Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Mansfield and A committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations) [2018] AATA 1510 (5 June 2018)

Division: GENERAL DIVISION

File Number: **2017/5707**

Re: **Mitchell Mansfield**

APPLICANT

And **A committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations)**

RESPONDENT

DECISION

Tribunal: **Deputy President J Redfern**

Date: **5 June 2018**

Place: **Sydney**

1. The reviewable decision of 1 September 2017, being the decision of a committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations) to refuse an application for registration as a liquidator, is set aside.
2. In substitution, the Tribunal decides that the applicant should be registered subject to conditions.
3. The parties are to provide short minutes of order to give effect to these reasons within 14 days.

.....[sgd].....

Deputy President J Redfern

CATCHWORDS

CORPORATIONS LAW – review of decision to refuse application to be registered as a liquidator – whether applicant has the qualifications, experience, knowledge and abilities prescribed by the Insolvency Practice Schedule and Rules – consideration of the meaning of 'exposure to processes (including Bankruptcy) under the Bankruptcy Act 1966' – where applicant is not a resident of Australia or in another prescribed country under s 20-20(4)(i) of the Insolvency Practice Schedule – whether applicant should be registered as a liquidator subject to certain conditions – decision set aside and substituted

LEGISLATION

Acts Interpretation Act 1901 (Cth) ss 28A, 15AA, 15AB
Administrative Appeals Tribunal Act 1975 (Cth), ss 43(1)(c), 42D
Australian Securities and Investments Commission Act 2001 (Cth), ss 5, 4(1)(a), 19, 30, 30B, 86, 102
Bankruptcy Act 1966 (Cth), Sch 2
Corporations Act 2001 (Cth), ss 5(4), 5C, 7(a), 109X , 581(4), 596A, 596B, 915C, 915B
Insolvency Practice Schedule (Corporations): Sch 2 (ss 1–1(1), 20–1, 20–5, 20–10, 20–15, 20-20, 20–25, 20–30, 40–25, 40–30, 40–40, 40–45, 40–55, 40–65, 45–1, 90–35, 105–1)
Insolvency Law Reform Act 2016 (Cth)
Insolvency Practice Rules (Corporations) 2016 (Cth), rule 20–1(2), 20−1(3)

CASES

Australian Securities and Investments Commission v Stuart Karim Ariff [2009] NSWSC 829
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41

SECONDARY MATERIALS

Explanatory Memorandum to the Insolvency Law Reform Bill 2015

Explanatory Statement to the Insolvency Practice Rules (Corporations)

Australian Law Reform Commission, General Insolvency Inquiry, Report no 45, Canberra, 1988

Parliamentary Joint Committee on Corporations and Financial Services, Corporate insolvency laws: a stocktake, Canberra, June 2004

Corporations and Markets Advisory Committee, Rehabilitating large and complex enterprises in financial difficulties, Sydney, October 2004

Corporations and Markets Advisory Committee, Issues in external administration, Sydney, November 2008

Senate Economics Committee, The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework, Canberra, September 2010

Extradition Act (Cap 103) 1968 (Singapore)

Employment of Foreign Manpower Act (Chapter 91A) 1990 (Singapore)

Regulatory Guide 258, Registered liquidators: Registration, disciplinary actions and insurance requirements, Australian Securities & Investments Commission (1 March 2017)

REASONS FOR DECISION

Deputy President Redfern

5 June 2018

INTRODUCTION

1. This application for review raises significant issues about the new regime for the registration of liquidators. It arises from a decision to refuse the registration of the applicant, Mr Mitchell Mansfield. Mr Mansfield is an Australian citizen with links to Australia but who now resides and works in Singapore.

2. After The Senate Economics References Committee Inquiry into Liquidators and Administrators (the Senate Inquiry) the law in relation to insolvency practitioners and the external administration of companies and insolvent estates was substantially amended through the enactment of the *Insolvency Law Reform Act 2016* (ILR Act). The ILR Act, which amended the *Corporations Act 2001* (Cth) by inserting the Insolvency Practice Schedule (Corporations) into Schedule 2, provides a new regime for the registration and disciplining of registered liquidators and for the regulation of companies under external administration.[1] There were similar amendments made to the *Bankruptcy Act 1966* (Cth), which inserted the Insolvency Practice Schedule (Bankruptcy) into Schedule 2 of the Bankruptcy Act. The amendments to the Bankruptcy Act provide a new regime for the registration and disciplining of registered trustees and for general rules relating to the administration of estates[2] and while not directly relevant, they provide legislative context for one of the critical issues in dispute between the parties.

3. The regulation of the insolvency profession, particularly corporate insolvency practitioners, has been the subject of a number of reviews over the past two decades,[3] including most recently, by the Senate Inquiry. The Senate Inquiry arose in the context of an increase in insolvencies as a result of the Global Financial Crisis and against the backdrop of several

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[1] Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* at [4.3].

[2] Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* at [1.3].

[3] These include the Australian Law Reform Commission, *General Insolvency Inquiry* (the Harmer Report), Report no 45, Canberra, 1988; Parliamentary Joint Committee on Corporations and Financial Services (The Committee), *Corporate insolvency laws: a stocktake*, Canberra, June 2004; Corporations and Markets Advisory Committee (CAMAC), *Rehabilitating large and complex enterprises in financial difficulties*, Sydney, October 2004 and CAMAC, *Issues in external administration*, Sydney, November 2008.

high-profile cases of misconduct by members of the corporate insolvency profession.[4] In particular, the Senate Inquiry was concerned with the adequacy of efforts to monitor and regulate the Australian insolvency system and the need to restore public confidence in the insolvency profession.[5] In September 2010, the Senate Inquiry published a report setting out 17 recommendations addressing the regulation, registration and remuneration of insolvency professionals.[6] A number of the recommendations were adopted and formed the basis of the ILR Act.

4. Relevantly, under the new statutory scheme for registration as a liquidator, an individual may apply to the Australian Securities and Investments Commission (ASIC) to be registered as a liquidator. ASIC then refers the application to a specially convened committee, in this case the respondent, which assesses the application against specified criteria. The committee reports its decision to ASIC and, if the committee concludes the applicant should be registered, ASIC registers the applicant as a liquidator.

5. Ensuring that liquidators are suitably qualified and experienced and that their conduct is appropriately supervised is an important tool for ASIC in regulating the administration of companies that are under external administration.

6. On 22 June 2017 the applicant, Mr Mitchell Mansfield, made an application to be a registered liquidator in Australia. He is an Australian citizen who resides in Singapore and works for Singapore-based insolvency firm, Borrelli Walsh. Borrelli Walsh has offices in a number of countries in Asia as well as in the Cayman and British Virgin Islands (BVI). It has 110 staff globally and specialises in restructuring, insolvency and forensic accounting.[7] Notably, the firm does not have an office in Australia.

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[4] See for example, *Australian Securities and Investments Commission v Stuart Karim Ariff* [2009] NSWSC 829; For further information refer to: Senate Economics Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, Canberra, September 2010 at [1.10] and [1.29].

[5] Senate Economics Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, Canberra, September 2010 at [1.4] and [1.28]; Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* at [5.4].

[6] Senate Economics Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, Canberra, September 2010 at [1.32] & [11.9] - [11.64].

[7] Applicant's Statement of Facts, Issues and Contentions dated 24 January 2018 at [34](c)&(d).

7. A committee was convened by ASIC to assess the application. As required by the legislation, the committee comprised a delegate of ASIC, a registered liquidator chosen by the Australian Restructuring Insolvency and Turnaround Association (ARITA) and an appointee of the Minister for Revenue and Financial Services. Mr Mansfield provided information about his application to the committee and was interviewed.

8. On 1 September 2017, the committee decided that Mr Mansfield did not satisfy certain criteria provided for in the Insolvency Practice Schedule (Corporations). Firstly, the committee was not satisfied Mr Mansfield met the relevant qualifications, experience, knowledge and abilities criteria prescribed under the law.[8] Secondly, the committee was not satisfied Mr Mansfield met the criterion of residency.[9] The fact Mr Mansfield resided in Singapore was a significant factor in the committee deciding that he should not be registered.

9. Relevantly, the committee was not satisfied Mr Mansfield met the prescribed qualifications, experience, knowledge and abilities criterion on three grounds.[10] The committee was not satisfied Mr Mansfield had engaged in at least 4,000 hours of employment that provided exposure to processes under the Bankruptcy Act in the five years prior to his application, that he had demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator or that he was able to satisfy any conditions that may be imposed about continuing professional education. The reasons given for the latter two grounds essentially relate to the fact Mr Mansfield resides in Singapore. The committee concluded this would cause 'logistical problems' for him in being appointed as a liquidator to a company registered in Australia or in maintaining continuing professional education.

10. Having found that Mr Mansfield did not meet all of the criteria, the committee decided Mr Mansfield should not be registered because it was 'unable to determine a condition that, if imposed, would satisfied it that Mr Mansfield would be suitable to be registered as a liquidator'.[11]

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[8] Exhibit 1 – T-documents, T2 at p. 97ff.
[9] Exhibit 1 – T-documents, T2 at p. 102, [14].
[10] Exhibit 1 – T-documents, T2 at pp. 98- 102, [11] - [13].
[11] Exhibit 1 – T-documents, T2 at p. 102, [16].

