



McGrathNicol

5 September 2024

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Brite Advisors Pty Ltd (In Liquidation) (Receivers and Managers Appointed)
ACN 135 024 412
(Brite Advisors)

Update – Distribution Framework Application

I refer to:

- the orders of the Federal Court of Australia (**the Court**) dated 6 February 2024, appointing Rob Kirman and I as (i) Court appointed receivers and managers of the property, assets and undertakings held by Brite Advisors on trust for others (**Receivers**), and (ii) joint and several Court-appointed liquidators of Brite Advisors (**Liquidators**); and
- previous correspondence issued to Beneficiaries and Corporate Trustees, regarding the Distribution Framework Application (**Application**).

1 Orders made by the Court on 2 September 2024

The Application was heard and determined by his Honour Justice O'Sullivan of the Federal Court of Australia on 2 September 2024 as notified in our earlier updates dated 22 and 28 August 2024. The hearing was livestreamed on the Court's YouTube channel.

A copy of the Court's orders made on 2 September 2024 (**September Orders**) are **enclosed** and have been published on our website, which can be accessed here: <https://www.mcgrathnicol.com/creditors/brite-advisors-pty-ltd>.

We explain the September Orders below.

2 Explanatory Memorandum for Distribution of Trust Assets (Orders 1 - 6)

The September Orders require the Receivers to, within 51 days (ie. by 23 October 2024), file an application with the Court (which is referred to as the **Explanatory Memorandum Application**) which will include the following:

- the orders that the Receivers propose the Court makes for the distribution of the Trust Assets; and
- a proposed explanatory memorandum that the Receivers intend to provide to the Beneficiaries and Corporate Trustees to explain the rationale for the Receivers' proposed distribution of the Trust Assets.

A further hearing will take place on Wednesday 13 November 2024 at 9am (AWST) / 11.30am (ACDT) where the Court will consider the proposed explanatory memorandum and, if the Court considers it to be appropriate, direct the Receivers to issue the explanatory memorandum to Beneficiaries and Corporate Trustees. We expect that the Court will livestream the hearing on its YouTube channel, which can be accessed here: <https://www.youtube.com/@FederalCourtAus/streams>.



Unless otherwise ordered by the Court, the Receivers will distribute the explanatory memorandum to all Corporate Trustees and Beneficiaries, and publish it on the Receivers' website, as soon as reasonably possible after the 13 November hearing.

Following distribution and publication of the explanatory memorandum, the Receivers will engage in a consultation period (the length of which will be determined at the 13 November hearing). The purpose of the consultation period is to receive, consider and address feedback and queries from Beneficiaries and Corporate Trustees on the matters covered in the explanatory memorandum. The Receivers will take this feedback into account when finalising the orders they propose the Court makes in relation to the distribution of the Trust Assets.

For further information and detailed explanation of the explanatory memorandum process, please refer to the Fourth Report at paragraph [3.5.2] and page [23] rows [3] - [5] of the indicative timetable.

3 Verifying identities of Beneficiaries (Order 7)

The September Orders authorise the Receivers to take steps to verify the identity of each Beneficiary, including engaging a third-party contractor to undertake Identity Proofing.

We will provide a separate circular to Beneficiaries and Corporate Trustees detailing the steps required to complete the Identity Proofing.

It will be necessary for Beneficiaries to successfully complete the Identity Proofing process before they will be able to access their Valuation Notice (which is explained further at item 4 below).

For further information in relation to the Identity Proofing, please refer the Tenth Smith Affidavit at paragraphs [10] - [24].

4 Calculating entitlements of Beneficiaries (Order 8)

The September Orders require the Receivers to calculate Beneficiaries' entitlements by reference to the value of the money and investments which were recorded as being held by each such Beneficiary in the defendant's systems as at 13 December 2023.

The basis of the Receivers' calculation of each Beneficiaries' entitlement will be set out during the verification of entitlement process on the web-based portal (which is explained further at item 5 below).

For further information in relation to the calculation of the entitlements of Beneficiaries, please refer to the Fourth Report at [3.4.1] - [3.4.6] and [3.4.13] - [3.4.19].

5 Beneficiary Valuation Notices (Order 9)

The September Orders establish a framework for Beneficiaries to access, review, and confirm or dispute their Valuation Notice. The Valuation Notice will set out the value of the investments that Brite Advisors should have been holding on each Beneficiaries' behalf as at 13 December 2023.

It is important to note that the value of a Beneficiary's Client AuM set out in their Valuation Notice is **not** the amount that the Receivers propose to distribute to the Beneficiary from the Trust Assets. Rather, it is a reference point from which the distribution to be paid to each Beneficiary will be calculated. The way in which the distribution to each Beneficiary will be calculated will be explained in the explanatory memorandum. As noted above, Beneficiaries and Corporate Trustees will have the opportunity to provide



feedback and ask questions in relation to the proposed method of distribution during the consultation period.

After the identification process has been successfully undertaken, a notification will be issued to Beneficiaries providing them with a unique login to a secure, web-based portal where they will be able to view their Valuation Notice. Beneficiaries will be able to review and approve, or dispute, their Valuation Notice via the web-based portal. The September Orders have also established a process for dealing with any dispute by a Beneficiary or Corporate Trustee with respect to a Valuation Notice.

