

13 April 2018

**D.M Garden Creations Pty Ltd (In Liquidation)**  
**ACN 158 123 150 (“Company”)**  
**Statutory Report to Creditors**

**1. Introduction**

I was appointed Liquidator of the Company pursuant to a winding up order obtained by the Australian Securities and Investments Commission (“ASIC”) under Section 489EA(2) of the Corporations Act 2001 (Cth) (“Act”) on 16 January 2018.

The purpose of this report is to provide creditors with an update on the progress of the liquidation and advise of the likelihood of a dividend being paid to creditors.

This report is mandatory under Section 70-40 of the *Insolvency Practice Rules (Corporations) 2016 (Cth)* (“IPR”).

**2. Statutory Information and Background**

The Company was incorporated on 2 May 2012.

As at the date of liquidation the Company had no current director. The former directors are tabled below:

Former Directors	
Name	Period
Adam Garfi	21/07/2014 – 10/06/2016
Elena Garfi	2/05/2012 – 21/07/2014
Tom Kotsimbos	2/05/2012 – 2/05/2012

Mr Adam Garfi has advised that the Company formerly manufactured and sold concrete garden ornaments operating from a leased premises in Brooklyn, Victoria. Further details regarding the Company’s operations is detailed below.

### 3. Financial Position Summary

Despite the Liquidator's attempts, Mr Garfi has not submitted a Report as to Affairs ("RATA").

I provide below the Liquidator's estimate of the financial position of the Company as at the date of liquidation:

Details	Notes	Liquidator's Estimate (\$)
<b>Assets</b>		
Cash at Bank	1	Nil
Total Assets		Nil
<b>Liabilities</b>		
Priority Creditors	2	(56,967)
Unsecured Creditors	3	(59,963)
Total Liabilities		(116,930)
<b>Estimated Net Surplus/(Deficiency)</b>		<b>(116,979)</b>

Notes:

1. The Liquidator contacted all major banks on the date of appointment requesting details of any bank accounts held by the Company. The only identified bank account was held with Westpac Banking Corporations Ltd which had a deficit balance of \$48.75.
2. The Liquidator has identified three (3) former employees with potential outstanding employee entitlements. The Liquidator notified employees of the Fair Entitlements Guarantee Scheme, administered by the Department of Employment, that acts as a safety net for employees in circumstances where companies that have been placed into liquidation with insufficient funds to pay employee entitlements.

The Department advised they have received claims from each of the three former employees. To date, one employee has received an advance from FEG in the amount of \$5,725.24. The Department of Employment is entitled to a subrogated claim pursuant to Section 560 of the Act for any amounts advanced to priority creditors.

3. The Liquidator is yet to call for proofs of debt from creditors to prove their claims. Therefore, the quantum of unsecured creditors is subject to change and final adjudication.

In a discussion with Mr Garfi on 22 January 2018 regarding the Company's operations and assets it holds, Mr Garfi advised:

- i. The Company was a small operation with a turnover of approximately \$300,000 per annum; and

- ii. The Company did not hold any assets. The only equipment used in its operations was a cement mixer which was borrowed, without charge, from the owner of the premises.

The Liquidator has been unable to verify the above statement by Mr Garfi.

#### **4. Former Directors' Reasons for the Company's failure**

Mr Garfi advised the following reasons surrounding the Company's failure:

- (i) The business was a continuation of a former business operated by the Moresco family, who owned the premises the Company operated from;
- (ii) The intention of Mr Garfi in establishing the Company was to continue to trade the former business in order to derive an income for himself and eventually pursue a sale of the business; and
- (iii) under the previous business model, operated by the Moresco family, the business benefited from free labour provided by members of the family and relatives. As the new business was required to pay wages at market rates, Mr Garfi was unable to operate the business profitably.

The Liquidator has not received any Company books and records as yet and thus, unable to verify the reasons for the Company's failure made by Mr Garfi.