11. Mr Mansfield disputes the findings of the committee and applied to the Tribunal for review of this decision. Mr Mansfield denies he does not have sufficient exposure to processes under the Bankruptcy Act and asserts that the committee has misinterpreted the relevant law. He also denies that his residency in Singapore impedes his ability to comply with the other criteria and that his residency prevents him from being registered. The new scheme expressly allows for non-residents to be registered subject to conditions and the committee failed to raise with him, or properly consider, whether registration on condition was appropriate.

12. The amendments contained in the ILR Act came into effect in two tranches. The first tranche, which included the insertion of the Insolvency Practice Schedule (Corporations) (IPS Corporations) commenced on 1 March 2017 and the balance of the reforms came into effect on 1 September 2017.

13. This is the first case before the Tribunal where the operation of regime has been considered. This review raises questions about the nature and extent of the experience required by a liquidator in relation to bankruptcy processes and whether the regulatory and practical problems created by a liquidator residing outside the jurisdiction effectively excludes registration and whether these problems can be overcome by the imposition of conditions.

RELEVANT LAW AND QUESTIONS FOR DETERMINATION

14. Section 600K of the Corporations Act provides that Schedule 2 has effect. As already noted, Schedule 2 is the IPS Corporations. The IPS Corporations relevantly provides for the registration and disciplining of practitioners (Part 2) and contains general rules relating to external administrations (Part 3).

15. The object of the IPS Corporations is set out in s 1−1(1) and relevantly provides:

> *The object of this Schedule is to ensure that any person registered as a liquidator:*
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> *(a) has an appropriate level of expertise; and*
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> *(b) behaves ethically; and*
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> *(c) maintains sufficient insurance to cover his or her liabilities in practising as a registered liquidator.*

16. The registration of liquidators is significant because:

> *...only a registered liquidator can perform certain roles, such as that of the receiver of the property of a corporation, the administrator of a company or of a deed of company arrangement, or the liquidator or provisional liquidator of a company.*[12]

17. The Explanatory Memorandum to *Insolvency Law Reform Bill 2015* indicates that the aim of the amendments to the regulations governing the insolvency system is to:

- *improve the effectiveness of the regulation of Australia's insolvency profession to restore confidence in the insolvency services industry, including through providing insolvency regulators with the powers they need to efficiently and effectively oversight the industry;*
- *improve the efficiency and effectiveness of the regulation of Australia's insolvency laws by aligning Australia's personal and corporate insolvency laws; and*
- *address current regulatory and market failures by:*
  - *enhancing competition within the market for insolvency services; and*
  - *empowering stakeholders with an interest in the conduct of an insolvency administration to better protect their own interests.* [13]

18. Division 20 of the IPS Corporations contains the provisions relating to the registration of liquidators. Under the regime an individual may apply to ASIC to be registered and the application must be lodged in an approved form (s 20–5 of the IPS Corporations). ASIC may convene a committee for the purposes of considering an application and must refer any application for registration as a liquidator to the committee convened for consideration (ss 20–10 and 20–15 of the IPS Corporations). This must be done within two months after receiving application. Under s 20–20, the committee must consider the application and interview the applicant. The committee must decide whether the applicant should be registered as liquidator within 45 business days after interviewing the applicant. Subsection 20–20(4) of the IPS Corporations sets out the criteria that must be considered and provides as follows:

> *The committee must decide that the applicant should be registered as a liquidator if it is satisfied that the applicant:*
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> *(a) has the qualifications, experience, knowledge and abilities prescribed; and*
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> *(b) will take out:*
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> *(i) adequate and appropriate professional indemnity insurance; and*
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> *(ii) adequate and appropriate fidelity insurance;*

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[12] *Corporations Act 2001* (Cth), sch 2 s 1-5.

[13] Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* at [9.75].

against the liabilities that the applicant may incur working as a registered liquidator; and

(c) has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; and

(d) is not, and has not been within 10 years before making the application, an insolvent under administration; and

(e) has not had his or her registration as a liquidator under this Act cancelled within 10 years before making the application, other than in response to a written request by the applicant to have the registration cancelled; and

(f) has not had his or her registration as a trustee under the Bankruptcy Act 1966 cancelled within 10 years before making the application, other than in response to a written request by the applicant to have the registration cancelled; and

(g) is not disqualified from managing corporations under Part 2D.6 of this Act, or under a law of an external Territory or a law of a foreign country; and

(h) is otherwise a fit and proper person; and

(i) is resident in Australia or in another prescribed country.

19. Subsection 20–20(5) of the IPS Corporations provides that if the committee is not satisfied of a matter referred to in paragraphs (4)(a),(e),(f) or (i), it may nonetheless decide the applicant should be registered provided it is satisfied the applicant would be suitable to be registered as a liquidator if the applicant complied with conditions specified by the committee. Subsection 20–20(6) of the IPS Corporations provides that the committee may decide that the applicant's registration is to be subject to any other conditions.

20. The committee must give the applicant and ASIC a report setting out its decision, the reasons for the decision, any conditions imposed and the reasons for imposing the conditions (s 20–25 of the IPS Corporations). If the committee has decided that the applicant should be registered it must register the applicant (s 20–30 of the IPS Corporations).

21. The *Insolvency Practice Rules (Corporations) 2016* (Cth) (the Rules) prescribe the standard of qualifications, experience, knowledge and abilities required for the purposes of s 20–20(4)(a) of the IPS Corporations (s 20–1 of the Rules). The Rules are made by the Minister under s 105–1 of the IPS Corporations.

22. Subsection 20–1(2) of the Rules provides:

> *A committee to which an application for registration as a liquidator is referred under section 20-15 of the Insolvency Practice Schedule (Corporations) must be*

satisfied that the applicant has each of the following qualifications, experience, knowledge and abilities:

(a) the applicant has completed the academic requirements for the award of a tertiary qualification that includes at least 3 years of full-time study (or its equivalent) in commercial law and accounting;

(b) the applicant has completed the academic requirements for at least 2 course units accredited under the Australian Qualifications Framework Level 8 (or equivalent study) in the practice of external administrators of companies, receivers, receivers and managers, and trustees under the Bankruptcy Act 1966;

(c) if the applicant wishes to be registered to practise as an external administrator of companies, receiver and receiver and manager—the applicant has, during the 5 years immediately preceding the day on which the application is made, been engaged in at least 4,000 hours of relevant employment at senior level;

(d) if the applicant wishes to be registered to practise only as a receiver, and receiver and manager—the applicant has, during the 5 years immediately preceding the day on which the application is made, been engaged in at least 4,000 hours of relevant employment at senior level;

(e) the applicant has demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator;

(f) the applicant is able to satisfy any conditions to be imposed under the Insolvency Practice Schedule (Corporations) if the applicant is registered as a liquidator.

23. 'Relevant employment' for the purposes of s 20–1(2)(c) of the Rules is defined in s 20–1(3) as employment that:

(a) involves assisting a registered liquidator in the performance of his or her duties as external administrator of companies, receiver or receiver and manager; and

(b) involves providing advice in relation to the external administration of companies, receivership or receivership and management; and

(c) provides exposure to processes (including bankruptcy) under the Bankruptcy Act 1966.

24. Subsection 20–5(2) of the Rules provides that:

It is a condition on registration of any person as a registered liquidator that the person undertake at least 40 hours of continuing professional education during each year that the person is registered as a liquidator.

25. At least 10 hours of that education must be capable of being objectively verified by competent source (s20-5(3) of the Rules).

26. Mr Mansfield does not reside in Australia or in a prescribed country and, as such, he does not satisfy s 20-20(4)(i) of the IPS Corporations.[14] This is not in dispute. Prior to the hearing of the review, the committee conceded that Mr Mansfield was able to satisfy the conditions imposed on his registration relating to the undertaking of continuing professional education.

27. Accordingly, the issues in dispute for determination are:

(a) The meaning of 'exposure' to processes under the Bankruptcy Act and whether Mr Mansfield's experience is sufficient to meet this requirement for the purposes of s 20-20(4)(a) of the IPS Corporations;

(b) Given the 'logistical problems' associated with Mr Mansfield residing in Singapore, whether he has demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator under s 20-1(2)(e) of the Rules to satisfy 20-20(4)(a); and

(c) Whether Mr Mansfield can nonetheless be registered as a liquidator in Australia subject to conditions under s 20-20(5) of the IPS Corporations, even if he does not meet ss 20-20(4)(a) and (i) of the criteria in the IPS Corporations, and if so, what conditions would be appropriate in the circumstances.

BACKGROUND FACTS

28. Mr Mansfield is a director of Borrelli Walsh Pty Ltd, which is a specialist restructuring, insolvency and forensic accounting firm with offices in Singapore, Hong Kong, Beijing, Jakarta, the Cayman Islands and the BVI. Mr Mansfield has been employed at Borrelli Walsh since December 2016.[15] He is a resident of Singapore but an Australian citizen. Mr Mansfield holds an employment pass issued by the Singapore Ministry of Manpower pursuant to the *Employment of Foreign Manpower Act (Chapter 91A) 1990* (Singapore).

