the **Gillies Road land**). The aggregate purchase price of the Gillies Road land was approximately $48.75 million.

108 The option to purchase was exercisable by notice on or before 1 May 2016. Separately, the purchase contract was conditional upon the property being rezoned as residential and Gillies Road obtaining planning approval and exercising the option under the option deed by 30 May 2016.

109 Mr Stephens was appointed sole director of Gillies Road from 1 October 2014.

110 Gillies Road did not exercise its option to purchase, or obtain rezoning or planning approval for the Gillies Road land by May 2016. Accordingly, both the option and the purchase contract have lapsed.

111 Gillies Road was wound up in insolvency, and on the just and equitable ground, on 16 July 2018.

112 ASIC submits, and I accept, that Gillies Road ceased to carry on business prior to April 2018, when Stephens tendered his resignation as director, and its creditors were (and are) unlikely to be fully paid. Accordingly, Mr Stephens was a director of Gillies Road when it failed.

Mr Stephens's management role

113 The evidence before the Court (in particular, the extracts from the section 19 examinations of Mr Stephens) establishes that he did not exercise any substantive decision-making capacity for any of the companies. I note the following:

(a) Mr Stephens confirmed that the Project Management Agreements that each company had with PMA were "pretty well all encompassing". He stated:

> The project management agreement essentially tied all the companies together in a group and provided for PMA to operate the bank accounts[,] to provide all the staff, to undertake all decisions with respect to the development of the projects, to provide accounting and administrative services. Pretty well it did everything. … Michael Grochowski effectively operated as the chief executive officer of the group.

(b) Mr Stephens admitted that, following his appointment as director, he did not undertake directorial decision-making; rather, Mr Grochowski continued to make decisions for the companies.

(c) Under examination, Mr Stephens was unable to recall any instance when he had challenged Mr Grochowski in relation to expenditures made on behalf of any of the companies.

114 Mr Stephens was, in substance, a mere proxy for Mr Grochowski's operation of the land banking schemes. As an experienced chartered accountant, his appointment as director presented a false façade of meaningful oversight and governance of the companies' affairs.

Consideration

115 In my view, on the basis of the facts and matters set out in [47]-[114] above, the conditions for disqualification under s 206D are satisfied, and it is appropriate in the circumstances that Mr Stephens be disqualified for a period from managing corporations. Mr Stephens has been, within the last seven years, an officer of two or more corporations (namely Bilkurra Investments, Foscari, Brookfield, Bilkurra West and Gillies Road) when they failed. As noted above, the definition of failure for present purposes encompasses a situation where the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid. Further, I am satisfied that the manner in which each corporation was managed was wholly or partly responsible for the corporation failing.

116 ASIC submits that Mr Stephens, in his role as the sole formally-appointed director of each company, should be held responsible for failing to carry out his duties of directorial oversight of, and control over, each company's affairs. I accept this submission. In *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at [19], Middleton J referred to the words of Pollock J in *Francis v United Jersey Bank* 432 A2d 814 (NJ, 1981) and said that those words "make it clear that more than a mere 'going through the paces' is required for directors". Middleton J added: "As Pollock J noted, a director is not an ornament, but an essential component of corporate governance."

117 ASIC submits, and I accept, that Mr Stephens bears a lesser culpability compared with Mr Grochowski for the failure of Bilkurra Investments, Foscari and the Project Companies, in that those companies' financial and operating frameworks were already in place, and all or most of the solicitation of investments had already been done, before Mr Stephens was

appointed as director in October 2014. ASIC submits, and I accept, that while Mr Stephens may have been derelict in failing to carry out his role as director, it may fairly be said that the companies and their respective projects were well on the way to failing by October 2014, by reason of the way in which they had been structured and mismanaged before that time.

118 Nonetheless, Mr Stephens's failure to exercise any meaningful decision-making and management responsibility in relation to companies that had solicited and obtained large amounts of investment from the public involved a serious abrogation of his duties as director, in circumstances where he had been appointed on account of his qualifications and experience as a chartered accountant.

119 Moreover, Mr Stephens was retained professionally, and subsequently appointed as director, in order to implement regular and robust accounting processes. The companies' financial records have been left in an unsatisfactory state. Further, Mr Stephens has not co-operated meaningfully with the liquidators of Bilkurra Investments and Foscari, and has not corresponded or met with the liquidators since June 2016.

120 ASIC submits that the Court should order that Mr Stephens be disqualified for a period of four years. Having regard to the facts and matters discussed above, and the circumstances generally, I am satisfied that a disqualification of four years is justified. I consider it appropriate in the circumstances to make an order under s 206D that Mr Stephens be disqualified from managing corporations for a period of four years.

