

8 October 2012

PRIVATE & CONFIDENTIAL

BY EMAIL

economics.sen@aph.gov.au

Senator David Bushby
 Senator for Tasmania
 Chair
 Senate Economics References Committee
 PO Box 6100
 Parliament House
 CANBERRA ACT 2600

Dear Senator

**Senate Economics References Committee Inquiry into the post-GFC banking sector –
 Submissions of Mark David Peter Englebert and Ian Charles Francis**

1. We refer to the letter from Minter Ellison to you dated 10 September 2012. This letter constitutes the written submissions that are referred to at paragraph 3(a) of the letter from Minter Ellison dated 10 September 2012.

Submissions made by Mr Sean Butler

2. As you are aware, Mr Sean Butler made a number of submissions and allegations regarding our conduct as joint and several receivers and managers of (together **Companies**):
 - (a) Lighthouse Beach Holdings Pty Ltd ACN 104 899 461 (Receivers and Managers Appointed) in its own right and as trustee for The Lighthouse Beach Unit Trust (**Lighthouse Beach**);
 - (b) Butler Constructions Pty Ltd ACN 009 371 340 (Receivers and Managers Appointed) in its own right and as trustee for The Cargill Trust (**Butler Constructions**) trading as the Lighthouse Beach Resort; and
 - (c) National Hotel Property Pty Ltd ACN 120 460 620 (Receivers and Managers Appointed) (**National Hotel Property**),

PERTH SYDNEY MELBOURNE BRISBANE

Level 6
 30 The Esplanade
 Perth WA 6000

PO Box Z5486
 St George's Terrace
 Perth WA 6831

Phone: +61 8 9321 8533
 Fax: +61 8 9321 8544
taylorwoodings.com.au

Taylor Woodings ABN 69 379 937 370

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during the course of his oral testimony before the Committee and in the context of his earlier written submissions to the Committee.

3. These submissions seek to address and respond to:
 - (a) the specific questions that were posed in your letter to Mr Michael Ryan (the Managing Partner of the firm Taylor Woodings, of which we are also partners) dated 22 August 2012; and
 - (b) the allegations that Mr Butler has made regarding our conduct as joint and several receivers and managers of the abovementioned companies.
4. We have prepared these submissions in our capacities as joint and several receivers and managers of the Companies.

Documents referred to in these submissions

5. These submissions refer to a number of documents. Those documents, which are included in the folder of documents accompanying these submissions, do not by any means constitute the entirety of the documents we hold in relation to the receiverships of the Companies, but rather are limited to those documents which give context to our submissions. Each document in the folder has been allocated a tab. When we refer to a document(s) in these submissions, the relevant tab will be noted in square brackets at the end of the paragraph – e.g. [see tab x].

Your letter of 22 August 2012

The nature of these written submissions and the appearance in person

6. As a general response to Mr Butler's submissions regarding our alleged conduct as joint and several receivers and managers of the Companies, we submit that we have at all times complied (and continue to comply) with our duties pursuant to the terms of our appointments, the security agreements pursuant to which we were appointed, at law, in equity and pursuant to the '*Code of Professional Practice for Insolvency Practitioners*'. For these reasons, and given the public nature of the Committee's Inquiry, we do not consider there to be any prejudice to us in these submissions being made public.
7. That said, however, we realise that the matters and correspondence referred to in these submissions touch on certain issues relevant to Mr Butler and other third parties which should, in our view, remain private as between the parties involved. Those matters have been disclosed in these submissions for the benefit of the Committee and to respond to the submissions made by Mr Butler. We do not believe that it would be beneficial to the parties involved for those matters to be made public. Rather, certain of the matters referred to could be prejudicial to the parties involved and, for that reason, we request that these submissions and its contents be kept private. For the same reason, we also request that our appearance before the Committee on Wednesday, 10 October 2012 be held privately – that is, *in camera*. We would be grateful for your assistance in accommodating these requests.

Parliamentary privilege

8. As to the submission that Mr Butler has made concerning issues of alleged interference and the manner in which the Committee approaches allegations of that nature, we respond as follows.
9. In short, we dispute that we have, in any way and at any time, sought to interfere or improperly influence Mr Butler with respect to the evidence and allegations he wished to make.
10. In your letter of 22 August 2012, you referred to an email sent by Mark Englebert to Mr Butler in response to a request from Mr Butler for confirmation of our position in relation to certain historical allegations that Mr Butler had made against us. The correspondence you have referred to is set out below.
11. On 27 July 2012, Mr Butler sent Mark Englebert the following email [*see tab 44*]:

'Dear Mark,

I have been asked to attend and appear at the Senate Economics References Committee Inquiry into the post-GFC banking sector and will attend in person on Wednesday 8th August.

My submissions are numbered 111 & 124 and can be viewed at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/post_gfc_banking/submissions.htm

In fairness I invite you to respond to my submissions and I will table your response at the hearing.

I have asked you several times previously to respond to the issues in the attached Email but this request has been denied, could you now please provide responses as requested so these can also be tabled at the hearing, this will give the Senators your view on the matters raised.

As you are aware there are many other requests I have made in the interests of transparency during the course of your appointment. Most of my requests have been refused. It would be good if you could now provide answers as requested or explanations as to why the information has been withheld.

Regards,

Sean Butler'

12. Our response to that email, issued to Mr Butler on 7 August 2012, was as follows [*see tab 44*]:

'Sean

Thank you for your email.

The Receivers have responded to you in writing on a number of occasions in relation to the matters addressed in the email that was attached to your email below ('Attachment'). The Receivers have also discussed those matters with you in person on a number of occasions. In the circumstances, the Receivers do not propose to restate that position in further correspondence. The Receivers are mindful of, and very conscious not to generate, unnecessary costs in the receiverships.

We are also mindful that the matters that are referred to in the Attachment relate to the proceedings that are the subject of the Deed of Release that you wrote to the Receivers about in recent days. It is

incumbent on you and Mrs Butler to consider and, if appropriate, take advice in relation to the extent to which your obligations of confidentiality pursuant to that agreement apply to the matters referred to within the Attachment.

If you have any queries, please don't hesitate to contact me.

Regards

Mark Englebert'

13. We submit that the above response to Mr Butler, in no way, involved any attempt to interfere with Mr Butler's entitlement to give evidence to the Committee. The suggestion that Mr Butler seek advice, if thought appropriate, about his duties of confidentiality did not involve any assertion, one way or another, as to what Mr Butler should or should not do, nor as to what he could or could not do. Indeed, to the contrary effect, the suggestion was that advice should be taken, if thought appropriate.
14. Mr Butler stated, during the course of his oral testimony on 8 August 2012, that the email threatened Mr Butler 'with action' if he submitted a particular document to the Committee. On any reading of the email, no action was threatened against Mr Butler. With respect, Mr Butler's understanding of what was conveyed to him was simply inaccurate and misconceived. Mr Butler was specifically urged to take advice and was represented by solicitors at the time of the relevant email.
15. In terms of s 12 of the *Parliamentary Privileges Act 1987* (Cth), nothing in the email can be seriously construed as a use of any "improper means" to influence Mr Butler in respect of any evidence to be given to the Committee or to induce Mr Butler to refrain from giving such evidence.

Pre-appointment matters

16. Mr Butler has, during the course of both his oral testimony before the Committee and in the written submissions he presented to the Committee, made a number of allegations in relation to the period prior to 18 July 2011. Those allegations relate to, amongst others, Bankwest (our appointor in respect of our appointments to the Companies) and Mr Butler's business partner.
17. Our appointments in respect of:
 - (a) Lighthouse Beach;
 - (b) Butler Constructions; and
 - (c) National Hotel Property,commenced on 18 July 2011. Thus, subject to only one matter touched on below, we cannot meaningfully comment on Mr Butler's allegations in the period before 18 July 2011.
18. In addition, we are also unable to comment meaningfully with respect to the allegations Mr Butler has made against Bankwest.

Our appointments in respect of the Companies

19. As mentioned, we were appointed by Bankwest as joint and several receivers and managers of the Companies on 18 July 2011. Our appointments were made pursuant to the following securities granted by the Companies in favour of Bankwest:
- (a) in respect of Lighthouse Beach:
 - (i) fixed and floating charges, registered on the Personal Property Securities Register as security interest numbers 201112151539806 and 201112120665472; and
 - (ii) Western Australian real property mortgages, registered numbers I540438, J939709 and K075061,granted by Lighthouse Beach in favour of Bankwest;
 - (b) in respect of Butler Constructions, a fixed and floating charge, registered on the Personal Property Securities Register as security interest number 201112130588463, granted by Butler Constructions in favour of Bankwest; and
 - (c) in respect of National Hotel Property, a Western Australian real property mortgage, registered mortgage number K327826, granted by National Hotel Property and Mr Brian Roland Benari in favour of Bankwest.
20. Our appointments, by virtue of the terms of the relevant securities and at law, required us to act independently from Bankwest.
21. The effect of our appointments as receivers was such that we took control of the following property of the Companies:
- (a) all of the rights, property and undertaking of Lighthouse Beach in its own right and as trustee for The Lighthouse Beach Unit Trust (i.e. all of the property the subject of security interest numbers 201112151539806 and 201112120665472 and registered Western Australian real property mortgages I540438, J939709 and K075061);
 - (b) all of the assets and undertakings including uncalled capital of Butler Constructions in its own right and as trustee for The Cargill Trust (being all of the property the subject of security interest number 20111213058846); and
 - (c) the interest of National Hotel Property in the property known as 98 High Street, Fremantle, Western Australia (being the property the subject of registered Western Australian real property mortgage K327826) which was owned by National Hotel Property and Mr Benari as tenants in common in equal shares.
22. From a practical perspective, our appointments to Lighthouse Beach and Butler Constructions encompassed the property and business comprising the Lighthouse Beach Resort, Bunbury, Western Australia (together with two adjoining properties), and our powers in respect of those assets were sufficiently broad to allow us to continue to trade the business during the course of the receivership.

23. By contrast, our appointment in respect of the National Hotel was more limited in nature by virtue of the building being only partially renovated, with new construction only partially complete, and not operating as a tradeable business. As a result, our appointment required the conduct of an asset sale process rather than any trading operations in respect of the National Hotel.