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[14] As at 1 March 2017 no countries have been prescribed: see Regulatory Guide 258, *Registered liquidators: Registration, disciplinary actions and insurance requirements*, Australian Securities & Investments Commission (1 March 2017).

[15] Exhibit 1 – T-documents, T1 at pp. 84 - 85.

The employment pass, which expires on 1 December 2018, provides temporary conditional permission to reside and work in Singapore.[16]

29. Prior to his appointment to Borrelli Walsh as a director, Mr Mansfield worked in Australia as an accountant for over 10 years.[17] He commenced working in 2004 for Hall Chadwick Chartered Accountants as an undergraduate, where he worked for a year.[18] He then worked for PKF Chartered Accountants and Business Advisors (now BDO Australia) for nearly two years and joined McGrathNichol, insolvency specialists, in February 2009.[19] Mr Mansfield worked at McGrathNichol until November 2016, commencing as a senior accountant and progressed to the roles of assistant manager, manager and finally senior manager.[20] According to the summary of Mr Mansfield's employment provided in support of his application for registration, the details of which are not in dispute, he has primarily worked on corporate insolvency and restructuring matters, under the direction of registered liquidators, since about 2005. Mr Mansfield has limited experience in bankruptcies and the nature and extent of his experience is limited to the work undertaken by him in the context of corporate insolvency insolvencies and receiverships. Whether this experience is sufficient is one of the critical issues in dispute.

30. Mr Mansfield has never been registered as a liquidator in Australia or Singapore but he has had over 10 years' experience in corporate administrations, insolvencies and restructures as evidenced by:

(a) Mr Mansfield's work experience as summarised in schedules attached to his application for registration as a liquidator;[21]

(b) references provided by Anthony McGrath and Barry Kogan, registered liquidators and partners of McGrathNichol;[22] and

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[16] Applicant's supplementary submissions dated 29 March 2018 at [5]. A copy of the Applicant's Singaporean employment pass was reproduced at Annexure 1.
[17] Exhibit 1 – T-documents, T1 at pp. 84 - 88.
[18] Exhibit 1 – T-documents, T1 at p. 88.
[19] Exhibit 1 – T-documents, T1 at p. 88.
[20] Exhibit 1 – T-documents, T1 at pp. 85 - 88.
[21] Exhibit 1 – T-documents, T7 at pp. 161 - 202.
[22] Exhibit 1 – T-documents, T7 at pp. 203 - 229.

(c) supporting material provided by Borrelli Walsh,[23] including a sworn statement provided by Mr Jason Kardachi, Managing Director of Borrelli Walsh.[24]

31. It is not in dispute that, subject to an issue about Mr Mansfield's exposure to bankruptcy processes and concerns about his ability to undertake the role of a liquidator whilst based in Singapore, Mr Mansfield has the necessary qualifications, experience, knowledge and abilities to undertake the role of a registered liquidator. Mr Mansfield was a senior manager at McGrathNichol for about two and a half years prior to relocating to Singapore and he has been a director of Borrelli Walsh since December 2016. According to the evidence provided by Mr Mansfield and Borrelli Walsh in support of the application, which has not been challenged, Mr Mansfield has undertaken a number of complex corporate administrations and receiverships in both Australia and Singapore since 2012.[25] While these projects were undertaken under the supervision of the registered liquidators appointed by the Court or by creditors, a review of the tasks undertaken by Mr Mansfield, supported by the references previously referred to, is consistent with the finding of the committee that Mr Mansfield, other than in the disputed matters, satisfies the criteria set out in the IPS Corporations.

32. Mr Mansfield seeks to be appointed as a registered liquidator so Borrelli Walsh can undertake insolvency appointments in Australia. As noted by Mr Mansfield during his interview with the committee, the broader strategy for Borrelli Walsh is to expand into Australia and eventually open an office in Australia leveraging 'off the back' of the appointments initially undertaken to 'grow a presence in Australia' for Borrelli Walsh.[26] According to Mr Mansfield, once he is registered it is proposed that he will undertake appointments in Australia and send Borrelli Walsh staff to Australia to work on those matters.[27] He told the committee that he anticipated 'splitting his time between Australia and Singapore.'[28] Mr Mansfield explained the initial plan to the committee in the follow terms:

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[23] Exhibit 1 – T-documents, T7 at pp. 230 - 244.
[24] Exhibit 3 – Witness Statement of Jason Aleksander Kardachi dated 24 January 2018.
[25] Exhibit 1 – T-documents, T1 at pp. 90 - 92.
[26] Exhibit 1 – T-documents, T3 at pp. 118 and 121.
[27] Exhibit 1 – T-documents, T3 at pp. 117 - 118.
[28] Exhibit 1 – T-documents, T3 at p. 117.

> *We do look to open a physical presence in Australia. When we begin, that may be a virtual office and we may need to attach storage in the location, but the staff, depending on [the] engagement [sic], will be based in Australia…*[29]

33. It is apparent from Mr Mansfield's interview with the committee that the impetus for the application was a desire of Borrelli Walsh to expand into Australia to take advantage of Borrelli Walsh's experience and connections in Asia and its ability to deal with Asian creditors.

34. Mr Mansfield was questioned by all three members of the committee about his qualifications, experience and the matters referred to in the IPS Corporations. Relevantly, Mr Mansfield was asked a number of questions about his residency and experience in bankruptcy procedures. While there was no concern specifically raised with Mr Mansfield during the interview about whether he had the necessary bankruptcy experience, there was considerable questioning about how he would undertake the role of a registered liquidator given his residence outside Australia. There was the following exchange at the end of the interview:

> *MR MANSFIELD: …On the residency issue, if there are further concerns about capability, and our ability to mobilise staff or grow in office, we are happy to have a more broader discussion on that as well if that is helpful to the committee or to ASIC.*
>
> *THE DELEGATE: Thanks very much for that, and it could be as result of our discussions we may make further inquiries of you, but I just don't want to pre-empt what I want to do.*[30]

35. According to Mr Mansfield, and the records do not suggest otherwise, no further information was requested from him by the committee and the committee provided its decision to him by letter dated 1 September 2017.

SUBMISSIONS

36. Mr Mansfield submits that he has demonstrated he has sufficient 'exposure to processes (including bankruptcy) under the Bankruptcy Act' and the committee has misconstrued the meaning of 'exposure' to these processes for the purposes of assessing whether he had

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[29] Exhibit 1 – T-documents, T3 at p. 128.

[30] Exhibit 1 – T-documents, T3 at p. 35.

'at least 4,000 hours of relevant employment at a senior level' as required under s 20-1(2)(c) of the Rules.

37. The committee concluded that 'exposure' to bankruptcy processes required an applicant to engage with the general processes of bankruptcy, which included bringing about the bankruptcy, securing assets, assessing creditors' claims, paying dividends to creditors and finalising bankruptcies was necessary.[31]

38. Mr Mansfield contends that the strict reading of the provisions by the committee requiring an applicant to have exposure to or engagement with *all* processes under the Bankruptcy Act was unlikely to have been intended. 'Exposure' means experience or familiarity with the processes governed by the Bankruptcy Act at a sufficient level to allow an external administrator to perform the duties and functions of a registered liquidator. It should be sufficient for an applicant to have knowledge and experience of the Bankruptcy Act in so far as that experience relates to the external administration of a corporation. This would generally involve the ability to analyse claims on the viability of bankruptcy proceedings, analyse assets and claims available to a trustee in bankruptcy, initiate enforcement action, commence bankruptcy proceedings and manage claims in a bankruptcy, attend and vote at meetings of creditors of bankruptcy and attend to the finalisation of bankruptcies. Mr Mansfield contends he has such experience and therefore satisfied this criterion. He further contends it is unnecessary for a registered liquidator to be able to administer bankruptcies. If this was the case most of the existing registered liquidators would not pass the test for suitability.

39. Mr Mansfield submits that if he does not satisfy this criterion, he would be prepared to undertake an examination or be registered subject to conditions that he undertake further training on any relevant processes under the Bankruptcy Act in respect of which he was adjudged to be deficient.

40. On the issue of whether he had capacity to perform satisfactorily the functions and duties of a registered liquidator given his residence in Singapore, Mr Mansfield contends that Borrelli Walsh has significant experience which is 'comparable to McGrathNichol, one of

[31] Exhibit 1 – T-documents , T2 at p. 98, [11](vi).

Australia's largest insolvency practices'.[32] It has a proven track record and has successfully undertaken insolvency assignments in multiple locations outside Singapore. Even if there are 'logistical' concerns about Mr Mansfield's ability to effectively undertake functions or the ability of ASIC to regulate him or to make enquiries in respect of the companies he is administering, the committee could impose conditions to ameliorate any concerns. It is clear from s 20-20(5) of the IPS Corporations that an applicant who did not reside in Australia could nonetheless be registered as a liquidator, subject to conditions. The committee did not give detailed consideration to this issue and simply decided it was 'not able to determine' any condition that could be imposed to satisfy it that Mr Mansfield would be suitable to be registered.[33] Mr Mansfield would accept the imposition of any reasonable condition and, relevantly, agreed both prior to and during the hearing to the imposition of potential conditions that he said should be sufficient to satisfy any concerns.