Conclusion

121 It follows from the above that there will be orders to the effect that Mr Grochowski is disqualified from managing corporations for a period of five and a half years, and Mr Stephens is disqualified from managing corporations for a period of four years.

122 In relation to costs, ASIC and Mr Grochowski have agreed that Mr Grochowski will pay ASIC's costs of the proceeding fixed in the sum of $50,000.00. In relation to Mr Stephens, ASIC proposes an order that he pay the balance of ASIC's costs of the proceeding net of: (a) the amount referred to in the costs order involving Mr Grochowski; and (b) any costs paid to ASIC pursuant to paragraph 4 of the orders made on 16 July 2018. Those orders related to the winding up of the first to fifth defendants. One issue that arises in relation to the proposed order relating to Mr Stephens is whether it is appropriate that he should be responsible for costs relating to the winding up aspect of the proceeding. As this issue was not canvassed in the

course of the hearing, I will list the matter for mention so that this issue can be addressed. As this may affect the wording of the costs order relating to Mr Grochowski, I will hold off making that costs order at this stage.

I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky.

Associate:

Dated: 30 January 2019

APPENDIX

STATEMENT OF AGREED FACTS
PURSUANT TO SECTION 191 OF THE *EVIDENCE ACT 1995* (CTH)

(Footnotes omitted)

I. INTRODUCTION

1. This statement of agreed facts, pursuant to section 191(3)(a) of the *Evidence Act 1995* (Cth), is made jointly by the applicant (**ASIC**) and the 6th Respondent (**Grochowski**), for the purpose of ASIC's application, under s 206D(1) of the *Corporations Act 2001* (**Corporations Act**), that Grochowski be disqualified from managing corporations.

2. In the circumstances set out further in sections IV and VI below, Grochowski was an officer of Bilkurra Investments Pty Ltd (**Bilkurra Investments**) and Foscari Holdings Pty Ltd (**Foscari**) when those companies failed within the meaning of s 206D(2) of the *Corporations Act*.

3. Grochowski's involvement in the affairs of the First Defendant (**PMA**), Midland Hwy Pty Ltd (**Midland**) and each of the Second, Third and Fifth Defendants (collectively, the **Project Companies**), as may be relevant to the Court's consideration under s [206D](3)(a), is set out further in sections III, V and VII to IX below.

II. GROCHOWSKI AND PMA

4. Grochowski has been the sole shareholder and director of PMA since its registration on 4 July 2011.

5. As described further below, PMA has:

   5.1 entered into Project Management Agreements with; and

   5.2 opened and operated project bank accounts for

   each of Midland, Bilkurra Investments, Foscari, Brookfield Riverside Pty Ltd (**Brookfield**), Bilkurra West Pty Ltd (**Bilkurra West**) and Gillies Road Pty Ltd (**Gillies Road**). The project bank accounts are bank accounts of PMA but in the name of each project.

6. Grochowski was the sole signatory to each of those bank accounts.

7. Through the operation of the bank accounts, Grochowski had control of the money paid into the accounts for each project.

8. In accordance with the Project Management Agreements, and through the operation of the bank accounts, Grochowski was responsible for and had the oversight and ability to direct the property development activities of each of Midland, Bilkurra Investments, Foscari, Brookfield, Bilkurra West and Gillies Road.

9. Investors invested:

   9.1 approximately $23.8 million in option fees in the Bendigo Hermitage scheme, originally operated by Midland;

9.2 approximately $858,000 in option fees and approximately $1.5 million in deposits for off-the-plan purchase contracts in the Foscari scheme, operated by Foscari;

9.3 approximately $13 million in option fees and approximately $800,000 in deposits for off-the-plan purchase contracts in the Veneziane scheme, operated by Brookfield Riverside; and

9.4 approximately $744,000 in deposits for off-the-plan purchase contracts for lots on the land that Bilkurra West had entered into contracts to purchase.

10. The Project Management Agreements provided that PMA was entitled to charge project management fees (of between $2,200 and $4,400 per lot), that became payable upon an investor entering into an option agreement or off-the-plan purchase contract with the relevant company. The project management fee was payable irrespective of whether the project was completed.

11. PMA received:

11.1 at least $2.95 million in project management fees from Midland;

11.2 around $387,600 in project management fees from Foscari; and

11.3 around $973,000 in project management fees from Brookfield Riverside.

12. Under the Project Management Agreements, PMA was permitted to make interest-free loans of funds in the project bank accounts to other project companies and to itself. Significant transfers of funds were made:

12.1 between project bank accounts[;]

12.2 from the project bank accounts to PMA; and

12.3 from PMA to the project bank accounts.

