Baker McKenzie.

KordaMentha

# Response to ASIC Consultation Paper 326: Chapter 6 Relief for Share Transfers Using s 444GA of the Corporations Act

# Background to this response

KordaMentha and Baker McKenzie make this joint submission to ASIC based on their experiences in the administration (and subsequent deed administration) of Ten Network Holdings Ltd (**Ten**) described in more detail below, in which ASIC relief from Chapter 6 of the Corporations Act[1] was sought (and obtained) in conjunction with a successful application made to the Court under s 444GA for leave to transfer all of the shares in ASX listed Ten to CBS.

This response also draws on KordaMentha's experiences in:

- having sought and obtained ASIC relief from Chapter 6 of the Corporations Act in conjunction with successful applications made to the Court under s 444GA in the deed administrations of each of Mirabela Nickel Limited (**Mirabela**) and Black Oak Minerals Limited (**Black Oak**); and
- their current experience as deed administrators of Alita Resources Limited (**Alita**), where the relevant s 444GA application is currently before the Court with a hearing scheduled for 4 March 2020

in each case acting as administrators and relevantly preparing the experts' report sent to shareholders for the purpose of seeking ASIC relief from Chapter 6 to enable the 444GA transfer to proceed.

In summary, our views (as discussed in more detail below) are:

- the inclusion of a going concern valuation in an expert's report sent to shareholders in support of ASIC relief relating to 444GA orders is unnecessary and misleading and of no assistance to the Court in considering a 444GA application;
- the administrator will generally be best placed to provide relevant material to shareholders in relation to a 444GA application and is appropriately independent; and
- if the Court is satisfied that the making of the 444GA orders causes no unfair prejudice to shareholders as required by s 444GA(3), then that ought to be sufficient to enable ASIC to grant the necessary waiver.

## The Ten administration and s 444GA application

Mark Korda, Jennifer Nettleton and Jarrod Villani of KordaMentha (**Administrators**) were the voluntary administrators of Ten. At their appointment, Ten had approximately 17,000 shareholders and had been suspended from trading.

At the second meeting of creditors, the creditors of Ten resolved that the company should enter into a deed of company arrangement (**DOCA**) which included as conditions precedent that leave be granted pursuant to section 444GA for the transfer of all of the shares in Ten to CBS and that ASIC relief necessary to permit that transfer of shares be obtained.

An explanatory statement (**ES**) and independent expert's report (**IER**) were issued by the Administrators to Ten shareholders. As noted by the independent expert Ian Jedlin of KPMG, the IER was to be:

- used for the purpose of the s 444GA court application to assist the Court in determining whether the proposed transfer of shares to CBS would unfairly prejudice shareholders;

[1] *Corporations Act 2001* (Cth).

- used for the purpose of applying to ASIC for relief from the takeover provisions of the Corporations Act; and
- included in an explanatory statement to be sent to shareholders.

As required by ASIC, the IER valued Ten on both a going concern basis and on a liquidation basis. In Ten, the Deed Administrators used an independent expert due to the nature of the industry in which Ten operated, and the litigious context of the administration.[2]

Three individual Ten shareholders (**Ten Shareholders**) appeared unrepresented at the 3 day hearing of the Administrators' s 444GA application and unsuccessfully opposed the making of the s 444GA orders.

Shortly after the conclusion of the hearing, Justice Black in the Supreme Court of New South Wales made orders pursuant to s 444GA of the Corporations Act giving the Administrators leave (subject to satisfaction or waiver of the other conditions precedent in the DOCA) to the transfer all of the issued shares in Ten to CBS.

Baker McKenzie acted for the Administrators in the s 444GA application.

A short summary timeline of the Ten administration can be found at **Appendix 1** to this submission.

The relevant history of the Ten administration is summarised in the judgment of Justice Black on the s 444GA application, *In the matter of Ten Network Holdings Limited (subject to deed of company arrangement)(receivers and managers appointed)* (2017) 123 ACSR 253, a copy of which appears at **Appendix 2** to this submission, at paragraphs [3] to [14].

## The Black Oak and Alita administrations and s 444GA applications

We also attach as **Appendices 3 and 4** timelines and short summaries of the administrations and s 444GA applications in respect of Black Oak and Alita respectively.

**B1: We propose to include guidance in RG 6 about when we will grant relief to facilitate a s444GA transfer, namely where**:

**(a)** **an IER is prepared in accordance with RG 111; and**

(b) **the IER and explanatory materials are made available to shareholders before the s444GA hearing.**

**B1Q1 Do you agree that ASIC should require an IER to be prepared in accordance with RG 111 and that the IER and explanatory materials should be provided to shareholders before the hearing? If not, why not?**

See our consolidated response below to B1Q3.

**B1Q2 Are there situations where you consider the IER might be unnecessary? If so, please outline the circumstances**.

See our consolidated response below to B1Q3.

[2] As discussed elsewhere in this submission, the deed administrators in each of Mirabela, Back Oak and Alita prepared the report themselves rather than use an independent expert.

**B1Q3 Do you consider that the administrator's report to creditors could be used instead of an IER? If so, on what basis? If not, why not?**

We agree that materials should be made available to shareholders before the hearing of the s 444GA application to enable shareholders to decide whether or not they wish to appear at the hearing and oppose the application (as they are entitled to do under s 444GA(2)(a)). We note that a relevant consideration for the Courts on the hearing of the s 444GA application is whether a full and accurate description has been given to shareholders and whether they have been given a full opportunity to appear in opposition to the application.[3]

In considering the form, content and author of those materials, it is important to appreciate that the *only* decision that shareholders can make on receipt of these materials is whether or not they will appear before the Court to oppose the application. Relevantly, there is no offer being made to shareholders for the acquisition of their shares (the transfer will be for nil consideration) and the transfer of shares can occur with leave of the Court whether or not the shareholders consent to the transaction.

Contrast this with an IER in a typical takeover transaction, where shareholders are able to actively decide whether to accept the bid (or, in a scheme of arrangement, to vote for the scheme). The IER will not only assist with that decision, it will also allow shareholders to assess (based on the premium for control being offered) whether an alternative, higher bid might be forthcoming from another bidder. This level of active decision making by shareholders is not part of a s 444GA process, and there is no premium for control being offered to them. Accordingly, the traditional purpose of an IER is not present in relation to a s 444GA process.

To put it another way, in a solvent takeover transaction the *magnitude* of the valuation is critically important - it determines whether or not the offer price is above or below the valuation. However, in a s 444GA transaction the magnitude is irrelevant - all that matters is that the value of equity is below zero. The size of the net asset deficiency is very relevant to unsecured creditors, but not at all relevant to shareholders.

The nature of the information that shareholders need, therefore, is quite different from what they would need in a takeover transaction. All they need to know is that equity is worth less than zero. Often, it will not require an independent valuation prepared in accordance with RG 111 to determine this.

We further note that in a solvent takeover transaction there is usually no legal obligation to provide an IER. It is the practice in schemes of arrangement to provide an IER (even when not legally required). However in agreed or recommended takeover bids there will often be no IER, and the target's directors will make a recommendation to shareholders themselves, based on their own assessment of the value of the company and taking account of any auction or sale process that they have undertaken in reaching the agreed bid.

With that in mind, we consider that prior to the hearing of the s 444GA application:

[3] See for example *Re Centennial Mining Ltd* (subject to deed of company arrangement) [2019] WASC 441 at [19].

(a) the administrator's report to creditors required by Rule 75-225 of the Insolvency Practice Rules (Corporations)[4] (**Administrator's Report to Creditors**) should, with some additions, generally and unless exceptional circumstances apply or the administrator considers it appropriate, be provided to shareholders in place of an IER even in circumstances where ASIC relief from Chapter 6 is sought; and

(b) as discussed below, a short supplementary document in the nature of an explanatory statement should also be made available to shareholders.

## Administrator's Report to Creditors

The Administrator's Report to Creditors is required to be provided to creditors before the second meeting of creditors convened pursuant to section 439A of the Corporations Act irrespective of the type of company in administration, whether or not a DOCA or a DOCA combined with a transfer of shares under s 444GA is proposed. That is, the preparation of the administrator's report is an expense that the administrator is already required by the Corporations Act to incur (whether or not those fees are recoverable from the assets of the company).

The requirement to obtain an IER on the other hand is an additional and not insignificant expense[5] which presently is only required as a condition of ASIC relief (even though not required by law) if the company in administration is a company to which the takeovers prohibition in Chapter 6 applies and a DOCA which proposes a transfer of shares under s 444GA has been approved by creditors.

Given the administrator's specialist insolvency expertise and their knowledge of the company, we consider that the administrator is best placed to understand the history of the company, its assets and liabilities (having access to the books and records) and the potential sale value of assets (having either run the sale process or been involved in a sale process run by a receiver appointed to the assets), being matters required to be included in any event in the Administrator's Report to Creditors.

The administrator is also required to opine in the Administrator's Report to Creditors on the potential outcomes to creditors and shareholders pursuant to the proposed DOCA and, in the alternative, in liquidation.

---

[4] Rule 75-225 of the Insolvency Practice Rules (Corporations) requires that the notice of the second meeting of creditors be accompanied by:

(a) a report by the external administrator about the company's business, property, affairs and financial circumstances; and

(b) a statement setting out the following:

(i) whether, in the administrator's opinion, it would be in the creditors' interests for the company to execute a deed of company arrangement;

(ii) whether, in the administrator's opinion, it would be in the creditors' interests for the administration to end;

(iii) whether, in the administrator's opinion, it would be in the creditors' interests for the company to be wound up;

(iv) the reasons for the opinions referred to in subparagraphs (i) to (iii);

(v) such other information known to the administrator as will enable the creditors to make an informed decision about each matter covered by subparagraph (i), (ii) or (iii);

(vi) whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Part 5.7B of the Act;

(vii) if a deed of company arrangement is proposed — details of the proposed deed.

[5] The independent expert who provided the IER in relation to the Ten s 444GA application disclosed in the IER that the fee charged for preparing the report was $370,000.

## Explanatory statement / supplementary document addressed to shareholders

Shareholders are generally not entitled to receive the Administrator's Report to Creditors except in the limited circumstances provided for in 600H of the Corporations Act. Consequently, we accept that if the Administrator's Report to Creditors is to be provided to shareholders, it requires some clarification to explain to shareholders the context in which the report is being provided.

We recommend that, where a DOCA that requires orders to be made under s 444GA has been approved by creditors, the Administrator's Report to Creditors be forwarded to shareholders in advance of the proposed hearing of the s 444GA application under cover of a short supplementary document[6] containing:

(a) the content typically included in the explanatory statement sent to shareholders explaining relevantly the context in which the Administrator's Report to Creditors is being provided, the options available to shareholders (primarily the right to oppose the orders sought) and the consequences of pursuing such options;[7]

(b) a statement that the Administrator's Report to Creditors is enclosed for the information of shareholders; and

(c) a statement by the administrator as to whether or not, in his or her opinion, it is likely that all unsecured creditors will be paid in full in a liquidation scenario and, consequently, whether shareholders are likely to receive any distribution in a liquidation scenario.[8]

* * * *

**B2 If we proceed with Proposal B1, we propose that the IER should be prepared solely on a liquidation basis where the only alternative is liquidation. Where the valuation shows no likely return for shareholders on this basis, we will normally grant relief, subject to the IER and explanatory materials being provided to shareholders and the Court granting leave**.

**B2Q1 Do you agree with our proposal that an IER should only be prepared on a liquidation basis? If not, why not?**

Yes. We agree that any report to be sent to shareholders (whether it be an IER, or the Administrator's Report to Creditors as we propose) to satisfy the requirements of proposed ASIC relief from Chapter 6 should not include a valuation on a going concern basis.

Preparing the IER on a going concern basis where the only alternative to the DOCA is liquidation:

(a) has no practical utility as a going concern basis is not an available option, and therefore delays the implementation of the DOCA and incurs unnecessary cost;

[6] An alternative would be to do a variation of the report to creditors including this content, but this approach reduces duplication and potential confusion.

[7] In light of our experience in Ten, we suggest that the content of this document be required to inform shareholders of their potential exposure for costs if they unsuccessfully oppose the 444GA application, it should make clear to shareholders the limitations of their right to oppose the 444GA application, and should include a statement by the administrator as to the likely outcome for the company (and consequently for creditors and shareholders) if the 444GA orders are not made.

[8] Noting the opinion that the administrator is already required to express as detailed above. This statement would be in lieu of any formal valuation of the company, which for the reasons discussed below is of less relevance than the ultimate question for the Court which is whether shareholders have any economic interest in the company which means that they will be unfairly prejudiced by the making of the s 444GA order.

(b) is of no utility to the Court in its consideration of the s 444GA application and in particular the question as to whether the transfer would not unfairly prejudice the interests of shareholders; and

(c) is misleading to shareholders, in that it suggests the company continuing as a going concern is an available option when it is not.

We expand on these reasons below, having particular regard to our experience in Ten.

## No practical utility

The Ten IER ran to 114 pages, and valued Ten's equity on both a going concern and a distressed basis as required by ASIC.

As to the going concern valuation, the independent expert noted in his report[9] that:

> *It is important to recognise that the going concern valuation assumes Ten Network's current financial difficulties do not exist and sufficient funding is available to pursue its operations.* ***In our opinion, these assumptions are inappropriate and as such, a valuation on this basis overstates the realisable value of Ten Network's business and/or assets in the absence of the DOCA****. The going concern valuation has been prepared on this basis in accordance with the requirement of ASIC, as discussed in Section 5.1 of this report. The more relevant assessment of value for the purpose of assisting the Court in determining whether the proposed transfer of shares to CBS Australia will unfairly prejudice shareholders is our distressed valuation. (emphasis added)*

In the Ten judgment, Justice Black noted[10] that:

> *Turning to KPMG's going concern valuation in more detail, that valuation assumed that [Ten] would continue its operations for the foreseeable future and would be able to realise its assets and discharge its post-administration liabilities in the normal course of business. Mr Jedlin rightly pointed out that that basis of valuation assumed that [Ten's] current financial difficulties did not exist and that sufficient funding was available to pursue its operations and he expressed the view that those assumptions were inappropriate and that a valuation on that basis overstated the realisation value of [Ten's] business and/or assets in the absence of the CBS DOCA.*

Justice Black concluded[11] that:

> *… Ten Group's business is properly treated as presently distressed…..* ***There is no basis, in my view, for undertaking a valuation of Ten on a going concern basis****. (emphasis added)*

One very real practical consequence of the above is that the Administrators were required to obtain a complex going concern valuation which was of no practical utility. It is submitted that the cost of that IER would have been significantly less if the independent expert was only required to value Ten on a distressed basis reflecting its then current position.

[9] At page 4.

[10] At paragraph [45].

[11] At paragraph [52].

Although the above represents the outcome of the Ten administration, similar reservations about the reliability of the going concern valuation have been expressed by other independent experts and the Court in similar circumstances.[12]

## No utility for the Court

If an expert's report has been prepared on the basis of assumptions which are not supportable, the opinion expressed has little to no utility for the Court in assessing the ultimate question of whether or not the proposed transfer of shares is unfairly prejudicial to shareholders, as we note above in the context of Justice Black's decision in Ten.

On several occasions since Ten, Courts have stated that a going concern valuation which includes assumptions that are not supported by evidence was "of little relevance"[13] and "of little utility"[14].

In the usual course, the Court is generally concerned with whether or not there is residual value in the equity by reference to a comparison between the likely returns to shareholders if the transaction is given effect to and their position if it is not (which will typically be a liquidation scenario).

## A going concern valuation is misleading to shareholders

As noted in the Ten IER (and consistent with reservations expressed in other IERs obtained for the same purpose), in order to prepare a valuation on a going concern basis, the independent expert is essentially required to disregard the current financial difficulties faced by the company and is therefore likely to overstate the realisable value of the assets of the company in the absence of the DOCA.

Even if the independent expert includes an opinion as to the usefulness of valuing the company on a going concern basis, we are of the view that including such an opinion, even with disclaimers may mislead at least some shareholders. We consider that it is not unreasonable for shareholders to consider that if ASIC require a valuation on this basis that it is useful and relevant. However this is not the reality.

As is evident from the Ten judgment,[15] much time at the 3 day hearing was taken up with the submissions of the Ten Shareholders in relation to the going concern valuation in the IER which was (obviously, and as Justice Black noted) more favourable to them and yet irrelevant. It is possible that the Ten Shareholders may have taken a different position on appearing at the hearing of the section 444GA application - and potentially exposing themselves to adverse costs orders in so doing - had they appreciated the irrelevance of the going concern valuation, and that it did not represent an alternative scenario for Ten that was available.