41. The committee submits Mr Mansfield does not have sufficient experience in bankruptcy processes because he could not demonstrate exposure to the full range of processes referred to in the committee's report, namely all of the general processes set out in the Bankruptcy Act. Sitting an exam would not satisfy the 'relevant employment' requirement in s 20–1(3) of the Rules, which entails exposure to bankruptcy processes over the five years immediately preceding an application for registration as a liquidator.

42. The issue of the most concern to the committee, which occupied much of the evidence and submissions of the parties, was the concern about whether Mr Mansfield could satisfactorily perform the functions and duties of a registered liquidator while based in Singapore and whether his conduct and his administration of corporate insolvencies in Australia could be adequately and effectively supervised by ASIC. Given the matters raised in the Parliamentary Inquiry that led to the insolvency law reform, it is understandable this issue raised significant concerns for the committee.

43. The committee could have considered whether conditions were capable of addressing these concerns, but it is unclear from its report whether it did so. There was no discussion or exchange of correspondence between the parties on the issue during or after the

[32] Applicant's Statement of Facts, Issues and Contentions dated 24 January 2018 at [34](c).
[33] Exhibit 1 – T-documents, T2 at p. 104, [15].

interview and it appears these matters were raised for the first time during the hearing of the review.

44. This is new legislation, the Tribunal did not have the benefit of detailed analysis about this issue by the committee and there is no policy published by ASIC on its approach to such matters.[34] In this respect, the Tribunal is in the difficult position of formulating policy about whether a person who resides outside Australia and who otherwise satisfies the relevant criteria under the new regime should be registered as a liquidator in Australia and, if so, whether there are any conditions that could be imposed to overcome the identified regulatory and logistical concerns. One option, in circumstances such as this, is for the Tribunal to make findings on contentious factual and legal issues and if the decision is favourable to Mr Mansfield, refer the matter back to the committee for further consideration under s 42D of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) or alternatively, remit the matter for reconsideration in accordance with any directions or recommendations under s 43(1)(c) of the AAT Act.

45. When this was raised with Counsel for the parties at the outset of the hearing and as the submissions developed, both indicated they wanted the Tribunal to not only determine the factual and legal issues in dispute but determine the question of whether conditions may be appropriate and, if so, the terms of the conditions. The parties provided considerable assistance in the form of submissions and potential conditions that could be imposed and I therefore proceeded on this basis.

CONSIDERATION

Does Mr Mansfield have sufficient exposure to bankruptcy processes?

46. Mr Mansfield worked on bankruptcy matters in the first year of practice but not since this time. Mr Mansfield provided evidence, through Annexure E to his Statement of Facts, Issues and Contentions, that he had experience in dealing with bankruptcy processes within the context of corporate insolvencies through his employment with McGrathNichol between December 2009 and July 2016. According to Mr Mansfield, and this is not

[34] Regulatory Guide 258 provides a description of the various processes under the IPS (Corporations) and the Rules and sets out ASIC's policy in respect of insurance requirements for registered liquidators but does not address policy considerations as to when conditions may be imposed.

challenged, in the period December 2009 to July 2016 he worked on three administrations related to debenture funds where the partners of McGrathNichol were appointed as receivers and managers. These funds were Hastings Capital Limited, Australian Secured Investments Ltd and Hastings Mezzanine Limited. The group's underlying business consisted of raising funds from debenture holders and advancing monies raised to third-party borrowers. The assets of the group consisted of loans totalling approximately $39 million advanced to 8 separate borrowers and guaranteed by 15 individual guarantors.

47. As part of his role in assisting the partners, Mr Mansfield was required to collate information in relation to the financial position of each guarantor and debtor and assess the availability of enforcement action. When enforcement action was taken, Mr Mansfield managed the legal proceedings and subsequent interaction with trustees in the bankruptcy. The receivers commenced actions against 13 guarantors and one of the directors resulting in 10 of the guarantors and one of the directors being declared bankrupt. As a result of his role in these receiverships, Mr Mansfield was involved in bringing about bankruptcies through the filing of creditors petitions, which involved issuing letters of demand to debtors, instructing lawyers to commence bankruptcy proceedings, managing the legal process of bankruptcy proceedings, reviewing and attempting to enforce judgement debts, reviewing and approving the issuance of bankruptcy notices, liaising with trustees and obtaining sequestration orders.

48. Mr Mansfield was also involved in securing and realising the assets in the context of the receiverships, which was said to include considering whether any income would be payable in the event that a debtor was declared bankrupt, considering which assets would be available for division amongst creditors, analysing property transactions to determine whether any transactions were undervalued or undertaken for the purpose of defeating creditors, obtaining valuations and copies of debtor's bank statements, analysing those statements to determine whether there were any preferential payments, analysing the likely return to the receivership and considering whether to fund public examinations of a debtor.

49. Mr Mansfield worked on the receivership of Banksia Securities Ltd and Cherry Fund Limited in the period October 2012 to September 2013, reporting directly to the partners of McGrathNichol who were appointed receivers. Banksia Securities Ltd was involved in raising money from the public in the form of debentures and advancing monies to third-

party borrowers, primarily for property investment and development purposes. At the time of the appointment, Banksia Securities Ltd had raised approximately $663 million from over 16,000 debenture holders and had advanced 956 loans to individual borrowers totalling approximately $527 million. Cherry Fund Limited had raised approximately $10 million from debenture holders and was owed money in respect of 37 loans totalling $10.1 million. It was Mr Mansfield's role to assist with the management of 74 impaired loans with a face value of $131 million. As part of this role he was involved in assessing creditors' claims is a participating creditor, preparing and submitting proofs of debt and attending to any queries regarding proofs of debt filed in the estate. He was also involved in collating information and calculating the estimated return to the receivership in the event that bankruptcy proceedings were pursued against the debtors. Mr Mansfield considered correspondence from the trustees regarding the upcoming expiry of the bankruptcy term and considered whether there were grounds for objecting to the discharge. He liaised with the trustees in bankruptcy, attended creditors meetings and was involved in considering and approving bankruptcy fees.

50. Having regard to this experience over a period of nearly 7 years, Mr Mansfield contends that he has been involved in most of the processes under the Bankruptcy Act, albeit in the context of corporate insolvency, including the bringing about of bankruptcy, the securing and realisation of the assets of the bankruptcy by investigating the bankrupt's financial affairs, liaising with trustees and making assessments about whether enforcement action was viable, assessing creditor claims, collating information relevant to the payment of dividends to creditors and assessing issues such as objections to discharge and annulment as part of the finalisation of bankruptcy processes. He contends that 'exposure' to bankruptcy processes as part of a corporate insolvency administration is what is required under s 20-1(3) of the Rules. Exposure to bankruptcy processes does not require an applicant to have undertaken or administered those processes but rather that he or she is involved in dealing with those processes as part of a corporate insolvency. Nor is it necessary for an applicant to be involved in all bankruptcy processes, although Mr Mansfield submits that he has been involved in most, as a creditor, during the period December 2009 to July 2016. Relevantly, he had been involved in those matters as either a manager or senior manager from at least July 2012.

51. The nature and extent of this experience was not initially provided to the committee because the committee did not raise any concerns with him during the interview process

or request any further information. He should not be criticised for providing this information as part of this review.

52. The committee provided evidence from Mr Adrian Lawrence Brown, who is employed by ASIC as a senior executive in the Insolvency Practitioners Team and has over 20 years industry experience in insolvency practice. He was a registered liquidator from March 2000 to March 2017.

53. According to Mr Brown, the requirement incorporated into s 20–20(4) for an applicant to have exposure to bankruptcy processes and practice goes to the interaction of those processes with the corporations regime. Mr Brown gave evidence that when he was in a private practice he was intimately involved in registered trustee work within the practice. In his opinion, having practical knowledge of the bankruptcy issues in the corporate context was important as it allowed him to 'consider strategically and tactically' the issues arising if they were to pursue company offices, including directors, to bankruptcy. While Mr Brown made some observations about Mr Mansfield experience more generally, he did not opine on whether the experience of Mr Mansfield, as set out in Annexure E to the applicant's statement, was insufficient for the purposes of satisfying s 20–1(3)(c) of the Rules.

54. The question for determination in relation to this issue is a legal rather than factual matter. In cross examination, Mr Mansfield confirmed he was not directly involved in undertaking bankruptcy work while working McGrathNichol. His role was to interact with the trustee in bankruptcy in relation to recovery actions against borrowers and directors for the companies under receivership. From at least 2012, Mr Mansfield was involved in this work at a senior level reporting to the relevant McGrathNichol partner. Each of the receiverships were significant and involved actions for the recovery of over $2.67 billion dollars (excluding amounts relating to commercial sensitive receiverships).

55. The issue is whether this experience is sufficient for the purposes of s 20−1(2) of the Rules, which requires 'relevant employment at senior level' during the 5 years immediately preceding the application. The criteria for 'relevant employment' are cumulative and include 'exposure to processes…under the Bankruptcy Act'.