13. Through the above mechanisms:

13.1 PMA's financial affairs were inextricably bound up with the financial affairs of each of Midland, Bilkurra Investments, Foscari, Brookfield Riverside, Bilkurra West and Gillies Road; and

13.2 Transfers of funds resulted in money paid by investors towards a particular property development being mixed with money paid by investors for other property developments; and

13.3 Money paid by investors towards a particular property development was utilised by other property developments without consideration given as to whether that money would be available to complete the particular project for which that money was raised.

14. Ultimately, none of the companies' schemes has been carried through to completion, and the companies have been wound up in circumstances in which three companies – Midland, Foscari and Brookfield Riverside – were unable to refund the option fees paid in by investors.

15. Under the project management agreements, PMA was required to keep and maintain financial records and prepare annual financial reports for Brookfield Riverside, [Bilkurra West] and Gillies Road. While PMA maintained MYOB

records for the projects, it did not prepare such annual reports.

III. MIDLAND AND THE BENDIGO HERMITAGE SCHEME

16. Midland was incorporated in September 2011. John Wood, the original owner of the Bilkurra land, was appointed as Midland's sole director on 17 October 2011 and continued in that role until his death on 28 July 2014.

17. On 18 October 2011, PMA entered into an agreement to purchase two lots of land on Midland Highway, Bagshot (the **Bilkurra land**) from Bilkurra Investments, for a total purchase price of $7.4 million.

18. On 1 November 2011, Wood entered into an "Appointment of Director Agreement" with Grochowski and Midland. John Wood therein agreed that:

    18.1 he would not act for, nor assume any responsibility or obligation on behalf of, Midland, other than as authorised in writing by Grochowski;

    18.2 he would not deal with any funds or assets of Midland other than as authorised in writing by Grochowski;

    18.3 he would sign a power of attorney appointing Grochowski as Midland's attorney; and

    18.4 he would sign a resignation of director form to be held by Grochowski "on trust" pending removal of Wood as director and company secretary "for whatever reason".

19. On 10 November 2011, PMA nominated Midland as its nominee purchaser of the Bilkurra land.

20. On 14 December 2011, PMA entered into a Project Management Agreement with Midland (the **Midland Project Management Agreement**). In it, Midland granted PMA the exclusive right to project manage the execution and completion of the Bendigo Hermitage project. Midland was also required to:

    20.1 execute all documents and do all things that PMA required in connection with the project, including entering into [any] sale contract or other transaction document relating to the Bilkurra land; and

    20.2 do all other things that PMA reasonably required in connection with the project.

21. Together, the Appointment of Director Agreement and the Midland Project Management Agreement gave Grochowski and PMA oversight and control over the development of the Bendigo Hermitage project, and sought to prevent John Wood from acting independently from Grochowski.

22. Further, under the Midland Project Management Agreement:

    22.1 PMA was required to hold a bank account, into which Midland was required to deposit all revenue received in respect of the project: cl 8.1(a)-(b);

    22.2 all transfers from the project bank account were required to be drawn in the name of, and signed or approved in writing by, PMA: cl 8.1(d);

    22.3 PMA was entitled:

        (i) to take a loan on an interest-free basis; and

(ii) to provide a loan on an interest-free basis to or for the benefit of Midland's related entities,

of any or all of the funds that PMA held on trust for Midland: cll 7.3(a), 7.4(a); and

22.4 PMA was obliged to maintain all necessary and proper receipts and expenditure invoices to enable Midland to prepare accounts and accounting and other financial records: cl 9.2(a).

23. In accordance with the Midland Project Management Agreement, PMA maintained a project bank account for Midland (the **Midland project bank account**), of which Grochowski was the sole signatory.

24. Between October 2011 and June 2013, investors entered into approximately 700 option deeds and 107 off-the-plan purchase contracts for parcels of the Bilkurra land. Option fees of $23.8 million were received into the trust account of Evans Ellis Lawyers. By Grochowski's directions to [Benjamin] Skinner, which were carried out by Skinner, $23.0 million of that revenue was deposited into the Midland project bank account.

25. Under the option agreements that investors entered into with Midland:

25.1 the option fee was stated to become the absolute property of Midland, and that Midland was free to direct and use the option fee as it sees fit and for any purpose whatsoever; and

25.2 Midland was required to refund the option fee to the investor in certain circumstances, including:

(i) when the purchase contract relating to the project land was not completed for any reason whatsoever; or

(ii) if planning approval is not obtained prior to the expiry of the option term.

26. Grochowski negotiated marketing and commission arrangements for the Bendigo Hermitage scheme between Midland and Property Choice Pty Ltd (**Property Choice**), under which Property Choice received a 30% commission for marketing the scheme to investors. Grochowski did not obtain any alternative quotations for marketing services before making that arrangement with Property Choice.