From a policy perspective, the additional expenses of an IER with a going concern valuation, and the potential additional legal and court costs associated with dealing with unrealistic shareholder expectations, could ultimately mean that less funds are available for distribution to creditors.

**B2Q2 Should an independent expert consider, when performing a liquidation valuation, potential recoveries from voidable transactions and other matters as a result of the administrator's investigations? If not, why not?**

---

[12] See for example *Re Nexus Energy Limited* [2014] NSWSC 1910 at [68] to [70], *Re Paladin Energy Limited* [2018] NSWSC 11 (Black J) at [7] and *Re Oroton Group* (White J) at [28].

[13] *Re Paladin Energy Ltd (subject to deed of company arrangement)* [2018] NSWSC 11 (Black J) at [7].

[14] *Re Oroton Group Ltd (subject to deed of company arrangement*) [2018] NSWSC 1213 (White J) at [28].

[15] At paragraphs [44] to [72].

If an independent expert report is required, then the inclusion or exclusion of potential liquidation recoveries from claims that will not be capable of being pursued if the DOCA is implemented should be a matter for the independent expert having regard to the contents of the Administrator's Report to Creditors. We expect that liquidation recoveries would generally be included, on the basis that these will form part of the assets available for creditors and, if there is a surplus after creditor claims, for distribution to shareholders.

Having said that, we reiterate our position articulated above that the administrator will generally be best placed to give the opinion on the likely outcomes if the transaction is implemented versus a liquidation (which is the general comparator used by the Courts).

Accordingly, if the independent expert considers liquidation recoveries relevant, he or she should generally rely on the estimates of these given by the administrator in the Administrator's Report to Creditors, as usually we would not expect the independent expert to have the expertise to from of view on the likelihood of liquidation recoveries, and obtaining separate evidence on the value of such recoveries would be duplicative and incur unnecessary costs.

**B2Q3 Do you consider that a 'going concern' valuation of the business is relevant or useful for a company in administration? If so, why?**

No, for the reasons discussed above.

**B2Q4 If you agree with the previous question, should ASIC refuse relief where the going concern value shows the shares have some value?**

Not applicable given our answer to B2Q3 above.

We do however provide a response to this question in the event that ASIC determines that it will continue to require a going concern valuation to be provided to shareholders.

For this purpose, we are of the view that given the lack of utility of the going concern valuation which necessarily assumes circumstances that do not exist in reality, a going concern valuation which shows value should not, and particularly should not in and of itself, be a basis for ASIC refusing relief, particularly if the Court is separately satisfied that the going concern valuation should not be adopted, determines that there is no unfair prejudice to shareholders and makes the s 444GA order.

If ASIC refused relief in those circumstances, then in all likelihood (and obviously dependent on the terms of the DOCA), the DOCA would terminate for failure to satisfy a condition precedent and the company will enter into liquidation. This outcome would offer no benefit to shareholders (i.e. their position would remain the same; no distribution available to shareholders) but it would have a potentially detrimental impact on creditors assuming that the DOCA would have or was at least likely to have produced a greater return to creditors than a winding up.

In our view, for ASIC to take this position would be effectively to prefer the interests of shareholders over the interests of creditors in insolvency in circumstances where it has been recognised by the Courts that Part 5.3A of the Corporations Act focusses on the interests of creditors[16] and in circumstances where shareholders have no real economic interest in what is being proposed given that the assets of the company are insufficient to satisfy its creditors in full.

**B2Q5 Are there other factors that we should take into account when considering whether to grant relief?**

[16] *Brash Holdings Ltd v Shafir* (1994) 14 ACSR 192.

In our experience, ASIC does not grant the relief until after the court has made orders under s 444GA giving the deed administrator leave to transfer the relevant shares. Given that ASIC has a level of oversight in respect of materials sent to shareholders in advance of the s 444GA hearing and has standing to appear at the hearing to oppose the orders being made, **if the Court is satisfied that the making of those orders causes no unfair prejudice to shareholders within the meaning of s 444GA(3), then in our view that ought to be sufficient**. That is, if ASIC holds any concerns then these should be ventilated before or during the s 444GA hearing and if - notwithstanding any concerns expressed by ASIC - the Court still makes the s444GA order, then this should be sufficient for ASIC to grant relief.

* * * *

**B3 If we proceed with Proposal B1, we propose that the IER should be prepared consistent with the principles in RG 112. In our view, this would preclude the administrator (or another member of the administrator's firm or party associated with their firm) being the independent expert**.

**Initial observations**

Before responding to the consultation questions in this section, we make the following observations:

(a) As noted above, an IER is hardly ever legally required in a solvent takeover transaction.

An IER is only necessary where the bidder and target have a common director, or where the bidder already has at least 30% of the target[17]. Although market practice may be to prepare an IER in relation to a scheme of arrangement or perhaps a hostile takeover bid,[18] it is not the law. To include a requirement for an IER as a condition of relief in a s 444GA process would be to elevate it above the background legal landscape for solvent control transactions.

(b) Even where current ASIC policy does require expert advice to shareholders, it does not always require it to be provided by way of an independent expert.

RG 74 (*Acquisitions approved by members*) notes at RG 74.32 that the target company's directors could provide the advice to shareholders if they have sufficient "expertise, experience and resources". RG 74.33 further requires that the person providing the advice should not be associated with the proposal or have an interest in the resolution.

The administrators of a DOCA would almost always have the expertise, experience and resources to provide the necessary information for shareholders, noting the limited scope of what is relevant to them (see our submissions in relation to B1Q3 above).

Administrators would not typically have an interest in a proposal that would differ in substance from that of a target company's directors - in each case the directors or administrator would be very involved in developing the proposal for consideration by shareholders or creditors (as applicable), but would not have a personal interest in its success.

(c) Further to (b), an administrator is subject to onerous statutory and other obligations of independence.

---

[17] Corporations Act s 640. Equivalent requirements apply in respect of a scheme of arrangement - Sch 8,cl 8303 of the Corporations Regulations.

[18] ASIC RG 60 on Schemes of Arrangement does not expressly require an IER to be provided to shareholders, it merely notes at RG 60.74 the limited situations in which an IER is required by law.

An administrator must be a registered liquidator,[19] subject to oversight by ASIC and the Court.[20] Additionally, an administrator has statutory and professional organisation obligations of independence - see ss 448C and 449CA of the Corporations Act, as well as the principles set out in the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) Code of Professional Practice.

The administrator's obligations of independence are, importantly in this context, continuing during the appointment - the administrator must be independent to accept the appointment, and must maintain that independence throughout the appointment, including (where applicable) when developing and making a recommendation in relation to a DOCA.

That continuing obligation of independence places any administrator in at least a comparable position, if not a better position, to that of a director of a target company, such that it would be strange for RG74.32 to contemplate that a director may provide the relevant advice to shareholders, but not an administrator.

Accordingly, in our submission there are no compelling policy reasons to require an IER in all cases, and where a report is provided for the benefit of shareholders there is no compelling policy reason to treat the administrator as being fundamentally unable to provide proper advice to shareholders for the limited purpose of a s 444GA process.

**B3Q1 Do you agree with this view? If not, why not?**

We agree that RG 112 would preclude the voluntary administrator from preparing an IER in respect of the entity to which they have been appointed.

**B3Q2 Do you agree that the concepts of independence should be based on RG 112? If not, what other standards should be applied?**

We do not believe that RG 112 is a relevant measure of independence in the case of preparing an IER in a 444GA context. As noted above, the administrator is already subject to the independence requirements of the Corporations Act and ARITA.

**B3Q3 Do you believe that another member of the administrator's firm or party associated with the administrator's firm (or their advisory/consulting arm), who has not been involved in the administration, should be allowed to prepare an 'independent expert' report? If so, why? If not, why not?**

Yes, although from an independence perspective (and in light of the requirements of the Corporations act and ARITA referred to above) we consider that this would not be materially different from the administrator preparing the report.

* * * *

[19] Corporations Act s 448B.

[20] Corporations Act s 536.

# Appendix 1 – Timeline of the Ten section 444GA orders

| | |
|---|---|
| **13 June 2017** | Shares in Ten placed in a trading halt |
| **14 June 2017** | Appointment of Administrators after receipt of letter from guarantors |
| **30 June 2017** | Appointment of Receivers |
| **17 July 2017** | Federal Court extends the convening period until 20 November 2017 |
| **7 August 2017** | Invitation issued seeking bids for recapitalisation/acquisition |
| **24 August 2017** | Final bid deadline |
| **27 August 2017** | CBS transaction documents executed |
| **4 September 2017** | Rule 75-225 report to creditors issued by Administrators |
| **11 September 2017** | Supplemental report to creditors issued by Administrators |
| **19 September 2017** | Second meeting of creditors – CBS DOCA approved and executed |
| **10 October 2017** | Independent Expert's Report and Explanatory Statement released |
| **31 October – 2 November 2017** | S 444GA application heard by Black J; three shareholders appear and oppose |
| **10 November 2017** | Judgment by Black J on s 444GA application |
| **16 November 2017** | Completion of CBS transaction – DOCA is effectuated |

# Appendix 2 – Decision of Justice Black *In the matter of Ten Network Holdings Limited (subject to deed of company arrangement) (receivers and managers appointed)* (2017) 123 ACSR 253.



**Re TEN NETWORK HOLDINGS LTD (subject to a deed of company arrangement) (recs and mgrs apptd)**

5

SUPREME COURT OF NEW SOUTH WALES

BLACK J

31 October, 1, 2, 10 November 2017 — Sydney

10

[2017] NSWSC 1529

**Voluntary administration — Deed of company arrangement — Application under s 444GA of Corporations Act 2001 (Cth) for leave to transfer shares pursuant to deed of company arrangement — Whether residual equity existing in company — Whether transfer would unfairly prejudice company shareholders — (CTH) Corporations Act 2001 s 444GA.**

15

The Ten Group, which consisted of (among others) Ten Network Holdings Ltd (TNHL), operated a major Australian free to air television network. On 14 June 2017, the directors of the Ten Group companies resolved to appoint voluntary administrators on the basis that those companies were insolvent or likely to become insolvent. On 30 June 2017, receivers and managers were appointed to those same companies.

20

The receivers subsequently commenced a competitive process for the sale or recapitalisation of the Ten Group companies, which resulted in the submission of two binding offers: the first, from Birketu Pty Ltd (Birketu) and Illyria Investment Trust No 4 (Illyria), being existing shareholders of TNHL, and the second from CBS International Television Australia Pty Ltd (CBS Australia) and CBS Studios Inc (CBS). Each of these proposals provided for the entry into a deed of company arrangement (DOCA), the creation of a creditors' trust, and the transfer of shares in TNHL to the bidder, although the Birketu/Illyria proposal would have also allowed existing TNHL shareholders to retain 25% of the shares in TNHL.

25

30

Prior to the second creditors' meeting, Birketu/Ilyria and CBS submitted revised proposals. On 19 September 2017, at the second creditors' meeting, the creditors declined to adjourn the meeting to permit the voluntary administrators to further progress the Birketu/Illyria proposal, and instead approved the execution of a DOCA in the terms of the CBS proposal. The CBS DOCA provided that its completion was conditional on an order being made under s 444GA of the Corporations Act 2001 (Cth) (the Act) granting leave to the deed administrators to transfer all the shares in TNHL to CBS Australia or its nominee. The CBS DOCA also provided that if such an order was not made, CBS Australia would be permitted to enter into an "Alternative Asset Sale Transaction" by which some or all of the assets of the Ten Group companies were to be sold to it or its nominee and creditors were to be treated in the same manner as under the CBS DOCA and creditors' trust

35

40

In this application, the plaintiffs, as deed administrators of TNHL and several other companies within the Ten Group, sought an order under s 444GA of the Act that they be granted leave to transfer all existing shares of TNHL to CBS Australia or its nominee. Three shareholders in TNHL opposed the application.

45

**Held,** allowing the application:

(i) The Ten Group's business was distressed, and unable to survive without CBS's financial support, such that the only alternatives to the implementation of the CBS DOCA were either the implementation of the Alternative Asset Sale Transaction or the liquidation of TNHL by a sale of its business on a "distressed basis". Accordingly, despite the fact that the independent expert had performed a valuation of shares in TNHL on a going concern

50

basis to satisfy ASIC's regulatory requirements in respect of an application for relief from relevant provisions of Ch 6 of the Act, that valuation was irrelevant for the purposes of the s 444GA application: at [44], [52], [72].

> *Re Nexus Energy Ltd (subject to deed of company arrangement)* (2014) 105 ACSR 246; [2014] NSWSC 1910, applied.

(ii) The independent expert's valuation of TNHL shares on a distressed basis was a more appropriate and relevant valuation. It concluded that the implied value of equity in TNHL was negative. In light of that conclusion, and on the approach consistently adopted in the authorities, there was neither prejudice nor unfair prejudice in a transfer of the shares in TNHL to CBS Australia or its nominee: at [72], [95].

> *Weaver (in their capacity as joint and several deed administrators of Midwest Vanadium Pty Ltd) v Noble Resources Ltd* (2010) 41 WAR 301; 79 ACSR 237; [2010] WASC 182; *Re Kupang Resources Ltd (subject to deed of company arrangement) (recs and mgrs apptd)* [2016] NSWSC 1895, applied.

(iii) Contrary to the opposing shareholders' submissions, the existence of Birketu/Illyria's revised proposal did not support any finding that the proposed transfer of the shares in TNHL to CBS Australia or its nominee involved prejudice, or unfair prejudice, to TNHL's shareholders. In any event, that proposal was not capable of implementation as TNHL and Ten Group's creditors did not vote to adjourn the second creditors' meeting to pursue that proposal and instead voted in favour of execution of the CBS DOCA, which was subsequently executed: at [78].

## Application

This was the hearing of an application made by the deed administrators of Ten Network Holdings Ltd and certain of its related bodies corporate for leave to transfer the shares in Ten Network Holdings Ltd in accordance with a deed of company arrangement and s 444GA of the Corporations Act 2001 (Cth).

*C R C Newlinds SC* and *M Izzo* instructed by *Baker McKenzie* for the plaintiffs (Mark Korda, Jennifer Nettleton and Jarrod Villani (as joint and several deed administrators of Ten Network Holdings Ltd) (subject to a deed of company arrangement) (recs and mgrs apptd) and certain of its related bodies corporate).

Y Du (Interested Person) (self-represented).

D Gubbay (Interested Person) (self-represented).

C K Leung (Interested Person (self-represented).

**[1]** **Black J.** By Originating Process filed on 25 September 2017, the Plaintiffs, Mr Mark Korda, Ms Jennifer Nettleton and Mr Jarrod Villani as joint and several deed administrators ("Deed Administrators") of Ten Network Holdings Limited (subject to deed of company arrangement) (receivers and managers appointed) ("TNHL") and of several other companies within the Ten Group seek orders that they have leave to transfer all of the existing shares of TNHL to CBS International Television Australia Pty Ltd ("CBS Australia") or its nominee. CBS Network Ten BV has been nominated as the proposed transferee of the shares (Ex A3). Three shareholders in TNHL, Messrs Du, Gubbay and Leung ("Interested Persons") oppose that application and were heard in these proceedings under r 2.13 of the Supreme Court (Corporations) Rules 1995 (NSW).

**[2]** I will first set out the background to the application and then refer to the affidavits on which the Deed Administrators and the Interested Persons rely. I will then set out the applicable legal principles and determine the application having regard to the relevant facts and those principles.

**Background facts**

[3] By way of background, the Ten Group companies operate a major Australian free to air television network, and TNHL and several of those companies are presently in deed administration. On 16 October 2013, TNHL entered into a $200 million facility with the Commonwealth Bank of Australia ("CBA") as agent and participant, which was guaranteed by nine other companies in the Ten Group and was due to expire on 23 December 2017 (Korda 10.10.17 [38]). That facility was guaranteed by three shareholders of TNHL, including Birketu Pty Ltd ("Birketu") and Illyria Nominees Television Pty Ltd as trustee for the Illyria Investment Trust No 4 ("Illyria"), which would also receive a fee on release of that guarantee (Korda 10.10.17 [39]).