56. Counsel for the committee contends that this requires exposure to the full spectrum of extant processes under the Bankruptcy Act not only those processes that are relevant to a

liquidator's work or, as in this case, those processes limited to recoveries for the receivership. The Macquarie Dictionary meaning of exposure includes 'laying open or subjecting to the action or influence of something' or 'the opportunity to work in a particular area'. Mr Mansfield conceded he was not directly exposed to the processes referred to Annexure E to his statement. Those processes were the processes that were being taken in relation to the individual bankruptcies being pursued in respect of the various receiverships Mr Mansfield was working on. His exposure was therefore limited.

57. Counsel for Mr Mansfield submits that the committee is impermissibly seeking to insert the words 'all' or 'all significant' into the requirement for 'exposure to processes'. It is clear from s 20–1(3) that relevant employment covers three distinct matters, namely, assistance to a registered liquidator, advice in relation to an external administration and exposure to processes under the Bankruptcy Act. The Rules do not require assistance or direct involvement, which is in contrast to the mirror provisions which govern registered trustees in the Insolvency Practice Rules (Bankruptcy) 2016. These rules require an applicant to assist a registered trustee in the performance of his or her duties as a trustee under the Bankruptcy Act but these rules relate to registration as a trustee under the Bankruptcy Act. If an applicant for registration as a liquidator was required to have direct involvement or work in processes under the Bankruptcy Act s 20–1(3) would have expressly provided this. Exposure to processes under the Bankruptcy Act does not require *direct* involvement or work experience in bankruptcy processes, nor does it require exposure to *all* processes. The experience of Mr Mansfield, which is not contested, was sufficient to satisfy this criterion.

58. The expression 'exposure to processes' under the Bankruptcy Act is not entirely clear in its terms but, as both parties agree, the expression should be given its ordinary English meaning. If the meaning of the expression is still unclear, the interpretation that would best achieve the purpose or objects of the Act should be preferred (s 15AA of the *Acts Interpretation Act 1901* (Cth) (Interpretation Act)). It may also be relevant to have regard to extrinsic materials (s 15AB of the Interpretation Act) and the statutory context of the provision (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47] (French CJ)).

59. The ordinary English meaning of 'exposure to processes' suggests that this expression is broad and general in its application rather than narrow and specific. There is nothing in

this wording that compels a narrow construction requiring the relevant employment to be *direct* involvement or work in bankruptcy processes or that it is necessary for the exposure to be in respect of *all* processes under the Bankruptcy Act. If either of these requirements had been intended, the word 'exposure' would not have been used and the expression 'processes (including bankruptcy) under the Bankruptcy Act' would have been more specifically described as '*the* processes'. The meaning of 'exposure to processes' is informed by the additional but contrasting criteria in s 20–1(3) of the Rules which require an applicant to have undertaken employment that 'involves assisting a registered liquidator in in the performance of his or her duties' and 'involves providing advice in relation to the external administration of companies'. These criteria are described with some level of precision.

60. Counsel for the Committee helpfully provided the Explanatory Statements for the Insolvency Practice Rules (Corporations) and Insolvency Practice Rules (Bankruptcy). There is no explanation of what is meant by the expressions 'exposure to processes (including bankruptcy) under the Bankruptcy Act' or the equivalent criterion for registered trustees of 'exposure to the external administration of companies' but the Explanatory Statement to the Insolvency Practice Rules (Corporations) provides as follows:

> *While not exhaustive, it is expected that an individual's relevant employment will be considered to be at a 'senior level' if the individual reported directly to the relevant external administrator or trustee, and:*
>
> - *formed opinions and made recommendations to the external administrator or trustee about the financial and potential legal position of the body corporate or debtor;*
> - *were directly involved in planning and managing on behalf of the external administrator or trustee the conduct of the external administration or bankruptcy;*
> - *prepare draft reports to creditors on the behalf of the external administrator or trustee;*
> - *instructed solicitors and evaluated legal advice as directed by the external administrator or trustee; and*
> - *supervised staff who reported through the individual to the external administrator or trustee, and had responsibility for allocating other resources.*[35]

[35] Explanatory Statement to the Insolvency Practice Rules (Corporations) at pp. 7 - 8.

61. The Explanatory Statement to the Insolvency Practice Rules (Corporations) recognises the dichotomy between relevant employment for the purposes of being registered as a liquidator and that for being registered as a trustee. Both require a level of direct involvement in relevant processes but neither requires direct involvement in the other disciplines, merely 'exposure'.

62. While the expression 'exposure to processes' is somewhat unhelpfully vague, it is nonetheless broad in its terms. I am therefore not persuaded that this criterion requires direct involvement or involvement in all bankruptcy processes but rather exposure to or experience in the range of bankruptcy processes at a general level. I do not consider it necessary to read in words, as counsel for Mr Mansfield contends, that the relevant exposure is only to those bankruptcy processes that are relevant to external administrations. I agree the expression must be taken to cover the range of bankruptcy processes but the ordinary English meaning does not require direct involvement in all bankruptcy processes, as contended by counsel for the committee. Exposure to a broad range of processes under the Bankruptcy Act at a general level would not only be sufficient to fall within the definition but is consistent with the object of the IPS Corporations.

63. Based on the evidence of Mr Mansfield, I am satisfied that he has experience in the broad range of processes under the Bankruptcy Act − from the commencement of bankruptcy proceedings through to recoveries and the discharge or annulment of the bankruptcy. His experience does not extend to direct engagement with or implementation of these processes because his role was directed to engaging with bankruptcy processes and procedures as an active professional creditor. While Mr Mansfield's experience was limited to a small number of administrations, these administrations were significant, they were over an extended period and involved multiple bankruptcies or recovery actions[36] and nine insolvencies and restructuring assignments.[37] I therefore find that Mr Mansfield has sufficient exposure to processes under the Bankruptcy Act to meet the 'relevant employment' required by s 20−1(3) of the Rules and therefore meets criterion set out in s 20−1(2)(c) of the Rules for the purposes of s 20−20(4)(a) of the IPS Corporations.

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[36] Applicant's Statement of Facts, Issues and Contentions dated 24 January 2018 at Annexure E.
[37] Applicant's Statement of Facts, Issues and Contentions dated 24 January 2018 at Annexure F.

Impact of Singapore residency

64. The fact Mr Mansfield resides in Singapore raised two concerns for the committee. Firstly, the committee was not satisfied Mr Mansfield had demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator in s 20−1(2)(e) of the Rules because of 'logistical problems' that were likely to arise. Secondly, the committee noted that Mr Mansfield did not satisfy the criterion in s 20–20(4)(i) of the IPS Corporations and stated that it was unable to determine a condition that could be imposed to ensure Mr Mansfield would be suitable to be registered as a liquidator.

65. The criteria in s 20–1(2)(e) of the Rules requires assessment of whether an applicant 'has demonstrated' the capacity to satisfactorily perform the functions and duties of a registered liquidator. On a plain reading of the provision, it is apparent that assessment of past performance is required to assess capacity because of the use of the words 'has demonstrated'. While it is not apparent as to how this is directed to assessment of future capacity, common sense suggests capacity demonstrated by past performance will be an indication of future capacity. It may therefore be argued, although neither party specifically addressed this in their submissions, that s 20–1(2)(e) not only covers past performance but future capacity as demonstrated by past performance.

66. The fact Mr Mansfield ordinarily resides in Singapore and it is his intention to continue to do so may fall within the parameters s 20–1(2)(e) of the Rules but it is not entirely clear given the terms of the provisions. However, it is unnecessary to resolve this issue because s 20–20(4)(i) of the IPS Corporations expressly provides that the applicant must reside in Australia or in a prescribed country. This requirement is no doubt intended to address the 'logistical problems' referred to by the committee, which would include the capacity of an applicant to satisfactorily undertake the external administrations of Australian companies while outside the jurisdiction and, importantly, having a registered liquidator who is amenable to regulation and scrutiny by ASIC. There can be no dispute that both these matters are highly relevant to the question of whether an applicant is suitable to be registered as a liquidator.

67. Mr Mansfield provided details of the work he had undertaken at Borrelli Walsh and was questioned about these matters. Mr Kardachi also gave details about administrations

undertaken by Borrelli Walsh which extended beyond Singapore and was questioned about these assignments.

68. According to the evidence of Mr Mansfield and Mr Kardachi, Borrelli Walsh has been appointed as liquidators or receivers on numerous cross jurisdiction appointments.[38] It has either managed those administrations from Singapore or established local offices. In summary, Borrelli Walsh has been appointed as:

(a) Liquidators in relation to four administrations in various jurisdictions across Asia, the United States, Netherlands, Cayman Islands, BVI and Bermuda. Borrelli Walsh only had an office in one of the relevant jurisdictions at the time of the appointment.

(b) Provisional liquidators in relation to five administrations in Bermuda, China, Hong Kong, Korea and the Cayman Islands. At the time of the appointments, Borrelli Walsh had not established offices in the Cayman Islands or China. However, the firm established an office in Hong Kong in respect of two of the appointments.