27. Between 18 October 2011 and 19 June 2012, Midland paid $1.4 million in instalments to Bilkurra Investments towards the purchase of the Bilkurra land.

28. On 28 June 2013, Midland's purchase of the Bilkurra land was cancelled, under a Deed of Release and Cancellation made between Midland, Bilkurra Investments and PMA. Grochowski executed the deed on behalf of PMA, and John Wood executed the deed on behalf of Midland (as its sole director), and on behalf of Bilkurra Investments (as one of its two directors). Under the deed, Midland was required to pay Bilkurra Investments a cancellation fee of $600,000, which was said to be accepted in full satisfaction of Midland's claim to the forfeited deposit.

29. The cancellation of Midland's purchase of the Bilkurra land triggered Midland's obligation to refund to investors the $23.8 million in option fees.

30. By a Deed of Assignment and Consent, also entered into on 28 June 2013

between Midland and Bilkurra Investments, Midland purported to "assign" the option agreements between Midland and its investors to Bilkurra Investments. Wood executed the deed, both as sole director of Midland and as one of two directors of Bilkurra Investments.

31. Midland was never in a position to meet its obligation to refund the $23.8 million it had received from investors in the Hermitage Bendigo scheme. All of the moneys invested in the scheme by investors have been paid out as described below.

32. Between October 2011 and January 2015, of the $23.0 million that was paid into the Midland project bank account:

    32.1 around $2.0 million was applied towards Midland's purchase of the Bilkurra land (including the $600,000 cancellation fee payable under the Deed of Release and Cancellation);

    32.2 around $7.3 million was paid to Property Choice Pty Ltd, as commission for marketing of the scheme;

    32.3 at least $3.25 million was paid to PMA;

    32.4 Midland advanced around $4.8 million to Foscari;

    32.5 Midland advanced around $2.0 million to Brookfield Riverside;

    32.6 Midland advanced around $350,000 to Gillies Road; and

    32.7 around $1.7 million was applied to works necessary for obtaining a planning permit for the proposed subdivision or otherwise progressing the development.

33. The inter-company loans made by Midland noted in [paragraphs 32.4] to 32.6 above were made at Grochowski's direction, and were never recorded in any loan agreement.

34. John Wood died on 28 July 2014.

35. Midland had no director between 28 July 2014 and 26 May 2015, when John Wood's son, Russell Wood, was appointed director. During that period, Grochowski acted on Midland's behalf in entering into a deed of variation of a settlement deed in October 2014, and swearing an affidavit in a proceeding to which Midland was party on 8 February 2015.

36. Midland was wound up under s 447A of the *Corporations Act* on 3 December 2015, in circumstances where the Court found that Midland was insolvent, and in the further circumstances described in section V below.

IV. BILKURRA INVESTMENTS

37. Pursuant to a Deed of Option to Purchase Shares that was entered into on 28 June 2013 (together with the agreements referred to in paragraphs 28 and 30 above), Greater Bendigo Consolidated Pty Ltd (**GBC**) became the sole shareholder of Bilkurra Investments from 1 July 2013.

38. GBC's sole shareholder is Evans Ellis Management Pty Ltd (**EEM**), as trustee of a trust called the Property Trust. EEM in turn holds:

    (i) 95 units in the Property Trust, as trustee of the Urban Property Trust; and

(ii) 5 units in the Property Trust, as Trustee of the M Prop Trust.

The Urban Property Trust and the M Prop Trust are discretionary trusts, having 5 and 6 specified beneficiaries respectively, including persons related to Grochowski.

39. Bilkurra Investments continued to carry on the Bendigo Hermitage project after 28 June 2013, albeit that investors' option contracts entered into with Midland had not been effectively novated to Bilkurra Investments (as Beach J found in December 2015).

40. On 25 November 2013, Benjamin Skinner, a principal of Evans Ellis Lawyers, was appointed sole director of Bilkurra Investments.

41. On or around 12 December 2013, Bilkurra Investments entered into a Project Management Agreement with PMA, in materially identical terms to the Midland Project Management Agreement.

42. From around 13 March 2014, PMA established a project bank account for Bilkurra Investments (the **Bilkurra project bank account**) and directed Evans Ellis to pay money received from investors in the Bendigo Hermitage project to that account.

43. Together with Foscari, Bilkurra Investments obtained loans:

43.1 of approximately $6 million from Adelaide Properties and Lezak Nominees (**Adelaide/Lezak**), at a "discounted" interest rate of 12.75% per annum and "agreed rate" of 18.75% per annum; and

43.2 $220,000 from Laycon Investments, at an interest rate of 3% per month.