Dealings with Mr Butler post-appointment

24. Following our appointments in respect of the Companies, we undertook usual and accepted protocols in taking control of and managing the property the subject of our appointments. This involved:
- (a) entering onto and taking possession of the property known as the Lighthouse Beach Resort in Bunbury and the National Hotel in Fremantle;
 - (b) advising known employees of the Companies of our appointments;
 - (c) conducting occupational health and safety reviews of the relevant properties to which we were appointed;
 - (d) opening trading accounts in respect of the Companies;
 - (e) conducting an assessment of the business operations of the Lighthouse Beach Resort; and
 - (f) preparing budgets for the receiverships (including a budget for the continuing trade of the Lighthouse Beach Resort).
25. In conducting the general tasks referred to above, and given Mr Butler's capacities as a co-director of Lighthouse Beach and as the sole director of Butler Constructions and National Hotel Property, we engaged and conferred with Mr Butler in relation to the conduct of those tasks. In particular, we met with Mr Butler, both at the Lighthouse Beach Resort on the date of our appointments, and subsequently at the National Hotel, to discuss our appointments and Mr Butler's role in respect of the Companies.
26. From the outset of the receiverships, Mr Butler gave us reason for concern regarding the carrying out of our duties and the exercise of our powers in the course of our appointments. Specifically, Mr Butler:
- (a) did not comply with certain statutory requests for information from us, namely, Mr Butler did not provide us with an 'ASIC Report as to affairs' despite a number of requests to do so. The provision of that form to ASIC is a requirement of s 429(2)(b) and (c) of the *Corporations Act 2001* (Cth);
 - (b) advised us that he would require any purchaser of the Lighthouse Beach Resort to pay to him personally an amount in respect of the 'goodwill' of the business and that, absent such a payment, Mr Butler would take his business and customers and cause staff from the Lighthouse Beach Resort to leave and commence employment with a competing hotel business;
 - (c) caused the sum of \$10,500.00 to be withdrawn and/or transferred from the bank account of Butler Constructions for his personal use immediately following our

appointment as receivers of Butler Constructions and in circumstances where Mr Butler had no entitlement to those funds; and

- (d) acted in breach of his duties at law in that he engaged, contacted or solicited (or attempted to engage, contact or solicit) employees of Butler Constructions (being those employees operating the Lighthouse Beach Resort).
27. At the time the above conduct became apparent to us, we sought to communicate with Mr Butler directly with a view to explaining the receivership process and to alleviate any concerns he may have had with respect to our appointments to Lighthouse Beach and Butler Constructions and his role post our appointment.
28. Notwithstanding our attempts to explain the receivership process to Mr Butler as referred to above, Mr Butler continued to give us reason for concern regarding the carrying out of our duties and the exercise of our powers in the course of our appointments. In an effort to address Mr Butler's actions, on 18 August 2011 we caused our solicitors to write to the solicitors for Mr Butler for the purpose of [see tab 1]:
- (a) advising Mr Butler of our concerns with his actions to date;
 - (b) advising Mr Butler of his duties as a director of Lighthouse Beach and Butler Constructions; and
 - (c) requesting Mr Butler to provide an undertaking that he would not continue to take the actions which had given rise to our concerns.
29. We took the step referred to above on the basis that if Mr Butler were to continue taking actions which, in our view, impacted on the performance of our duties and the exercise of our powers in the receiverships, it would potentially have a deleterious effect on the financial outcomes of the receiverships of Lighthouse Beach and Butler Constructions. In particular, we considered that certain of Mr Butler's actions (and the work and expense that they generated) would inevitably impact upon the sale process in respect of the Lighthouse Beach Resort, would increase costs and expenses of the receiverships and would thus affect the return available to Bankwest as secured creditor and would also affect any surplus proceeds that might have been available for other creditors and stakeholders.
30. On 31 August 2011, we (together with our solicitors) also met with Mr Butler and his solicitor to discuss the above issues. At the time, we considered that the meeting had been productive and we had stated to Mr Butler our agreement to cooperate with Mr Butler going forward.
31. In light of the matters referred to above, Mr Butler's submission that we 'threatened' him with a restraining order and later retracted some of our 'demands' is not an accurate reflection of events as they occurred. We submit that we at all times sought to engage with Mr Butler (and his solicitors) in an appropriate manner in relation to his conduct and concerns and, following the meeting on 31 August 2011, considered that both Mr Butler's and our concerns had been addressed satisfactorily.

Employee issues

32. As part of our assessment of the business operations of the Lighthouse Beach Resort following our appointments to the Companies, we conducted an assessment of the employee, contractor and staffing needs for the business. That assessment was conducted in the context of, amongst other things:
- (a) the expected cash flow and profitability forecasts for the continued trading of the business;
 - (b) the existing skills of the employees of the business; and
 - (c) our obligations at law.

33. At the time of the above assessment, the books and records of Lighthouse Beach and Butler Constructions did not in our view suggest or evidence that Mr Butler or his wife, Mrs Margherita Butler, were employees of either of those entities. Further, despite the fact that:

- (a) we were appointed as receivers and managers of Lighthouse Beach and Butler Constructions on 18 July 2011; and
- (b) following our appointments on 18 July 2011, we had participated in numerous discussions with Mr Butler in relation to the business, property and affairs of Lighthouse Beach and Butler Constructions,

Mr Butler and Mrs Butler did not assert that they were employees of Butler Constructions until in or about late August and early September 2011 [*see tab 2*].

34. On 23 September 2011, and to address Mr and Mrs Butler's assertions regarding their employment by Butler Constructions, we caused our solicitors to write to the solicitors for Mr and Mrs Butler for the purpose of [*see tab 3*]:

- (a) observing that the books and records did not contain any suggestion or evidence of an existing employment relationship between Butler Constructions and Mr and Mrs Butler;
- (b) stating that we did not consider Mr Butler or Mrs Butler to be employees of Butler Constructions; and
- (c) providing notice to Mr Butler and Mrs Butler that, to the extent that they may be held to be employees of Butler Constructions, their employment by Butler Constructions was terminated in any event with immediate effect (i.e. as at the date of that letter) and in exercise of our power to discharge employees on behalf of Butler Constructions pursuant to s 420(2)(o) of the *Corporations Act*.

35. We took the step referred to above because, even if Mr and Mrs Butler were employees of Butler Constructions, we considered their roles (if any) to be redundant and unnecessary in the circumstances and on the basis that:

- (a) Butler Constructions was in receivership; and

- (b) the current general manager of the Lighthouse Beach Resort was undertaking the task of managing the Resort with sufficient skill.
36. Between 23 September 2011 and 6 October 2011, our solicitors corresponded with the solicitors for Mr and Mrs Butler in relation to the question of their employment status. That exchange of correspondence, and the additional evidence subsequently provided by Mr and Mrs Butler, placed us in a position where, as at 5 October 2011, we did satisfy ourselves that Mr and Mrs Butler were likely to have been employees of Butler Constructions as at 23 September 2011. The period of time taken in order for us to confirm the position was, in our view, attributable to the fact that the books and records of Lighthouse Beach and Butler Constructions did not, in our view, suggest or evidence that Mr Butler or Mrs Butler were employees of either of those entities.
37. On 6 October 2011 and 7 October 2011, and following the correspondence referred to above, Mr Butler wrote to us foreshadowing the commencement of unfair dismissal proceedings in the event that certain alleged wage and employee entitlements were not paid to him and to Mrs Butler [*see tabs 4 and 5*].
38. On 13 October 2011, we instructed our solicitors to write to Mr Butler's solicitors for the purpose of explaining that, by reason of the receivership of Butler Constructions, to the extent that any entitlements may have been due and owing by Butler Constructions to Mr and Mrs Butler in their capacities as former employees, those entitlements constituted claims that [*see tab 6*]:
- (a) were in the nature of unsecured claims against Butler Constructions; and
 - (b) were, to the extent that such claims (or any part of them) could be afforded any priority status by virtue of s 433 of the *Corporations Act*, subject to the provisions of the *Corporations Act* relating to issues of priority (including, without limitation, those relating to the status of Mr and Mrs Butler as 'excluded employees': see ss 556(1A), 556(1B) and 556(1C) of the *Corporations Act*).
39. On 17 October 2011, Mr Butler sent an email to us in response to the letter referred to above which confirmed that unfair dismissal proceedings would be commenced against Butler Constructions [*see tab 7*].
40. On 6 October 2011, Mr and Mrs Butler each commenced proceedings against Butler Constructions seeking relief in respect of what was alleged by them to have been their unfair dismissal by Butler Constructions (together **FWA Proceedings**). In the FWA Proceedings, Mr and Mrs Butler also asserted that they were entitled to payments in respect of unpaid wages and employee entitlements for [*see tabs 8 and 9*]:
- (a) the period prior to our appointment as receivers and managers of Butler Constructions; and
 - (b) for the period between the date of our appointment and the date of termination their employment by Butler Constructions,
- (together **Wages Claims**).

41. On 1 November 2011, and in our capacities as receivers and managers of (and agents for) Butler Constructions, we caused responses to be filed with Fair Work Australia in relation to the FWA Proceedings. Those responses referred to, and set out in a detailed manner, the matters referred to above regarding Mr and Mrs Butler's redundancies and the nature of their claims against Butler Constructions [*see tabs 10 and 11*].
42. On 2 November 2011, a conciliation was conducted between the parties to the FWA Proceedings and a representative from Fair Work Australia. The conciliation did not give rise to a settlement of the FWA Proceedings.
43. On 18 October 2011, Mr and Mrs Butler lodged submissions with the Fair Work Ombudsman (being submissions number MAT-0002-7262) in relation to the matters referred to above (**Ombudsman Complaints**) [*see tab 12*].
44. Between 30 November 2011 and 14 December 2011, we engaged in negotiations in good faith with Mr and Mrs Butler with a view to settling the FWA Proceedings. Those negotiations were motivated by commercial considerations, including the significant costs associated with continuing the FWA Proceedings, and were directed at settling the FWA Proceedings, the Ombudsman Complaints and the Wages Claims.
45. On 12 December 2011, the parties settled the FWA Proceedings, the Ombudsman Complaints and the Wages Claims pursuant to the terms of a Deed of Settlement and Release (**Settlement**) [*see tab 14*].
46. By reason of the considerations outlined above, the submissions made by Mr Butler that we:
 - (a) would not allow Mr and Mrs Butler to work in the business they had built and stopped paying them;
 - (b) did not acknowledge that Mr and Mrs Butler had been with the business for 20 years and were employees;
 - (c) sacked both Mr Butler and Mrs Butler without notice, for no reason and with no pay, entitlements or superannuation;
 - (d) submitted 'a series of lies' to Fair Work Australia to justify their termination; and
 - (e) offered Mr and Mrs Butler a part settlement of wages only on the basis that they did not pursue the FWA Proceedings any further,

are not an accurate reflection of events as they occurred. Rather, we submit and maintain that the issues relating to Mr and Mrs Butler's employment were at all times dealt with in an appropriate manner, consistent with our duties and obligations at law and taking into consideration the circumstances of Butler Constructions as a company in receivership. Any submission to the contrary is, we submit, made without basis.