#### **5. Liquidator's Investigations**

##### **5.1 Investigations**

The Liquidator has carried out initial investigations into the Company's affairs and the conduct of the Former Directors.

These investigations included, but were not limited to, the following:

- (i) Obtaining publicly available information from Land Registry and ASIC;
- (ii) Reviewing the Company's bank statements to identify any potential voidable and uncommercial transactions that may be recoverable by the Liquidator;
- (iii) Correspondence and discussions with Mr Garfi, in relation to the Company's affairs;
- (iv) Correspondence and discussions with former employees in respect to the Company's former operations and their outstanding entitlements owed to them; and
- (v) Investigations into the personal financial position of Mr Garfi.

Pursuant to Section 533 of the *Corporations Act 2001* ("**Act**"), the Liquidator is required to lodge a confidential report with ASIC detailing the outcome of his preliminary investigations into the affairs of the Company. This includes:

- (i) The reasons for the failure of the Company;
- (ii) The asset and liability positions of the Company;

- (iii) Potential contraventions of the Act committed by the Former Directors; and
- (iv) An estimate as to when the liquidation will likely be finalised.

The report is anticipated to be lodged within the next three months.

## **5.2 Books and Records**

The Liquidator has requested Mr Garfi deliver up all Company records in his possession.

Mr Garfi has advised that he does not hold any company records and did not offer up a reason as to why no books and records of the Company were available.

As at the date of this report no books and records have been submitted to the Liquidator which has hindered investigations to date.

## **5.3 Voidable Transactions**

### Insolvent Trading - Section 588G of the Act

Pursuant to Section 588G of the Act, a director of a company has a duty to prevent a company from incurring debts whilst it is insolvent. Should a company incur such debts, a liquidator is entitled, pursuant to Section 588M of the Act, to commence proceedings against a current or former director to recover damages equivalent to the amount of the debts incurred during their directorship which remain unpaid by the company.

Section 588E of the Act allows presumptions to be made in relation to the solvency of a company whereby it has failed to keep financial records required pursuant to Section 286(1) of the Act, or fails to retain financial records for 7 years under Section 286(2) of the Act. Insufficient Company books and records have been received to date and therefore the presumption of insolvency may be able to be relied upon in pursuing an insolvent trading claim.

Prior to commencing any action against Mr Garfi, it is necessary for the Liquidator to satisfy himself that Mr Garfi has a capacity to pay any claim made against him. The Liquidator is aware Mr Garfi entered bankruptcy on 10 June 2016. The Liquidator has notified the Bankruptcy Trustees, Mr Andrew Aravanis and Alexander Clark, of the Company's potential claim against the bankrupt estate.

Should a dividend in the bankrupt estate look likely, the Liquidator will lodge a formal claim with the Trustees.

### Uncommercial Transaction – Section 588FB of the Act

A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

- i. the benefits (if any) to the company of entering into the transaction; and

- ii. the detriment to the company of entering into the transaction; and
- iii. the respective benefits to other parties to the transaction of entering into it; and
- iv. any other relevant matter.

The Liquidator has not identified any uncommercial transactions to date.

#### Preferential Payments – Section 588FA of the Act

Transactions (including a payment of money) between the Company and an unsecured creditor six (6) months prior to the relation back day may constitute an unfair preference payment if the company was insolvent at the time of the transaction and it is likely that the recipient (i.e. the creditor) received a greater repayment than they would have if the Company's affairs were wound up.

In this case, the relation back day is the date of the Liquidator's appointment on 8 November 2017, with the relation back period being 16 July 2017 to 16 January 2018.

The Liquidator's investigations have not identified any payments made by the Company during the relation back period and therefore, no unfair preference payments have been identified.

### **6. Receipts and Payments**

There have been no receipts or payments in the liquidation to date.

### **7. Likelihood of a dividend**

A dividend is dependent upon recoveries from voidable transactions or an insolvent trading claim.

