

K – Correspondence with ASIC

ASIC sought additional detail on the Administrators' position that KPMG was not a creditor of DSA in relation to the invoice for the pre-appointment engagement charged by KPMG to DSA totalling \$182k (excluding GST). Noting the funds for which were placed on Trust with KWM (under a binding authorisation) on 12 August 2021, invoice issued on 24 August 2021 and paid to KPMG on 25 August 2021.

We further note that:

- KPMG's view is that it was never a creditor of DSA,
- the Administrators do not consider that DSA was insolvent prior to appointment. Pursuant to Section 588FE of the Act, an unfair preference pursuant to Section 588FA of the Act requires that a company be insolvent at the date of a voidable transaction, the Administrators do not consider there are any claims against creditors of DSA for unfair preferences.
- even if KPMG were a creditor of DSA and the payment of the invoice in relation to the pre-appointment engagement constituted a voidable preference, given that in the DOCA scenario, creditors will receive a 100 cent in the Dollar return, no creditors will be disadvantaged in relation to the payment. For completeness we reject this assertion.

NOON, Phoebe

From: Carl Sibia <Carl.Sibia@asic.gov.au>
Sent: Tuesday, 12 October 2021 5:53 PM
To: Dickerson, Gayle
Cc: Vy Dang; Sutherland, Ian
Subject: [EXTERNAL] RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

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Dear Gayle

We acknowledge your response and anticipate receiving your report to creditors in due course.

To ensure adequate transparency for creditors, ASIC requests that all correspondence between DSA's Administrators and ASIC regarding your independence is included in your report to creditors.

Regards

Carl Sibia

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001

Tel: +61 2 9911 2994

carl.sibia@asic.gov.au



(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Dickerson, Gayle <gdickerson@kpmg.com.au>
Sent: Friday, 8 October 2021 7:29 AM
To: Carl Sibia <Carl.Sibia@asic.gov.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>; Sutherland, Ian <isutherland@kpmg.com.au>
Subject: Disability Services Australia - in confidence

Dear Carl

Thank you for your letter dated 23 September 2021 and detailed contents.

We note ASIC's expectation that the *"administrators' report will include reference to the payment received by KPMG and an explanation as to why you do not consider it a preference payment"*.

We agree to address those matters in our report to creditors, which will be issued to creditors in due course in accordance with the Insolvency Practice Rules. ASIC will be provided with a copy of that report when issued, which we expect will be at the end of November subject to timing of the EOI process.

For completeness, we note that we have provided a detailed explanation to ASIC of the basis on which we disagree with ASIC's view that KPMG was a creditor of DSA. The analysis in ASIC's letter does not change our views or the basis for those views. We do not propose to repeat our views in this correspondence and acknowledge the above agreement to disclose this information in our report.

As always, we remain happy to discuss the matter with ASIC at any time.

Apologies for the delay in the response.

Kind regards

Gayle

Gayle Dickerson
Partner
Deals, Tax and Legal

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From: Carl Sibilía <Carl.Sibilía@asic.gov.au>
Sent: Thursday, 23 September 2021 6:13 PM
To: Dickerson, Gayle <gdickerson@kpmg.com.au>; Sutherland, Ian <isutherland@kpmg.com.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>
Subject: [EXTERNAL] RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

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Dear Gayle

Please refer attached.

Regards

Carl Sibilía

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001
Tel: +61 2 9911 2994
carl.sibilía@asic.gov.au



(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Dickerson, Gayle <gdickerson@kpmg.com.au>
Sent: Wednesday, 8 September 2021 6:02 PM
To: Carl Sibilila <Carl.Sibilila@asic.gov.au>; Sutherland, Ian <isutherland@kpmg.com.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>
Subject: RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

Dear Carl

Our previous response has made it clear that KPMG has never been a creditor of DSA. There is no basis on which KPMG should repay any funds paid to it under its pre-appointment engagement, whether in the period from 16 July 2021 to 13 August 2021 or otherwise.

The timing of delivery of our Phase 1A report is irrelevant to DSA's obligation to pay KPMG. Payment terms are provided in clause 5.3 of our Standard Terms, which formed Schedule 2 to the KWM engagement letter:

"5.3. You agree to pay our fees, expenses and charges, plus any applicable GST, within 14 days from the date of issue of our invoice" (emphasis added).

Nothing was payable to KPMG until we issued our invoice on 24 August 2021. The payment was fully addressed by the DSA payment direction to KWM and KWM's compliance with that direction on 25 August 2021. KPMG was never a creditor of DSA.