Mr Butler's actions following the Settlement

47. On a number of occasions since the Settlement, and notwithstanding the terms of the Settlement, Mr Butler has sought to raise issues relating to the FWA Proceedings, the Ombudsman Complaints and the Wages Claims [*see tab 15*].

48. From that correspondence, it can be seen that one of the matters raised by Mr Butler, from time to time, related to a 'commercial opportunity' that had allegedly been presented to him by the Lord Forrest Hotel in Bunbury. Further, as to this:
- (a) Mr Butler requested that we reinstate his employment (and that of Mrs Butler) with Butler Constructions; and
 - (b) Mr Butler stated that, in the event that we did not accede to this request, he and Mrs Butler would '*start work on a new business and property in direct competition with the Lighthouse Hotel...*'.
49. Our position in relation to the above matters was as follows [*see tab 15*]:
- (a) in our view, the matters that Mr Butler had sought to raise had been adequately addressed by the Settlement; and
 - (b) in any event:
 - (i) we were not prepared to accede to the request referred to above;
 - (ii) consistent with our previous communications with Mr Butler (over many months) in relation to the employment opportunity which he (and Mrs Butler) apparently had with the Lord Forrest Hotel, Mr Butler was well within his rights to seek alternate employment, including with the Lord Forrest Hotel, provided that he did not engage in conduct that constituted a breach of his duties as a director of the relevant companies and as a former employee of Butler Constructions; and
 - (iii) on the basis that Mr Butler had previously informed us that he would, in pursuing alternative employment, be mindful of his duties as a director of the relevant companies and as a former employee of Butler Constructions, we did not foresee any difficulties if he took up other employment.
50. By reason of the above matters, the submission made by Mr Butler that he was told not to work for other businesses similar to the Lighthouse Beach Resort in Bunbury is incorrect. Rather, we submit that our dealings with Mr Butler in relation to this issue were entirely appropriate and in accordance with our duties and obligations at law. In no way did we seek to, or wish to, prohibit Mr Butler from pursuing alternative employment.
51. It should also be noted that:
- (a) we had the benefit of legal representation in relation to the employee issues referred to above by reason of the nature and complexity of the legal issues raised by Mr Butler; and
 - (b) Mr Butler was legally represented in relation to the majority of the employment issues referred to above.

Sale process – Lighthouse Beach Resort

52. As noted above, from a practical perspective our appointments to Lighthouse Beach and Butler Constructions encompassed the property and business comprising the Lighthouse

Beach Resort, Bunbury, Western Australia. That enabled us to continue to trade the business during the course of the receivership and the sale process.

Marketing process

53. We commenced marketing the Lighthouse Beach Resort for sale to interested parties in September 2011. The marketing process was extensive and was informed by, and consistent with, our obligations pursuant to s 420A of the *Corporations Act*. Specifically, the marketing process comprised, amongst other things, the following actions:
- (a) obtaining a valuation from an established and reputable valuation consultant (Colliers International (WA) Pty Ltd) in order to determine the market value of the Resort. That valuation provided an 'as is' walk in walk out sale in one line market value for the Lighthouse Beach Resort (and its two adjoining properties) of \$8.2m inclusive of GST;
 - (b) employing the services of two established and reputable selling agents (CB Richard Ellis and Burgess Rawson) in marketing the Lighthouse Beach Resort for sale. Mr Butler had previously engaged CB Richard Ellis and Burgess Rawson in marketing the Lighthouse Beach Resort for sale prior to our appointments, and Mr Butler and Mr Brian Benari also expressly approved our engagements of the selling agents in marketing the Lighthouse Beach Resort for sale to interested parties;
 - (c) relying on the selling agents' expert advice as to the most appropriate method of sale for the Resort. After considering that advice, we formed the view that an 'offers invited' process would be the most effective process to obtain a sale of the property (as opposed to an auction of the Resort); and
 - (d) advertising the Resort for sale in:
 - (i) media advertisements in *'The West Australian'* and *'The Australian Financial Review'*;
 - (ii) online advertising via the selling agents' websites; and
 - (iii) direct advertising via the selling agents' client database.

This aspect of the marketing process included the preparation and distribution of an Information Memorandum with respect to the Lighthouse Beach Resort, which provided that offers could be submitted to our appointed selling agents at any time up until 4pm (WST) on Wednesday, 28 September 2011.

First expressions of interest

54. By the close of the 'offers invited' process at 4pm on Wednesday, 28 September 2011, we had received two expressions of interest and an offer in respect of the Lighthouse Beach Resort. The expressions of interest and offer were as follows [*see tab 16*]:
- (a) an expression of interest, submitted by Mr Butler on behalf of Butler Constructions as trustee for The Cargill Trust and GB Clarke Holdings Pty Ltd as trustee for the GB Clarke Family Trust (and executed only by Mr Butler in his personal

capacity). This expression of interest allocated a purchase price of \$9.8m for the land and plant and equipment comprising the Lighthouse Beach Resort and \$2m for a 'Business deed of restraint purchased from Butler Constructions'. The offer was also subject to, amongst other things, the following special conditions:

- (i) the sale of the National Hotel within 60 days of acceptance of the offer; and
 - (ii) the sale of two new houses at 87 Clarke Street, Bunbury within 60 days of acceptance of the offer;
- (b) an expression of interest, submitted by Mr Richard Green (purportedly on behalf of a syndicate), for the sum of \$9.8m. That expression of interest provided for a deposit of \$50,000, with 75% of the purchase price being financed by an entity referred to as Offshore Facilitators Pty Ltd; and
- (c) an offer, submitted by BRNFB Pty Ltd as trustee for the Benari Trust, for the sum of \$10m. That offer, by its Special Conditions (amongst other things), provided for a deposit of \$500,000, with the sale of the Resort being a GST-free sale of a going concern.
55. Mr Butler had, during the course of the 'offers invited' process referred to above, informed us that there were various other parties interested in submitting expressions of interest in respect of the Lighthouse Beach Resort. On each of those occasions, our appointed selling agents followed up with the relevant parties, however no expressions of interest were forthcoming.
56. Following receipt of the offer and expressions of interest referred to above, we considered the merits of the respective offer and expressions of interest and conducted relevant due diligence in relation to the offering entities. Those enquiries led us to form the view that:
- (a) the expression of interest submitted by Mr Butler contained terms that were not capable of acceptance. Specifically, the expression of interest:
 - (i) was submitted on behalf of Butler Constructions, being a company in receivership. Leaving to one side any question in relation to the capacity of Mr Butler to cause Butler Constructions to make an offer, we had legitimate and reasonable concerns as to whether Butler Constructions (being a company in receivership) could:

(A) obtain sufficient finance to complete the purchase of the Lighthouse Beach Resort; and

(B) otherwise comply with the proposed terms of sale of the Resort.

The basis of this concern was that the assets of Butler Constructions were already fully secured to Bankwest (which was, in the circumstances, likely facing a shortfall from the realisation of those assets), leaving no assets available to secure any further financial accommodation to finance the expression of interest and in circumstances where no other aspect of the expression of interest indicated an ability or intention to address this issue; and

- (ii) was made conditional on the sale of the National Hotel, Fremantle (being the property owned by National Hotel Property and Mr Benari as tenants in common in equal shares) and two other properties located in Bunbury (being the two properties located at 87 Clarke Street, Bunbury and not the subject of our appointment). There was, in our view, no reasonable certainty that those properties would be able to be sold within the stated timeframe. In any event, we were in control of the Lighthouse Beach Resort asset and did not consider conditions of the sort proposed to be acceptable or reasonable in the circumstances as we could only control Lighthouse Beach Resort assets;
- (b) the expression of interest submitted by Mr Green similarly contained terms that were not properly capable of acceptance in that our enquiries revealed that the proposed financier was not of sound financial standing (a search of the Australian Securities and Investments Commission revealed that Offshore Facilitators Pty Ltd was subject to a winding up application); and
- (c) the offer submitted by Mr Benari was, by reason of the above, the only expression of interest capable of being further considered.

Request for final offers

57. Notwithstanding the views expressed above, and in the interests of conducting a fair and open sale process, we (through our selling agents) engaged with the entities that submitted expressions of interest and/or offers for the purposes of:
- (a) advising them of our position in relation to their expressions of interest and/or offers; and
 - (b) advising them that they had all been 'shortlisted' to submit a final offer by Friday, 7 October 2011 (which was subsequently extended to 10 October 2011).
58. Following that advice, Mr Green elected not to pursue his expression of interest in relation to the Resort. Mr Benari and Mr Butler were, however, open to further discussions regarding their respective expressions of interest and offers.
59. On 10 October 2011, we received a revised offer from Mr Benari for the purchase of the Lighthouse Beach Resort, comprising:
- (a) an offer, in the form of a unit sale deed, proposed to be entered into between Butler Constructions, Simone Investments Pty Ltd and Simon Harold Berns in respect of the sale and purchase of units held by Butler Constructions as trustee for the Cargill Trust in the Lighthouse Beach Unit Trust, for a sale price of approximately \$10m; and
 - (b) an alternative offer, in the form of:
 - (i) a contract for sale of land by offer and acceptance, proposed to be entered into between BRNFB Pty Ltd as trustee for the Benari Trust, Simone Investments Pty Ltd, Simon Harold Berns as trustee for the Simon Berns Family Trust and Lighthouse Beach, in respect of the land on which the Resort is located; and

- (ii) a stock sale agreement, proposed to be entered into between Butler Constructions and Lighthouse Keeper Pty Ltd, in respect of the assets comprising the business of the Resort,

for an aggregate sale price of approximately \$9.491m.

60. No formal offer was received by Mr Butler by 10 October 2011.

Correspondence with Mr Benari and Mr Butler

61. Between 10 October 2011 and 1 December 2011:

- (a) we corresponded with Mr Benari and his solicitor regarding our concerns in relation to the proposed mechanics by Mr Benari, Mr Berns and their related entities for the sale and purchase of the Lighthouse Beach Resort; and
- (b) we and our selling agents corresponded with Mr Butler in relation to our consideration of his expression of interest and a further offer purported to be put forward by an associate or acquaintance of Mr Butler.