[4] The Ten Group incurred substantial losses in the period prior to appointment of the voluntary administrators including a net loss of $151.7 million (which in turn included an impairment of intangible assets of $135.2 million) in the 2016 financial year; had accumulated losses of $1.3 billion at the end of that financial year (Korda 10.10.17 [32]); incurred a further loss of $231.7 million before tax in the first half of the 2017 financial year, including a further impairment of $214.5 million of intangible assets (Korda 10.10.17 [33]); and, by 28 February 2017, had accumulated losses of $1.6 billion and trade creditors of $215 million and owed approximately $73 million to financiers, and additional production payments would fall due in the second half of the financial year (Korda 10.10.17 [33]).

[5] On 2 May 2017, one of the shareholder guarantors to the CBA facility advised TNHL that it would not extend or renew its guarantee of the CBA facility when it expired on 23 December 2017. On 9 June 2017, a financial adviser to Birketu and Illyria advised TNHL that they would also not extend or increase or extend their existing guarantees in respect of the CBA facility or agree to the deferral of the accrued guarantee fees. The directors of the Ten Group companies resolved to appoint voluntary administrators to those companies on 14 June 2017 on the basis that those companies were insolvent or likely to become insolvent.

[6] A first meeting of creditors of the Ten Group companies was held on 26 June 2017. CBA Corporate Services (NSW) Pty Ltd (as security trustee of the CBA securities) then appointed Messrs Carter, Hill and McEvoy as receivers and managers of most of the companies within the Ten Group on 30 June 2017 and CBA extended a loan facility to the Ten Group companies to meet operating costs during the receivership. On 17 July 2017, the Federal Court of Australia made orders extending the convening period for the second meeting of creditors in respect of the Ten Group companies to 20 November 2017. The receivers also commenced a process for the sale or recapitalisation of the Ten Group companies. That process was extensive, with 21 bidders initially expressing an interest and signing a confidentiality deed; 7 parties submitting confirmation letters and progressing to further due diligence (Hill [27]); and two parties, Birketu and Illyria on the one hand and CBS Australia and CBS Studios Inc ("CBS") on the other, submitting binding offers. Both the Birketu/Illyria proposal and the CBS proposal provided for entry into a deed of company arrangement and the creation of a creditors' trust, and each contemplated a transfer of shares in TNHL to the bidder, although the Birketu/Illyria proposal would have allowed existing shareholders in TNHL to retain 25% of the shares in TNHL.

**[7]** The proposal put by CBS Australia and CBS was preferred by the receivers and administrators over the proposal put by Birketu and Illyria. On 25 August 2017, an Exclusivity Deed was executed between the receivers, CBS Australia and CBS and, on 27 August 2017, a Transaction Deed was executed between TNHL, Network Ten Pty Ltd (subject to deed of company arrangement) (receivers and managers appointed) ("Network Ten"), the voluntary administrators, CBS Australia and CBS. Also on 27 August 2017, a new facility agreement was entered between TNHL, several other companies within the Ten Group, CBS Australia as lender and CBS as agent and security trustee, which provided a single draw term facility of approximately $139 million and a further facility of up to $30 million for working capital purposes to TNHL. The CBA facility expired in accordance with its terms on 31 August 2017 and, on 1 September 2017, the CBA facility, shareholder guarantor fees and an amount previously drawn under the working capital facility were repaid with advances by CBS Australia (Korda 10.10.17 [70]).

**[8]** The voluntary administrators issued their section 439A report on 4 September 2017, initially convening a second meeting of creditors of the Ten Group companies for 12 September 2017. On 6 September 2017, Birketu and persons associated with it commenced proceedings to restrain the holding of the second meeting of creditors; on 7 September 2017 the Court made orders, with the voluntary administrators' consent, adjourning the second meeting of creditors to 19 September 2017; and, on 11 September 2017, the voluntary administrators issued a supplemental report. Those proceedings were heard on 12 and 13 September 2017 and dismissed by judgment delivered on 18 September 2017 (*Re Ten Network Holdings Ltd (admin apptd) (recs and mgrs apptd)* [2017] NSWSC 1247).

**[9]** On 15 September 2017, the financial advisers to Birketu and Illyria submitted a revised proposal for a deed of company arrangement and creditors' trust to be put to creditors at the second meeting of creditors of TNHL (Ex CKL-1, tab E2; Ex MK-1, tab 25), which the voluntary administrators disclosed to Australian Securities Exchange Ltd ("ASX") and sent to known email addresses of creditors (Korda 10.10.17 [78]–[79]) prior to the second meeting of creditors. That proposal increased the proposed maximum payment to unsecured creditors from $35 million to $55 million, of which CBS would receive $20 million, and contemplated that the Ten Group's unsecured creditors excluding CBS would receive $35 million or 13.4 cents in the dollar. That proposal also contemplated that:

> "[TNHL] will remain listed on ASX. Whilst all current shareholders in [TNHL] (including all employee shareholders) will be diluted through the issue of options or shares to [Birketu or Illyria] or a transfer under [s] 444GA, existing shareholders (other than [Birketu and Illyria]) will retain approximately 25% of their existing interest in [TNHL] and share in Ten's recovery."

That proposal also contemplated that the Ten Group would be funded by a new financing facility and indicated that Birketu and Illyria were "highly confident" that credit approval of a new financing facility would be obtained prior to the second creditors' meeting. My attention was not drawn to evidence as to whether such approval was ultimately obtained. Draft transaction documents relating to Birketu's and Illyria's revised proposal, incorporating the revised terms, were

sent by Birketu's and Illyria's financial advisers to KordaMentha on 19 September 2017, the date of the second meeting of creditors (Korda 10.10.17 [81]).

[10] CBS Australia also made a revised proposal for a deed of company arrangement which the voluntary administrators sent to known email addresses of creditors on 18 September 2017. That revised proposal provided for secured creditors, employees, and Pool A and Pool B creditors to recover the entirety of their debt, and for Pool C and Pool D creditors to recover a specified proportion of their debt, and increased the amount to be contributed to Twentieth Century Fox Film Corporation ("Fox") as a participant in Pool D under the creditors' trust (Korda 10.10.17 [80]). CBS was excluded from a claim against the fund established by the creditors' trust.

[11] The second meeting of creditors was held on 19 September 2017. A set of powerpoint slides presented by the voluntary administrators at that meeting (Ex MK-1, tab 28, 1038) outlined the estimated returns to creditors under each of the deed of company arrangement and creditors' trust proposed by CBS Australia on the one hand and Birketu and Illyria on the other and compared the value of the two proposals, which the voluntary administrators quantified as, in the case of Birketu and Illyria, $35 million excluding CBS and $55 million including CBS and, in the case of CBS, $40.58 million. The implication of that comparison was that CBS's proposal was more favourable than Birketu's and Illyria's proposal to creditors other than CBS, and, in particular, CBS's proposal was more favourable to financial, statutory and other creditors, parties to onerous and terminated contracts (excluding Fox) and also more favourable to Fox, although the difference in the return to Fox between the two proposals was marginal.

[12] Creditors declined to adjourn the second meeting of creditors for the voluntary administrators to progress the revised proposal put by Birketu and Illyria and approved the execution of a deed of company arrangement in the terms of CBS Australia's revised proposal. After that meeting, and also on 19 September 2017, the voluntary administrators executed a deed of company arrangement ("CBS DOCA") reflecting the revised CBS proposal (Korda 10.10.17 [91]). The CBS DOCA provides, inter alia, that its completion is conditional on an order being made under s 444GA of the Corporations Act 2001 (Cth) granting leave to the Deed Administrators to transfer all the shares in TNHL to CBS Australia or its nominee (cl 5.1), although I will refer to a modification of that condition precedent which is sought in this application below. The DOCA also provides, in cl 5.2, that CBS Australia may give written notice to the Deed Administrators waiving that condition, if such an order is not made or is unlikely to be made, and CBS Australia may then enter into an "Alternative Asset Sale Transaction" by which some or all of the assets of the Ten Group companies are sold to it or its nominee and creditors are treated in the same manner under the CBS DOCA and creditors' trust.

[13] By letter dated 27 October 2017 (Ex A2), Fox claimed that Network Ten was in default of the terms of a programming licence agreement with Fox and elected to make the licence fees and all other monetary obligations of Network Ten under that agreement immediately due and payable and to terminate that agreement with effect from 6 October 2017, and reserved the right to seek damages.

**[14]** By letter dated 31 October 2017 (Ex A1), the Australian Securities and Investments Commission ("ASIC") advised the Deed Administrators' solicitors that it would, in principle, grant the relief sought by the Deed Administrators to permit a transfer of shares in TNHL to CBS's nominee, if the Court granted leave to the Deed Administrators for that transfer under s 444GA of the Corporations Act. It appears that ASIC had regard to evidence in this application filed and served by the Deed Administrators and by Messrs Gubbay, Du and Leung, and at least to the Deed Administrators' and Mr Du's submissions. ASIC rightly noted that its decision whether to grant relief from s 606 of the Corporations Act, in respect of the transfer of shares, involves different, although potentially overlapping, matters to the Court's decision. ASIC also indicated that it did not propose to support or oppose the application made by the Deed Administrators under s 444GA of the Corporations Act or appear at this hearing and it did not do so.

**Affidavit evidence**

**[15]** The Plaintiffs rely on the affidavit dated 9 October 2017 of Mr Christopher Hill, who is one of the receivers to TNHL and other companies within the Ten Group appointed by CBA Corporate Services (NSW) Pty Ltd and subsequently by CBS Studios. Mr Hill refers to the financing arrangements between TNHL and the Ten Group and CBA, prior to the appointment of the receivers, and to the circumstances in which the voluntary administrators and receivers were appointed and CBA provided funding for the receivership. Mr Hill also refers to the conduct of a sale process for the companies within the Ten Group, involving both the receivers and the voluntary administrators, and to the determination by the receivers and the voluntary administrators that the binding proposal put by CBS Australia was the preferred bid over the alternative proposal put by Birketu and Illyria and the entry into subsequent transaction documents with CBS Australia. I have drawn upon Mr Hill's evidence in the outline of the background to this application set out above.

**[16]** The Plaintiffs also rely on an affidavit dated 10 October 2017 of Mr Stephen White, who is a director of CBS Australia. That affidavit refers to the negotiation by CBS Australia and the Deed Administrators of the key terms of the "Alternative Asset Sale Transaction" as contemplated by cl 5.2 of the CBS DOCA, and annexes a term sheet containing the key terms of that transaction. That affidavit indicates that CBS Australia intends to give a notice contemplated by cl 5.2 of the CBS DOCA, waiving the condition precedent referred to in cl 5.1(d) of the DOCA relating to approval under s 444GA of the Corporations Act and electing to enter into the Alternative Asset Sale Transaction, if this application is unsuccessful. That affidavit, and the term sheet that is annexed to it, are relied on by the Deed Administrators to support a submission as to the proper comparison to the proposed transfer of the shares, for the purposes of s 444GA of the Corporations Act, which I will address below.

**[17]** The Plaintiffs rely on several affidavits of Mr Mark Korda. Mr Korda's first affidavit dated 10 October 2017 refers to the structure and operations of the Ten Group, sets out information concerning the current directors and major shareholders in TNHL and refers to the pre-appointment financial performance of the Ten Group, the terms of the CBA Loan Facility and shareholder guarantees that were in place prior to the voluntary administrators' and receivers' appointment, the appointment of the voluntary administrators and receivers, the position as to employees and other unsecured creditors of the Ten Group and the

sale process that was undertaken by the receivers and voluntary administrators after their respective appointments. That affidavit also refers to the report dated 4 September 2017 issued by the voluntary administrators under s 439A of the Corporations Act and their supplemental report issued on 11 September 2017 and to the voluntary administrators' receipt of revised proposals from Birketu and Illyria and CBS Australia prior to the second meeting of creditors. Mr Korda also refers to the resolutions passed at the second meeting of creditors, to which I referred above, not to adjourn that creditors' meeting to enable the voluntary administrators to progress the revised proposal put by Birketu and Illyria and to approve the execution of the CBS DOCA. Mr Korda also refers to the execution of the CBS DOCA on 19 September 2017 and refers to the key terms of that CBS DOCA, the conditions precedent to it, and the terms of the creditors' trust which is to be established under it, and the estimated return to creditors under that creditors' trust.

**[18]** Mr Korda also refers to the likely outcome if the orders sought by the Deed Administrators are not made, and on the implementation of the Alternative Asset Sale Transaction, which he observes would involve the contribution by CBS of $40.58m to the creditors' trust, for distribution to creditors on the same terms as the CBS DOCA and creditors' trust, and the assignment of all assets of TNHL to CBS Australia or its nominee; would leave TNHL, after the CBS DOCA was effected, with no assets and no liabilities other than a residual amount owing by it in respect of the CBS loan facility, and would provide the same return to creditors of the Ten Group as the CBS DOCA and creditors' trust. Mr Korda also sets out his assessment of the likely outcome if the Ten Group companies were to be wound up instead of executing the CBS DOCA, including on a sale of business of the Ten Group without a deed of company arrangement or a close down. Mr Korda's evidence is that:

> "I have considered above the likely return to creditors and shareholders under four possible scenarios (effectuation of the [CBS] DOCA if the s 444GA order is made; effectuation of the [CBS] DOCA if the [Alternative Asset Sale Transaction] goes ahead and two possible liquidation scenarios). For the reasons outlined above, I do not consider that shareholders will receive a distribution under any of these scenarios.
>
> Further, given that:
>
> (a) shareholders in Holdings are unlikely to receive any distribution under any of the four scenarios considered by the [Deed] Administrators and in this affidavit; and
>
> (b) the only realistic alternative to the section 444GA transfer is the [Alternative Asset Sale Transaction];
>
> the proposed transfer of the shares to CBS as part of the transaction with CBS is in the best interests of creditors of the Ten Group, is consistent with the objects of Part 5.3A of the Act and will not unfairly prejudice the shareholders of Holdings."

**[19]** By his second affidavit dated 13 October 2017, Mr Korda refers to information released by the Deed Administrators to ASX and published on the Ten Group's website and on KordaMentha's website, including, on 27 September 2017, information relating to the outcome of the directions hearing held in this application and, on 10 October 2017, an announcement to ASX, a circular to shareholders, an explanatory statement in respect of the proposed transfer of the shares in TNHL to CBS Australia or its nominee and the independent expert's report prepared by KPMG Financial Advisory Services (Australia) Pty Ltd ("KPMG"). By his third affidavit dated 24 October 2017, Mr Korda refers to

further announcements made to ASX and placed on the Ten Group's website and KordaMentha's website on 17 October 2017, in respect of the directions hearing held in the application on 16 October 2017, and summarises the status of conditions precedent to completion under the CBS DOCA. Mr Korda's evidence is, in particular, that approval from the Foreign Investment Review Board has been obtained by CBS Australia in relation to the proposed transfer of the shares in TNHL to a nominee of CBS Australia, as announced to ASX on 23 October 2017, and that the creditors' trust deed would be executed by the Deed Administrators and each of the Ten Group companies before this application was heard. Mr Korda also refers to communications received by KordaMentha from several of TNHL's shareholders in respect of this application.

**[20]** The Deed Administrators also rely on an affidavit dated 11 October 2017 of their solicitor, Ms O'Brien, which refers to verification of the explanatory statement dated 10 October 2017 which the Deed Administrators caused TNHL to issue to its shareholders in relation to the proposed transfer of the shares in TNHL to CBS Australia or its nominee. That affidavit records a verification process in common form by which material statements were allocated to the Deed Administrators' staff for verification and were verified. By a second affidavit dated 23 October 2017, Ms O'Brien refers to communications with several shareholders of TNHL, including a shareholder who has not sought to appear at this hearing, and Mr Leung, who has appeared at this hearing. The Deed Administrators also rely on an affidavit dated 13 October 2017 of Ms Hunter, a solicitor employed by the firm acting for them, which confirms service of the evidence relied on in these proceedings, up to and including 13 October 2017, on ASIC. I have referred above to ASIC's letter dated 31 October 2017 indicating its attitude to this application. The Deed Administrators also rely on an affidavit dated 23 October 2017 of Mr Guy Sanderson, a partner in the firm of solicitors acting for the Deed Administrators, which also refers to the status of conditions precedent under the CBS DOCA, and expresses the opinion that, apart from ASIC relief, no other consents or approvals from ASIC or ASX are required in order to satisfy the conditions precedent to the CBS DOCA.