At this stage, no voidable transactions have been identified and it is unlikely an insolvent trading claim will be pursued given:

- i. the quantum of a potential insolvent trading claim is minimal;
- ii. Mr Garfi is bankrupt and therefore pursuing the claim is unlikely to result in a return to creditors; and
- iii. the liquidation is currently unfunded and accordingly, a creditor or another party would be required to fund such an action.

Accordingly, a dividend in this matter is unlikely.

### **8. Cost of the liquidation**

The Liquidator's fees and disbursements incurred from appointment to 10 April 2018 total \$8,666 excluding GST.

The Liquidator will request approval for his remuneration if recoveries are made in this matter.

## 9. Way Forward

Creditors shall be updated on the Liquidator's investigations and actions in due course.

Should creditors request the Liquidator hold a meeting of creditors, the request for a meeting must comply with the guidelines set out in the enclosed information sheet. The Liquidator will then attend to holding a meeting of creditors.

## 10. Where can you get more information?

The Australian Restructuring Insolvency and Turnaround Association ("ARITA") provides information to assist creditors with understanding liquidations and insolvency.

This information is available from ARITA's website at [www.arita.com.au/creditors](http://www.arita.com.au/creditors).

ASIC also provides information sheets on a range of insolvency topics. These information sheets can be accessed on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au) (search for "insolvency information sheets").

Should you have any queries, please contact Ms Isabel Schoen of this office on (03) 9604 0600.

Yours faithfully



**Ross Blakeley**  
**Liquidator**

# Creditor Rights in Liquidations

As a creditor, you have rights to request meetings and information or take certain actions:



## Right to request a meeting

In liquidations, no meetings of creditors are held automatically. However, creditors with claims of a certain value can request in writing that the liquidator hold a meeting of creditors.

A meeting may be requested in the first 20 business days in a creditors' voluntary liquidation by  $\geq 5\%$  of the value of the debts held by known creditors who are not a related entity of the company.

Otherwise, meetings can be requested at any other time or in a court liquidation by:

- $> 10\%$  but  $< 25\%$  of the known value of creditors on the condition that those creditors provide security for the cost of holding the meeting
- $\geq 25\%$  of the known value of creditors
- creditors by resolution, or
- a Committee of Inspection (this is a smaller group of creditors elected by, and to represent, all the creditors).

If a request complies with these requirements and is 'reasonable', the liquidator must hold a meeting of creditors as soon as reasonably practicable.

## Right to request information

Liquidators will communicate important information with creditors as required in a liquidation. In addition to the initial notice, you should receive, at a minimum, a report within the first three months on the likelihood of a dividend being paid.

Additionally, creditors have the right to request information at any time. A liquidator must provide a creditor with the requested information if their request is 'reasonable', the information is relevant to the liquidation, and the provision of the information would not cause the liquidator to breach their duties.

A liquidator must provide this information to a creditor within 5 business days of receiving the request, unless a longer period is agreed. If, due to the nature of the information requested, the liquidator requires more time to comply with the request, they can extend the period by notifying the creditor in writing.

## Requests must be reasonable.

### They are not reasonable if:

Both meetings and information:

- (a) complying with the request would prejudice the interests of one or more creditors or a third party
- (b) there is not sufficient available property to comply with the request
- (c) the request is vexatious

Meeting requests only:

- (d) a meeting of creditors dealing with the same matters has been held, or will be held within 15 business days

Information requests only:

- (e) the information requested would be privileged from production in legal proceedings
- (f) disclosure would found an action for breach of confidence
- (g) the information has already been provided
- (h) the information is required to be provided under law within 20 business days of the request

If a request is not reasonable due to (b), (d), (g) or (h) above, the liquidator must comply with the request if the creditor meets the cost of complying with the request.

Otherwise, a liquidator must inform a creditor if their meeting or information request is not reasonable and the reason why.