62. Following the above correspondence, Mr Butler reiterated to us that, amongst other things, any sale of the Lighthouse Beach Resort must attribute value to the 'goodwill' of the business and that the amount referable to that value should be paid to Butler Constructions and/or Mr Butler personally. Mr Butler proposed that, in consideration for that payment, he would enter into a deed of restraint preventing him from working elsewhere in Bunbury in direct competition with the Lighthouse Beach Resort [*see attachment to tab 1 (email dated 15 August 2011) and tab 17*].

63. Our position in relation to the above was that:

- (a) there was no value attributable to the goodwill of the business; and
- (b) in any event, even if there was value attributable to the goodwill of the business, it would be inappropriate and improper for us to pay such an amount to Mr Butler.

Meeting with Mr Butler

64. In light of the matters referred to above, and considering that during the course of the Lighthouse Beach Resort sale process Mr Butler had expressed concerns to us in relation to our conduct of the sale of the Resort, on 30 November 2011 we met with Mr Butler and his solicitors, together with representatives from Bankwest, to discuss Mr Butler's concerns.

65. At that meeting, Mr Butler stated, amongst other things, that further parties interested in purchasing the Lighthouse Beach Resort had been dissuaded from doing so by our appointed selling agents. Our position and response in relation to this assertion is set out below.

Extension of period for submission of offers

66. By early December 2011, we had formed the view that the revised offer put forward by Mr Benari was, for various reasons, incapable of acceptance. In light of that fact, and

given that we had been made aware (through Mr Butler) of the possibility of another party being interested in purchasing the Lighthouse Beach Resort, we decided to give potentially interested parties an extension of time in which to present an offer.

67. On 2 December 2011, we caused our solicitors to write to the solicitor for Mr Benari for the purpose of informing Mr Benari that [see tab 18]:
- (a) his offer was incapable of acceptance in its current form; and
 - (b) in light of another party having expressed an interest in purchasing the Lighthouse Beach Resort, interested parties would have until 4pm on Wednesday, 21 December 2011 to present further offers for the purchase of the Resort.
68. On 8 December 2011, we caused our solicitors to write to the solicitors for Mr Butler for the purpose of, amongst other things [see tab 19]:
- (a) responding to Mr Butler's concerns regarding the sale of the Lighthouse Beach Resort; and
 - (b) advising Mr Butler that, in light of a third party having expressed an interest in purchasing the Lighthouse Beach Resort, interested parties would have until 4pm on Wednesday, 21 December 2011 to present further offers for the purchase of the Resort.
69. In order to assist interested parties in formulating any offer to purchase that they wished to present to us, and subject to the execution by the relevant parties of an appropriate form of confidentiality agreement, we provided interested parties with updated trading figures for the Lighthouse Beach Resort for the period of the receivership to date. Accordingly, Mr Butler's submission that we refused to provide him with recent trading figures for the Resort is incorrect.

Close of extended period for submission of offers

70. As at 4pm on 21 December 2011, we had not received any offers to purchase in respect of the Lighthouse Beach Resort. However, Mr Benari and one other party (not Mr Butler) had advised that they required until midday on 22 December 2011 to submit a revised offer. Given that no offers had yet been received, we advised the relevant parties that we would receive offers submitted on 22 December 2011.
71. On 22 December 2011, we received the following expression of interest and offer in respect of the Lighthouse Beach Resort:
- (a) an expression of interest, submitted by Mr Butler on behalf of Butler Constructions as trustee for The Cargill Trust and GB Clarke Holdings Pty Ltd as trustee for the GB Clarke Family Trust. That expression of interest allocated a purchase price of \$8.5m for the land and plant and equipment comprising the Lighthouse Beach Resort (excluding the adjoining houses) with no deposit being payable by the proposed purchasers. The offer was also subject to, amongst other things, the following special conditions [see tab 20]:
 - (i) the sale of the National Hotel within 45 days of acceptance of the offer; and

- (ii) Mr Benari providing vendor finance of \$500,000 or '*retaining strata units in Ocean Block to that value*'; and
- (b) an offer, submitted by Mr Benari and comprising [*see tab 21*]:
 - (i) an offer to purchase, in respect of the land on which the Lighthouse Beach Resort is located and the two adjoining properties in Carey Street, Bunbury, by Brian Benari as trustee for the Benari LBH Trust, Simone Investments Pty Ltd and Simon Harold Berns as trustee for the Berns Family Trust; and
 - (ii) an offer to purchase, in respect of the assets comprising the business of the Lighthouse Beach Resort, by Lighthouse Keeper Pty Ltd,

for the sum of \$9.491m plus the value of stock located at the Resort.

72. Following receipt of the documents referred to above, we considered the merits of the expressions of interest submitted by Mr Butler and the offer from Mr Benari and formed the view that the offer presented by Mr Benari and his related entities was the only viable offer received in respect of the Lighthouse Beach Resort. We formed this view on the basis that:

- (a) the expression of interest submitted by Mr Butler contained terms that were incapable of acceptance in that it:
 - (i) was submitted on behalf of Butler Constructions, being a company in receivership. As noted above, this fact caused us to have legitimate and reasonable concerns as to whether Butler Constructions could obtain sufficient finance to complete the purchase of the Lighthouse Beach Resort. In particular, the assets of Butler Constructions were already fully secured to Bankwest, leaving no assets available to secure any further financial accommodation to finance the purchase of the Resort;
 - (ii) contemplated a 'share purchase' arrangement in relation to shares in the Lighthouse Beach Unit Trust (that were not the subject of our appointment); and
 - (iii) was made conditional on the sale of the National Hotel, Fremantle (being the property owned by National Hotel Property and Mr Benari as tenants in common in equal shares) and finance being provided by Mr Benari. Mr Benari separately informed us that he was not prepared to provide any such financial accommodation and that he had not been consulted in relation to the finance condition contained within the expression of interest.

Those issues were, in our view, of sufficient concern to warrant Mr Butler's expression of interest being rejected and taken no further. This fact was communicated to Mr Butler through our selling agents on 22 December 2011 [*see tab 22*]; and

- (b) the offer from Mr Benari and his related entities was (subject to certain legal issues being resolved between the parties) conditional only on finance being obtained by the purchasing entities and the approval of the Western Australian Director of Liquor Licensing to the transfer of the Liquor Licence to the purchasing entities.

The offer also ascribed a value to the Lighthouse Beach Resort that exceeded the valuation that we had obtained in respect of the Resort.

Further correspondence with Mr Benari and Mr Butler

73. During the course of February 2012, we and our solicitors engaged with Mr Benari and his solicitors for the purposes of negotiating documentation in relation to the proposed sale and purchase of the Lighthouse Beach Resort in the terms contemplated by Mr Benari's offer.
74. During that same period, we and our selling agents received various correspondence from Mr Butler:
- (a) requesting whether the Lighthouse Beach Resort had been sold;
 - (b) noting that parties remained interested in purchasing the Resort; and
 - (c) requesting revised financial information for the Resort.
75. On 10 February 2012, we wrote to Mr Butler for the purpose of clarifying, amongst other things, the issues we had with the expressions of interest submitted by Mr Butler in relation to the Lighthouse Beach Resort [*see tab 22*].

Meeting with Sean Butler

76. On 29 February 2012, and with a view to resolving Mr Butler's ongoing concerns in relation to the conduct of the sale process in relation to the Lighthouse Beach Resort, we met with Mr Butler and his solicitors, together with representatives from Bankwest, with a view to discussing, amongst other things, the progress of the sale of the Resort.
77. At that meeting, we discussed with Mr Butler his concerns in relation to the sale of the Resort. In particular, Mr Butler was advised, amongst other things:
- (a) in relation to his query as to whether the Resort had been sold, we had received an offer and although negotiations in respect of that offer were well advanced, no agreement had been concluded at that time;
 - (b) in relation to his request to submit an offer for the Resort and to be provided with financial information for the Resort, Mr Butler had been afforded the same opportunity, and provided with the same information, as other parties interested in submitting an offer; and
 - (c) in relation to his query regarding the potential need for a deed of restraint, that no such restraint was or would be required by us.

Agreement for the sale and purchase of the Lighthouse Beach Resort

78. On 12 March 2012, we entered into:
- (a) a conditional contract for the sale and purchase of the land on which the Lighthouse Beach Resort was located with Brian Benari as trustee for the Benari

LBH Trust, Simone Investments Pty Ltd and Simon Harold Berns as trustee for the Berns Family Trust [*see tab 23*]; and

- (b) a conditional contract for the sale and purchase of the assets comprising the business of the Lighthouse Beach Resort with Lighthouse Keeper Pty Ltd [*see tab 24*].
79. Between 12 March 2012 and 16 July 2012, we and our solicitors engaged with Mr Benari and his solicitor for the purpose of arranging the settlement of the sale of the Lighthouse Beach Resort. The majority of that time was attributable to the purchaser's endeavours to obtain appropriate approvals in relation to the proposed transfer of the liquor licence in respect of the Lighthouse Beach Resort.
80. On 9 June 2012, we received further correspondence from Mr Butler requesting whether the Lighthouse Beach Resort had been sold and noting that Mr Butler may have identified a further party interested in purchasing the Resort. In response to that email, we advised Mr Butler that we were materially progressed with a conditional offer. We also said that if Mr Butler (or any other party) wished to lodge a formal offer, it was open to him to do so, though our ability to deal with such an offer would be limited given the state of our negotiations with the party that had presented the conditional offer (being Mr Benari and entities associated with him). Notwithstanding that correspondence, and further enquiries being made by our selling agents, no offer was received from Mr Butler or any other party [*see tab 25*].
81. By reason of the matters referred to above, the submissions made by Mr Butler that he and another party put in an offer to buy the Resort, at a price of approximately \$13.3m, but that offer has not accepted because, amongst other things, it was subject to finance and the sale of another property, is incorrect. Mr Butler's expressions of interests never materialised into a formal offer. Further, his expressions of interest were problematic for the reasons outlined above and not solely because they were subject to finance and the sale of another property.
82. Additionally:
- (a) Mr Butler's submission that we refused to tell Mr Butler if the Lighthouse Beach Resort was sold or under offer is incorrect. As outlined above, Mr Butler was kept appropriately informed in relation to our progress in selling the Lighthouse Beach Resort;
 - (b) Mr Butler's submission that another syndicate who were in the process of putting in an offer for the purchase of the Lighthouse Beach Resort for \$14m was told by our appointed selling agents that the Lighthouse Beach Resort had sold and to 'go away' is not an accurate reflection of events. As noted above, Mr Butler was informed that if he (or any other party) wished to lodge a formal offer it was open for him to do so. Notwithstanding that notice, Mr Butler (or the syndicate he referred to in his submissions) did not submit a formal offer to us in relation to the Lighthouse Beach Resort;
 - (c) Mr Butler's submission that his business partner negotiated with us without Mr Butler's knowledge to purchase the Lighthouse Beach Resort for \$9.5m is without basis. As outlined above, we engaged in a marketing and sale process for

the Lighthouse Beach Resort in accordance with our duties pursuant to s 420A of the *Corporations Act* and with a view to obtaining the best possible price for the Resort. Following that sale process, the best available offer (being the offer from Mr Benari and his associated entities) was accepted; and

- (d) in respect of Mr Butler's submissions regarding Mr Benari's conduct in purchasing the Lighthouse Beach Resort, we are not able to make any meaningful comments in relation to those submissions save to say that:
 - (i) Mr Butler was not entitled to be informed of the nature of the offer from Mr Benari. The fact that Mr Butler did not lodge a formal offer for a price greater than Mr Benari's offer of \$9.5m (or at all) despite being invited to do so was a matter for Mr Butler; and
 - (ii) the alleged offer from Mr Benari for the sum of \$14m was, in our understanding, made prior to our appointments to the Companies. We are therefore unable to make any comment in relation to that alleged offer. We were only able to consider offers received during the course of our marketing campaign for the Lighthouse Beach Resort. As noted above, the best offer received during that process (being the offer from Mr Benari and his associated entities) was accepted.