**[21]** The Deed Administrators also rely on two affidavits dated 13 October 2017 and 23 October 2017 of Mr Kamran Beiglari, who is Head of Insolvency Solutions at Link Market Services ("Link"). Mr Beiglari's first affidavit refers to the steps taken by Link to despatch a notice concerning this application to shareholders in TNHL, by email where a shareholder had supplied an email address and otherwise by ordinary post. Mr Beiglari's second affidavit dated 23 October 2017 refers to steps which were taken to despatch a notification of the application to TNHL's shareholders where email notifications to those shareholders had bounced back, and to further notifications sent by ordinary post to reflect updated information relating to shareholders contained in communications received by Link from shareholders in the period after the voluntary administrators' appointment, from 14 June 2017 to 12 October 2017. Mr Beiglari also refers to emails and telephone calls received by Link on a dedicated hotline and by email. Mr Beiglari refers to emails from two shareholders objecting to the transfer of their shares to CBS Australia or its nominee, to a person contacting the hotline indicating that shareholders had not been given sufficient time to consider the application and to several other voicemails recording complaints about the proposed share transfer. Mr Beiglari also confirms that the shareholder register for TNHL records that, in respect of

the interested persons who appear in this application, Mr Du holds 34,890 shares in TNHL, Mr Gubbay holds 4,733 shares in TNHL and Mr Leung holds 40,213 shares in TNHL.

[22] The Plaintiffs also rely on the affidavit of Mr Ian Jedlin dated 10 October 2017 and Mr Jedlin's report. Mr Jedlin is a director and authorised representative of KPMG and a partner of the Australian firm and has substantial experience in the provision of corporate financial advice, including specialist advice on valuations, mergers and acquisitions, and the preparation of independent experts' reports, and is, in my view, well qualified to give expert evidence. KPMG was instructed to provide an independent expert's report (Ex IRJ-1) valuing the shares in TNHL for the purposes of this application and for the purpose of applying to ASIC for relief from the takeover provisions in Ch 6 of the Corporations Act. Mr Jedlin confirms that he had been provided with and had read, understood and agreed to be bound by the Expert Witness Code of Conduct.

[23] Appendix 6 to KPMG's report set out the assumptions underlying the cashflow adopted for the purposes of that report, including as to declines in free to air television industry advertising revenue generally, a marginal increase in Ten Network's audience share, increases in digital revenue, moderate declines in affiliate revenue and a modest increase in total revenue in the 2018 financial year, with modest declines thereafter; as to programming costs and other expenses; and as to capital expenditure, working capital and tax. That appendix noted that the cashflow model allowed for incorporation of revenue benefits and costs savings associated with "bankable" initiatives under Network Ten's transformation program, resulting in an increase in earnings of around $50 million in the 2018 financial year and approximately $80 million in the 2019 financial year and beyond. (Mr Leung treated that assumption, in his analysis, as involving an increase in earnings of $50 million in the 2018 financial year and an increase in earnings of a further $80 million in the 2019 financial year, for a total increase in earnings of $130 million, rather than as $50 million in the first year and a further $30 million in the second year for a total increase of $80 million. It is not necessary to determine the correctness of that treatment, given the findings that I reach on other grounds.) That appendix also indicated that:

> "The model allows for incorporation of US content agreements based on the terms sought by Ten Network (but not formalised) prior to the appointment of the Administrators. This results in a reduction in the cost of acquiring content by approximately 40%."

The assumed reduction in that cashflow of amounts payable under content agreements with CBS and Fox meant that it did not include the total future amounts payable to CBS and Fox over the term of their programming agreements, where agreement has not been reached as to their amendment. KPMG made a further adjustment in their report to address that omission, which was criticised by the Interested Persons as "double counting", and I will address that criticism below. I will also refer to other aspects of the approach adopted in KPMG's report and the Interested Persons' criticisms of it in dealing with a range of issues raised in the application below.

[24] The Deed Administrators also relied on a second affidavit of Mr Jedlin dated 30 October 2017, which attached a second report of the same date responding to the affidavits of Mr Du dated 20 October 2017, Mr Gubbay dated 23 October 2017 and Mr Leung dated 20 and 25 October 2017. That affidavit and report was read by the Plaintiffs without objection by the Interested Persons, after

I adjourned the proceedings to allow them further time to review that report. I will also address the issues raised in those affidavits and Mr Jedlin's response to them in dealing with the matters raised by the Interested Persons in opposition to the application below.

**[25]** By his affidavit dated 20 October 2017, Mr Du identified the basis of his objections to the application, partly by way of submissions. Mr Du's affidavit identified five primary bases of objection to the transfer of shares in TNHL to CBS Australia, relating to suggested "fallacies" in KPMG's report identified by Mr Leung; the Deed Administrators' suggested failure to consider the implications of the alternative proposal put by Birketu and Illyria prior to the second meeting of creditors; unfair prejudice to shareholders in TNHL arising from matters other than the value of their shares; matters relating to the way in which TNHL and other companies were placed in voluntary administration and the conduct of the voluntary administrators; and the suggested disregard of the interests of TNHL's shareholders by the voluntary administrators. I will address these matters in dealing with the substantive issues in dispute below.

**[26]** By his affidavit dated 23 October 2017, Mr Gubbay, who is a qualified non-practising accountant, referred to the revised Birketu and Illyria proposal; endorsed Mr Leung's criticisms of KPMG's report; and identified other criticisms of the KPMG report that I will also address below. Mr Gubbay also referred to a document headed "Review of KPMG Report" which he attributed to Illyria's solicitors, although that document was not on their letterhead, was not signed by them, and neither Illyria nor those solicitors appeared or sought to support it in this application. It was perhaps unfortunate that Mr Gubbay relied on that document, since Illyria's solicitors had declined consent for him to do so and had advised him (Ex YD-2) that:

> "We do not consent to the use of the internal review of the KPMG Report being provided to the Court. It was an internal document, prepared by various stakeholders, to assist Illyria in its internal decision-making processes. It was not prepared by any one person or firm and was not prepared having regard to the requirements of Court rules surrounding evidence. It was also provided to you solely on a confidential non-reliance basis as a matter of courtesy to assist you in your evaluation."

**[27]** Even apart from Illyria's solicitors' objection to Mr Gubbay's reliance on the document which he attributes to them, an immediate difficulty with that document is that there is no evidence to support the accuracy of the assumptions that were made in preparing it, no evidence that it was prepared by person(s) with appropriate expertise and no suggestion that the person(s) who prepared it complied with the Expert Witness Code of Conduct. I give little weight to that document, which appears to have had some influence upon the shape of the Interested Persons' submissions. I should add that, if Illyria had wished to make submissions in this application, then it has had the opportunity to appear and do so which it has not taken up. I have, however, addressed below a particular issue raised in that document, and adopted by Mr Gubbay's affidavit, in respect of a suggested "double counting" of programming costs payable by the Ten Group to CBS and Fox in KPMG's report.

**[28]** Mr Leung's affidavits dated 20 October 2017, 25 October 2017 and 30 October 2017 in turn set out numerous criticisms of the approach adopted in Mr Jedlin's report. Mr Leung's evidence is that he is a certified practising accountant with some six years of working experience in preparations of financials and business analysis as a business service accountant. Mr Leung did

not indicate the extent, if any, of his experience with large listed public companies or with valuations, whether in the context of listed public companies or insolvency or generally. I will address Mr Leung's evidence in his first affidavit in dealing with the substantive issues in dispute below. By his second affidavit dated 25 October 2017, Mr Leung expanded on the approach to be adopted in determining equity value and criticised a suggested implication of KPMG's report that the television licence held by the Ten Group had a substantial negative value and advanced a suggestion of a "windfall" gain by CBS on implementation of the transaction that I will address below. By his third affidavit dated 30 October 2017, Mr Leung referred to the background to the introduction of s 444GA of the Corporations Act, reasserted the proposition that the Birketu and Illyria proposal remained open, questioned the legitimacy of the transaction contemplated by the Alternative Asset Sale Transaction term sheet, and otherwise responded to aspects of the Deed Administrators' submissions.

**A preliminary matter**

**[29]** I should first address a preliminary matter. By Interlocutory Process filed, by leave, on 2 November 2017, the Deed Administrators sought an order, under s 447A of the Corporations Act, that Pt 5.3A of the Act is to operate in relation to TNHL and each of the relevant companies as if s 445A of the Act provided that a deed of company arrangement may be varied by the Court on the application of its deed administrator and, pursuant to that section as varied and applied to TNHL and each of those companies, cl 1.1 of the CBS DOCA is varied by adding the words "or the Supreme Court of New South Wales" at the end of definition of "Court" in that clause. The Court has power to vary a deed of company arrangement by order made under s 447A of the Act as an alternative to a deed administrator seeking a variation of the deed of company arrangement by creditors' resolution under s 445A of the Act: *Re Pasminco Ltd (subject to deed of company arrangement) (No 2)* (2004) 49 ACSR 470; [2004] FCA 656 at [35]; *Reed Constructions Australia Ltd v DM Fabrications Pty Ltd* (2007) 25 ACLC 1463; [2007] NSWSC 1190.

**[30]** By way of background to this Interlocutory Process, cl 5.1 of the CBS DOCA provides that the conditions precedent to the operation of cll 11.1 and 11.2 of the DOCA, which provide for payment of the Fund Amount (as defined) by CBS Australia and the transfer of TNHL shares to CBS Australia or its nominee, include, inter alia, the Deed Administrators having obtained the Section 444GA Order (as defined). Clause 1.1 of the CBS DOCA in turn defines the term "Section 444GA Order" as an order of the Court (as defined) granting the leave sought in the Section 444GA Application (as defined); defines the term "Section 444GA Application" as an application to be commenced in Court (as defined) by the Deed Administrators to seek leave of the Court under s 444GA(1)(b) of the Corporations Act for the transfer of TNHL shares to the New Shareholder (as defined); and defines the term "Court" as referring to the Federal Court of Australia. That condition precedent would therefore not, as it stands, be satisfied by an order made by this Court under s 444GA of the Corporations Act, although this Court has coordinate jurisdiction with the Federal Court of Australia to make such an order. Section 445A in turn provides that a deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors, but only if the variation is not materially different from a proposed variation set out in the notice of meeting. The effect of the order sought by the Deed Administrators is to permit satisfaction of the condition precedent in cl 5.1 of the

CBS DOCA if an order under s 444GA of the Corporations Act is made by this Court rather than the Federal Court of Australia. The making of that order was, sensibly, not opposed by the Interested Persons, where each of the Deed Administrators and the Interested Persons have devoted about two hearing days to the hearing of this application in this Court.

**[31]** It seems to me that the order sought will promote the operation of Pt 5.3A of the Act, and is consistent with the fact that each of the Supreme Court of New South Wales and the Federal Court of Australia has power to make the relevant order under s 444GA of the Corporations Act. Conversely, it would not promote the interests of Pt 5.3A of the Act, or the interests of the parties or the interests of justice, if an order were made under s 444GA of the Act on its merits, by this Court, but the condition precedent to the DOCA was not satisfied. For these reasons, I will make an order under s 447A of the Corporations Act varying s 445A of the Act and the CBS DOCA in the manner sought by the Deed Administrators.

**The applicable principles in an application under s 444GA of the Corporations Act**

**[32]** Section 444GA(1) of the Corporations Act permits a deed administrator to transfer shares in a company in deed administration with either the consent of the shareholders or with leave of the Court. Section 444GA(3) provides that the Court may only grant such leave if it is satisfied that the sale would not unfairly prejudice the interests of the company's shareholders. Mr Newlinds, who appeared with Mr Izzo for the Deed Administrators, summarised the applicable principles by reference to the case law. He submitted that the concept of "unfairly prejudice" in s 444GA(3) permits an order to be made where there is some degree of prejudice to members of a company, provided that prejudice is not unfair; that a mere transfer of shares without compensation does not constitute unfair prejudice; and that shareholders are unlikely to suffer prejudice, still less unfair prejudice, if the shares to be transferred have no value and there would be no distribution in the event of a liquidation, where that is the only realistic alternative to the proposed transfer. Mr Newlinds also pointed to the relevance of the same process undertaken by receivers or administrators of a company to a conclusion that shares have no residual value for shareholders. Mr Du (who is a third year law student) also addressed those principles, although without detailed reference to the case law. I summarised the relevant principles in *Re Kupang Resources Ltd (subject to deed of company arrangement) (recs and mgrs apptd)* [2016] NSWSC 1895 (*Re Kupang*) at [11]ff and I have drawn on that summary for the following account of them.

**[33]** In *Weaver (in their capacity as joint and several deed administrators of Midwest Vanadium Pty Ltd) v Noble Resources Ltd* (2010) 41 WAR 301; 79 ACSR 237; [2010] WASC 182 (*Weaver v Noble Resources Ltd*), Martin CJ undertook a detailed review of the history of s 444GA of the Corporations Act, to which I referred in *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 (*Re Mirabela*), *Re Nexus Energy Ltd (subject to deed of company arrangement)* (2014) 105 ACSR 246; [2014] NSWSC 1910 (*Re Nexus*) and *Re Kupang* above and which I again gratefully adopt. The section was introduced into the Corporations Act by the Corporations Amendment (Insolvency) Act 2007 (Cth) with effect from 31 December 2007 and adopted a recommendation made in a report of the Legal Committee of the Companies and Securities Advisory Committee ("CAMAC") on Corporate Voluntary

Administration (June 1998) that the law should grant deed administrators the ability to compulsorily sell company shares where necessary for the purposes of implementing a deed of company arrangement under which payment of creditors' debts was dependent upon such a transfer occurring (Recommendation 42, para [6.73], noted in *Weaver v Noble Resources Ltd* at [65]–[71]). The Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007 in turn noted (at [7.54]) that the purpose of the section was to enable a deed administrator to transfer shares in the company without the consent of shareholders where such a transfer was necessary for the success of the deed. The Explanatory Memorandum also noted (at [7.58]) that:

> "The Court may only grant leave if it is satisfied that the sale would not unfairly prejudice the interests of shareholders. This is intended to direct the Court to consider the impact of a compulsory sale of shareholders [sic] where there may be some residual value in the company."

**[34]** In *Weaver v Noble Resources Ltd* above, Martin CJ also noted (at [69]–[71]) that the limitation in s 444GA(3) of the Corporations Act that the Court may only grant leave for a transfer of shares under s 444GA(1) if it is satisfied that the transfer would not unfairly prejudice the interests of members reflects the view expressed in the CAMAC report that the possibility of prejudice to a shareholder would arise if there were some residual equity in the company. His Honour also noted (at [79]) that:

> "... [t]he notion of unfairness only arises if prejudice is established. If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair."

His Honour also noted (at [80]) that something more than a mere transfer of shares without compensation would be necessary to establish unfair prejudice.

**[35]** In *Lindholm (in their capacity as joint and several liquidators of Munday Group Pty Ltd (recs and mgrs apptd) (in liq)) v Tsourlinis Distributors Pty Ltd* [2010] FCA 1488 at [9]–[10], Finkelstein J took a similar view to that taken by Martin CJ in *Weaver v Noble Resources Ltd* above. In *Re Lewis (in their capacity as joint and several deed administrators of Diverse Barrel Solutions Pty Ltd) (subject to a deed of company arrangement)* [2014] FCA 53, White J noted (at [19]) that the terms of s 444GA(3), in focusing on the concept of "unfair prejudice" to shareholders, contemplated that a transfer of shares may result in some prejudice to the interests of shareholders and that:

> "Whether or not 'unfair prejudice' will result from a transfer of the shares is to be determined having regard to all the circumstances of the case and to the policy of the legislation. Relevant matters would seem to include whether the shares have any residual value which may be lost to the existing shareholders if the leave is granted; whether there is a prospect of the shares obtaining some value within a reasonable time; the steps or measures necessary before the prospect of the shares attaining some value may be realised; and the attitude of the existing shareholders to providing the means by which the shares may obtain some value or by which the company may continue in existence. A relevant comparison will be between the position of the shareholders if the proposal does not proceed and their position if leave to transfer shares is granted."

His Honour there held that a transfer of shares involved no unfair prejudice where those shares had no residual value and the shareholders would not receive any return on a winding up.

**[36]** In *Re Mirabela* above at [42], in a case involving a listed company, I similarly noted that the question whether shareholders have any residual equity in a relevant sense "has to be determined by comparison with their position on a winding up, at least where that is the likely or necessary consequence of the transfer of shares not being approved".