For completeness, we reject ASIC's assertion that a fair-minded observer could reasonably form the view expressed by ASIC in its email below.

We trust this addresses ASIC's queries. We confirm that we are not proposing to seek to recover our fees and expenses incurred in this correspondence with ASIC.

Kind regards

Gayle

Gayle Dickerson
Partner
Deals, Tax and Legal

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From: Carl Sibia <Carl.Sibia@asic.gov.au>
Sent: Monday, 6 September 2021 4:16 PM
To: Sutherland, Ian <isutherland@kpmg.com.au>; Dickerson, Gayle <gdickerson@kpmg.com.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>
Subject: RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

Dear Ian/Gayle

Thank you for your email.

ASIC respectfully disagrees with your views that at no time was KPMG a creditor of DSA.

Based on the documents you have provided to date, it appears that a debtor-creditor relationship existed up until 13 August 2021 (being the date DSA's funds were deposited into KWM's trust account).

ASIC observes that:

1. KPMG were engaged to provide specific services on 16 July 2021. Under the engagement letter, KPMG were not to continue with Phases 2 and 3 of the work until further instructed. A report under Phase 1 was to be completed within 7 days.
2. The engagement letter dated 27 July 2021 acknowledged that the Phase 1A Report was delivered on 27 July 2021.
3. The KWM email dated 12 August 2021 notes that the report was costed at \$30k and that KPMG's fees to 10 August 2021 was a further \$70k.
4. In respect of the Phase 1A Report, although the cost was not billed, delivery of the report suggests that work was completed and that, but for delivering the invoice, KPMG were entitled to be paid for this work.

In the circumstances, ASIC considers a fair-minded observer might reasonably apprehend that you might not bring an impartial mind to:

- (a) the real possibility that payment for the above work constitutes a voidable preference; and
- (b) your obligations required by statute to investigate, opine on, and report to creditors about a potential claim against KPMG.

In light of ASIC's observations, we request that you advise:

- (a) the reasons why you believe that KPMG is not a creditor of DSA; and
- (b) why KPMG should not repay the fees relating to services provided from 16 July 2021 to 13 August 2021.

Please provide your response by close of business, Wednesday 8 September.

Regards

Carl Sibia

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001
Tel: +61 2 9911 2994
carl.sibilia@asic.gov.au



(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Sutherland, Ian <isutherland@kpmg.com.au>
Sent: Thursday, 2 September 2021 5:49 PM
To: Carl Sibia <Carl.Sibilia@asic.gov.au>; Dickerson, Gayle <gdickerson@kpmg.com.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>
Subject: RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

Hi Carl

Thank you for your email. I respond as follows.

KWM's email to DSA dated 12 August 2021 provided an update on KPMG's work in progress. No invoice was issued until the invoice dated 24 August 2021. Accordingly, nothing was payable by DSA to KPMG until that time and KPMG was not a creditor of DSA.

The agreement between KPMG and DSA was that the fees and expenses would be paid out of funds held by KWM on trust. That agreement was confirmed by:

- KWM's email dated 12 August 2021 which requested the payment of funds into trust by DSA on account of KPMG's fees and expenses;
- That email provided that DSA's deposit of funds would constitute DSA's irrevocable authorisation of KWM to apply those funds against KPMG's invoice once issued;
- DSA's deposit of funds into KWM's trust account on 13 August 2021 constituted that irrevocable authorisation – attached is a copy of the payment receipt from KWM's records;
- On 24 August 2021, in advance of our appointment as administrators, we issued our invoice a copy of which you have seen; and
- On 25 August 2021, in accordance with DSA's irrevocable authorisation, KWM applied trust funds in payment of the KPMG invoice (you have a copy of the payment receipt).

At no time was KPMG a creditor of DSA whether in respect of its pre-appointment fees or otherwise. When invoiced, there was an irrevocable and binding agreement involving the payment of KPMG's fees and expenses up to the \$200k figure (including GST). That amount was paid by KWM from funds held on trust in strict application of the binding authorisation provided to KWM by DSA.

We trust that this addresses your query. If you have any further questions or would like to discuss please let Gayle or I know.

Kind regards,
Ian

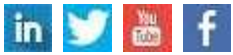
Ian Sutherland
Director
Deal Advisory

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From: Carl Sibia <Carl.Sibia@asic.gov.au>
Sent: Wednesday, 1 September 2021 6:04 PM
To: Dickerson, Gayle <gdickerson@kpmg.com.au>
Cc: Sutherland, Ian <isutherland@kpmg.com.au>; Vy Dang <Vy.Dang@asic.gov.au>
Subject: RE: Disability Services Australia - in confidence [SEC=OFFICIAL]

Dear Gayle

Thank you for your response.

