

# FEDERAL COURT GRANTS ELECTRONIC NOTICE APPLICATION

Date: 6 May 2019

## Australia Restructuring & Insolvency Alert

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On 27 March 2019, the Federal Court of Australia delivered an important decision demonstrating the Court's willingness to assist liquidators to streamline the procedural aspects of liquidations using technology with the aim of conserving assets for the benefit of creditors. In *Re Quinlan, in the matter of Halifax Investment Services Pty Ltd (In Liquidation) (No 4)*<sup>1</sup>, the Federal Court confirmed that the liquidators of Halifax Investment Services Pty Ltd (In Liquidation) (**Halifax**) may send all notices required to be sent to creditors in the winding up via electronic means, and highlighted an apparent drafting error within the *Corporations Act 2001* (Cth) (**Act**).

## BACKGROUND

Halifax was a financial services provider which traded financial products on behalf of its clients through a number of electronic trading platforms. Halifax had approximately 12,500 clients most of which resided in Australia, however approximately 25% of its clients resided overseas, including in New Zealand and China.

On 23 November 2018, Morgan Kelly, Phil Quinlan and Stewart McCallum of Ferrier Hodgson (**Liquidators**) were appointed as the voluntary administrators of Halifax. On 20 March 2019, at the second meeting of the creditors of Halifax, the Liquidators were appointed as liquidators of Halifax.

Pursuant to the Act, the *Corporations Regulations 2001* (Cth) (**Regulations**) and the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**Rules**), liquidators must send certain notices, reports, documents and communications to creditors via post. In the case of Halifax, given that a high proportion of Halifax's 12,500 clients are also creditors in the company's liquidation, the Liquidators formed the view that to give notice via post to each and every creditor, including those creditors located overseas, would be difficult and costly.

Seeking to overcome these difficulties, the Liquidators brought an application under section 447A(1) of the Act to modify section 446A(2) of the Act to allow the Liquidators to send any notices, reports, documents and communications required to be sent to creditors under the Act, Rules and Regulations, electronically.

## ELECTRONIC NOTICE

Justice Gleeson accepted that it was in the nature of the business of Halifax that its clients would usually communicate with Halifax through electronic means, and in the period since Halifax had first entered into administration, clients had generally sought to communicate with the Liquidators electronically. Her Honour also accepted the evidence of the Liquidators that the most efficient and cost-effective manner of sending or publishing

communications to creditors would be to give notice via email or through Halifax's websites and electronic trading platforms.

Justice Gleeson also noted that the Liquidators needed to undertake additional investigations regarding the email and postal addresses of certain clients who had provided limited contact information in order to obtain additional contact information for those clients.

Justice Gleeson concluded that giving notices electronically would save costs and time, and would ultimately "conserve the limited assets of the company for the benefit of creditors."<sup>2</sup>

## SECTIONS 446A(3) AND 497 OF THE CORPORATIONS ACT

The Liquidators also sought orders from the Court in respect of section 497 of the Act, which provides that the liquidator of a company must send to each creditor a summary of the affairs of the company and a list of all of the creditors of the company. The Liquidators sought to be relieved of the obligation to send the list of the creditors of Halifax on the basis that the client list was a valuable asset of Halifax and any process for the sale of that asset could be damaged by its disclosure.

On its face, section 446A(3) of the Act provides that section 497 of the Act is taken to be complied with in relation to the winding up. Counsel for the Liquidators submitted that section 446A(3) of the Act is in fact a drafting error and that the requirements of section 497 of the Act apply to the Liquidators. Justice Gleeson accepted this submission and proceeded on the basis senior counsel for the Liquidators was correct.

Justice Gleeson ordered that the Liquidators were not required to circulate the list of creditors of Halifax.

## IMPACT OF THE DECISION

The Federal Court's decision in *Halifax No. 4* has opened up the range of circumstances where it may be appropriate for all notices, reports, communications and documents in a liquidation to be sent to creditors by electronic means for the duration of a winding up. The decision has also brought to light concern that there may be a drafting error in section 446A(3) of the Act, which needs to be addressed and amended by the legislature.

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<sup>1</sup> [2019] FCA 604.

<sup>2</sup> Ibid [47].

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