44. Bilkurra Investments also received related-party transfers of:

44.1 around $550,000 from PMA;

44.2 around $700,000 from Foscari; and

44.3 around $621,500 from Brookfield Riverside,

each calculated on a net basis. Those inter-company payments were made by Grochowski.

45. Bilkurra Investments was wound up on 15 April 2016 in insolvency, and on the just and equitable ground.

46. Although not formally appointed a director, Grochowski was an officer of Bilkurra Investments at all material times until it was wound up in insolvency on 15 April 2016.

V. BILKURRA INVESTMENTS' 2015 DOCA PROPOSAL FOR MIDLAND

47. In June 2015, after being appointed as director of Midland, Russell Wood resolved to appoint Nicholas Martin and Craig Crosbie as administrators of Midland.

48. At the first meeting of creditors on 14 July 2015, Skinner attended and successfully proposed a resolution replacing Messrs Martin and Crosbie with substitute administrators. Skinner proposed and passed that resolution with the

benefit of proxies.

49. ASIC then applied to the Court to remove the administrators appointed at Skinner's proposal and to reappoint Messrs Martin and Crosbie, which application was granted on 5 August 2015.

50. Bilkurra Investments provided the administrators with a [Deed of Company Arrangement (**DOCA**)] proposal for Midland on 29 July 2015, and a revised DOCA proposal on 12 October 2015.

51 On around 16 October 2015, Bilkurra Investments wrote to option holders in the Bendigo Hermitage scheme, asking them to vote in support of Bilkurra Investments' proposed DOCA and enclosed a letter to option holders signed by Stephens as director of Bilkurra Investments.

52. A draft of the letter to option holders was sent to Grochowski, who sought approval from Stephens as director of Bilkurra before agreeing that it could be sent out.

53. On 3 December 2015, in response to ASIC's application under s 447A of the Corporations Act, Beach J ordered that the creditors' resolution approving the DOCA be set aside, and that Midland instead be wound up.

VI. FOSCARI AND THE FOSCARI SCHEME

54. Foscari was incorporated on 8 May 2012. Foscari's sole shareholder is EEM, under the same trust structure as for GBC, as described in [paragraph 38] above.

55. On 29 May 2012, David Bracka entered into a purchase contract with the Chilean Club of Victoria for land at Truganina (the **Foscari land**) for $3.3 million.

56. Skinner was appointed director of Foscari on 8 June 2012, which role he retained until replaced by Stephens from 1 October 2014.

57. On 11 June 2012, Foscari entered into a Project Management Agreement with PMA (the **Foscari Project Management Agreement**), in materially identical terms to the Project Management Agreements entered into by Midland and Bilkurra Investments, save that the project management fee was $3,300 for the first 70 lots and $2,200 for all subsequent lots.

58. The Foscari scheme was marketed by Market First Property Consulting Pty Ltd (**Market First**) on behalf of Foscari.

59. In accordance with the Foscari Project Management Agreement, PMA opened a project management account for Foscari, into which deposits and withdrawals of $18.1 million were made between January 2014 and March 2015. Grochowski was the sole signatory to the Foscari project management account.

60. In December 2013, Foscari (together with Bilkurra Investments) entered into a loan agreement with Adelaide/Lezak, for a loan of $3.35 million, at a "discounted" interest rate of 12.75% per annum and an "agreed rate" of 18.75%.

61. There were 149 investors in the Foscari scheme by way of:

61.1 around 41 who entered into option deeds, investing around $858,000

in option fees; and

61.2 around 108 who entered into off-the-plan purchase contracts and paid around $1.5 million in purchase deposits.

62. The option deed that Foscari entered into with investors included the same terms regarding use and refund of option fees as in the option contracts for the Hermitage Bendigo project.

63. Inter-company transfers were made to Foscari from:

63.1 Midland, in the net amount of $5.8 million; and

63.2 Brookfield Riverside, in the net amount of $1.5 million.

64. Between May 2012 and April 2016, Foscari also paid:

64.1 approximately $5.0 million, to Evans Ellis;

64.2 approximately $1.3 million, to Market First;

64.3 approximately $1.0 million, to PMA, together with net transfers of a further $380,000 in favour of PMA; and

64.4 net transfers of approximately $700,000 to Bilkurra Investments; and

64.5 approximately $8.1 million on site development costs.

65. On 16 October 2014, Foscari made a payment of $400,000 to [Evans Ellis's] trust account towards the deposit on a purchase contract entered into by the Fourth Defendant (**Bilkurra South**).

66. The payments and transfers from Foscari to PMA and Bilkurra Investments, and in respect of Bilkurra South's purchase contract were made by Grochowski.