We note that under the terms of the engagement letters that the Company was liable for KPMG's fees and expenses. KWM, although the engaging party, has no liability. As such, it appears that KPMG may be a creditor of the Company for the work performed.

As per KWM's email dated 12 August 2021, it appears that KPMG's total fees to 10 August 2021 was approximately \$100k.

Company funds in respect of those fees and future fees appear to have been put into the KWM trust account on or after 12 August 2021.

Please confirm:

1. when the Company deposited its funds into KWM's trust account, and
2. the total of KPMG's fees and expenses at the time the Company's funds were deposited into KWM's trust account.

Please provide your response by close of business, Thursday 2 September.

Regards

Carl Sibia

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

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(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Dickerson, Gayle <gdickerson@kpmg.com.au>
Sent: Monday, 30 August 2021 5:31 PM
To: Carl Sibilila <Carl.Sibilila@asic.gov.au>
Cc: Sutherland, Ian <isutherland@kpmg.com.au>; Vy Dang <Vy.Dang@asic.gov.au>
Subject: Disability Services Australia - in confidence
Importance: High

In confidence

Dear Carl

Thank you for your inquiry regarding our pre-appointment work with Disability Services Australia Limited (administrators appointed) (**DSA**). Enclosed are the following documents:

- Signed engagement letter with King & Wood Mallesons (**KWM**) dated 16 July 2021.
Please refer to the scope at page 3-4. We performed work on Phase 1 (Cashflow forecast review).
- Engagement letter with KWM dated 27 July 2021.
Given the outcome of our Phase 1 work, we agreed a second engagement letter with DSA and KWM involving a new scope with Phases 1B and 2A. We did not counter-sign this engagement letter, but performed under its terms from 27 July 2021 onwards.
- Email from KWM to DSA dated 12 August 2021 concerning KPMG's fee estimate, the \$200k funding into KWM's trust account, and constituting DSA's authorisation of KWM to apply those funds from trust to pay KPMG's invoice.
- KPMG invoice dated 24 August 2021.
- KWM's confirmation dated 25 August 2021 confirming payment of our invoice from funds held in trust.

I confirm we received no payments in respect of this work other than the funds paid to us from KWM's trust account.

For completeness, I note that this information is disclosed to ASIC in confidence within the meaning of section 127(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth).

I trust that the attached documents address your queries.

If you have any further questions or would like to discuss please let me know.

Gayle Dickerson
Partner
Deals, Tax and Legal

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From: Carl Sibilía <Carl.Sibilía@asic.gov.au>
Sent: Friday, 27 August 2021 4:17 PM
To: Dickerson, Gayle <gdickerson@kpmg.com.au>
Cc: Vy Dang <Vy.Dang@asic.gov.au>
Subject: FW: Disability Services Australia [SEC=OFFICIAL]

Dear Gayle

I refer to our telephone conversation yesterday.

ASIC wishes to understand your firm's pre-appointment dealings with the Group to assess whether those dealings impact upon your independence as voluntary administrators of the Group.

We reviewed the declaration of relevant relationships and declaration of indemnities dated 26 August 2021 (**DIRRI**) and note that your firm:

- was engaged by King Wood & Mallesons (**KWM**) from 16 July to 24 August 2021 to provide pre-appointment advice to the Group; and
- was paid remuneration of \$181,818.18 (excluding GST) by KWM from funds held on trust for the Group.

To assist with our review, please provide, on a voluntary basis, the following documents regarding the pre-appointment engagement:

- copy of the engagement letter(s);
- copies of invoice(s) rendered by your firm; and
- copies of the remittance advices (including particulars such as date(s) paid, payer details, payment manner) of the \$181,818.18 (excluding GST) received by your firm.

Please provide your response by 2 September 2021.

ASIC expects you will not claim remuneration or costs against the Group for dealing with this request.

If you have any questions, please do not hesitate to contact me.

Regards

Carl Sibilía

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001

Tel: +61 2 9911 2994

carl.sibilía@asic.gov.au



(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Pitt, Gregory <gpitt@kpmg.com.au>
Sent: Friday, 27 August 2021 3:49 PM

To: Carl Sibilía <Carl.Sibilía@asic.gov.au>
Cc: Dickerson, Gayle <gdickerson@kpmg.com.au>
Subject: RE: Disability Services Australia [SEC=OFFICIAL]

Hi Carl,

Please see attached a copy of the creditors circular for Disability Services Australia Limited, DSA Mentoring Services Limited and Macquarie Employment Training Service Limited (all Administrators Appointed).