**[37]** In *Re BCD Resources (Operations) NL (subject to deed of company arrangement)* (2014) 100 ACSR 450; [2014] VSC 259 at [55]–[57], Digby J observed that:

> "The words 'unfairly prejudice' clearly requires more that the identification of prejudice consequential upon the proposed transfer, or likely to result from the proposed transfer. The addition of the qualifying adjective "unfairly" in s 444GA(3), makes it clear that prejudice alone will not trigger the prohibition in s 444GA(3). This is consonant with the purpose of the section because it accommodates the practical need for the section to be able to operate notwithstanding a situation where the grant of leave can be said to give […] to some degree of prejudice to members of the company.
>
> The confinement of the required level of satisfaction under s 444GA(3), means that the prejudice which a member would suffer also needs to be in the nature of an unfair prejudice. If there is no prejudice the court will not be constrained by s 444GA(3). If there is prejudice the court will only be constrained if it is satisfied as to the unfairness of that prejudice to a member or members, in the circumstances.
>
> The sort of circumstances which may potentially inform the courts as to whether there would be relevant unfair prejudice to the interests of the members of the Company cannot be exhaustively catalogued. However, such circumstances would logically include a comparison of the members' position in the event that the enforced transfer of shares occurred with the members' position in the event the transfer did not occur. Therefore, it will be material to consider the value of the relevant shares and what, if any, loss will result if leave is granted; whether the shares are likely to increase in value, and the factors which are likely to bring about that result including the likely timing of such factors."

**[38]** In *Re Nexus* above at [22], I followed the observation of Martin CJ in *Weaver v Noble Resources Ltd* above that the possibility of prejudice to a shareholder "would arise if there was some residual equity in the company." That decision was in turn referred to by the Supreme Court of Victoria in *Re 3GS Holdings Pty Ltd (subject to deed of company arrangement)* [2015] VSC 145 where Sifris J noted (at [14]) that the relevant question was whether the shares to be transferred had a residual value if the transfer was not approved and (at [22]) that no unfair prejudice to shareholders arose from a transfer of shares to a third party if it was unlikely that those shares would support a dividend to shareholders or contributories in any scenario.

**[39]** In *Re Kupang* above, I accepted Counsel's submissions that it was difficult to see how shareholders could be prejudiced by the transfer of their shares in the absence of any residual value or equity in the company; that the authorities establish that the fact that shares are to be transferred without compensation is not sufficient, in itself, to establish unfair prejudice; and that there would not ordinarily be any prejudice, or no prejudice that has the requisite quality of "unfairness", if the shares to be transferred have no value, and there would be no distribution in the event of a liquidation that is the only realistic alternative to a proposed transfer.

**The parties' submissions**

[40] The Deed Administrators relied on their written submissions and Mr Newlinds made no oral submissions in chief and only brief oral submissions in reply.

[41] In addition to the submissions in his affidavits, Mr Du relied on written submissions dated 30 October 2017 (MFI 1) and 1 November 2017 (MFI 4) and on oral submissions made on 1 and 2 November 2017. Mr Du's first written submissions responded to the Deed Administrators' written submissions and reemphasised matters raised in his affidavit. In oral submissions, Mr Du relied on Mr Leung's evidence to show that there is value in the equity of TNHL; that the alternative proposal made by Birketu and Illyria established an implied value for TNHL; that TNHL has particular value for shareholder bidders; and that unfair prejudice within the scope of s 444GA of the Corporations Act could arise from the whole process of voluntary administration, rather than the terms on which shares in TNHL were transferred (T61).

[42] Mr Gubbay in turn relied on a "Further Statement to the Court" dated 30 October 2017 (MFI 3) and his "Final Summation" also dated 30 October 2017 (MFI 5) and made brief oral submissions.

[43] Mr Leung primarily relied on his affidavit evidence, and also responded to Mr Jedlin's response to his criticisms of Mr Jedlin's report by a further document headed "Comments from Chun Kei Leung (CPA)" (Ex CKL-4). Mr Leung made oral submissions which largely addressed the matters addressed in his affidavits and that document.

**Valuation of shares in TNHL on a going concern basis**

[44] KPMG's report (Ex IRJ-1) assessed the value of TNHL's equity on alternative bases. I will first address the valuation that seems to me to be of lesser relevance to this application, which was prepared on a going concern basis to satisfy ASIC's regulatory requirements in respect of an application for relief from relevant provisions of Ch 6 of the Corporations Act. In summary, as Mr Newlinds points out, KPMG's going concern valuation adopts a discounted cashflow analysis to derive a base case, low case and high case valuation, reflecting different assumptions as to decline in the free to air television market, the terminal growth rate to be adopted in the valuation, savings achievable under Network Ten's "transformation program" and costs savings by any renegotiation of content agreements with CBS and Fox. KPMG's analysis indicates that the Ten Group's business has a substantial negative value on each of the base case and low case valuations, although a positive value on the high case valuation which would still not be sufficiently high to allow any value to TNHL's equity after allowing for the Ten Group's borrowings and liabilities, including "mitigated claims" of CBS and Fox which I will address below, claims of creditors and transaction costs.

[45] Turning to KPMG's going concern valuation in more detail, that valuation assumed that TNHL would continue its operations for the foreseeable future and would be able to realise its assets and discharge its post-administration liabilities in the normal course of business. Mr Jedlin rightly pointed out that that basis of valuation assumed that TNHL's current financial difficulties did not exist and that sufficient funding was available to pursue its operations and he expressed the view that those assumptions were inappropriate and that a valuation on that basis overstated the realisable value of TNHL's business and/or assets in the absence

of the CBS DOCA. Mr Jedlin also noted that KPMG had assessed TNHL's equity on a going concern basis to have nil value, after assessing the value of all of TNHL's business operations on a going concern, control basis, then deducting secured borrowings and shareholder guarantee fees (net of cash) as at 31 August 2017, the Deed Administrators' assessment of "mitigated claims" lodged by entities associated with CBS and Fox, in the amounts of $348 million and $195 million respectively, and trade and other creditors of $30–$35 million and expected transaction costs, and then adding other net assets. KPMG did not include any "special value" or synergies specific to a particular acquirer in undertaking that valuation.

**[46]** KPMG primarily relied on a discounted cashflow methodology for this valuation, on base case, low case and high case scenarios. KPMG assessed the "Adjusted NPV" (as defined) of Ten Network's business operations as negative, adopting a discount rate between 9.5% and 10% on each of the base case and low case scenarios, and expressed the view that there was no equity value in TNHL under the base and low case scenarios, which followed from the negative value of Ten Network's business operations on those scenarios.

**[47]** Mr Jedlin expresses the view that KPMG's third, high case scenario was optimistic, and unlikely to arise, so far as it assumed several matters including the realisation of a substantial majority of "bankable" initiatives under an internal transformation program undertaken by the Ten Group; the revision of US content agreements on terms sought by Ten Network prior to the voluntary administrators' appointment (which, I interpolate, seems no longer to be feasible after Fox has terminated its program supply agreement with Network Ten); and a decline in the free-to-air television market at a rate that is less than independent medium term forecasts and recent industry performance (Ex IRJ–1, 7). Mr Jedlin also expresses the view, which seems to me persuasive, that the combination of those outcomes is unlikely and it is also unlikely that a third party acquirer would pay a price to acquire the Ten Network business that reflected the combination of those items. KPMG assessed the "Adjusted NPV" (as defined) of Ten Network's business operations as between $114.7 and $117.7 million on the high case scenario, and expressed the view that TNHL's equity had a negative value of between $529.2 and $543.7 million even on the high case scenario, after allowing for the value of the "mitigated claims" of CBS and Fox.

**[48]** The "mitigated claims" included in this valuation reflected amounts that would fall due to CBS and Fox under programming arrangements that extend into the future, but excluding amounts taken into account in the Ten Group's cashflows in the manner noted below. Those "mitigated claims" were determined at the present value of amounts payable under the programming agreements with CBS and Fox, and discounted by amounts that CBS and Fox would likely realise in reselling the relevant programming in the Australian market. So far as Fox's claims are concerned, as I noted above, Fox has terminated its program supply arrangements with the Ten Network on the basis of an alleged default of those arrangements, claimed the amounts due under that agreement and reserved its claim to damages. Even if no account was taken of CBS's claim, and if any realistic allowance is made for Fox's claim, Ex IRJ-1, 6, table 2 indicates that the value of equity in TNHL on the high case scenario would be negative on Mr Jedlin's analysis.

**The issues raised by the interested persons as to the "going concern" valuation of TNHL**

**[49]** The first basis on which Mr Du opposed the application, as set out in his affidavit dated 20 October 2017, was that KPMG's first report was "full of fallacies" and Mr Du relied on Mr Leung's evidence in that respect. Both Mr Du and Mr Leung focused their criticisms on KPMG's "going concern" valuation rather than on the distressed valuation to which I refer below, although the former was more favourable to the Interested Persons than the latter.

**[50]** In oral submissions, Mr Du submitted that there was value in TNHL's equity, established by Mr Leung's evidence (T75). Mr Du also submitted that KPMG's report as to the value of TNHL was not reliable, and that it adopted inconsistent assumptions and that Mr Leung had doubt "whether the report had been manipulated in one sense or the other" (T75) and that Mr Jedlin "ha[d] a clear purpose" to prepare a report to show that the shares have no value by "manipulat[ing] data or information which they can get from any sources they prefer to reach the conclusion that Ten Network has no value in equity" (T76). Mr Leung's affidavits also advanced numerous criticisms of KPMG's expert report, which I will address below. In oral submissions, Mr Leung indicated (T105) that he was putting that there was not merely a difference of professional views between himself and Mr Jedlin, but that Mr Jedlin's view had been distorted to minimise the value of equity in TNHL. Mr Leung maintained that position, even after I drew to his attention that an allegation of that kind would be more difficult to establish, because of its serious character, than a dispute as to methodology.

**[51]** Where the case put by Mr Du and Mr Leung is that KPMG has distorted and manipulated its report to achieve a desired result, and necessarily also that Mr Jedlin has breached the Expert Witness Code of Conduct in respect of that report, I must have regard to the standard of proof set out in s 140 of the Evidence Act 1995 (NSW), and the principles recognised in the general law in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334 (*Briginshaw*) and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449. It seems to me that the evidence led by Mr Leung, and his submissions, did not come close to establishing the allegations that he put, on the basis on which he insisted on putting them, as, in effect, an allegation that KPMG manipulated its expert's report to achieve a desired result.

**[52]** I should add that, to the extent that the question is properly treated as one of different expert views or the accuracy of underlying assumptions, and although Mr Du and Mr Leung did not accept that approach, then I would prefer the approach adopted by KPMG to the approach adopted by Mr Leung for the reasons that I will set out below. First, and most fundamentally, it seems to me that the Ten Group's business is properly treated as presently distressed, and unable to survive without CBS's financial support, such that the only alternatives to the implementation of the CBS DOCA and the share transfer to CBS Australia or its nominee is either the implementation of the Alternative Asset Sale Transaction or the liquidation of TNHL by a sale of its business on a "distressed basis". There is no basis, in my view, for undertaking a valuation of TNHL on a going concern basis.

**[53]** In these circumstances, many of the criticisms made by Mr Leung of KPMG's alternative valuation, so far as they were directed to the "high case" component of that valuation, do not strictly need to be addressed. I will, however,

refer to them briefly in deference to the efforts that Mr Leung made in articulating them and that Mr Jedlin made in responding to them. Mr Leung, like Mr Du, objected to the Deed Administrators' reliance on Mr Jedlin's first report and contended that that report was "misleading on the grounds that assumptions and information used in the report contradict public information". Mr Leung's evidence was that the net present value outcomes in respect of the valuation of the Ten Group's business and TNHL were highly sensitive to changes to free to air advertising revenue as almost all of the Ten Group's costs are fixed. Mr Leung's evidence (Leung 20.10.17 [12]–[16]) was also that KPMG's assumption that advertising revenue would decline in the base case, low case and high case was inconsistent with the Ten Group's actual revenue growth trend. In his second report, Mr Jedlin responds that the rates to which Mr Leung refers reflect industry growth rather than Network Ten's revenue growth; that the revenue forecasts made by management to which Mr Leung refers concern Ten's revenue growth; and that Ten's revenue growth is a function both of industry growth and Ten's revenue share. Mr Jedlin points out, and I accept, that each of KPMG's lower case forecasts finds support in recent historical experience in financial years 2016 and 2017 and other industry forecasts, and that KPMG's high case forecast is more optimistic than forecasts made by alternative sources. Mr Jedlin also points to several factors which, I accept, provide a reasonable basis for KPMG's approach to Ten Network's advertising revenue share.

**[54]** Mr Leung also contended that KPMG had overlooked Ten's success in expanding streaming services and that KPMG had failed to have regard to the growth rate of Ten's competitors. In his second report, Mr Jedlin responds that, although the Ten Group has achieved substantial growth in digital revenue, and KPMG's high case scenario reflects a substantial proportion of that growth, digital revenue is presently a small part of the Ten Group's revenue and, even if management achieve their transformation objectives, will still be a relatively small part of that revenue by the 2022 financial year. Mr Leung's evidence was also that KPMG's base and low case scenarios use lower terminal growth rates than those used in valuing the Ten Group's competitors, and Mr Leung also addressed the issue of terminal growth rates in oral submissions (T98). Mr Jedlin responds to Mr Leung's criticism of his use of terminal growth rates by pointing out that the terminal growth rate used by KPMG, at least in its high case scenario, is consistent with that used by Ten's competitors, and that KPMG used lower terminal growth rates in its base case and low case scenarios. I do not see any error in that approach, given the nature of a "base case" and "low case" in modelling alternative assumptions, and the evidence that the Ten Group presently faces greater financial and performance challenges than its competitors.

**[55]** Mr Leung advances a criticism of a limitation to the scope of KPMG's inquiries (Leung 20.10.17 [17]–[18]) which appears to be directed to the treatment of forward-looking information. I do not accept that criticism, where KPMG's report indicates that KPMG has reviewed the key commercial assumptions in Ten Group's cashflow model and holds the view that that model provides a suitable basis for its valuations. Mr Leung also contended that there was a mismatch of information between the voluntary administrators' section 439A report (Ex CKL-1, tab E10), KPMG's report (Ex IRJ-2; Ex CKL-1, tab E6) and announcements made by the Ten Group's management (Ex CKL-1, tab E11), and refers to the reduction in programming costs sought to be achieved by renegotiation of arrangements with CBS and Fox (Leung 20.10.17 [19]–[20]).

Mr Leung also addressed a suggested misstatement of the level of potential reduction in programming costs, between 40% and 50%, in his oral submissions (T98–T98). Mr Jedlin responds to this criticism in his second report, distinguishing between a potential reduction in content costs with CBS and Fox of approximately 50%, offset by a 10% increase in acquiring substitute content, to bring about a 40% reduction in costs. Mr Jedlin also points to the alternative scenarios for reduction in program costs adopted in KPMG's base case, low case and high case. In any event, as I noted above, Fox has now terminated its program arrangements with the Ten Group.

**[56]** Mr Leung also suggested that greater weight should be given to the Ten Group's transformation program (Leung 20.10.17 [24]–[29]), by contrast with KPMG's recognition of the uncertainties as to the implementation of that program. Mr Leung pointed to various positive statements made by the Ten Group's management as to progress with that program and submitted that KPMG's "high case" did not accurately reflect the prospects of that process. I do not see any error in KPMG's recognition of a substantial portion of the benefits of that program in its "high case" or its recognition of the risk that program will not achieve all the anticipated savings in its alternative scenarios.

**[57]** Mr Leung criticises KPMG's report (Leung 20.10.17 [30]) by reference to a suggested failure to use more than one valuation methodology. Mr Jedlin responds, rightly, that KPMG had used a capitalised earnings methodology to cross-check its discounted cashflow valuation. Mr Leung also submitted (Leung 20.10.17 [42]), not entirely consistently with the former submission that KPMG had used only one methodology, that there was inconsistency between KPMG's valuation and its cross-check of that valuation using a capitalised earnings methodology. Mr Jedlin's second report responded that Mr Leung's use of a capitalised earnings methodology was not appropriate as a primary approach, where TNHL's earnings were not sufficiently stable to support it, and that Mr Leung had also not appropriately applied that approach. Mr Jedlin also criticised Mr Leung's approach to the use of TNHL's share price to value TNHL. There seems to me to be force in each of those criticisms and Mr Leung's approach has the further difficulty that TNHL's shares ceased trading when TNHL was placed in voluntary administration, and the share price at that point therefore did not incorporate either the withdrawal of shareholder guarantees, or the directors' view that TNHL was insolvent or likely to become insolvent, as reflected in the appointment of voluntary administrators.