67. From December 2014, Foscari experienced difficulties in meeting its loan commitments. As a result:

67.1 it extended and increased its existing loan facilities with Adelaide/Lezak and Bourke & Queen; and

67.2 on 5 June 2015, Foscari entered into a loan agreement with NWC Finance Pty Ltd to borrow $1.12 million, at a lower interest rate of 24% per annum and a higher rate of 60% per annum;

67.3 on 25 September 2015, Adelaide/Lezak issued a notice of default to Foscari; and

67.4 on 30 November 2015, NWC Finance [Pty Ltd] appointed receivers and managers to the assets of Foscari.

68. As of November 2015, Foscari had obtained a planning permit for the Foscari scheme but had not obtained endorsed plans or satisfied the further requirements for development approval. It had encountered contamination issues affecting the site.

69. As a consequence of its failure to complete the subdivision and redevelopment of the Foscari land, Foscari became indebted to option holders for the refund of the option fees of at least $858,000 that remained invested in the Foscari

project.

70. Foscari was not in a position to meet its obligation to refund the $858,000 in option fees that it received from investors in the Foscari scheme. All of the moneys invested in the scheme by investors who entered into option contracts have been expended including as set out at [64 and 65] above.

71. On 15 April 2016, Foscari was wound up in insolvency, and on the just and equitable ground. [TPC (Vic) Pty Ltd] entered into possession of the Foscari land on 27 May 2016.

72. Although not formally appointed a director, Grochowski was an officer of Foscari at all material times until it was wound up in insolvency on 15 April 2016.

VII. BROOKFIELD RIVERSIDE AND THE VENEZIANE SCHEME

73. Brookfield Riverside was incorporated on 21 June 2012. Skinner was appointed as its sole director, which role he retained until replaced by Stephens from 1 October 2014.

74. Although he was not formally appointed as an officer or director of Brookfield Riverside, Grochowski exercised control over the financial affairs and project development activities of Brookfield Riverside pursuant to the Brookfield Project Management Agreement as described below.

75. Brookfield Riverside's sole shareholder is EEM, under the same trust structure as for GBC, as described in [paragraph 38] above.

76. On or around 6 July 2012, Brookfield Riverside entered into a Project Management Agreement with PMA (the **Brookfield Project Management Agreement**), which Grochowski prepared.

77. The Brookfield Project Management Agreement was in substantially identical terms to the Midland Project Management Agreement, save only that:

    77.1 it included a new cl 6.1(c), which obliged the Owner to "keep in a separate account any and all Revenue amounts arising from the Project from time to time and part of such Revenue amounts if and where requested by the Project Manager";

    77.2 cl 8.1(a) provided that "the Project Manager has been authorised by the Owner to maintain a trading account with [a bank] nominated by the Owner";

    77.3 cl 8.1(b) provided that "the Project Manager and Owner agree to deposit all monies received in respect of the Project ... on investment deposit with the account ("Project Bank Account")";

    77.4 cl 7.3(a) provided that "the Project Manager shall be hereby entitled to take a loan on an interest-free basis of any or all of the funds the Project Manager holds on trust for the Owner and/or the Owner's Related Entities and/or the Project" (underlining added to show key differences from the Midland Project Management Agreement);

    77.5 cl 9.2(b) and (c) provided that the Project Manager (rather than the Owner) was responsible for completing accounts for the project for each financial year, including financial reports, projected budgets, balance sheets, cash flow statements and profit and loss statements;

and

77.6 the project management fee was $3,300 per lot.

78. The Veneziane scheme was marketed by Market First, which received a commission of around 35% for each lot for which investors entered into an option contract or an off-the-plan purchase contract.

79. On around 9 July 2012, in accordance with the Brookfield Project Management Agreement, PMA opened two project accounts in respect of Brookfield Riverside, of which the primary account was the **Brookfield 5318 account**. Grochowski was the sole signatory for the Brookfield 5318 account.

80. Between 9 July 2012 and 18 June 2016, about $20 million was deposited into, and withdrawn from, the Brookfield 5318 account.

81. Between June and October 2012, David Bracka entered into three purchase contracts, and a call option, in relation to four parcels of land in Brookfield (the **Brookfield land**). On the day after he entered into each agreement, Bracka nominated Brookfield Riverside as the purchaser or option holder. The aggregate consideration under those contracts was about $27 million, with settlement due to occur between April 2016 and July 2017. Aggregate deposits of about $4.2 million were payable in respect of the 3 contracts of sale.

82. These deposits were funded in part by about $2.055 million advanced from Midland to Brookfield Riverside, which Grochowski paid, and for which no written loan agreement was entered into.

83. In July 2015, Brookfield Riverside paid the $1.5 million option fee in respect of the fourth parcel of the Brookfield land, and entered into a purchase contract for that land, for which settlement was due to occur on 30 April 2016.