Kind regards,

Greg Pitt
Associate Director
Deal Advisory

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Brisbane QLD 4000 Australia

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From: Carl Sibilía <Carl.Sibilía@asic.gov.au>
Sent: Thursday, 26 August 2021 6:25 PM
To: Dickerson, Gayle <gdickerson@kpmg.com.au>
Cc: Pitt, Gregory <gpitt@kpmg.com.au>
Subject: RE: Disability Services Australia [SEC=OFFICIAL]

Hi Gayle

Thank you for the return call and arranging creditor correspondence to come to me tomorrow.

Periodic updates appreciated too.

regards

Carl Sibilía

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001

Tel: +61 2 9911 2994

carl.sibilía@asic.gov.au



(I work flexible hours and at different times of the day - I do not expect that you will respond to this email outside your regular working hours)

From: Dickerson, Gayle <gdickerson@kpmg.com.au>
Sent: Thursday, 26 August 2021 5:49 PM
To: Carl Sibilialia <Carl.Sibilialia@asic.gov.au>
Cc: Pitt, Gregory <gpitt@kpmg.com.au>
Subject: RE: Disability Services Australia [SEC=OFFICIAL]

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Hi Carl

Thanks for reaching out – we will share our creditor correspondence with you tomorrow.

We will let you know if there is anything to flag to ASIC in terms of the Administration.

Happy to provide periodic updates.

Kind regards

Gayle

From: Carl Sibilialia <Carl.Sibilialia@asic.gov.au>
Sent: Thursday, 26 August 2021 3:32 PM
To: Dickerson, Gayle <gdickerson@kpmg.com.au>
Subject: Disability Services Australia [SEC=OFFICIAL]

Afternoon Gayle

I just left messages on your office and mobile. Appreciate you might be busily engaged in your recent appointment as Voluntary Administrator to Disability Services Australia.

If you could return my call that would be appreciated, hopefully only take about 10 minutes of your time.

Regards

Carl Sibilialia

Senior Manager, Registered Liquidators

Australian Securities and Investments Commission

Level 5, 100 Market Street, Sydney, 2001

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ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Ms Gayle Dickerson
KPMG
300 Barangaroo Ave
SYDNEY NSW 2000

By email: gdickerson@kpmg.com.au

23 September 2021

Dear Ms Dickerson

**Disability Services Australia Limited ACN 002 507 655 (Company)
(Administrators Appointed)**

We refer to email exchanges between ASIC and KPMG between 26 August to 8 September 2021 regarding the appointment of you and your partners as voluntary administrators of the Company.

We have considered clause 5.3 of KPMG Standard Terms and acknowledge this clause provides a timeframe within which an invoice is to be paid once issued. However, it does not appear, as you suggest, to stand for the proposition that you have no entitlement to be paid for services rendered until such time as an invoice is issued and, therefore, KPMG was not a creditor of DSA at any time prior to your appointment.

Background

KPMG was first engaged to provide services by letter dated 16 July 2021.

Following delivery of the KPMG report dated 27 July 2021 (**Phase 1A Report**), KPMG was engaged to provide further services under further instructions given by the Company and evidenced by a second engagement letter dated 27 July 2021. The second engagement letter replaced the previous engagement letter and detailed additional services to build on recommendations from the Phase 1A Report.

At all times the Company was liable to pay KPMG's fees for services under both engagement letters.

Notably, it was not a condition of either engagement letter that funds be transferred into a trust account on account of future services before KPMG began work.

The Company transferred funds to the King Wood & Mallesons ('KWM') Trust Account on 13 August 2021 to cover KPMG's fees. This transfer was in response to an email from KWM dated 12 August 2021 that set out KPMG's costs to that date (including work that had been performed under the first engagement letter) and ongoing and anticipated future costs of work to be performed under the second engagement letter.

On 24 August 2021 KPMG issued an invoice for its fees for all the services provided under both the engagement letters dated 16 July 2021 and 27 July 2021.

On 25 August 2021 the KPMG invoice was paid out of funds held in the KWM Trust Account and you, and your partners, were appointed voluntary administrators of the Company.