**[58]** Mr Leung contended (Leung 20.10.17 [33]–[35], Leung 25.10.17 [1]–[6]) that KPMG's report failed to assign a fair value for intangible assets, and particularly the television licence held by the Ten Group and Mr Leung also addressed the question of licence valuation in oral submissions (T99). In his second report, Mr Jedlin responds to Mr Leung's criticism of the valuation of intangible assets, and expresses the view that his valuation of TNHL's equity inherently captures that value, and that Mr Leung's approach to the value of those assets is in any event inappropriate, and distinguishes the position in respect of licence values for Network Ten from its competitors with higher earning margins and greater revenue shares. To the extent that this issue involves a difference of expert view, I would prefer Mr Jedlin's approach to Mr Leung's approach. So far as Mr Leung put this matter, not as a difference of expert view but as a manipulation of value by KPMG, then he has not established that allegation on the *Briginshaw* standard.

**[59]** Mr Leung also criticised (Leung 20.10.17 [36]–[41]) KPMG's approach to calculating equity value, and in particular KPMG's treatment of trade creditors and the "mitigated claims" of CBS and Fox in respect of the calculation of that value, and suggested that there was an inconsistency between that treatment and the treatment of trade debtors, program rights and other intangible assets in KPMG's valuation. Mr Leung also addressed those matters in oral submissions (T100–T102). In his second report, Mr Jedlin responds to Mr Leung's criticism as to KPMG's approach to deducting creditor claims and supports KPMG's approach on the basis that amounts claimed by CBS and Fox, assessed at the level of "mitigated claims" accepted by the administrators, would need to be discharged before any residual value of the Ten Group was available to shareholders.

**[60]** Mr Gubbay, and the document prepared by Illyria or its solicitors or advisers and referred to in Mr Gubbay's affidavit (Gubbay 23.10.17 [10(f)]), also raised an associated criticism that KPMG had double counted CBS's and Fox's claims in respect of programming costs on a mitigated basis. Mr Jedlin responded, and I accept, that there is no double counting of program costs where (as Appendix 6 to KPMG's report had noted) Ten Group's cashflow model assumed payment of substantially reduced the programming fees to CBS and Fox on the basis of a successful renegotiation of such fees, which has not in fact occurred. The additional adjustment made in KPMG's report reflects the continuing liability for the amount not reflected in the cashflow, but reduced to the extent that CBS and Fox are assumed to mitigate their loss by selling content at its current market value. I can see no error in that approach.

**[61]** Mr Leung also undertakes a free cashflow analysis of the Ten Group (Leung 20.10.17 [44]–[48]), to which Mr Jedlin responds by pointing out that, inter alia, it depends upon a projected earnings before interest, tax, depreciation and amortisation ("EBITDA") of $138.8 million from financial year 2019, which is inconsistent with the Ten Group's history of financial losses. To the extent that Mr Leung's valuation assumes the result of the transformation program, it seems to me that it does not sufficiently discount for implementation risks in that program. Mr Jedlin also points to inconsistencies between Mr Leung's approach and management guidance by the Ten Group for the 2017 financial year and management's forecast of modest annual declines in revenue. Mr Leung accepted, in submissions, that he had double counted savings in relation to aspects of that calculation. It seems to me that Mr Leung's approach had too little regard to the issues facing the Ten Group. As Mr Jedlin pointed out, the enterprise value of nearly $942 million derived by Mr Leung does not appear to be consistent with TNHL's historical performance. Nor did potential purchasers of TNHL (including Birketu and Illyria) share Mr Leung's view of its value. Mr Newlinds also points out, and I accept, that the sales process adopted by the receivers was extensive, robust and competitive and did not produce any offer for the Ten Group that would recognise value in the equity of TNHL. That matter substantially undermines the approach adopted by the several Interested Persons, in particular Mr Leung, to the valuation of TNHL.

**[62]** In Mr Leung's second affidavit, he also submitted (Leung 25.10.17 [7]–[8]) that CBS will make an immediate windfall gain of approximately $568 million on implementation of the CBS DOCA. Mr Newlinds points out that that suggestion wrongly assumes that CBS's debt has been extinguished, where that is not the case, although that debt is not treated as a claim against the creditors'

trust. I also do not accept that submission so far as it may be directed to any gain in economic terms, since there is no evidentiary basis for any finding that CBS Australia could realise TNHL's business, having acquired it, for any amount substantially in excess of its acquisition cost.

**[63]** Mr Gubbay submits (Gubbay 23.10.17 [10]) that there are several omissions and inconsistencies in the figures used in the KPMG report. Mr Newlinds responds, and I accept, that the several matters which Mr Gubbay identifies as omissions were addressed in KPMG's report and the inconsistencies to which Mr Gubbay refers are explicable, for example, by the fact that the fees owing to shareholder guarantors were stated at different dates in the explanatory statement provided to shareholders and KPMG's report. Mr Gubbay also suggested (Gubbay 23.10.17 [10(g)] that special value to a prospective purchaser of the Ten Group should not be overlooked. That is not a matter that necessarily establishes unfair prejudice in an application of this character, where TNHL's shareholders could not realise any such special value to a purchaser in a liquidation of TNHL or a liquidation or receivership of its subsidiaries (*Re Nexus* above at [98]) and there was, in any event, no evidence that TNHL's shares had such "special value" to CBS Australia in this case, including in respect of tax losses to which I refer below.

**[64]** In his "Further Statement to the Court" and in oral submissions, Mr Gubbay also referred to several positive statements made by TNHL's management, prior to the point at which TNHL and other companies in the Ten Group were placed in voluntary administration. Mr Gubbay questioned the basis for the impairment of intangible assets in the 2017 half year financial report (Gubbay 23.10.17 [11]), but the reasons for that impairment are identified in that report as a decline in the free to air television market, financial performance shortfalls and a sustained reduction in market capitalisation, all of which seem to me to provide a proper basis for such an impairment. Mr Gubbay also expressed the view in that affidavit (Gubbay 23.10.17 [12]) that:

> "It is also difficult to comprehend how the Net Present Value of [TNHL] can now be nil in view of the fact that [TNHL] appears to be continuing to operate as a commercial entity, broadcasting programs as well as revenue earning commercial advertisements."

Mr Gubbay also referred to some evidence of increase in the Ten Group's free to air advertising revenue (Gubbay 23.10.17 [13]). Mr Gubbay repeated that submission in his "Further Statement to the Court" and in oral submissions, and also observed the fact of continuing, and possibly increasing, advertising which he sees while watching Channel 10 or at least its affiliate broadcasting in the Newcastle region.

**[65]** Mr Newlinds responds to Mr Gubbay's evidence and submissions by drawing attention to KPMG's observation that a business such as the Ten Network will experience a contraction in earnings margins, in a declining market, unless it can reduce costs or increase its market share, where it has a fixed cost base or fixed increases in costs. KPMG also notes that, despite significant investment in Ten Network over the last five years, and increases in the Ten Group's revenue share, revenue and costs have increased at a similar rate such that its EBITDA remains negative, and its revenue share remains significantly lower than that of its competitors, bringing about a weaker negotiating position for advertising revenue and reduced economies of scale. With respect to Mr Gubbay, it also seems to me that this evidence failed to have regard to the fact

that the value of TNHL depends not only upon its capacity to earn revenue and its assets but also upon its incapacity to repay its liabilities.

**[66]** In oral submissions in opening, Mr Gubbay suggested that, by manipulation of TNHL's financial results, a "not-very-good" result could be made to look "disastrous" and that, without impairment costs, TNHL's results for the six months to 28 February 2017 would have been a loss of $17 million, which was "in the overall scheme of things … not all that great", and Mr Gubbay noted that impairment charges of $946 million had been taken by TNHL since the 2013 financial year. Mr Gubbay emphasised the "many imponderables" and uncertainties in KPMG's report and submitted that, if the value of TNHL to shareholders was really nil, then Birketu and Illyria would not have combined to make a bid for TNHL. Mr Gubbay also emphasised that Birketu's and Illyria's bid was still on foot, referring to an email from Illyria's legal representative confirming that it had not been withdrawn. I have addressed these matters above. In oral submissions, Mr Gubbay also submitted that astute businessmen such as those controlling Birketu and Illyria would not have made a bid to take control of TNHL if their shares and other shareholders' shares were worthless (T71–T72). I am unable to accept that submission, which it seems to me does not distinguish between the present worth of TNHL's shares, having regard to the level of its existing debt, and the potential future value of equity in TNHL if that debt can be substantially reduced by a deed of company arrangement and creditors' trust and additional funds made available to TNHL by either Birketu and Illyria on the one hand or CBS on the other to allow a potential improvement in its future performance.

**[67]** In his "Final Summation" document (MFI 5) and in oral submissions, Mr Gubbay also expressed the view that shareholders had been "blindsided" by the circumstances and events leading up to the voluntary administration of TNHL (T88). Mr Gubbay's evidence is not sufficient to allow me to form any view as to the merit of that submission, which would require a review of the information contained in the Ten Group's published financial reports and TNHL's disclosures to ASX over the recent past. Assuming, without deciding, that the withdrawal of the shareholder guarantees and the appointment of voluntary administrators did catch shareholders in TNHL by surprise, it does not seem to me that that can displace a finding that there is no unfair prejudice in the transfer of shares to CBS Australia or its nominee, if (as I have found) those shares have no equity value. Mr Gubbay also advanced several criticisms (T89) of the management of the Ten Group, including in respect of the payment of guarantee fees to the three shareholder guarantors and in respect of suggested extravagance in staffing daytime programming on Channel 10. Ultimately, as Mr Gubbay fairly accepted, this application is not a forum for scrutiny of decisions of that kind, since the Court must address the position in which TNHL and its shareholders now find themselves.

**Valuation of shares in TNHL on a distressed basis**

**[68]** Alternatively, KPMG's report assessed the value of TNHL's equity on a distressed basis, reflecting the situation that TNHL did not have sufficient funding to pursue its operations for the foreseeable future. Mr Jedlin expressed the view that the proper basis to value TNHL's equity is on a distressed basis to reflect a liquidation scenario, although KPMG assumed, realistically in my view, that it was more likely that a liquidation would proceed by a distressed sale of the Ten Network's business, with ongoing funding from secured creditors to the extent

necessary to effect the sale of the assets on a going concern basis, rather than on a "breakup" basis. Mr Jedlin noted that a sale on that basis would nonetheless involve an "anxious" seller, seeking to achieve a sale within a limited time period, and adjusted KPMG's high case going concern valuation to reflect financial distress, by increasing the discount rate, noting the potential impact of financial distress on existing content agreements where providers of content could potentially terminate their agreements (and, as I noted above, Fox has done so) and CBS's and Fox's content agreements were not formally amended. On each of these scenarios, KPMG concluded that the adjusted NPV of the Ten Group's business operations was below that under the high case going concern valuation and the implied value of equity in TNHL was negative. KPMG also noted the need to pay the claims of priority creditors, including annual leave, long service leave and redundancy costs of employees, in a winding up of TNHL.

**[69]** Mr Leung also, perhaps surprisingly, took issue with KPMG's treatment of the Ten Group's business as being "distressed" and with KPMG's assumption that Ten did not have sufficient funding to pursue its operations for the future (Leung 20.10.17 [21]–[22]). That criticism was based on an observation in the voluntary administrators' section 439A report that creditors were being paid in accordance with commercially negotiated terms; however, that position reflected the facilities provided by CBA in respect of the receivership and subsequently by CBS Australia under the CBS DOCA, and did not establish the Ten Group's ability to sustain its operations without that support. Mr Leung also maintained in oral submissions (T93) that TNHL is not in distress by reason of progress with the turnaround program. It seems to me that there can be no serious question that a company which has been placed in voluntary administration by its directors, on the basis that it is insolvent or likely to become insolvent, and had substantial amounts due to be repaid to CBA within a short time frame, as to which its major shareholders had foreshadowed the withdrawal of their guarantees, could and can properly be described as "distressed". Mr Leung's unwillingness to accept that proposition seems to me to undermine the weight to be given to his views generally.

**[70]** Mr Leung also contended that the fair value of the Ten Group should not, under ASIC's regulatory guidance, have regard to its financial distress (Leung 20.10.17 [23]). I do not accept that submission. ASIC's Regulatory Guide 111 requires a going concern valuation to be undertaken for an application of this kind but, not surprisingly, does not prevent a liquidation or going concern valuation also being undertaken in an appropriate case. Such a valuation was, for example, material to the decision in *Re Nexus* above.

**[71]** As Mr Newlinds pointed out, in oral submissions, the Interested Persons' criticisms of KPMG's report otherwise largely focused on its going concern valuation. Mr Newlinds submitted that that was not the appropriate methodology since it did not have regard to the Ten Group's current financial difficulties and assumed that sufficient funding was available to pursue its operations (T18). As Mr Newlinds pointed out, KPMG's "distressed" valuation corresponds to a liquidation scenario, although KPMG assumes that secured creditors would fund ongoing trading to allow a sale of the assets on a going concern basis to avoid a "break up" sale. The value derived for the Ten Group's business, on that analysis, again has the result that the implied value of equity in TNHL is negative. A lesser value would be derived on a "close down" outcome if the business was not sold on a "going concern", albeit distressed, basis (Korda 10.10.17 [127]–[130]).

**[72]** As I noted above, it seems to me that the Ten Group's business is properly treated as presently distressed and the only alternatives to the implementation of the CBS DOCA and the share transfer to CBS Australia or its nominee are now either the implementation of the Alternative Asset Sale Transaction or the liquidation of TNHL by a sale of its business on a "distressed basis" or, at worst, on a close down basis. The position here seems to me to be analogous to that which I considered in *Re Nexus* above at [70], where a going concern valuation of an entity was irrelevant for the purposes of an application under s 444GA where that entity and its operating subsidiaries were not going concerns. On that basis, the equity in TNHL has no value and, on the approach that has consistently been adopted in the authorities to which I have referred above, there is neither prejudice nor unfair prejudice in a transfer of the shares in TNHL to CBS Australia or its nominee.

**The deed administrators' submissions as to the alternative asset sale transaction**

**[73]** The Deed Administrators submitted that the appropriate counterfactual to a transfer of shares was not a liquidation of TNHL, but the Alternative Asset Sale Transaction provided by cl 5.2 of the CBS DOCA. The result of implementation of that transaction would be that TNHL's assets and undertakings, including its interest in shares in the Ten Group, would be transferred to CBS Australia or its nominee, and that The Ten Group Pty Ltd would assume TNHL's liabilities under the CBS facility, other than certain retained liabilities, and CBS Australia would make the relevant payment into the creditors' trust for distribution to creditors. The effect of that transaction would be that TNHL would have no assets or liabilities other than the residual amount owed by it in respect of the CBS facility.

**[74]** I do not consider it necessary to determine whether the Alternative Asset Sale Transaction could properly be used as a comparator to determine whether there is "unfair prejudice" to TNHL shareholders for the purposes of s 444GA of the Corporations Act, where the evidence establishes that TNHL's shares would have no value in a liquidation, and the Alternative Asset Sale Transaction would have the same result. I have reservations as to whether it would generally be appropriate to have regard to an alternative transaction of that kind, for the purposes of an application under s 444GA of the Corporations Act, where it may often be possible for a deed proponent and a deed administrator to structure an alternative transaction, to be undertaken if the application under s 444GA of the Corporations Act was not approved, which would have the result that shareholder equity had no value. I am inclined to think that, if an alternative transaction had that result, but a liquidation did not, then a transfer of shares would potentially be unfairly prejudicial to shareholders for the purposes of s 444GA of the Corporations Act, or the Court would otherwise decline to exercise its discretion to grant leave for such a transfer.

**Birketu's and Illyria's "alternative proposal"**

**[75]** The second basis on which Mr Du opposed the application (Du 20.10.17 [7]–[8]) was the Deed Administrators' alleged failure to consider the implications of the equity component in the "alternative proposal" put by Birketu and Illyria. It is common ground that Birketu's and Illyria's alternative proposal contemplated that existing shareholders in TNHL would retain a 25% equity interest in TNHL. Mr Du's evidence, by way of submission, was that Birketu's and Illyria's alternative proposal's equity offer component was relevant to the

value of shareholders' shares in TNHL. Mr Gubbay (Gubbay 23.10.17 [7]) and Mr Leung also relied on the alternative proposal put by Birketu and Illyria immediately prior to the second meeting of creditors. The possibility that alternative hypothetical or actual restructuring proposals may give rise to complexities in applications of this kind has also been recognised in the academic literature: see RJ Turner, "Debt for equity swaps and corporate restructuring under s 444GA of the Corporations Act" (2015) 26 *JBFLP* 264 at 278–279.