Settlement of Lighthouse Beach Resort

83. Settlement of the sale of the Lighthouse Beach Resort was completed on 16 July 2012.

Sale process – National Hotel

Enquiries regarding the status of the building

84. By contrast to the Lighthouse Beach Resort, the National Hotel was, at the time of our appointment, a partially completed building. It had, in the years prior to our appointment, been badly damaged in a fire incident. While some rebuilding work had been completed, no significant construction work had been undertaken in the year before our appointment and, as such, on any reasonable assessment the National Hotel required significant building and renovation works in order to restore it to a completed state. The National Hotel was also subject to certain relevant heritage register listings.

85. Following our appointment in respect of the National Hotel, we:

- (a) conducted investigations and took advice in relation to the status, condition and market value of the National Hotel;
- (b) conducted an occupational health and safety review of the property; and
- (c) wrote to the relevant local authorities to advise of our appointment in respect of the property; and
- (d) liaised with Mr Butler in relation to the work required to be conducted at the National Hotel.

86. One matter that became obvious, during the course of the investigations referred to above, was that a reliable 'cost to complete' (in respect of the building and renovation works that remained to be completed at the National Hotel) may have been of assistance in marketing the National Hotel for sale.
87. In order to determine whether the best market value would be achieved with or without a 'cost to complete', we made inquiries in relation to historical 'cost to complete' estimates that had previously been prepared in relation to the National Hotel. Those inquiries revealed that:
- (a) several historical 'costs to complete' documents had been prepared in respect of the National Hotel in 2009 and 2010;
 - (b) following the preparation of the 'costs to complete' documents referred to above, some further building and renovation works had been conducted at the National Hotel (by Mr Butler/Butler Constructions); and
 - (c) by reason of these works, the 'costs to complete' documents that had been obtained were not up to date.
88. Our inquiries in relation to the 'cost to complete' issue also caused us to ascertain that those building and renovation works that had been conducted at the National Hotel before our appointment (by Mr Butler/Butler Constructions) had been completed without a structural engineers report (certifying the overall design) being obtained prior to those works being conducted.
89. In light of the matters referred to above, and on the basis of advice from the builders with whom we consulted in relation to the 'cost to complete', we formed the view that the absence of such a structural engineers' report would make it difficult for an accurate 'cost to complete' to be prepared in respect of the building and renovation works that remained to be completed at the National Hotel.
90. To enable us to properly consider the issue, we obtained a quote from a structural engineer in relation to the preparation of appropriate structural documentation that would allow us to prepare an accurate 'cost to complete'. That quote was for an amount of approximately \$80,000 plus GST.
91. On 10 November 2011, we wrote to Mr Benari (as tenant in common, in equal shares with National Hotel Property, in respect of the National Hotel) in relation to the matters referred to above. In that correspondence, we advised Mr Benari that:
- (a) despite earlier requests, Mr Benari had not provided us with his consent to the completion of the required structural documentation;
 - (b) his consent was necessary given that Mr Benari was a co-owner of the property and liable for half of the costs associated with the preparation of that documentation; and
 - (c) notwithstanding the above, we intended to instruct the structural engineer to commence the preparation of the required structural documentation, in accordance with the above quote, after 4pm on Monday, 14 November 2011.

92. Despite the above, Mr Benari did not provide his consent to engagement of a structural engineer to prepare the required structural documentation. As such, and due to the cost associated with the preparation of that structural documentation, we resolved that it was appropriate to proceed with the sale of the National Hotel without obtaining the structural documentation.
93. Despite the difficulties that we had encountered in identifying a party that would be willing to prepare a cost to complete, we were informed by one of the parties that had previously provided a cost to complete in relation to the National Hotel, EMCO Building, that they would be prepared to revise the cost to complete that they had previously prepared in 2009. In order to do so, however, EMCO required particulars in relation to the specific building and renovation works that had been performed at the National Hotel since the preparation of the initial cost to complete. Those particulars would enable them to update their cost to complete to reflect the current state of the Hotel.
94. On 23 November 2011, we listed the National Hotel for sale. We comment further in relation to the marketing and sale process below. In light of the issues regarding the preparation of a revised cost to complete, when the National Hotel was marketed for sale, we informed prospective purchasers that:
- (a) a cost to complete that had been prepared by Ralph Beattie Bosworth Pty Ltd on 21 March 2010 was available for inspection; and
 - (b) given that additional building and renovation works had been undertaken at the National Hotel since March 2010, we were endeavouring to obtain an indicative cost to complete from an independent third party builder (being EMCO) and proposed to make that available for inspection by prospective purchasers when it was to hand.
95. Following their review of invoices and other materials that Mr Butler had provided in respect of (and by way of description in relation to) the works referred to above, EMCO informed us that:
- (a) the invoices and materials that Mr Butler had prepared in respect of the works lacked detail, and contained insufficient particulars, to enable EMCO to revise their earlier cost to complete; and
 - (b) by reason of the above, EMCO would require Mr Butler's assistance in order to properly ascertain the specific building and renovation works that had been performed at the National Hotel since the preparation of the initial cost to complete. To that end, EMCO identified particular information that they required from Mr Butler in order to complete the indicative cost to complete.
96. On 20 December 2011, Mr Butler attended our offices in response to our request to provide the above information. During the course of that meeting, Mr Butler *[see tab 27]*:
- (a) expressed frustration with the process that EMCO insisted upon in order to revise their cost to complete; and
 - (b) said that it was a waste of time and money for us to go through this process of requesting information from him.

97. Subsequent to that meeting, Mr Butler did not provide us with information referred to above.
98. By reason of the requested information not being provided to us and, consequently, our inability to provide to EMCO the requested information, we were unable to provide prospective purchasers of the National Hotel with an indicative cost to complete. The National Hotel was therefore marketed without that updated information.
99. In light of the matters referred to above, the submission made by Mr Butler that it took us 18 weeks to market the National Hotel for sale must be considered in context. Following our appointment, we were obliged at law to conduct the enquiries referred to above in relation to the status, condition and market value of the National Hotel. Once those investigations were complete, and Mr Benari signed the relevant selling agents' agreement referred to below, the Hotel was marketed for sale. We submit that this process was appropriate in the circumstances, in accordance with our usual practice in receivership asset sales and consistent with our duties and obligations at law.

Marketing and sale process

100. The marketing and sale process that we employed in relation to the National Hotel was informed by, and consistent with, our obligations pursuant to s 420A of the *Corporations Act*. That process comprised, amongst other things, the following actions:
- (a) obtaining a valuation from an established and reputable valuation consultant (Colliers International (WA) Pty Ltd) in order to determine the market value of the National Real Property. That valuation ascribed a market value of \$1.5m (exclusive of GST) to the National Hotel.
 - (b) together with Mr Benari (in respect of his 1/2 share in the National Real Property), employing the services of two established and reputable selling agents (Burgess Rawson and CB Richard Ellis) to sell the National Hotel. Burgess Rawson and CB Richard Ellis had also acted on behalf of the owners of the National Hotel in relation to a sale campaign that the owners had conducted prior to our appointment, and Mr Butler and Mr Benari also expressly approved our engagements of the selling agents in marketing the National Hotel for sale to interested parties;
 - (c) relying on the selling agents' expert advice as to the most appropriate method of sale for the National Hotel. On the basis of that advice, we formed the view that an 'offers invited' campaign would be the most effective method to obtain a sale of the Hotel (as opposed to an auction of the Hotel); and
 - (d) advertising the National Hotel for sale in:
 - (i) media advertisements;
 - (ii) online advertising via the selling agents' websites; and
 - (iii) direct advertising via the selling agents' client database.

This aspect of the marketing process included the preparation and distribution of an Information Memorandum with respect to the National Hotel, which provided

that offers could be submitted to our appointed selling agents at any time up until 4.00pm on Wednesday, 14 December 2011.

Expressions of interest and offers received

101. On 14 December 2011, we received the following expressions of interest and offers from prospective purchasers of the National Hotel [*see tab 28*]:
 - (a) an expression of interest, submitted by Mr Butler on behalf of National Hotel Property, for the sum of \$4.5m. We comment on this expression of interest further below;
 - (b) an expression of interest, submitted by the Dome Cafe Group, for a price to be determined following the completion of a 'cost to complete'. This expression of interest was ultimately not pursued by the interested party;
 - (c) an expression of interest, submitted by BTMCB Pty Ltd (a related entity of Mr Benari), for a price to be determined following the completion of a 'cost to complete'. Mr Benari ultimately withdrew his interest in the National Hotel;
 - (d) an offer to purchase, submitted by Carnegies Realty Unit Trust, for the sum of \$3.55m. That offer was conditional on finance and a satisfactory building report being obtained by the purchaser; and
 - (e) an offer to purchase, submitted by Mr George Katrib on behalf of the Zenith Property Trust and/or its nominee, for the sum of \$3.38m. That offer was conditional on a number of special conditions, including but not limited to due diligence being conducted by the purchaser and the inclusion of all relevant permits and approvals as part of the sale.
102. The primary differentiating factor between the offers that were pursued out of the above, being those offers from the Carnegies Realty Unit Trust and the Zenith Property Trust, was the ascribed purchase price for the National Hotel. In this regard, the offer to purchase from Carnegies Realty Pty Ltd contemplated the highest purchase price of \$3.55m plus GST (which was subsequently revised upwards to \$3.6m plus GST) and was above the market value for Hotel.
103. On 23 January 2012, together with Mr Benari, we accepted an offer to purchase the National Hotel from Carnegies Realty Pty Ltd (**Contract**) for the price of \$3.6m plus GST [*see tab 29*].
104. On 3 May 2012, together with Mr Benari and Carnegies Realty Pty Ltd, we agreed to vary the Contract by increasing the purchase price from \$3.6m plus GST to \$3.725m plus GST (**Variation**). The Variation was agreed between the parties by reason of, amongst other things, the 'licensing' issues referred to below.
105. On 4 May 2012, settlement of the sale of the National Hotel (pursuant to the Contract (as varied by the Variation)) was completed.
106. By reason of the considerations outlined above, there is no foundation for the submissions made by Mr Butler that the Hotel was marketed inadequately. We submit that the marketing process we adopted was entirely consistent with our obligations pursuant to

s 420A of the *Corporations Act*, resulted in a number of expressions of interest and offers being submitted in respect of the Hotel and, ultimately, resulted in a sale price greater than the market value of the Hotel.