## Right to give directions to liquidator

Creditors, by resolution, may give a liquidator directions in relation to a liquidation. A liquidator must have regard to these directions, but is not required to comply with the directions.

If a liquidator chooses not to comply with a direction given by a resolution of the creditors, they must document their reasons.

An individual creditor cannot provide a direction to a liquidator.

## Right to appoint a reviewing liquidator

Creditors, by resolution, may appoint a reviewing liquidator to review a liquidator's remuneration or a cost or expense incurred in a liquidation. The review is limited to:

- remuneration approved within the six months prior to the appointment of the reviewing liquidator, and
- expenses incurred in the 12 months prior to the appointment of the reviewing liquidator.

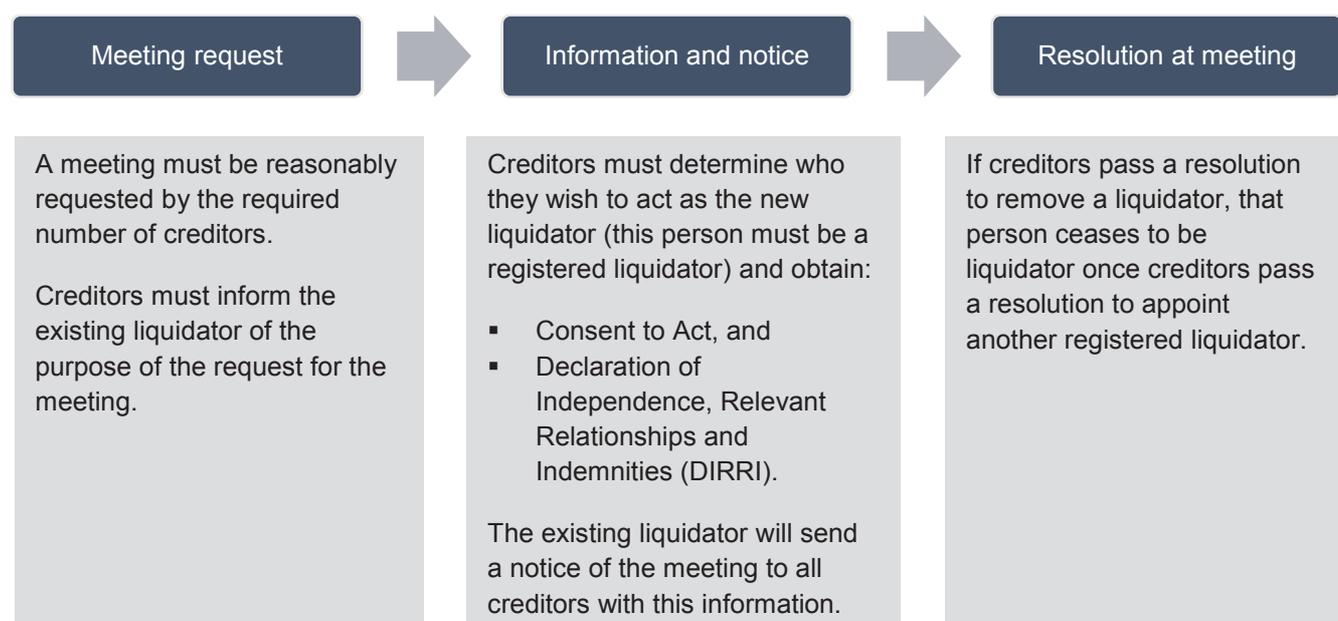
The cost of the reviewing liquidator is paid from the assets of the liquidation, in priority to creditor claims.

An individual creditor can appoint a reviewing liquidator with the liquidator's consent, however the cost of this reviewing liquidator must be met personally by the creditor making the appointment.

## Right to replace liquidator

Creditors, by resolution, have the right to remove a liquidator and appoint another registered liquidator.

For this to happen, there are certain requirements that must be complied with:



**For more information, go to [www.arita.com.au/creditors](http://www.arita.com.au/creditors)**