**[76]** Mr Du relies on a statement that the revised Birketu and Illyria proposal has not been withdrawn, so far as its withdrawal required a positive notification to KordaMentha that has not been given, made in an email dated 30 October 2017 (Ex YD-2) from Illyria's solicitors to Mr Gubbay, which was tendered without objection, notwithstanding that it was apparently subject to a claim for common interest privilege by Illyria. It seems to me that statement is of limited weight in establishing that Birketu and Illyria remain committed to that proposal, where that statement is made only on behalf of Illyria and not on behalf of Birketu and neither Birketu nor Illyria has appeared in this application. In oral submissions, Mr Du also submitted that the offer from Birketu and Illyria was still open, and that liquidation was therefore not the only alternative to the CBS DOCA and the transfer of shares to CBS Australia or its nominee for the purposes of s 444GA of the Corporations Act (T77). Mr Du was not prepared to accept, in that respect, that the fact that creditors of the Ten Group had voted to execute the CBS DOCA, rather than pursue Birketu's and Illyria's alternative proposal, had the result that that alternative proposal could not now be accepted in place of the CBS DOCA.

**[77]** Mr Newlinds submits, in response to the Interested Persons' reliance on Birketu's and Illyria's revised proposal, that there is no evidence that that proposal remains available and Birketu and Illyria have not objected to the proposed transfer of shares in TNHL to CBS Australia or its nominee; that creditors voted, by substantial margins, to enter the CBS DOCA; that the revised Birketu and Illyria proposal was less favourable to creditors than the revised CBS proposal (Ex MK-1, tab 28, 1038); that the fact that it allowed TNHL's shareholders to retain a proportion of their shares did not establish that those shares had value; and that a refusal of this application, on the basis of a possible continuance or improvement of the Birketu and Illyria proposal would be inconsistent with the commercial urgencies facing the Ten Group, and contrary to the objects of Pt 5.3A of the Act.

**[78]** I do not accept that the existence of Birketu's and Illyria's alternative proposal supports any finding that the proposed transfer of the shares in TNHL to CBS Australia or its nominee involves prejudice, or unfair prejudice, to TNHL's shareholders. I will assume, without deciding, that Birketu and Illyria are or may still be prepared to proceed with that proposal, although the evidentiary basis for that proposition is doubtful. That proposal is presently not capable of implementation, because TNHL's and the Ten Group's creditors, exercising the powers conferred on them at a second meeting of creditors under Pt 5.3A of the Corporations Act, did not vote to adjourn the second meeting of creditors to pursue that proposal and voted in favour of execution of the CBS DOCA which has now been executed.

**Whether the transfer of the shares is unfairly prejudicial to shareholders on other grounds**

**[79]** Mr Du's affidavit dated 20 October 2017 advanced a third submission that:

> "I object [to] this applicant's reliance on expert value report to prove there is no unfair prejudice to members of TNHL. Value of the shares should not be the only base to decide whether the s 444GA application unfairly prejudices the members of TNHL. Although prior cases had a particular focus on the value of shares to decide the issue of prejudice and unfair prejudice under s 444GA(3), this case is very different to those in which liquidation was almost the only alternative. In the current matter, there is or was an alternative recapitalisation proposal, which arguably is better, at least from the point of justice concern. The major shareholders, along with so many small shareholders, have contributed so much to the maintenance and transformation of the business, a national brand and even icon, and are willing to continue contributing to the business; it is unfair to ignore the past contributions of shareholders to the business, on which the business will keep going."

**[80]** Mr Du elaborated on these matters in further submissions. Mr Du submitted that an interest in shares has a special quality, involving an element of speculation, and that a share is of a proprietary nature. Mr Du also submits that there is unfair prejudice to shareholders, because a share confers rights on shareholders and:

> "to say taking away all those rights under the share is without unfair prejudice to the shareholder does not fit the notion that property rights are inviolable."

In oral submissions, Mr Du similarly submitted that a share was a kind of property which conferred rights upon shareholders and that voluntary administration did not necessarily eliminate shareholders' rights (T76).

**[81]** I recognise that a share may be characterised as having a proprietary quality, which will be recognised and protected in an appropriate case: *Gambotto v WCP Ltd* (1995) 182 CLR 432; 127 ALR 417; 16 ACSR 1; but see also H Bird, "A Critique of the Proprietary Nature of Share Rights in Australian Publicly Listed Corporations" (1998) 22 *Melb Univ LR* 13, pp 143–4; RJ Turner, "Debt for equity swaps and corporate restructuring under s 444GA of the Corporations Act" above at 282–283. However, it must also be recognised that shareholders are largely excluded from decision-making in a voluntary administration and their economic interests are, at least to some extent, deferred in favour of the interests of creditors. In *Brash Holdings Ltd v Shafir* (1994) 14 ACSR 192 at 196, Beach J observed that:

> "If one looks at the provisions of Pt 5.3A of the Corporations Law, it is clear, in my opinion, that they focus exclusively on the interests of creditors of the corporation in question. Nowhere in Pt 5.3A is provision made for members to have a voice in the administration of the corporation. Expressed another way, members are excluded from contemplation during the process of an administration."

**[82]** The deferral of such interests is analogous to the approach taken in respect of reconstructions and amalgamations and the transfer of assets and liabilities in the context of a creditors' scheme, where shareholders' or lower ranking creditors' consent is required if their financial stake in a transferring company is diminished, but not where they have no real economic interest in what is proposed, because the company is insolvent and its assets are insufficient to satisfy its creditors in full: *Re Tea Corporation Ltd* [1904] 1 Ch 12; *Re Opes Prime Stockbroking Ltd (recs and mgrs apptd) (in liq)* (2009) 179 FCR 20; 258 ALR 362; 73 ACSR 385; [2009] FCA 813 at [76]; *Re Bluebrook Ltd* [2010] 1 BCLC 338; [2009] EWHC 2114 at [25]; see also C Anderson & D Morrison, "Seen but not heard? The significance of shareholders under Pt 5.3A of the Corporations Act" (2008) 16 *Insolv LJ* 222; RJ Turner, "Debt for equity swaps

and corporate restructuring under s 444GA of the Corporations Act" above. I also observed, in *Re Nexus* above at [18] that s 444GA of the Corporations Act:

> "... should be understood in the context that provisions for the compulsory transfer of shares have long existed in the companies legislation, both in respect of schemes of arrangement and takeovers, and the significance of shareholders' proprietary rights in their shares are recognised by the wider concept of "unfair prejudice" in s 444GA(3) of the Corporations Act."

**[83]** I am here obliged to apply the statutory regime established by s 444GA of the Corporations Act, which contemplates the transfer of shares under a deed of company arrangement in the specified circumstances, and Mr Du abandoned any challenge to the validity of that section on constitutional grounds. So far Mr Du's submission turns on the test to be applied in determining whether there is prejudice or unfair prejudice for the purpose of s 444GA(3) of the Corporations Act, I consider that the authorities to which I have referred above cannot be distinguished on the basis put by Mr Du. There is real importance in consistency in decision making, particularly in respect of national corporations legislation, and the principles established by the case law to which I have referred above are now well established. I also cannot accept Mr Du's submission that property rights in shares are inviolable, where s 444GA of the Corporations Act authorises the transfer of shares in a deed administration in appropriate circumstances. In the course of oral submissions, Mr Du also raised the possibility that the law could be reformed to require a voluntary administrator to have regard to "current shareholders' rights, not necessarily in money value, but some rights inherent with shareholders" (T84). That, no doubt, is a possibility, but I am required to determine this application having regard to s 444GA of the Corporations Act as it stands, not to the position that might exist if the section were amended in that manner.

**[84]** So far as Mr Du's submission relies on Birketu's and Illyria's alternative proposal, I have held above that that proposal is not capable of implementation, where the Ten Group's creditors did not adjourn the second meeting of creditors to pursue it and the CBS DOCA has been executed and not set aside. Mr Du also submits that a shareholder bidder should be given "special consideration" in a voluntary administration. It does not seem to me that Pt 5.3A of the Corporations Act, or s 444GA in particular, requires that, if creditors resolve at a second meeting of creditors in favour of a deed of company arrangement with a third party that they regard as most favourable to them, and that outcome is neither challenged nor unreasonable on its face, leave should not then be granted for a transfer of shares to that third party to implement that deed merely by reason that a shareholder bidder had advanced an alternative proposal that creditors did not pursue. Had any question arisen of giving any "special consideration" to Birketu's and Illyria's alternative proposal in this case, a novel question may also have arisen as how the Court should exercise its residual discretion whether to approve a transfer of shares to them under s 444GA(3) of the Corporations Act, where their notification of their intention not to continue their shareholder guarantees appears to have prompted the voluntary administration and created the occasion for such a transfer.

**[85]** Mr Du also advanced an oral submission that the voluntary administrators had not had sufficient regard to shareholders' rights and should have taken a "little bit more effort" to find a genuine or the best possible bid from potential bidders. There is no evidentiary basis for a finding that the sale process adopted

in this case was not comprehensive or adequate. There is also no basis to think that a longer sale process would have been in the interests of Ten Group's business, or of maximising its value, where it would have promoted ongoing uncertainty as to that business and as to the Ten Group's programming arrangements, advertising sales and employees. In oral submissions, Mr Du also submitted that a voluntary administrator had a duty to obtain a "genuine bid" from "shareholder bidders" (T84). Plainly, that will not always be possible in a voluntary administration, although initial and revised proposals were here made by Birketu and Illyria, and, as I have noted above, Ten Group's creditors chose not to adjourn the second meeting of creditors to pursue that proposal.

**[86]** In his second submission, Mr Du also raised a question as to the position if a high technology company that was insolvent and was placed in voluntary administration, where its shares had no value, and submitted that a transfer of shares under s 444GA of the Corporations Act in that situation would be "unfair" and "dangerous" to the development of high technology industries, and also raised this question in oral submissions (T79). It seems to me that that situation does not arise in this case, where TNHL is an operating business using a well-established technology which can be valued in an orthodox way. The position in respect of high technology industries can be addressed when and if it arises.

**[87]** In his second submission, Mr Du also submitted that the Ten Group's tax losses had value, at least for Birketu and Illyria, and it was unfair that Birketu and Illyria should be deprived of those tax losses, and Mr Du also addressed the commercial value of tax losses to a shareholder bidder in oral submissions (T85). I do not accept that submission, which it is notable that Birketu and Illyria did not seek to advance for themselves. First, that submission may depend upon the individual tax positions of Birketu and Illyria, as to which there is no evidence; second, the question of unfairness to shareholders is not to be determined by reference to the position of a particular shareholder or two major shareholders; and, third, in any event, it is not apparent to me that either Birketu or Illyria has any particular entitlement to TNHL's tax losses, such that a lack of access to those tax losses could reasonably be described as unfair to them, where TNHL's creditors did not vote to adjourn the second meeting of creditors to pursue that proposal and voted in favour of execution of the CBS DOCA which has now been executed.

**The interested persons' criticisms of the deed administrators' conduct**

**[88]** Mr Du's affidavit dated 20 October 2017 identified a fourth basis of objection to the order under s 444GA of the Corporations Act, by reference to the Deed Administrators' (or, possibly, shareholder guarantors') conduct prior to and during the voluntary administration process. Mr Du's evidence, by way of submission, was initially that shareholder guarantors' conduct in withdrawing their support for the Ten Group should have been investigated by the voluntary administrators (Du 20.10.17 [9]–[10]). Mr Du also submitted, in written submissions, that those events, and the payment of guarantee fees by TNHL to the shareholder guarantors:

> "pose indication of oppressive conduct by guarantor shareholders against other members of the company, and unfair benefit received by guarantor shareholders to the detriment of other creditors or shareholders."

[89] In oral submissions, Mr Du initially submitted that there ought to have been an investigation by the voluntary administrators of the position taken by the shareholder guarantors, which caused TNHL's directors to appoint voluntary administrators and had implications for other shareholders and for the Ten Group's creditors. Mr Du also submitted that that conduct may give rise to oppressive conduct within the scope of s 232 of the Corporations Act (T62). Mr Newlinds responded that it was not apparent that shareholder guarantors had committed any legal wrong by providing advance notice of their intention not to renew their support when the CBA facility expired in December 2017.

[90] After the shareholder guarantees were made available for his inspection, Mr Du advised (T81) that he did not press the criticism of the shareholder guarantors and it seems to me that there can be no basis for criticising the Deed Administrators for focusing their efforts primarily on the continued operation of and realisation of the Ten Group's business for the benefit of its creditors. This matter does not seem to me to raise any question as to the conduct of the administration or the Deed Administrators' conduct which might warrant the exercise of a discretion to withhold the orders sought. Mr Du also submitted that the Deed Administrators lacked "perceived impartiality" (Du 20.10.17 [10]) and did not reasonably investigate the shareholders' actions and, in oral submissions, Mr Du raised a concern as to the independence of the voluntary administrators, based on a suggestion that they had been working for TNHL before they were appointed as voluntary administrators (T62). To the extent that any issue as to the voluntary administrators' perceived impartiality was raised in the decision of the Federal Court of Australia in *Korda, Re Ten Network Holdings Ltd (admins apptd) (recs and mgrs apptd)* [2017] FCA 914, it was there addressed by the appointment of a special purpose administrator for a limited purpose, and there is no basis for me to take a different view from that taken by the Federal Court in that application. Mr Du's criticism of the voluntary administrators was otherwise not established by evidence, particularly having regard to the complexity of the administration and the short time period available to address the relevant issues under Pt 5.3A of the Corporations Act.

[91] Mr Du also indicated that he objected to the Deed Administrators'"complete disregard of shareholders' interest, especially other non-guarantor shareholders". Mr Du also submitted that:

> "Pt 5.3A has a particular focus on the interest of creditors as a whole and object of maximising the chance of business' existence. However, it does not indicate anything that shareholders' interest can be completely disregarded. Pt 5.3A is not an isolated part of the Corporations Act, which has a notion of shareholder primacy. Corporation law itself is subject to broader general law, including principles of equity."

[92] It is not necessary to address questions of the interaction between the Corporations Act generally, Pt 5.3A of the Act, the general law or equity to address this submission which I do not accept, for two reasons. First, it was not the Deed Administrators who determined to execute the CBS DOCA, but creditors of TNHL and other Ten Group companies, exercising the decision that is conferred upon them at the second creditors' meeting under Pt 5.3A of the Corporations Act. Second, the question that I need to address is whether the proposed transfer of the shares to CBS Australia or its nominee under the CBS DOCA is prejudicial or unfairly prejudicial to TNHL's shareholders, for the purposes of s 444GA of the Corporations Act. Where that has not been established, the Court has jurisdiction to approve the transfer and there is no basis

to withhold that approval, on discretionary grounds, where there is no suggestion that any more favourable outcome for shareholders could follow from either Birketu's and Illyria's proposal (which cannot be implemented where Ten Group's creditors did not adjourn the second meeting of creditors to pursue it and voted for execution of the CBS DOCA) or a liquidation of TNHL. Several other aspects of Mr Du's submissions, including his criticism of the voluntary administrators for not "directing" the adjournment of the second creditors' meeting, misapprehended the distribution of powers between the voluntary administrators on the one hand and creditors voting at the second creditors' meeting on the other. Other aspects of those submissions, including the proposition that the voluntary administrators did not provide details of the revised Birketu and Illyria proposal to creditors at the second creditors meeting, were incorrect as a matter of fact.

**[93]** The Interested Persons also advanced criticisms of the time available to shareholders to consider this application and suggested that other shareholders might have opposed the application had additional time been available for them to do so. In his second submission, Mr Du repeats his submission that there was unfairness in the process of this application, largely directed to his criticism of the speed of that process, and a suggested lack of opportunity for other shareholders to intervene. I am not persuaded that that submission provides any basis not to approve this application, where there is substantial evidence of steps taken by the Deed Administrators to make information concerning this application available on ASX and on the Ten Group's and on KordaMentha's websites, the application has been the subject of media reports, and applications of this kind will ordinarily have a degree of commercial urgency that requires that they be expedited. Mr Du also made further oral submissions as to the application of principles of procedural fairness to administrative decision-making, while fairly recognising that the Deed Administrators were not a government agency (T126). It seems to me that, on any view, the Interested Persons have been afforded procedural fairness in respect of the application for leave to transfer their shares to CBS Australia or its nominee, where they have had the opportunity to make detailed written and oral submissions in respect of it in a hearing of about two days in length before this Court.