Mr Butler's involvement in the sale process

107. As noted above, Mr Butler was involved in the sale process in relation to the National Hotel and, on 14 December 2011, caused National Hotel Property to submit an expression of interest in respect of the National Hotel for the sum of \$4.5m (EOI).
108. In respect of the EOI, Mr Butler has submitted that [*see tab 32*]:
 - (a) our selling agents advised him, by email dated 16 December 2011, that National Hotel Property could not submit an offer in respect of the National Hotel because it was in receivership;
 - (b) subsequently, Mr Butler was told by the selling agents that there was no point submitting any offer for the National Hotel that was under \$5m;
 - (c) Mr Butler treated the above statement as accurate and elected not to pursue the EOI; and
 - (d) Mr Butler reserved all of his rights in relation to the statements about the sale process that we allegedly made to him by us and by the selling agents, and in relation to the sale of the National Hotel for a price that was not the 'best available' price.
109. Our position in relation to the matters referred to above was (and remains) as follows [*see tab 33*]:
 - (a) the EOI was an "expression of interest" only. That is, it did not constitute an offer that was capable of acceptance;
 - (b) in any event, we considered the EOI to be incapable of being progressed (from both a legal and a commercial risk perspective) in the form that was presented for the following reasons:
 - (i) the EOI was submitted by National Hotel Property Pty Ltd (Receivers and Managers Appointed), being a company in receivership. Leaving to one side any question in relation to the capacity of Mr Butler to cause National Hotel Property to make an offer (that being a contention that we did not take issue with), we had legitimate and reasonable concerns as to whether the party that had submitted the EOI (being a company in receivership) could:
 - (A) obtain sufficient finance to complete the purchase of the National Real Property; and
 - (B) otherwise comply with the proposed terms of sale of the National Real Property.

The basis of this concern was that the assets of National Hotel Property were already fully secured to Bankwest (which was, in the circumstances, likely facing a shortfall from the realisation of those assets), leaving no assets available to secure any further financial accommodation to finance the EOI and in circumstances where no other aspect of the EOI indicated an ability or intention to address this issue;

- (ii) the EOI was in respect of both the National Hotel (in respect of which we were appointed (as to National's 1/2 share in the National Real Property)) and "Plant and Equipment" (in respect of which we were not appointed). During the marketing and sale campaign, we had requested offers in respect of the National Hotel only; and
- (iii) the EOI did not expressly provide for a deposit to be paid by the proposed purchaser;
- (iv) the EOI was conditional on:
 - (A) finance approval being obtained within 60 days of acceptance of the EOI, during which time National Hotel Property Pty Ltd (Receivers and Managers Appointed) would still to be subject to the appointment of receivers and managers; and
 - (B) the sale of the Lighthouse Beach Resort, Bunbury, within 60 days of acceptance of the EOI,

being conditions which we did not consider to be acceptable or capable of satisfaction in any event;

- (c) Mr Butler was advised of certain of the above issues by the selling agents by email from the selling agents dated 16 December 2011 [*see annexure 1 of tab 22*];
- (d) notwithstanding our concerns with the EOI, Mr Butler was advised by the selling agents that, "subject to satisfaction of the above [issues], he had been shortlisted to resubmit in accordance with the attached contract and any other Special Conditions...". Mr Butler was also invited, by reason of the concerns outlined above in relation to financial capacity, to provide evidence of capacity to complete any purchase of the National Hotel;
- (e) despite Mr Butler being afforded the opportunity to submit an offer to ourselves and to Mr Benari, he did not do so. Mr Butler also did not provide us with evidence of his financial capacity to complete. In this regard, we understand that at the relevant time, Mr Butler orally advised Mr Graeme Clarke (a representative of one of our two appointed selling agents) that he would be unable to raise sufficient funds to purchase the National Hotel unless and until he received a flow of funds from the proceeds from the sale of the Lighthouse Beach Resort. But, at the time, we considered that there would be no surplus funds from the sale of the Lighthouse Beach Resort; and
- (f) in respect of the alleged statement by the selling agents that there was no point in submitting any offer for less than the sum of \$5m:

- (i) we submit that any such statement (if made) would have been made in response to the continued communications from Mr Butler regarding the value of offers received by the selling agents in respect of the National Hotel;
 - (ii) we submit that any such statement (if made) would have been treated as a general statement ("mere puffery") made by the selling agent with the intention of obtaining the best possible price in respect of the National Hotel. That statement (if made) would also need to be considered in the context of the marketing and sale process and the nature of Mr Butler's communications and interactions with the selling agents during that process; and
 - (iii) in any event, it remained open for Mr Butler to submit an offer in respect of the National Hotel for less than \$5m if he considered any such amount to be an appropriate value for the National Hotel. Mr Butler did not do so.
110. Further to the correspondence referred to above, on 20 April 2012 we received a formal offer to purchase, in respect of the National Hotel, submitted by Mr Butler, on behalf National Hotel Property, and Vidcock Pty Ltd. That offer was for the sum of \$3.95m and was subject to a number of conditions precedent. The offer was not, however, capable of acceptance as we had by that time already entered into the Contract with Carnegies Realty Pty Ltd [*see tab 37*].
111. On 27 April 2012, we caused our solicitors to write to the solicitors for Mr Butler for the purposes of informing him that [*see tab 39*]:
- (a) we were unable to accept the offer submitted on behalf National Hotel Property, and Vidcock Pty Ltd, by reason of us having entered into the Contract with Carnegies Realty Pty Ltd; and
 - (b) in the event that the Contract was terminated, we would contact Mr Butler and Vidcock Pty Ltd to ascertain whether they continued to maintain an interest in the National Hotel and wished to re-submit their offer.
112. For the reasons outlined above regarding the completion of the Contract with Carnegies Realty Pty Ltd, we were not ever in a position to re-visit the offer from National Hotel Property and Vidcock Pty Ltd.
113. Further, by reason of the matters outlined above, the submission made by Mr Butler that he put an offer in to buy the National Hotel for \$4.5m that was rejected in favour of an offer for \$3.6m must be considered in context. The EOI submitted by Mr Butler was problematic for the reasons referred to above and, despite being informed of those reasons and invited to submit a formal offer to ourselves and Mr Benari, no such offer was forthcoming from Mr Butler within a reasonable timeframe (the offer for \$3.95m only being submitted on 20 April 2012). Accordingly, we, together with Mr Benari, accepted the offer from Carnegies Realty Pty Ltd.
114. We also submit that:
- (a) Mr Butler's assertions that our appointed selling agents told him that any offer must be at least \$5m must be considered in the context of the matters referred to

above. As noted above, it remained open for Mr Butler to submit an offer in respect of the National Hotel for less than \$5m if he considered any such amount to be an appropriate value for the National Hotel. Mr Butler did not do so within a reasonable timeframe (the offer for \$3.95m only being submitted on 20 April 2012);

- (b) Mr Butler's submission that we took over the Hotel and it became a 'complete disaster' is incorrect. We submit that we conducted investigations and took advice in relation to the status, condition and market value of the National Hotel, and marketed the property for sale, in an appropriate manner consistent with our obligations at law. This is, in our view, evidenced by the fact that we sold the National Hotel for a price substantially greater than the market value of the Hotel and the indicative expressions of interest received by the selling agents prior to our appointment; and
- (c) Mr Butler's submission that the National Hotel was valued at \$7m prior to our appointment must also be considered in the context of that valuation. Following our appointment, we engaged Colliers International (WA) Pty Ltd to critique the prior valuation. That critique stated that the prior valuation was based on an 'as if complete' walk in walk out market value (that is, incorporating goodwill and on the basis that the Hotel was functioning as a business) and did not, in Colliers' opinion, accurately reflect the value of the Hotel in its current condition (being a partially complete building). For that reason, we did not seek to rely on the previous valuation of the Hotel [*see tab 26*].

'Fixtures' dispute

- 115. During the later stages of the receivership in respect of the National Hotel, an issue arose in relation to 'fixtures' forming part of the National Hotel. In short, that issue arose because Mr Butler challenged our authority to sell (as part of the sale of the National Hotel) certain items of wood and wood products that were located on site at the National Hotel (for example, wooden balustrades and window frames) and certain other items of wood and wood products that were located offsite (specifically, old timber beams) – he contended that those items did not fall within the scope of our appointment.
- 116. Having taken advice in relation to the issue, we considered Mr Butler's position to be inaccurate and without merit. We took that position on the basis that we considered that the relevant items of wood and wood products were fixtures and were therefore included within the scope of our appointment.
- 117. Consistent with the position referred to above, we contracted with the purchaser of the National Hotel to include the relevant items of wood and wood products as part of the sale of the National Hotel.
- 118. Notwithstanding the above, and in the face of the issue raised by Mr Butler, we resolved, for commercial reasons alone and by agreement with the purchaser, to exclude certain of the items of wood and wood products from the contract of sale in respect of the National Hotel. Those excluded items were, in effect, the wood and wood products that were stored offsite. Although those items were, in our view, in the nature of fixtures (i.e. fixtures that had been temporarily de-affixed and removed from the National Hotel), we considered

that it would be commercially prudent to remove them from the Contract to avoid any dispute in relation to those items (particularly having regard to their nominal value).