(c) Receivers in respect of seven administrations, of which two were formal appointments. In some of these administrations, the firm was also appointed as a manager. The administrations were in various jurisdictions including Sierra Leone, the United Kingdom, China, Hong Kong, Singapore, Cambodia, Malaysia, Korea, BVI, the Netherlands and Switzerland. Borrelli Walsh established an office in Hong Kong in three of those appointments.

69. In his evidence about how he would perform his duties as a liquidator or external administrator of an Australian company while residing in Singapore, Mr Mansfield submitted in his reply to the committee's Statement of Facts, Issues and Contentions that he would:

(d) when excepting any appointment, notify the appointed that, whilst he is an Australian registered liquidator, he is a resident of and his principal place of practice is Singapore;

[38] Applicant's Statement of Facts, Issues and Contentions dated 24 January 2018 at Annexure G.

(e) appoint in Australian citizen to accept service on his behalf and advertise these details in his appointment documents;

(f) maintain an Australian telephone number during business hours in Sydney for the period of time he conducts operations in Australian friend for a further minimum six months following any appointment;

(g) maintain any books and records in relation to an appointment concerning an Australian registered company in Australia until such time they can be properly destroyed in accordance with the law;

(h) set up an office through Borrelli Walsh in Australia for the duration of any appointment; and

(i) make himself available to fly back to Australia as soon as reasonably possible where requested to do so either by the court, ASIC or creditors.

70. When questioned about this during the hearing, Mr Mansfield expanded upon the matters referred to above as follows:

> *I will be here to effect the appointment as required. If that requires me to be here fulltime for extended periods of time, then I will be. If it requires me to be here for periods of time, I will be. If I need to attend meetings, I will be. It is my full intention to do what is necessary to run the matters.*
>
> …
>
> *[W]e would not be charging the travel related costs from Singapore to Australia. I think the full intention is not to charge costs that wouldn't ordinarily be charged by a resident liquidator on a matter. We have an internal policy as well that we do not charge for travel time between locations.*[39]

71. The committee contends in its Statement of Facts, Issues and Contentions that this would not be sufficient to satisfy regulatory concerns about Mr Mansfield residing outside Australia because:

(a) the regulatory scheme is consistent in its requirements for registered liquidators to be resident in Australia;

[39] Transcript at P-103.

(b) Mr Mansfield's residency should not be considered solely in relation to his ability to satisfactorily perform the functions and duties of a registered liquidator;

(c) residency of a registered liquidator outside Australia presents critical regulatory and supervisory concerns, including that ASIC will lack capacity to investigate the conduct of such a registered liquidator because the compulsory statutory powers essential to conducting such an investigation will not be able to be exercised in relation to a liquidator resident outside Australia:

(d) overseas residency of a registered liquidator would also present practical concerns in relation to ASIC's engagement with registered liquidators, engagement of a liquidator not present in Australia with creditors and third parties and the capacity of creditors and other stakeholders to inspect the external administrator's books of the administration of a company; and

(e) examples of registered liquidators residing overseas do not provide an applicable precedent because all were registered while resident in Australia and, with one exception, none have undertaken Australian appointments other than on a joint basis since being resident overseas.

72. Accordingly, the committee contends there are no conditions that would be capable of addressing the critical regulatory and supervisory concerns in the circumstances of this case. The Tribunal should therefore refrain from exercising its discretion to register Mr Mansfield subject to conditions notwithstanding the provisions of s 20–20(5) of the IPS Corporations. The power to approve registration subject to conditions provides the committee with greater flexibility to determine, on a case-by-case basis, what conditions may be appropriate to alleviate concerns raised by a failure to satisfy certain requirements under s 20–20(4) of the IPS Corporations. The purpose of the ILR Act, as set out in the Explanatory Memorandum at paragraph [27], is to improve the powers available to the corporate regulator to regulate the corporate insolvency market. Allowing registration of Mr Mansfield as a liquidator, even if that registration is subject to conditions, would deprive ASIC of regulatory mechanisms otherwise available to it which is inconsistent with the purpose of the ILR Act.

73. Relevantly, ASIC cannot suspend or cancel the registration of a liquidator who fails to comply with a condition on his or her registration under ss 40–25 or 40–30. Non-

compliance with a condition does not result in the automatic cancellation of registration and ASIC may only issue a show cause notice to refer a liquidator to the committee if ASIC does not receive a satisfactory explanation within 20 days after the notice is given. As such, the imposition of conditions on registration alone does not provide 'an adequate level of protection to the public'.

74. Mr Mansfield contends in his oral and supplementary written submissions that s 20–20(5) of the IPS Corporations expressly provides for registration even where an applicant does not comply with s 20–20(4)(i) and is not resident in Australia. Parliament must have intended to allow for registration in these circumstances. Mr Mansfield has agreed to submit to any reasonable conditions and contends that the committees concerns should be alleviated by the following matters:

(a) Mr Mansfield has significant ties to Australia. He is an Australian citizen, his family resides here and he owns property in Australia. He intends to spend significant time in Australia if he is registered and once the insolvency practice of Borrelli Walsh is established;

(b) Mr Mansfield's Singaporean employment pass, which allows him to reside and work in Singapore, is temporary and any regulatory concerns raised about Mr Mansfield by ASIC with Singaporean authorities would be highly prejudicial to his prospects of renewal. Moreover, there is no suggestion that Mr Mansfield would fail to be cooperative and refused to comply with regulatory requests. He has worked for reputable insolvency practices and there is no history of contraventions. This, together with Mr Mansfield's close ties to Australia, means that any regulatory concern Mr Mansfield would simply ignore ASIC's requests or notices or his obligations under Australian law are 'more academic than real';

(c) Mr Mansfield is prepared to accept a condition of registration that if he is required by any Court or Tribunal or requested by ASIC, he will return to Australia within 48 hours;

(d) Mr Mansfield is also prepared to accept service of documents by a solicitor within the jurisdiction and would not object to service of notices under the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) or to the enforcement of such notices; and

(e) Even if there are remaining concerns about the enforcement of ASIC Act notices, there are alternative remedies available to ASIC to obtain information and books and records, namely ss 596A and 596B of the Corporations Act which provides for the examination of a person about a corporation's examinable affairs. The Corporations Act is not limited to operation in Australia and it has extraterritorial effect by reason of ss 5(4) and 7(a) of the Corporations Act. Another alternative available to ASIC would be to seek to examine Mr Mansfield in Singapore under s 581(4) of the Corporations Act. In addition, ASIC could make an application to court under s 45–1 of the IPS Corporations to request the court to make orders, whether urgent or ex parte, in relation to Mr Mansfield. These orders could include suspension or cancellation of Mr Mansfield's registration. Relevantly, s 90–35 of the IPS Corporations provides a simplified process through which creditors may remove an external administrator and appoint another by resolution at a general meeting. Given these alternative remedies available to both ASIC and creditors, the limitations in respect of the issue and enforcement of notices under the ASIC Act are alleviated.

75. Mr Mansfield also contends that the experience of Borrelli Walsh demonstrates it can operate effectively across jurisdictions and the firm will provide sufficient support to him to ensure he is able to discharge his duties and functions satisfactorily.

76. The committee does not accept these contentions. It is submitted that registration of a liquidator who is not resident in Australia has a significant impact on creditors and on the use by ASIC of its regulatory tools. While a number of these matters can be addressed by the imposition of conditions, the critical issue is that ASIC has been given important and wide ranging compulsory powers to obtain information under ss 19 and 30B of the ASIC Act which cannot be satisfactorily addressed by conditions.

77. Section 19 provides as follows:

> *(1) This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.*
>
> *(2) ASIC may, by written notice in the prescribed form given to the person, require the person:*
>
> *(a) to give to ASIC all reasonable assistance in connection with the investigation; and*

(b) *to appear before a specified member or staff member for examination on oath and to answer questions.*

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

78. Section 30B relevantly provides:

(1) Subject to subsection (2), ASIC may give a registered liquidator a written notice requiring the liquidator:

(a) to give specified information; and

(b) to produce specified books;

to a specified member or staff member at a specified place and time.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) The power in subsection (1) may only be exercised:

(a) for the purposes of the performance or exercise of any of ASIC's functions and powers in relation to the liquidator requirements; or

(b) for the purposes of ascertaining compliance with the liquidator requirements; or

(c) in relation to:

(i) an alleged or suspected contravention of the liquidator requirements; or

(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that relates to the performance or exercise of a registered liquidator's functions, duties or powers and that either concerns the management of the affairs of a body corporate or involves fraud or dishonesty and relates to a body corporate; or

(d) for the purposes of an investigation under Division 1 relating to a contravention referred to in paragraph (c).

79. It should also be noted that ASIC has power under s 30 of the ASIC Act to obtain information from a corporation relating to the affairs of the corporation.