**[94]** Mr Gubbay also points to several matters which may indicate that it is surprising that TNHL reached its present position, and may suggest that it has a better future, including growth in audience and revenue share and a potential for earnings improvement and benefits under its transformation strategy. Mr Gubbay also pointed to a view expressed in another context, by an on-air personality on Ten that it is "a sad day when another Australian company goes overseas". I accept that these views may reasonably be held and would be held by some or many members of the Australian community. It does not, however, seem to me that they demonstrate any prejudice or unfair prejudice in the proposed transfer of shares in TNHL to CBS Australia or its nominee, which turns upon more specific considerations. Mr Gubbay also submitted, possibly correctly, that TNHL would not now be in voluntary administration and shareholders would not be exposed to the loss of their equity, but for the withdrawal of support by the shareholder guarantors. It may be that that views may also be reasonably held and may be shared by some, or many, of TNHL's shareholders and other persons within the Australian community. Again, however, that matter does not

demonstrate that the proposed transaction, at least so far as it involves a transfer of shares to CBS Australia or its nominee rather than Birketu or Illyria, is unfairly prejudicial to TNHL's shareholders.

5

**Orders**

**[95]** For these reasons, it seems to me that there is no prejudice, and no unfair prejudice, arising from any equity value in TNHL's shares or otherwise, in the transfer of those shares to CBS Australia or its nominee. I am therefore satisfied that the Court should make the orders sought to modify the definition of "Court" in the CBS DOCA and grant leave to the Deed Administrators to transfer TNHL's shares to CBS Australia's nominee, and I make orders in accordance with the short minutes of orders initialled by me and placed in the file.

10

**Order**

15

The Court grants leave pursuant to s 444GA of the Corporations Act 2001 (Cth) to transfer the shares in Ten Network Holdings Limited pursuant to the deed of company arrangement and varies the deed in accordance with the variation sought in the Plaintiffs' Interlocutory Process dated 2 November 2017.

20

JOSHUA SANTILLI
SOLICITOR

25

30

35

40

45

50

# Appendix 3 – Timeline of the Alita section 444GA orders

| | |
|---|---|
| **12 August 2019** | Shares in Alita placed in a trading halt |
| **27 August 2019** | Galaxy acquires senior secured debt facility provided to Alita |
| **28 August 2019** | Appointment of Administrators |
| **29 August 2019** | Appointment of Receivers |
| **20 September 2019** | Supreme Court of Western Australia extends the convening period until 11 December 2019 |
| **8 October 2019** | Administrators invite bids for recapitalisation/ acquisition |
| **7 November 2019** | Bid deadline |
| **November 2019** | Negotiations with preferred bidders |
| **29 November 2019** | Repayment of Galaxy by Administrators with funding from CHEL |
| **9 December 2019** | Rule 75-225 report issued for second meetings to be held on 17 December 2019 |
| **17 December 2019** | Second meetings of creditors held, DOCA resolutions passed and DOCA executed |
| **18 December 2019** | Originating process filed in Supreme Court of Western Australia seeking s 444GA orders |
| **23 December 2019** | Draft Expert's Report and Explanatory Statement lodged with ASIC |
| **14 January 2020** | Expert's Report and Explanatory Statement released |
| **14 January 2020** | Application for delisting submitted to SGX-ST |
| **17 January 2020** | Extension of time for Singapore shareholders to file objections, and change of date for final hearing |
| **28 January 2020** | Shareholder information session held by Deed Administrators |
| **30 January 2020** | Extension of time for all shareholders to file objections |
| **4 February 2020** | Shareholder Frequently Asked Questions published by Deed Administrators (with answers) |
| **4 February 2020** | Expert Report addendum – comments by author of Independent Specialist Report – published |
| **17 February 2020** | Expert Report addendum published |
| **21 February 2020** | No objection notice received from SGX-ST for delisting |
| **4 March 2020** | Final hearing date scheduled |

# Overview of the Alita s 444GA orders

## Background to s 444GA application

Alita owns the Bald Hill Mine, located near Kambalda in Western Australia, which produced lithium spodumene concentrate and tantalum as a by-product.

Following Alita's offtake counterparty ceasing to take product in accordance with the terms of the offtake agreement, on 28 August 2019, Richard Tucker and John Bumbak (**Administrators**) were appointed as administrators of Alita and certain subsidiaries (**Alita Group**).

Martin Jones, Matthew Woods and Andrew Smith of KPMG (**Receivers**) were subsequently appointed as receivers and managers of each company in the Alita Group on 29 August 2019 by Galaxy Resources Ltd (**Galaxy**), a creditor holding security over the assets of the Group.

During the limited period of their appointment, the Receivers:

- controlled the Alita Group's operations and assets
- reviewed the Alita Group's operations
- ceased trading the Alita Group's operations
- shut down the mine and implemented a care and maintenance program

The Administrators undertook a sale/recapitalisation campaign for the Alita Group. This resulted in two deed of company arrangement proposals and no offers to purchase the Alita Group's assets.

At the conclusion of the sale campaign, and after assessing the two deed of company arrangement proposals, the Administrators recommended to creditors in their report that the DOCA proposal of Liatam Mining Pty Ltd (**Liatam**) should be accepted. On 29 November 2019, and as a prelude to the DOCA, China Hydrogen Energy Ltd (**CHEL**), a related company of Liatam, advanced funds to the Administrators to fund the repayment of Galaxy's secured debt in full. CHEL became the Alita Group's new secured creditor and the Receivers retired.

At the meeting of creditors held on 17 December 2019, the creditors of each Alita Group company resolved that the DOCA be entered into. On 17 December 2019, the DOCA was executed, and the Administrators became the Deed Administrators.

## Deed Administrators preparing the Experts' Report

Following execution of the DOCA, the Deed Administrators made an application pursuant to s 444GA, and prepared an experts' report and explanatory statement for shareholders. The experts' report was prepared with substantial reliance on, and reference to, two independent reports:

- an independent valuation of Alita's assets prepared by Deloitte Financial Advisory Pty Ltd, and
- an independent specialist report on the mineral assets of Alita prepared by SRK Consulting (Australasia) Pty Ltd.

It was not practicable for one expert to opine on the entirety of Alita's financial position in a liquidation scenario, covering:

- the realisable value of its mine and mineral assets
- the realisable value of product stockpiles

- the realisable value of cash and debtors
- the potential recoveries available to a liquidator, and the commercial considerations to pursuing such recoveries
- the quantum and validity of creditor claims.

The appropriate approach was to engage experts to opine on technical asset values, and for the Deed Administrators to collate those values together with other asses and recoveries, and the creditor position, to confirm an overall position for the purposes of the experts' report.

Relevantly, this is a fundamentally similar approach to that applied in administration in making a recommendation to creditors in the Administrators' Report to Creditors.

# Appendix 4 – Timeline of the Black Oak section 444GA orders

| | |
|---|---|
| **25 November 2015** | Shares of Black Oak placed in a trading halt pending a decrease Reserves and Resources update |
| **27 November 2015** | Shares of Black Oak voluntarily suspended from the official quotation |
| **27 November 2015** | Appointment of Administrators |
| **27 November 2015** | Appointment of Receivers |
| **10 December 2015** | Receivers commence their first sale campaign |
| **29 December 2015** | Federal Court of Australia grants an extension to the convening period to 15 March 2016 |
| **15 March 2016** | Black Oak placed into Liquidation |
| **29 August 2016** | Black Oak removed from official quotation (delisted from the ASX) |
| **July 2017** | Receivers commence a secondary sale campaign focusing on the remaining assets, being the Marda Gold Project and Battler and British Hill Tenements |
| **2 July 2018** | Receivers commenced the 2018 Sale Process, being the third sale process for the Marda Gold Project only |
| **31 July 2018** | Receivers retired from their position as receivers and managers due to a conflict arising from the merger of PPB and PwC. With the consent of the Secured Creditor, the Liquidators took over and continued to run the 2018 Sale Process for the Marda Gold Project |
| **24 August 2018** | Liquidators received seven (7) final offers for the Marda Gold Project from interested parties of which the Ramelius Proposal is preferred |
| **28 September 2018** | Liquidators apply to Court for leave to appoint themselves as Administrators to implement the Ramelius Proposal |
| **5 October 2018** | Federal Court of Australia grants leave for the Liquidators to appoint themselves as Administrators. Convening period amended to 15 business days |
| **23 October 2018** | Administrators issued the Administrators' Report to Creditors, which detailed the Ramelius Proposal |
| **31 October 2018** | Meeting of Creditors held and the creditors voted in favour of the DOCA |
| **8 November 2018** | DOCA executed and the Administrators became the Deed Administrators |
| **7 December 2018** | Expert Report and Explanatory Statement issued |

| | |
|---|---|
| **11 December 2018** | Notice provided to shareholders informing them of the s 444GA application |
| **20 December 2018** | Originating process filed in the Federal Court of Australia |
| **22 January 2019** | ASIC provide decision "in principle" |
| **23 January 2019** | First Federal Court of Australia hearing for application made under s 444GA. Court required that shareholders be notified through the ASIC online portal that the substantive hearing would be held on 31 January 2019 |
| **31 January 2019** | Substantive hearing of s 444G application; Federal Court of Australia grants leave under s444GA |
| **6 February 2019** | DOCA effectuates |

# Summary of the Black Oak s 444GA orders

## Background to s 444GA application

On 27 November 2015, Robert Hutson, Jarrod Villani and David Winterbottom (**Administrators and subsequently Deed Administrators**[21]) were appointed as the joint and several voluntary administrators of Black Oak (then an ASX-listed company).

Immediately following the appointment of Administrators, Marcus Ayres, Michael Owen and Simon Theobald then of PPB (**Receivers**) were appointed as the joint and several receivers and managers of the property of Black Oak by the Secured Creditor.

At a meeting of creditors held on 15 March 2016, the creditors resolved that Black Oak be wound up and that the Administrators be appointed the joint and several liquidators.

During the period November 2015 to July 2018, the Receivers undertook a number of sales processes and sold substantially all of the assets of Black Oak subject to the security in favour of the Secured Creditor, other than a gold project located north of Southern Cross, Western Australia known as the Marda Gold Project.

On or around 2 July 2018, the Receivers commenced a new sale campaign for the Marda Gold Project. This new sale process was commenced given the improvement in the spot price for gold in 2018 (compared with the gold price during 2016 and 2017) and the resolution of the plaints that had been disincentives for potential purchasers during previous sale campaigns.

The Receivers received 70 enquiries and issued 56 copies of an information memorandum in relation to the sale of the Marda Gold Project from this sale campaign. Initial expressions of interest were required by 23 July 2018 and access to a data room was provided to interested parties. In total, the Receivers admitted 11 parties to the Marda Gold Project data room.

On 31 July 2018 the Receivers retired due to a conflict arising from the merger of PPB and PwC. With the consent of the Secured Creditor, the Liquidators took over and continued to run the sale process for the Marda Gold Project.

[21] David Winterbottom was replaced by Richard Tucker.

On or around 24 August 2018, the Liquidators received seven final offers for the Marda Gold Project from interested parties.

The Liquidators formed the view that the best offer received was from Ramelius. This offer to acquire the Marda Gold Project involves the transfer of 100% of the shares in (and therefore control of) Black Oak to Ramelius Operations Pty Ltd (ACN 621 626 391) (**Ramelius Operations**), a wholly owned subsidiary of Ramelius.

The Ramelius Proposal required the use of a DOCA to compromise and release all debts and liabilities of Alita and to facilitate the transfer of the issued shares in Black Oak to Ramelius Operations pursuant to s 444GA of the Corporations Act. Following effectuation of the DOCA, Black Oak would emerge as a going concern and as a wholly-owned subsidiary of Ramelius.

The Liquidators determined it was in the best interests of Black Oak to proceed with the Ramelius Proposal and to undertake the necessary steps to implement that proposal, including to appoint themselves as administrators and seek orders under s 444GA.

## Actions to pursue s444GA application

In order to proceed with the Ramelius Proposal the Administrators sought leave from the Court and were appointed Administrators of Black Oak on 5 October 2018 pursuant to s 436B of the Corporations Act.

The orders of the Court, among other things, also had the following consequences:

- the liquidation of Black Oak continued subject to the creditors resolving to execute a DOCA;
- the report to creditors was to consider the details of the Ramelius Proposal and provide a comparison of the outcomes of the Ramelius Proposal against the other likely outcomes (which the Administrators believed could only be Black Oak returning to liquidation).

No other DOCA proposals were received and on 31 October 2018, creditors voted in favour of the DOCA. The DOCA was executed on 8 November 2018 and the Administrators became the Deed Administrators.

Following execution of the DOCA, the Deed Administrators made an application pursuant to s 444GA, and prepared an expert report and explanatory statement for shareholders, the sole purpose of which was to provide an independent assessment of the value of Black Oak and its remaining assets, benchmarked against liquidation (and therefore the value of existing issued shares in Black Oak). This is a fundamentally similar approach to that applied in voluntary administration in making a recommendation to creditors in the Administrators' Report to Creditors pursuant to Rule 75-225.

## Deed Administrators preparing the Experts' Report

In addition to the assessment made in the independent expert's report being fundamentally similar to that applied in the Administrators' Report to Creditors, there are also time and financial cost savings in the Deed Administrators preparing the experts' report.

Specifically, due to the substantial history of Black Oak's insolvency (first administration, receivership, liquidation and second administration), in addition to the extensive knowledge base the Deed Administrators already possessed in relation to Black Oak and its assets (including the sale processes), there would have been substantial additional financial cost and time delay to engage a separate independent expert to prepare the expert report.

The Deed Administrators remained independent (by nature of their appointment) and were able to refer to / leverage their previous reports, as well as their extensive contact with Black Oak and its assets, when forming their opinion.

The Deed Administrators prepared the experts' report in conjunction with and reliance on an independent specialists' report produced by PCF Capital Group (**PCF**) (**PCF Report**). The PCF Report's outputs were relied upon as a cross-check when forming the view on the value of Black Oak and its remaining assets.

While the Deed Administrators were capable of performing the primary valuation methodology (when considering the valuation methodologies outlined in RG 111 (Contents of expert reports)), PCF was engaged with consideration of the ASIC Regulatory Guides, which envisage the use of a technical expert (i.e. a specialist) if the independent expert does not possess the necessary expertise in assessing the value of certain assets. PCF was selected as they are a leading independent mining consultancy firm and was engaged to prepare a discrete independent specialist's report, which only assessed the value of the Marda Gold Project.

This approach or utilising PCF to produce an independent specialist report over discrete assets ensured applied Regulatory Guidelines were complied with, while simultaneously producing a report that was in the best interests of stakeholders.

Ultimately, PCF's opinion on the technical value of the assets was required to support the Deed Administrators' conclusion, which based on the consideration presented in recent sale processes. This estimated valuation range was collated with other non-technical asset realisation estimates, as well as Black Oak's total indebtedness, which the Deed Administrators were again best placed to opine on as they were in possession of proofs of debt, received throughout the administration and liquidation processes.

# Contacts

## Baker McKenzie

**Maria O'Brien**
Partner
Sydney
+ 61 2 8922 5222
maria.o'brien@bakermckenzie.com

**David Walter**
Partner
Sydney
+61 2 8922 5294
david.walter@bakermckenzie.com

**Guy Sanderson**
Partner
Sydney
+61 2 8922 5223
guy.sanderson@bakermckenzie.com

**Heather Sandell**
Special Counsel
Sydney
+61 2 8922 5514
heather.sandell@bakermckenzie.com

## KordaMentha

**Mark Korda**
Partner, Restructuring
Melbourne
+61 3 8623 3344
mkorda@kordamentha.com

**Jenny Nettleton**
Executive Director, Restructuring
Sydney
+61 2 8257 3044
jnettleton@kordamentha.com

**Richard Tucker**
Partner, Restructuring
Perth
+61 8 9220 9352
rtucker@kordamentha.com

## 333 Capital

**Ryan Rabbitt**
Executive Director
Sydney
+61 2 8257 3027
rrabitt@333capital.com