119. The items referred to above were made available for collection by Mr Butler at his convenience. Notwithstanding the items referred to above being made available to Mr Butler, those items were not, and to the best of our knowledge have never been, collected. The balance of the items of wood and wood products in respect of which Mr Butler had challenged our authority were included as part of the sale of the National Hotel (on the basis that they were fixtures to the property) and conveyed to the purchaser as part of that sale [*see tab 40*].
120. Further, Mr Butler was legally represented in relation to the above matters, with a substantial amount of correspondence passing between our solicitors and the solicitors for Mr Butler in relation to those matters (and other issues raised by Mr Butler) [*see tabs 30 to 36 (inclusive), 38 and 40*].
121. By reason of the above, the submission made by Mr Butler that we sold materials with the National Hotel that were not owned by National Hotel Property and which were not the subject of our appointment is incorrect. We submit that those items that were sold together with the National Hotel formed part of the Hotel and, as such, were sold in accordance with our duties at law. We deny any allegation that we engaged in 'theft' of any property to which we were not appointed.

Concerns raised by Mr Butler

122. During the course of the receiverships, and the sale processes outlined above, Mr Butler raised a number of concerns in relation to our conduct of, and matters relevant to, the receiverships of the Companies. The primary issues in respect of which Mr Butler expressed his concerns were those referred to below [*see tab 13*].

Sale issues in relation to the Lighthouse Beach Resort and the National Hotel

123. Mr Butler's concerns with respect to our conduct of the sale of the Lighthouse Beach Resort and the National Hotel have already been referred to above. It is unnecessary to deal with them again save to say that his concerns were addressed in correspondence to Mr Butler and his solicitors at the relevant time and, in any event, we consider those concerns to be without merit.

Unpaid wages, superannuation and entitlements

124. Mr Butler's concerns with respect to his and Mrs Butler's unpaid wages, superannuation and entitlements have already been referred to above. It is again unnecessary to deal with them again save to say that those matters were adequately addressed in our dealings with Mr Butler, Mrs Butler and their solicitors at the relevant time.

Unpaid supplier accounts for the Lighthouse Beach Resort

125. Mr Butler informed us, in discussions on 20 October 2011, that he was advised by various contractors operating in Bunbury that the contractors' accounts in relation to the Lighthouse Beach Resort were not being paid.

126. In respect of this issue, we advised Mr Butler that we considered that he had been misinformed and that his concerns were inaccurate and without any proper basis.

Treatment of staff at the Lighthouse Beach Resort

127. Mr Butler has alleged that, during the course of receiverships, we "threatened" staff at the Lighthouse Beach Resort with termination if they contacted Mr Butler.
128. In respect of this issue, we advised Mr Butler that we denied his allegations and any allegation (actual or implied) that suggested wrongdoing on our part in relation to the treatment of staff at the Lighthouse Beach Resort. In addition:

- (a) Mr Butler had, following our appointment, sought to obtain information (including trading information) from the Lighthouse Beach Resort staff after we had informed him that he was not entitled to that information generally (and having regard to his comments regarding taking business, customers and staff from the Lighthouse Beach Resort to a competing hotel business); and
- (b) we had been informed by staff at the Lighthouse Beach Resort that they had concerns regarding Mr Butler's continued contact with them.

It was in the context of the above issues that we requested that Mr Butler not to contact staff at the Lighthouse Beach Resort in relation to work matters.

129. In light of the above, Mr Butler's submissions that we "threatened" staff at the Lighthouse Beach Resort with termination if they contacted Mr Butler is incorrect. Mr Butler's submission that he and Mrs Butler were told not to talk to the staff and subcontractors at the Lighthouse Beach Resort must also be read in the context outlined above.
130. As an additional point, it is, in our view, reasonable to say that our appointment was welcomed by the staff at the Lighthouse Beach Resort. We say this on the basis that we have received positive feedback from staff regarding our performance and we observed that the staff remained motivated and committed to the Lighthouse Beach Resort during the course of our conduct of the business. This was of great assistance to us during the course of the sale and settlement process. There was also no loss of management staff during the course of our trading of the Lighthouse Beach Resort and, accordingly, we submit that Mr Butler's submissions that:

- (a) staff were in tears over our appointment; and
- (b) several staff left during the course of our appointment,

is not an accurate reflection of events during our conduct of the business of the Lighthouse Beach Resort.

Our costs in the receiverships

131. Mr Butler's concerns with respect to our costs in conducting the receiverships of the Companies are addressed below. For the moment, we submit that his concerns were adequately addressed in correspondence with Mr Butler and his solicitors at the relevant time.

*Safety and occupational health issues at the Lighthouse Beach Resort and National Hotel
(including working with asbestos)*

132. Mr Butler raised a number of issues in relation to alleged safety and occupational health and safety issues at the Lighthouse Beach Resort and the National Hotel, including but not limited to the following:
- (a) that we instructed an electrician to drill into asbestos material at the Lighthouse Beach Resort in circumstances where it was extremely hazardous to do so. In relation to this issue, Mr Butler advised us orally on 20 October 2011 that his complaint related to work being completed on an electrical switchboard and ceiling boards made of asbestos;
 - (b) that the swimming pool area at the Lighthouse Beach Resort was unsafe. In relation to this issue, Mr Butler advised us by email on 15 October 2011 that he had been contacted by a 'local' staying at the Resort who was concerned about water around the pool walkways due to children 'dive-bombing' into the pool; and
 - (c) the National Hotel would be a serious fire risk to the City of Fremantle and its adjoining buildings during the course of summer.
133. In respect of these issues, we advised Mr Butler that:
- (a) we denied instructing (as is the case) an electrician to drill into any asbestos at the Lighthouse Beach Resort in circumstances where it was extremely hazardous to do so;
 - (b) we had (where necessary) taken appropriate action to assess safety and occupational health issues associated with the properties the subject of our appointments. This included the remediation of certain occupational health and safety issues that remained unrectified from the period before our appointment;
 - (c) we had, in relation to the Lighthouse Beach Resort, taken the necessary steps to ensure that health, occupational health and safety, and other relevant legislation and regulation was being complied with, including in relation to any dealings with asbestos and in relation the swimming pool at the Lighthouse Beach Resort; and
 - (d) in relation to the National Hotel:
 - (i) we had conducted a review of the occupational health and safety issues; and
 - (ii) we had previously requested Mr Butler's assistance (in the form of a request for an estimate of his expected costs in assisting us and on the basis that he was a registered builder) in ensuring that health, occupational health and safety, and other relevant legislation were being complied with. We did not receive a satisfactory response from Mr Butler in relation to that request and therefore engaged a third party contractor to conduct the required work.
134. By reason of the matters referred to above, the submissions made by Mr Butler regarding alleged safety and occupational health and safety issues at the Lighthouse Beach Resort and the National Hotel are incorrect. We have at all times acted appropriately (and in

accordance with our duties at law) to address any safety and occupational health and safety issues as and when they arose during the course of the receiverships.

Un-registered builder issues at the Lighthouse Beach Resort

135. Mr Butler had advised us of his concern that we had undertaken minor works at the Lighthouse Beach Resort without engaging a registered builder. We advised Mr Butler that this was not the case and that we had (where required) engaged appropriately qualified external contractors to undertake work at the Lighthouse Beach Resort. We otherwise denied (and continue to deny) any allegation (actual or implied) that suggested any wrongdoing on our part in relation to the conduct of the business of the Lighthouse Beach Resort.

The validity of our appointment to Butler Constructions

136. Mr Butler expressed to us, on numerous occasions, that in his opinion Butler Constructions was a solvent company and, as such, we should not have been appointed as joint and several receivers and managers of Butler Constructions.
137. In respect of this issue, we advised Mr Butler that we:
- (a) unreservedly denied Mr Butler's contentions regarding the validity of our appointment to Butler Constructions; and
 - (b) maintained that we were validly appointed as joint and several receivers and managers of Butler Constructions on the basis of Butler Constructions' default under the fixed and floating charge, registered on the Personal Property Securities Register as security interest number 201112130588463, granted by Butler Constructions in favour of Bankwest, which of itself was not dependent on the need to show insolvency.

Documents held by our office

138. Mr Butler has referred in his submissions to documents being taken from the offices located at the National Hotel without legal jurisdiction. In respect of this issue, we submit that we were entitled to inspect and retain copies of documents relevant to our appointment in respect of the National Hotel. For that purpose, and to assist in readying the Hotel for sale, we collected documents located at the National Hotel and moved them to our offices for review and safekeeping. Following an inspection of the documents, those documents that were determined to be unrelated to our appointment were returned to the offices of Mr Butler's solicitors.
139. By reason of the above, we submit that Mr Butler's submission that we 'stole' personal documents is incorrect. We submit that we have, at all times, acted appropriately in our dealings with the property the subject of our appointments.

Media engagement

140. Following our appointments to the Companies, there was a newspaper article published in the *South Western Times* on 4 August 2011 in relation to the receivership of the Lighthouse Beach Resort.

141. Following the publication of that article, and after consultation with our media advisors, we issued a holding statement to the *South Western Times* and elected to limit our engagement with the media. We took this action on the basis that continued media attention could adversely affect the trading performance of the Lighthouse Beach Resort. In the light of that decision, we discussed the issue with Mr Butler and requested that he avoid communicating with the media in relation to the receiverships of the Companies.
142. We also discussed the media issue with Mr Butler and his solicitors at the meeting on 31 August 2011. At the time, we considered that the meeting had been productive and the parties had agreed to cooperate with each other going forward with respect to the conduct of the receiverships.
143. By reason of the considerations outlined above, the submissions made by Mr Butler that we told him not to talk to the media about any aspect of the business does not accurately reflect the position. A request was simply put to Mr Butler in the context of the ongoing receiverships of the Companies and with a view to avoid any adverse affects on the trading performance of the Lighthouse Beach Resort.

Requests for information

144. Mr Butler has submitted that, despite being a director and shareholder of the Companies, he has not been provided with any information regarding our conduct of, and our charges incurred in, the receiverships of the Companies.
145. In respect of this issue, we submit that it is evident, from the matters referred to in these submissions, that we have, since the date of our appointments, engaged with Mr Butler in respect of a wide range of issues regarding the conduct of, and information pertaining to, the receiverships of the Companies. We exchanged numerous correspondence with both Mr Butler and his solicitors, engaged with Mr Butler during the course of the sales processes for both the Lighthouse Beach Resort and the National Hotel, and met with Mr Butler and his solicitors on a number of occasions in order to address his concerns regarding our conduct of the receiverships. We also issued correspondence to Mr Butler to notify him that information regarding our fees and charges are publicly available from ASIC by virtue of our lodgement of presentations of accounts and statement in accordance with s 432 of the *Corporations Act*. Additionally, we have written to Mr Butler directly to advise him of our fees [*see tabs 41, 42 and 43*].
146. By reason of the matters referred to above, we submit that Mr Butler's assertions that he was not provided with any information regarding our conduct of the receiverships of the Companies, and that we refused to tell him 'what was going on', are incorrect. We have at all times sought to engage with Mr Butler (and his solicitors) in a manner consistent with our duties at law.