84. Between 2012 and 2014, Brookfield Riverside operated the Veneziane scheme and raised approximately $13.8 million in funds from 359 investors;

84.1 around $13 million in option fees were paid by 247 investors who entered into option contracts; and

84.2 around $800,000 was paid by way of deposits on off-the-plan sale contracts by a further 112 investors.

85. Like the option contracts for the Bendigo Hermitage scheme, the option contracts for the Veneziane scheme stated that:

85.1 any option fees paid by the investor would become the absolute property of Brookfield Riverside, and that Brookfield Riverside was free to direct and use such funds as it sees fit for any purpose whatsoever: cl 4.2; and

85.2 the option fee shall be refunded to the investor:

(i) if the investor has not received written notice of planning approval from Brookfield Riverside at the expiration of the option term (10 years from the date of the deed): cl 14.1; or

(ii) in the event that Brookfield Riverside's purchase contracts for the Brookfield land are not completed for any reason whatsoever: cl 15.3.

86. The option fees were paid by investors to a trust account operated by Evans Ellis and were then transferred to the Brookfield 5318 account at the request of Grochowski or one of his staff (which request was confirmed by Skinner). Between June 2012 and July 2016, Evans Ellis paid at least about $12.3 million into the Brookfield 5318 account.

87. Transfers in the following aggregate amounts were made to and from the Brookfield 5318 account:

    87.1 around $3.5 million in payments to Market First;

    87.2 around $2.07 million from Brookfield Riverside to Foscari, and around $364,000 from Foscari to Brookfield Riverside;

    87 .3 around $695,000 from Brookfield Riverside to Bilkurra Investments, and around $64,500 from Bilkurra Investments to Brookfield Riverside;

    87.4 payments to PMA, described as "PMA Inv", totalling about $828,000;

    87.5 additional payments to PMA, described as "Brookfield to PMA", of about $822,000, and receipts from PMA, described as "PMA to Brookfield" of about $321,500.

88. Other significant payments were made from the Brookfield 5318 account to provide funding towards land purchases by the other Project Companies, namely:

    88.1 a payment of $350,000 to Bilkurra West on 15 May 2014: see [para 100] below; and

    88.2 a payment of $145,000 to Gillies Road on 10 July 2014: see [para 116] below.

89. The payments and transfers from Brookfield Riverside to Foscari, Bilkurra Investments, Bilkurra West, Gillies Road, PMA and Market First were made by Grochowski.

90. Settlement of Brookfield Riverside's purchase contracts for the Brookfield land has not occurred, and the settlement date under each contract has passed. Accordingly, the $13 million in option fees paid by investors has become refundable in accordance with the terms of the option agreements.

91. Brookfield Riverside was never in a position to meet its obligation to refund the $13 million it had received from investors who entered into option contracts for the Veneziane scheme. All of the option fees invested in the scheme by investors have been expended as set out at [paragraphs 87 and 88] above.

92. Since June 2017, pursuant to instructions given by Stephens[,] Evans Ellis has commenced refunding deposits to off-the-plan investors in the Veneziane scheme. To November 2017, Evans Ellis had refunded around $280,000 of approximately $800,000 in deposits paid by investors who entered into off-the-plan purchase contracts.

93. Brookfield Riverside was wound up on the just and equitable ground, and in insolvency, on 16 July 2018.

VIII. BILKURRA WEST

94. Bilkurra West was incorporated on 11 April 2014. Skinner was appointed as its sole director, which role he retained until replaced by Stephens from 23 October 2014.

95. Although he was not a director of Bilkurra West, Grochowski exercised control over the financial affairs and project development activities of Bilkurra West under the Bilkurra West Project Management Agreement as described below.

96. EEM is Bilkurra West's sole shareholder, under the same trust structure as for GBC, as described in [paragraph 38] above.

97. On around 30 April 2014, Bilkurra West entered into a Project Management Agreement with PMA. The agreement is in materially identical terms to the Brookfield Project Management Agreement ([para 76] above), save only that:

    97.1 cl 6.1(c) of the Brookfield Project Management Agreement was not included; and

    97.2 cl 8.1(a) provided that the Project Manager shall utilise the Bilkurra project bank account. Grochowski was the sole signatory of that account.

98. On 14 November 2013, David Bracka entered into contracts of sale for three parcels of land adjacent to the Bilkurra land (the **Bilkurra West land**). The aggregate price for the land was $8 million. Deposit payments of $200,000 were due on the day of sale, with a further $200,000 due 6 months after the day of sale (13 April 2014). The settlement date for one contract was 14 November 2015, and for the other two contracts was 14 November 2016.

99. On around 11 April 2014, Bracka signed nomination forms nominating Bilkurra West as the purchaser under each contract.

