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30 October 2012

Ms Narelle Ferrier  
Technical Director  
Insolvency Practitioners Association of Australia  
GPO Box 9985  
SYDNEY NSW 2001

By Email: [nferrier@ipaa.com.au](mailto:nferrier@ipaa.com.au)

Dear Ms Ferrier

**Butler Constructions Pty Ltd (Receivers and Managers Appointed) ("BC")**

I refer to your letter dated 16 October 2012 regarding a complaint made against me to the Insolvency Practitioners Association of Australia ("IPA") by Mr Sean Butler.

I set out below my response to the complaint.

**General response to complaint**

1. As a general response to Mr Butler's complaint regarding my alleged conduct as joint and several receiver and manager of BC, I have at all times complied (and continue to comply) with my duties pursuant to the terms of my joint and several appointment, the security agreements pursuant to which I was appointed, at law, in equity and pursuant to the *'Code of Professional Practice for Insolvency Practitioners'*.

**Dealings with Mr Butler**

2. From the outset of the receivership, 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 me that he would require any purchaser of the Lighthouse Beach Resort (the Business from which BC traded) 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- (c) caused the sum of \$10,500.00 to be withdrawn and/or transferred from the bank account of BC for his personal use immediately following my appointment as receiver of BC and in circumstances where Mr Butler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).
- 3. At the time the above conduct became apparent, I 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 my appointment BC and his role post our appointment.
- 4. Notwithstanding my attempts to explain the receivership process to Mr Butler as referred to above, Mr Butler continued to give reason for concern regarding the carrying out of our duties and the exercise of our powers in the course of my appointment. 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:
  - (a) advising Mr Butler of 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 the concerns.
- 5. A copy of the letter sent from my solicitors is attached [see tab 1].
- 6. We took the step referred to above on the basis that if Mr Butler were to continue taking actions which, in my view, impacted on the performance of my duty and the exercise of my power in the receivership, it would potentially have a deleterious effect on the financial outcomes of the receivership of BC. In particular, I 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 receivership 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.
- 7. On 31 August 2011, I (together with my solicitors) also met with Mr Butler and his solicitor to discuss the above issues. At the time, it was considered that the meeting had been productive and outlined to Mr Butler our agreement to cooperate with Mr Butler going forward.
- 8. At all times I 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 my concerns had been addressed satisfactorily.



**Employee issues, including termination of Mr Butler's employment**

9. As part of our assessment of the business operations of the Lighthouse Beach Resort following my appointment to BC, an assessment of the employee, contractor and staffing needs for the business was conducted. 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.
10. At the time of the above assessment, the books and records of BC did not in my view suggest or evidence that Mr Butler or his wife, Mrs Margherita Butler, were employees. Further, despite the fact that:
  - (a) I was appointed as joint and several receiver and manager of BC on 18 July 2011; and
  - (b) following my appointment on 18 July 2011, I (including my staff) had participated in numerous discussions with Mr Butler in relation to the business, property and affairs of BC,

Mr Butler and Mrs Butler did not assert that they were employees of BC until in or about late August and early September 2011. A copy of the correspondence issued by Mr Butler's solicitors is attached [see tab 2].
11. On 23 September 2011, and to address Mr and Mrs Butler's assertions regarding their employment by Butler Constructions, my solicitors wrote to the solicitors for Mr and Mrs Butler for the purpose:
  - (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*.
12. A copy of the letter sent from my solicitors is attached [see tab 3].
13. I took the step referred to above because, even if Mr and Mrs Butler were employees of BC, we considered their roles (if any) to be redundant and unnecessary in the circumstances and on the basis that:
  - (a) BC 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.
- 14. Between 23 September 2011 and 6 October 2011, my 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 to confirm the position was, in our view, attributable to the fact that the books and records of BC did not, in our view, suggest or evidence that Mr Butler or Mrs Butler were employees of that entity.
- 15. On 6 October 2011 and 7 October 2011, and following the correspondence referred to above, Mr Butler wrote to me 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. A copy of correspondence is attached [see tabs 4 and 5].
- 16. On 13 October 2011, I instructed my solicitors to write to Mr Butler's solicitors for the purpose of explaining that, by reason of the receivership of BC, 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:
  - (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*).
- 17. A copy of the letter sent from my solicitors is attached [see tab 6].
- 18. On 17 October 2011, Mr Butler sent an email to me in response to the letter referred to above which confirmed that unfair dismissal proceedings would be commenced against BC. A copy of Mr Butler's correspondence is attached [see tab 7].
- 19. On 17 October 2011, Mr and Mrs Butler each commenced proceedings against BC seeking relief in respect of what was alleged by them to have been their unfair dismissal by BC (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**).



20. On 1 November 2011, and in my capacity as receiver and manager of (and agent for) BC, responses were 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. Copies of the responses filed with Fair Work Australia are attached [see tabs 10 and 11].
21. 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.
22. On 18 October 2011, Mr and Mrs Butler also 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].
23. Between 30 November 2011 and 14 December 2011, I (together with my solicitors) engaged in negotiations in good faith with Mr and Mrs Butler (and their solicitors) 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.
24. 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**). I am not able to provide a copy of the Deed without breaching the confidentiality clause contained with same.
25. By reason of the considerations outlined above, the various allegations made by Mr Butler to IPA and others that I:
  - (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, I 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 my duties and obligations at law and taking into consideration the circumstances of BC as a company in receivership. Any complaint to the contrary is, I submit, made without basis.

### Mr Butler's actions following the Settlement

26. 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. This includes providing comment to third parties, such as the media, in an attempt to have the issues readdressed.
27. 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 I reinstate his employment (and that of Mrs Butler) with BC; and
  - (b) Mr Butler stated that, in the event that I 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...*'.
28. My position in relation to the above matters was as follows:
  - (a) in my view, the matters that Mr Butler had sought to raise had been adequately addressed by the Settlement; and
  - (b) in any event:
    - (i) I was not prepared to accede to the request referred to above;
    - (ii) consistent with my 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 me 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.
29. A copy of the correspondence referred to at paragraphs 26 and 27 is attached [see tab 13].
30. My dealings with Mr Butler in relation to the termination of his employment was entirely appropriate and in accordance with our duties and obligations at law.




31. It should also be noted that:

- (a) I 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.

If you have any queries in relation to the above, please contact the writer in the first instance.

Yours faithfully

**Butler Constructions Pty Ltd**  
**(Receivers and Managers Appointed)**



M D Englebert  
Joint and Several Receiver and Manager

**Enc**