Remuneration, costs and expenses

147. In addition to the matters referred to above, we wish to address and respond to the issues raised by Mr Butler in relation to our remuneration, costs and expenses incurred in the receiverships.

148. Receivers and managers are entitled to claim remuneration for professional services that they render. That entitlement usually arises expressly pursuant to the terms of the security document under which a receiver and manager is appointed. It also arises at law.
149. In the receiverships in question, our rights to remuneration are derived from the terms of the security documents pursuant to which we were appointed and at law. Our remuneration is time based. This entails the calculation of remuneration by reference to specified hourly rates which are applied to the time spent on necessary work that is properly performed.
150. In the course of our insolvency practice and the various insolvency appointments that we accept, we abide by the spirit and the terms of the Insolvency Practitioners Association '*Code of Professional Practice for Insolvency Practitioners*' (**Code**).
151. The Code articulates a number of general principles in relation to the remuneration of insolvency practitioners. The primary principle, in the context of a private receivership (i.e. the appointment of receivers out of Court), is that a practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration. In simple terms, this means that a receiver is only entitled to remuneration for work that was necessary. The Code expresses that 'necessary work' means work that was connected to the administration and done in furtherance of the exercise of their powers and the performance of a practitioner's duties, as required by insolvency law and practice. Receivers may claim for work that may not have produced a positive outcome provided they properly exercised their professional judgment at the time when the work was undertaken.
152. Our position in relation to our remuneration, costs and expenses in the receiverships is as follows:
 - (a) we have calculated our remuneration on a 'time basis' employing hourly rates that are no greater than the market rates charged by equivalent firms engaged in equivalent insolvency work. As at the date of these submissions, we have incurred fees of approximately \$726,820 (excluding GST and disbursements) in relation to the receiverships of the Companies;
 - (b) during the course of the receiverships, as is the case in any insolvency appointment that we accept and have the carriage of, we ensure that work is conducted by the appropriate level of practitioner (at the appropriate hourly rate) in order to ensure that costs are carefully, reasonably and appropriately managed;
 - (c) our remuneration, costs and expenses in relation to the receiverships relate to necessary work that was properly performed in during the course of the receiverships. That is, they relate to work that was connected to the administrations and done in furtherance of the exercise of our powers and the performance of our duties, as required by insolvency law and practice. To the extent that any aspect of our claim for remuneration, costs and expenses relates to work that may not have produced a positive outcome (which is not conceded in any event), we maintain that any such claim was valid given that we have at all times properly exercised our professional judgment during the course of our appointments; and

- (d) we have at all times complied with our duties pursuant to the terms of our appointments, the security agreements pursuant to which we were appointed, at law, in equity and pursuant to the Code.

153. By reason of the considerations outlined above, the submissions made by Mr Butler that:

- (a) we engaged in fee gouging;
- (b) our rates are 'indefensible',

are wholly incorrect. We submit that our rates are in accordance with accepted industry standards and that we have at all times complied with our duties pursuant to the terms of our appointments, the security agreements pursuant to which we were appointed, at law, in equity and pursuant to the Code.

Email correspondence from Mr Butler on 7 October 2012

154. On 7 October 2012, Mr Butler sent Mark Englebert the following email [*see tab 45*]:

'Dear Mr Englebert,

I have been informed representatives of Taylor Woodings are giving evidence at the Senate Economics Committee in Canberra next Wednesday and I have been invited to send through questions and /or observations.

I will provide certain information to the Committee before the hearing. Taylor Woodings and Bankwest have not provided answers to my questions raised previously and I will request these issues be addressed at the hearing as an example of how your company and Bankwest operate.

Could you please provide to me answers to the following questions before the hearing? Answers to questions raised to which you and Bankwest have not responded in emails below would also be appreciated. I believe these are reasonable questions and hope that in the interests of honesty and transparency you can now provide answers and give reasons and explanations for your actions.

- 1) In the attached letter dated 8th June 2012 it states Taylor Woodings has charged Butler Constructions \$347,230 for fees plus \$109,946 for legals totalling \$457,176 for 9 ½ months work. Can you please advise us from where these payments were made as it appears they have been made from the operating profits of my company previously used to pay Bankwest interest?
- 2) Bankwest have setup new loan accounts without my consent with debit balances now over \$863,000 on which they are now charging us 18.81% interest (so much for their contention that they don't make money when businesses are placed in receivership). How have these debit balances arisen? How have Taylor Woodings been paid for the balance of their fees and their legal fees totalling a further \$598,506?
- 3) Could you please advise us what assets of Butler Constructions (and Trading as Lighthouse Beach Resort) were managed and sold and for what returns?
- 4) It appears that under your management our once profitable Company has been either mostly destroyed or given to new owners at little or no cost without my consent however the evidence from the sale proceeds will determine that. If this is the case the question has to be asked: Were you negligent and how were your fees justified if they exceed the value of the asset sold?

- 5) Does a company associated with Brian Benari ,the now CEO and CFO of Challenger Financial Services, a shareholder and director of companies in this group, now employ the staff of Butler Constructions and if so how much did he pay for the assets of the business?
- 6) Are you prepared in the interests of honesty and transparency to release all correspondence between Taylor Woodings and Brian Benari and his associates and representatives and if not why?
- 7) Do you think it is a reasonable request that similar correspondence with Bankwest also be released (we have asked but this request has been denied)? If not why?

If there is any aspect of the above you don't understand or wish to discuss please contact me. If there are any questions you would like me to address please advise. I look forward to your reply.

Yours Sincerely,

Sean Butler'

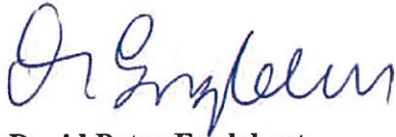
155. To respond to the matters referred to in the above email generally, we submit that Mr Butler's assertion that we have not provided him with answers to his queries is incorrect. It is in our view evident, from the matters referred to in these submissions, that we have, since the date of our appointments, engaged with Mr Butler in respect of a wide range of issues regarding the conduct of, and information pertaining to, the receiverships of the Companies.
156. We, and on our instruction, our solicitors, have been diligent in ensuring that all communications and queries from Mr Butler and his solicitors have been addressed with a responding communication. In the absence of a specific instance or example we are unable to address this issue further. We note that in some instances, Mr Butler's requests have not been met, or his comments or allegations refuted, however it has always been our response to address communications and not ignore them. We exchanged numerous correspondence with both Mr Butler and his solicitors, engaged with Mr Butler during the course of the sales processes for both the Lighthouse Beach Resort and the National Hotel, and met with Mr Butler and his solicitors on a number of occasions in order to address his concerns regarding our conduct of the receiverships. We also issued correspondence to Mr Butler to notify him that information regarding our fees and charges are publicly available from ASIC by virtue of our lodgement of presentations of accounts and statement in accordance with s 432 of the *Corporations Act*. Additionally, we have written to Mr Butler directly to advise him of our fees.
157. Certain of the queries in Mr Butler's email of 7 October 2012 have not previously been raised by Mr Butler and, on that basis and for the benefit of the Committee, we have (utilising Mr Butler's numbering of the questions in the email) outlined our position in relation to each of Mr Butler's queries, as to both matters previously and not previously raised by Mr Butler, below:
 - (a) (Item number 1) in relation to Mr Butler's query regarding the payment of our fees for the conduct of the receivership of Butler Constructions, our fees have been paid for by Bankwest in accordance with accepted industry practice and pursuant to the terms of our appointment to Butler Constructions;

- (b) (Item number 2) in relation to Mr Butler's query regarding the payment of the balance of our fees for the conduct of the receiverships of the Companies, our fees for the conduct of the receiverships of Lighthouse Beach and National Hotel Property have been paid for by Bankwest in accordance with accepted industry practice and pursuant to the terms of our appointments to Lighthouse Beach and National Hotel Property. We are not otherwise able to comment meaningfully with respect to any actions which may have been undertaken by Bankwest in respect of the Companies;
- (c) (Item number 3) in relation to Mr Butler's query regarding what assets of Butler Constructions were managed and sold by us and for what return, we submit that this query has been adequately addressed in these submissions and/or has previously been disclosed to Mr Butler;
- (d) (Item number 4) in relation to Mr Butler's query regarding our conduct of the receivership of Butler Constructions, particularly the allegations that we acted negligently in our conduct of the receivership of Butler Constructions and that our fees were not justifiable, we deny any such allegations and submit that we have at all times complied with our duties pursuant to the terms of our appointments, the security agreements pursuant to which we were appointed, at law, in equity and with regard to the guidelines in the Insolvency Practitioners Association of Australia *'Code of Professional Practice for Insolvency Practitioners'*;
- (e) (Item number 5) in relation to Mr Butler's query regarding the current employment status of the former employees of Butler Constructions, we submit that we are not privy to the current employment status of those former employees and are therefore unable to comment in relation to that query. In relation to Mr Butler's query regarding how much was paid for the assets of Butler Constructions, we submit that that query has been adequately addressed in these submissions;
- (f) (Item number 6) in relation to Mr Butler's request for copies of all correspondence between ourselves and Mr Benari and his associates and representatives, we submit that the requested correspondence is private as between ourselves and Mr Benari and his associates and representatives and we are not under any obligation to provide that correspondence to Mr Butler in the absence of consent being granted by Mr Benari, his associates and representatives upon Mr Butler making a request of them for consent; and
- (g) (Item number 7) in relation to Mr Butler's request for copies of all correspondence between Bankwest and Mr Benari and his associates and representatives, we submit that we are not able to comment on behalf of Bankwest in relation to that request.

Contact details

158. If you have any queries, please do not hesitate to contact Mark Englebert on (08) 9321 8533.

Yours faithfully



Mark David Peter Englebert

Joint and several receiver and manager with Ian Charles Francis

Lighthouse Beach Holdings Pty Ltd ACN 104 899 461 (Receivers and Managers Appointed) in its own right and as trustee for The Lighthouse Beach Unit Trust

Butler Constructions Pty Ltd ACN 009 371 340 (Receivers and Managers Appointed) in its own right and as trustee for The Cargill Trust trading as the Lighthouse Beach Resort

National Hotel Property Pty Ltd ACN 120 460 620 (Receivers and Managers Appointed)

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