100. On 15 May 2014, Brookfield Riverside made a deposit of $350,000 into the Bilkurra project bank account; and on the same date two debits of $100,000 were made, with narrations referring to the two parcels of Bilkurra West land for which deposits of $100,000 were due on 13 April 2014.

101. Brookfield Riverside made those advances out of Brookfield Riverside's option fee revenue, towards Bilkurra West's purchases of the Bilkurra West land.

102. The Bilkurra West land was marketed to investors as part of the Hermitage Bendigo scheme. Between July 2014 and February 2015, 47 investors entered into off-the-plan purchase contracts with Bilkurra West to buy lots in the proposed subdivision of the Bilkurra West land, paying around $744,000 in deposits.

103. Bilkurra West did not complete its purchase contracts for the Bilkurra West land.

104. Since June 2017, pursuant to instructions given by Stephens[,] Evans Ellis has commenced refunding deposits to off-the-plan investors in relation to the Bilkurra West land. To November 2017, Evans Ellis had refunded around $654,000 of approximately $744,000 in deposits paid by investors who entered into off-the-plan purchase contracts.

105. Bilkurra West was wound up on the just and equitable ground, and in insolvency, on 16 July 2018.

IX. GILLIES ROAD AND THE GILLIES ROAD SCHEME

106. Gillies Road was incorporated on 21 May 2013. Skinner was appointed as its sole director, which role he retained until replaced by Stephens from 1 October 2014.

107. Although he was not a director of Gillies Road, Grochowski exercised control over the financial affairs and project development activities of Gillies Road under the Gillies Road Project Management Agreement as described below.

108. EEM is Gillies Road's sole shareholder, under the same trust structure as for … GBC, as described in [paragraph 38] above.

109. On or around 5 June 2013, Gillies Road entered into a Project Management Agreement with PMA (the **Gillies Project Management Agreement**) on materially identical terms to the Brookfield Project Management Agreement. Grochowski drafted the Gillies Project Management Agreement.

110. On around 12 June 2013, in accordance with the Gillies Project Management Agreement, PMA opened two project accounts in respect of Gillies [Road], of which the primary account was the **Gillies 7489 account**. Grochowski was the sole signatory for the Gillies 7489 account.

111. Between 12 June 2013 and 11 January 2016, approximately $673,500 was deposited into, and withdrawn from, the Gillies 7489 account.

112 On or around 30 May 2013, Gillies Road entered into a call option deed and a contract of sale in relation to two adjoining properties on Gillies Road, Miners Rest (the **Gillies Road land**). Under the call option, an option fee was payable in two tranches of $250,000 plus GST, the first due on the day of signing, and the second due on 1 May 2014. Under the purchase contract, a deposit of $1,000 was due on the day of signing. The aggregate purchase price of the Gillies Road land was approximately $48.75 million.

113. The option period for exercise of the call option expired on 1 May 2016. The purchase contract was expressed to be conditional upon:

113.1 the property being rezoned residential;

113.2 Gillies Road obtaining planning approval for the development; and

113.3 Gillies Road exercising the option under the call option deed,

by 30 May 2016.

114. Grochowski gave guarantees to the vendors of the Gillies Road land in respect of Gillies Road's performance of both the option deed and the purchase contract.

115. On 30 May 2013 (and before the Gillies 7489 account was opened), Midland transferred $250,000 to a bank account maintained by PMA (the **PMA 8129 account**). On 31 May 2013, two cheque withdrawals of $275,000 and $1,000 were made from that account, in payment of the option fee and deposits due on signing of the option deed and purchase contract for the Gillies Road land.

116. On 10 July 2014, Brookfield Riverside transferred $145,000 to the Gillies

7489 account. On the same day, a payment was made from that account to the vendor of the Gillies Road land, in part payment of the second tranche of the option fee that was due on 1 May 2014.

117. The advances made to Gillies Road by Midland and Brookfield Riverside were transacted by Grochowski, and while recorded as loans in the MYOB accounts, were not documented by written loan agreements.

118. Gillies Road did not enter into option contracts or off-the-plan sale contracts with investors.

119. Gillies Road did not exercise the call option or obtain rezoning or planning approval by May 2016. Accordingly, both the call option and the purchase contract have lapsed.

120. Gillies Road was wound up on the just and equitable ground, and in insolvency, on 16 July 2018.

Date: August 2018

SCHEDULE OF PARTIES

VID 325 of 2018

Defendants

Fourth Defendant:	BILKURRA SOUTH PTY LTD (ACN 602 374 390)
Fifth Defendant:	GILLIES ROAD PTY LTD (ACN 163 866 724)
Sixth Defendant:	MICHAEL STEFAN GROCHOWSKI
Seventh Defendant:	IAN EDWARD STEPHENS