KPMG as a creditor

At the time the Company transferred funds to the KWM Trust Account on 13 August 2021, the Company had received the Phase 1A Report and given instructions to KWM that KPMG be engaged to provide further services (which was done by a second engagement letter on that date).

As noted above, the second engagement letter replaced the first engagement letter. The second engagement letter did not include the work already performed under the first engagement letter.

We consider KPMG was entitled under the first engagement letter, before funds were transferred to the KWM Trust Account, to be paid for the cost associated with preparing the Phase 1A Report – notwithstanding that KPMG had not issued an invoice. This is because the work had been completed and the engagement letter under which the services were performed had been replaced with the second engagement letter dated 27 July 2021 that did not include the costs associated with preparing the Phase 1A Report.

As such, KPMG was a creditor of the Company for this amount before funds were transferred to the KWM Trust Account. The KWM email dated 12 August 2021 states the cost of preparing the Phase 1A Report was \$30,000.

Further to this argument, and although considered in a different context, we draw your attention to the decision *In the matter of RCR Tomlinson (Administrators appointed) and Ors* [2020] NSWSC 735 and the consideration of when work in progress was considered an asset and subject to a circulating security interest.

In that case, in both the following circumstances it was determined that there was a monetary obligation under the personal property security legislation and that the work in progress was subject to the circulating asset security:

- where, in respect of services provided, all that remained was to issue an invoice or demand or request for payment for work done
- where the provision of services has been completed but an approval is required before an invoice could be issued.

In our email on 6 September 2021 we observed that:

1. KPMG was engaged to provide specific services on 16 July 2021. Under the engagement letter, KPMG was not to continue with Phases 2 and 3 of the work until further instructed. A report under Phase 1 was to be completed within 7 days.
2. The second engagement letter dated 27 July 2021 acknowledged that the Phase 1A Report was delivered on 27 July 2021.

In respect of the Phase 1A Report, although the cost was not billed, delivery of the report and the entering into an engagement letter dated 27 July 2021 (which replaced the first engagement letter) suggests that work was completed and that, but for delivering the invoice, KPMG were entitled to be paid for this work separately from the services to be provided under the second engagement letter.

Consistent with the reasoning in the RCR Tomlinson case, we consider KPMG was entitled to be paid their fees for delivering the Phase 1A Report notwithstanding an invoice had not been issued requesting payment.

We note the KWM email dated 12 August 2021 states that the Phase 1 Report was costed at \$30k. We consider KPMG was entitled to be paid this amount and was a creditor at that time.

This argument also applies to the costs for work under other completed phases of the engagement letter dated 27 July 2021 (if any) before the funds were transferred into the KWM Trust Account on 13 August 2021 on account of future services to be performed under the engagement letter.

In this regard we note the KWM email dated 12 August 2021 states that KPMG's fees to 10 August 2021 was a further \$70k (although it is unclear what phases, if any, of the work schedule to the second engagement letter had been completed).

The consequences

The KPMG invoice for services rendered under the engagement letters dated 16 July 2021 and 27 July 2021 was paid on the same day as the appointment of you and your partners as voluntary administrators of the Company.

Accordingly, it appears the KPMG partners were not disqualified from acting as voluntary administrators of the Company under section 448C of the *Corporations Act 2001*.

However, KPMG appears to have been preferred ahead of other creditors for (at least) payment of its fees in preparing the Phase 1A Report dated 27 July 2021. As noted above, the entitlement to be paid for this work arose before funds were transferred to the KWM Trust Account and in the absence of a condition in the engagement letter that funds be put in trust as a condition of commencing the work.

As set out above, notwithstanding KPMG had not issued an invoice for their fees for this work, we consider all the pre-conditions for payment had occurred and KPMG was entitled to issue an invoice. It was, therefore, a creditor of the Company.

Had funds been placed in the KWM Trust Account before work commenced under the 26 July 2021 engagement letter as a precondition of undertaking the work, the ultimate effect of the transaction is unlikely to have been to prefer KPMG over other creditors.

What you need to do

ASIC notes that as voluntary administrators, you have a duty to investigate and report to creditors regarding (amongst other things) whether you have identified any voidable transactions, which include unfair preference payments.

ASIC expects that your administrators' report will include reference to the payment received by KPMG and an explanation as to why you do not consider it a preference payment.

Please consider ASIC's views and provide your response by close of business, 7 October 2021.

Should you have any questions regarding this letter, please contact me on (02) 9911 2994.

Yours faithfully



Carl Sibilis
Senior Manager
Registered Liquidators
Australian Securities and Investments Commission