80. There is no dispute that the powers under the ASIC Act do not have extraterritorial operation having regard to s 4(1)(a) of the ASIC Act. As such, the submission made by the committee that 'the regulatory measures available to ASIC in relation to a liquidator

ordinarily resident outside Australia will necessarily differ from those available in relation to a person ordinarily resident in Australia' must be accepted.[40]

81. The limited operation of the provisions of the ASIC Act is significant because these provisions give ASIC enforceable powers that can be effectively and expeditiously used to investigate potential breaches of the Corporations or ASIC Acts or to ensure compliance with the legislation. These compulsory powers are an important regulatory tool for ASIC in undertaking its supervisory functions and, in this regard, I accept the evidence of Mr Brown that these powers are a 'basic tool' for ASIC investigations. This is also apparent from the regulatory regime set out in both the Corporations and ASIC Acts and is not controversial. While it is accepted by Mr Mansfield, at least on a prima facie basis, that service of notices under the ASIC Act outside the jurisdiction may not be effective or enforceable, counsel for Mr Mansfield contends these matters can be overcome by conditions or alternative measures.

82. The critical question is whether this is the case and, if so, what conditions should be imposed.

83. After the commencement of the hearing, the parties conferred about appropriate conditions that may be imposed in the event the Tribunal decided Mr Mansfield would be suitable to be registered as a liquidator even if he did not meet the residency requirement set out in s 20–20(4)(i) of the IPS Corporations. The conditions agreed are in the following terms:

> 1. *The Applicant will appoint, upon commencement of his registration, and then retain, for 5 years (or such other time period as agreed with ASIC) after the finalisation of his last Australian external administration or controller appointment, an Australian solicitor (practising from an office located in Australia) in order to accept service on his behalf. Written notice of this solicitor's details will be provided to ASIC, as well as creditors in his Australian appointments.*
> 2. *The Applicant will accept as valid service any court documents, as well as statutory notices and/or directions under the Australian Securities and Investment Commission Act 2001 and the Corporations Act 2001, which are served on him via his Australian solicitor referred to in Condition 1.*
> 3. *The Applicant will comply with any such statutory notices and/or directions so served on him via his Australian solicitor notwithstanding any legal arguments*

[40] Refer the Respondent's supplementary submissions dated 9 April 2018 at [6.7].

which may be available to him in respect of the validity and/or enforceability of such notices due to his physical presence being outside of Australia, so long as those statutory notices and/or directions would be lawful if they had been issued to, and served on, him whilst he was physically within Australia.

4. *In circumstances where the Applicant is overseas but is requested to be present in Australia by either Court or ASIC, the Applicant will return to Australia within 48 hours or within such other time period as agreed with ASIC.*
5. *The Applicant's firm, Borrelli Walsh, will open an operation in Australia before the Applicant can accept his first Australian external administration or controller appointment and will maintain that office until 6 months (or such other time period as agreed with ASIC) after the finalisation of his last Australian appointment.*
6. *When consenting to act in Australian external administration or controller appointments, the Applicant will notify the appointor that, whilst he is an Australian registered liquidator, he is a resident of, and his principal place of practice is in, Singapore. Once appointed, that same disclosure is made to creditors when he first communicates with them.*
7. *The Applicant and his firm, Borrelli Walsh, will keep and maintain the following records in Australia or at some other location as agreed with ASIC until such time as they can be properly destroyed in accordance with Australian law:*
   - *any books and records in relation to an external administration or controller appointment concerning an Australian registered company;*
   - *the Australian registered company's pre-appointment records;*
   - *Borrelli Walsh business records in respect of its practice in Australia; and*
   - *a copy of all engagement working files in relation to an external administration or controller appointment concerning an Australian registered company.*
8. *In respect of Australian external administration and controller appointments, the applicant will open and then maintain all external administration and controller bank accounts in Australia, provided that the Applicant may maintain ancillary accounts in other jurisdictions for the external administration's convenience. All monies received from Australian appointments shall be paid into these Australian bank accounts and all payments relating to Australian appointments shall be paid from these Australian bank accounts.*
9. *The Applicant's firm, Borrelli Walsh, will maintain an Australian telephone number from the time the Applicant accepts his first Australian external administration or controller appointment until 5 years (or such other time period as agreed with ASIC) after finalisation of his last Australian appointment.*
10. *Prior to accepting his first Australian external administration or controller appointment, the Applicant will provide ASIC with evidence that his firm Borrelli Walsh has entered into a licence agreement with an Australian specialist insolvency software provider and has in place precedents, templates and checklists which are in conformity with Australian law.*
11. *The Applicant will maintain residency in Singapore and/or Australia, or as such other location as agreed with ASIC.*

12. *The Applicant will become and remain a Professional Member of the Australian Restructuring Insolvency & Turnaround Association.*
13. *The Applicant will not seek to recover travel costs or expenses (including, but not limited to, airfares or accommodation) against the Australian registered company to which the applicant has been appointed that would not ordinarily have been incurred by a registered liquidator resident in Australia*
14. *The Applicant will be physically present in Australia for any second meeting of creditors, pursuant to s 439A of the Corporations Act 2001 (Cth), in a voluntary administration of an Australian registered company to which the Applicant has been appointed, where the majority of creditors, by number and value, are within Australia.*
15. *That the Applicant undertake 10 hours of continuous professional education in relation to processes under the Bankruptcy Act prior to accepting any appointment, including the following courses offered by ARITA:*
    a. *Bankruptcy & family law;*
    b. *Recoverable transactions;*
    c. *Annulment, discharge, s 73 composition;*
    d. *Income contribution assessments.*

84. The committee proposes, but Mr Mansfield does not accept, a condition in the following terms:

> *The Applicant can only accept Australian external administration or controller appointments on a joint and several basis with another person who is registered as a liquidator under the Corporations Act 2001 (Cth) (**Registered Liquidator**). Such a Registered Liquidator must be ordinarily resident in Australia and her/his own registration must not be subject to a condition requiring joint appointments with another registered liquidator.* [Emphasis in Original]

85. Subsection 20–20(5) of the IPS Corporations specifically contemplates registration when the requirement set out in residency requirement set out in s 20–20(4)(i) is not met. This demonstrates an intention by Parliament that non-residents, who are otherwise considered to be suitable, may be registered as a liquidator in Australia. The provisions are unequivocal and there is no scope to read down or restrict the operation of s 20–20(5). While I accept that the effective and timely use of regulatory tools available to ASIC under the provisions of the ASIC Act may be impacted if a registered liquidator is outside Australia, counsel for Mr Mansfield poses a question that is difficult to answer. If an applicant does not satisfy s 20−20(4)(i) but could never be registered as a liquidator in Australia, what is the utility of s 20–20(5)?

86. The committee could not point to any legislative provision that would compel the conclusion the Tribunal should not exercise the discretion under s 20–20(5) where an

applicant did not ordinarily reside in Australia. Nor could the committee identify any circumstances were an applicant was ordinarily resident outside Australia but would not be subject to the same regulatory limitations under the ASIC Act as an applicant who resides in Singapore.

87. In oral submissions, it was suggested by counsel for the committee that s 20–20(5) could apply to a non-resident who proposes to return to Australia and is absent at the time of application. However, the only way in which a condition could completely overcome the identified limitation would be to impose a condition that the liquidator could not accept appointments until his or her return to Australia. Even if this was the case, an applicant could merely delay making any application for registration until he or she returned to Australia. Given there are tight timeframes for approval, this would hardly seem to be an unreasonable or onerous alternative solution. As such, the limited nature of the scope of the discretion contended for by the committee attributes an unduly narrow, indeed singular, interpretation to the operation and effect of s 20–20(5) which raises issues about whether this provision has any utility when an applicant resides outside Australia.

88. I therefore do not accept the contention of the committee that there is no condition capable of being imposed to allow registration of an applicant who ordinarily resides outside Australia.

89. Counsel for Mr Mansfield submits, and I accept, the question is therefore not whether the regulatory regime is identical to the regime for a liquidator within the jurisdiction, but rather whether, in the circumstances of the particular application, conditions of registration will provide an adequate level of protection of the public.

90. This being the case, the issue is whether the conditions proposed are sufficient to meet the objects of the regulatory regime under the Corporations and ASIC Acts or whether the additional condition sought by the committee should be imposed.

Should Mr Mansfield be registered subject to conditions and if so, what conditions should be imposed?

91. I am satisfied that the proposed conditions 4 to 14 will resolve the majority of the committee's concerns about the potential logistical issues that may arise if Mr Mansfield undertakes administrations in Australia while continuing to reside in Singapore.

Relevantly, under the conditions proposed and agreed Borrelli Walsh will set up an operational office before Mr Mansfield can accept his first appointment, Mr Mansfield will notify the appointor and creditors about his Singaporean residency, he will agree to return to Australia on 48 hours' notice if required by ASIC, books and records will be maintained in Australia, Mr Mansfield will be physically present in Australia for certain creditors' meetings and he will not seek to recover travel costs or accommodation from creditors.

92. It is also relevant to note that Borrelli Walsh has experience in managing insolvency and restructuring assignments which have an international element including, for instance overseas creditors, offshore holding companies or onshore assets. A significant number of these assignments involved locations where the firm does not (or did not at the time of appointment) have an office. I accept Borrelli Walsh has practical experience with the logistical matters outlined by the committee and that it is the intention of the company, of which Mr Mansfield is a director, to support Mr Mansfield in the discharge of the proposed functions and duties. Relevantly, Mr Kardachi confirmed that expanding its operations into Australia is part of Borrelli Walsh's future business strategy.

93. While a breach of conditions do not result in an automatic suspension or cancellation of registration, ASIC may issue a show cause notice under s 40–40(1) of the IPS Corporations if ASIC believes a liquidator has breached a condition. ASIC may convene a committee under s 40–45 and refer a liquidator to the committee for disciplinary action if ASIC does not receive an explanation within 20 days or is not satisfied with the explanation. The committee must interview the liquidator and then make a decision about what should happen, which may include suspension or cancellation of the liquidator's registration (s 40–55 of the IPS Corporations) and report to the liquidator and ASIC about its decision. ASIC must give effect to the decision of the committee (s 40–65 of the IPS Corporations).

94. This is similar to the procedures adopted by ASIC under the Corporations Act in respect of any disciplinary or regulatory action against Australian Financial Service Licenses (AFSL). Licenses are not automatically cancelled or suspended if there is a breach of condition (s 915B of the Corporations Act) but may be cancelled or suspended after a hearing (s 915C of the Corporations Act). The difference between the AFSL procedures and the procedures established under the IPS Corporations is that ASIC delegates decision-making under section 915C to an authorised officer under s 102 of the ASIC Act but under

the IPS Corporations certain decisions, including disciplinary and registration decisions, are made by a specialist committee convened by ASIC.

95. The committee contends that conditions on registration do not provide an adequate level of protection. I do not accept this submission. ASIC regularly imposes conditions on AFSLs and, provided these conditions are properly and adequately defined, monitored and enforced, this is an effective regulatory tool. The procedure under the IPS Corporations is less direct but this is because Parliament has considered it appropriate to interpose an expert committee as the decision maker. In other respects, and for practical purposes, the procedure is similar.

96. A critical question is whether there are any technical or logistical limitations for ASIC in giving or enforcing such a notice.

97. There are no provisions in the IPS Corporations about how documents are to be given to corporations or natural persons.

98. Section 109X of the Corporations Act provides for service on corporations and directors and company secretaries of corporations as follows:

> *(1) For the purposes of any law, a document may be served on a company by:*
>
> *(a) leaving it at, or posting it to, the company's registered office; or*
>
> *(b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or*
>
> *(c) if a liquidator of the company has been appointed--leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or*
>
> *(d) if an administrator of the company has been appointed--leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.*
>
> *(2) For the purposes of any law, a document may be served on a director or company secretary by leaving it at, or posting it to, the alternative address notified to ASIC under subsection 5H(2), 117(2), 205B(1) or (4) or 601BC(2). However, this only applies to service on the director or company secretary:*
>
> *(a) in their capacity as a director or company secretary; or*
>
> *(b) for the purposes of a proceeding in respect of conduct they engaged in as a director or company secretary.*

99. There are no provisions dealing with service of documents on natural persons under the Corporations Act but s 5C provides that the Interpretation Act applies. Section 28A of this Act provides as follows:

> *(1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used, then the document may be served:*
>
> *(a) on a natural person:*
>
> *(i) by delivering it to the person personally; or*
>
> *(ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or*
>
> *(b) on a body corporate – by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate.*
>
> *Note: The Electronic Transactions Act 1999 deals with giving information in writing by means of an electronic communication.*
>
> *(2) Nothing in subsection (1):*
>
> *(a) affects the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorises the service of a document otherwise than as provided in that subsection; or*
>
> *(b) affects the power of a court to authorise service of a document otherwise than as provided in that subsection.*

100. Accordingly, if Mr Mansfield establishes a place of business in Australia any show cause notice could be served on him at that office. As the Corporations Act has extraterritorial operation there is no reason why the process under s 40–40 of the IPS Corporations could not be efficiently utilised to hold Mr Mansfield accountable if he does not comply with conditions imposed. The committee has not raised any issues in its submissions or suggest otherwise during oral submissions.

101. The second critical issue for consideration is whether ASIC's 'basic' regulatory tools under ss 19, 30 and 30B of the ASIC Act can be given effect notwithstanding Mr Mansfield is ordinarily resident in Singapore.

102. In so far as ASIC may seek to issue notices under s 30 for records of the company in administration, having regard to proposed conditions 5 and 7 and section 109X of the Corporations Act, there would be no impediment on ASIC serving and enforcing compliance with such notices within the jurisdiction.

103. In relation to notices served under ss 19 and 30B, I accept the submission of the committee that the question of how ASIC notices may be served on a person who resides outside the jurisdiction are separate and distinct from whether those notices are validly issued and whether they are or can be enforced.

104. Section 5 of the ASIC Act provides that the expression to 'give' in relation to a document has the meaning affected by s 86 of the ASIC Act. Section 86 provides:

> *Section 109X of the Corporations Act has effect for the purposes of this Part as if a reference in subsection (2) of that section to leaving a document at an address were a reference to leaving it at that address with a person whom the person leaving the document believes on reasonable grounds:*
>
> *(a) to live or work at that address; and*
>
> *(b) to have attained the age of 16 years.*

105. As already noted if Mr Mansfield establishes a place of business under proposed condition 5, service may be effected on that office or personally under s 28A of the Interpretation Act. If Mr Mansfield is in the jurisdiction at the time of service and he is served personally, there will be no issue with service. If he is in Singapore, service may still be affected but the issue raised by the committee, which is significant, is that the notice may not be valid, given the ASIC Act does not have extraterritorial operation, and it may not be enforceable.

106. Counsel for Mr Mansfield submits that there is no evidence Mr Mansfield would not comply with notices but in any event proposed conditions 1 to 3 overcome issues of service and enforceability. It is further submitted that there are alternative processes available to ASIC to seek information or investigate Mr Mansfield and the administrations he undertakes through proceedings under ss 596A and 596B of the Corporations Act, enforcement of an examination summons in Singapore under the Singaporean *Extradition Act (Cap 103)*[41] or requesting an examination in Singapore under s 581(4) the Corporations Act.

107. In response, the committee submits that these alternative measures are costly and may be protracted. They do not provide the quick and effective 'basic tools' through the use of compulsory notices under ss 19 and 30B of the ASIC Act. It is further submitted that the

[41] Exhibit 9 - *Extradition Act 1968 (Chapter 103)* (Singapore).

issues of service and enforceability are not adequately overcome by proposed conditions 1 to 3 because those conditions do not overcome the fundamental difficulty of validity. Even if a notice is validly served in Australia, it is unclear whether that notice could be enforced outside the jurisdiction, firstly, because of the territorial limitations of the ASIC Act and secondly, because of the practical problems of enforceability outside the jurisdiction.

108. These submissions are persuasive. The extensive submissions provided by counsel for Mr Mansfield about how service and enforceability could be over overcome only serve to highlight the difficulties with these alternative remedies. I accept it is possible for ASIC to issue examination summonses or to have examinations conducted in Singapore under various provisions of the Corporations Act and it may also be possible to have those summonses enforced in Singapore, either through extradition orders or examinations in Singapore. However, these processes are likely to be protracted and costly. I accept there is no evidence to suggest Mr Mansfield will not comply with notices, for instance, there is no evidence of previous non-compliance and Mr Mansfield has exemplary references from senior insolvency practitioners who are registered in Australia. Notwithstanding this, I accept the submission of the committee that Mr Mansfield does not have a demonstrated record as a registered liquidator, either in Australia or in Singapore. As such, he is untested.

109. I am therefore satisfied it would be appropriate to impose the additional condition requested by the committee as a condition of registration, not because of concerns about whether Mr Mansfield has sufficient exposure to bankruptcy processes, but rather to ensure some joint accountability with a liquidator registered in Australia. I propose that this condition be limited to a period of one year to give ASIC the opportunity to identify any regulatory concerns and for Mr Mansfield and Borrelli Walsh to identify and resolve any logistical issues in establishing an office in Australia and conducting external administrations given Mr Mansfield's Singapore residency.

110. I also accept that conditions to the effect of those agreed by the parties and set out as conditions 1 to 14 would be appropriate.

111. Given I have found Mr Mansfield has had sufficient exposure to bankruptcy processes as contemplated by s 20−1(3) of the Rules, I consider it unnecessary to impose proposed condition 15.

CONCLUSION

112. For the above reasons, I have decided to set aside the reviewable decision. The applicant should be registered as a liquidator subject to the conditions outlined above. I direct that the parties provide within 14 days short minutes of order giving effect to these reasons.

I certify that the preceding 112 (one hundred and twelve) paragraphs are a true copy of the reasons for the decision herein of Deputy President J Redfern.

.....[sgd].....

Associate

Dated: 5 June 2018

Date(s) of hearing:	**22 and 23 March 2018**
Date final submissions received:	**12 April 2018**
Counsel for the Applicant:	**Mr S. Aspinall**
Solicitors for the Applicant:	**Norton Rose Fulbright Australia**
Counsel for the Respondent:	**Ms J. Davidson**
Solicitors for the Respondent:	**Australian Securities And Investments Commission**