We will provide a separate circular to Beneficiaries and Corporate Trustees detailing the steps required to complete the verification of Beneficiaries' entitlements prior to issuing the unique login details to the web-based portal.

For further information in relation to the verification of Beneficiary entitlements, please refer to the Fourth Report at [3.4.27] - [3.4.34].

6 Increase to cap on pension withdrawals (Orders 10 and 11)

The September Orders amended the pension withdrawal request protocol by:

- increasing the cap on withdrawals from 30% to 50% for regular pension withdrawals; and
- clarifying that the percentage cap is calculated by reference to the value of a Beneficiaries' cash holdings and model portfolio assets as at 13 December 2023.

In order to ensure that the proposal to increase the 30% cap on withdrawals to 50% (for regular pension withdrawals) would not result in any potential prejudice to another Beneficiary, the Receivers undertook some hypothetical modelling which Counsel for the Receivers explained to the Court during the hearing of the Application.

As is explained at paragraphs [16] - [17] and [21] of the Eleventh affidavit of Linda Smith (**Eleventh Smith Affidavit**), the 50% cap was calculated on a highly conservative hypothetical basis to identify the size of the potential shortfall that could be suffered by any group of beneficiaries. In order to do this, the hypothetical assumes (contrary to the Receivers' actual findings in the Fourth Report) that there is an effective segregation of assets held on behalf of US and UK Beneficiaries.

To be clear, the Receivers' position is that there is no effective segregation of the Trust Assets. That position is clearly stated most recently in our Fourth Report (see section 6, in particular 6.3.5) and our answers to FAQ dated 28 August 2024, both available on our Brite Advisors webpage [link: <https://www.mcgrathnicol.com/creditors/brite-advisors-pty-ltd>] (see the answer to FAQ 3.1), as well as our previous reports to the Court and updates to Beneficiaries and Corporate Trustees.

As to the references made by Counsel during the hearing of the Application to "US Beneficiaries", "UK Beneficiaries" and "RoW (rest of world) beneficiaries", those terms are contained in our reports and court materials and were referred to in the context where funds were recorded in Brite Advisors' books and records as being held in the various Interactive Brokers Master Accounts designated as the "US" account, the "UK" account and "RoW" account. As has been explained in detail in our Fourth Report, these designations were arbitrary and the Receivers do not believe they resulted in any effective segregation which would provide any legal protection or ring fencing for any group of Beneficiaries based on domicile, jurisdiction of their financial advisor or Corporate Trustee, or otherwise.

Further detail will be provided in the explanatory memorandum and Beneficiaries will have the opportunity to raise any queries at the appropriate time during the consultation period. For further information in relation



to the separation of assets into different IBA, please refer to the Fourth Report at [2.1.24] - [2.1.26], [4.6.9] - [4.6.12], [6.3] and [6.4].

The Receivers recognise the importance of ensuring that Beneficiaries who rely on their pension for living costs continue to have access to their regular payments. If you do need funds from your pension to meet your living costs or to avoid financial hardship, please speak with your pension administrator who will be able to assist you with submitting a request to the Receivers.

In the event you have invested directly with Brite Advisors, please send your pension payment withdrawal requests by email to briteadvisors@mcgrathnicol.com, including all necessary supporting documentation. Please include "Pension payment withdrawal request" in the email subject line to allow the request to be efficiently categorised and allocated to a team member from the Receivers' team for processing.

For further information in relation to the increase to the pension withdrawal cap, please refer to the Tenth Smith Affidavit at [25] - [33] and the Eleventh Smith Affidavit.

7 Publication of Court Material

The Receivers obtained the Court's permission to publish the Eleventh Smith Affidavit so that Beneficiaries, Corporate Trustees and other interested parties have the benefit of the detailed information contained in the Eleventh Smith Affidavit as it relates to pension withdrawals.

The Eleventh Smith Affidavit is available on our website, which can be accessed here:

<https://www.mcgrathnicol.com/creditors/brite-advisors-pty-ltd>.

8 Orders held over

Our update of 9 August 2024 informing Beneficiaries and Corporate Trustees of the Application provided a copy of the original orders sought by the Receivers. Not all of the orders contained in our minute of proposed orders were made by the Court on 2 September 2024, and some of them were held over for determination at the 13 November hearing.

Those orders that his Honour wished to hold over related to:

- the consultation period allowing interested parties to provide feedback to the Receivers;
- the process for interested parties wishing to be heard by the Court on the Receivers' future application for the distribution of the Trust Assets to seek leave of the Court to do so; and
- filing and listing of the Receivers' future application for the distribution of the Trust Assets.

His Honour was of the view that the process could be broken into stages to provide flexibility to the process in reaching the hearing in relation to distribution of the Trust Assets and requested that the Receivers return to the Court after the filing of the explanatory memorandum. At that further hearing (which is listed for 13 November 2024) his Honour would then be in a position to make further orders in relation to the above matters.

It is the Receivers' intention to work towards the indicative timeline set out in the Fourth Report at paragraphs [3.5.2] – [3.5.4] however, as highlighted in the Fourth Report, there are certain factors which may impact the Receivers' ability to meet these dates and which are outside the Receivers' control.



9 Ongoing updates

The Receivers will continue to keep Corporate Trustees and Beneficiaries apprised of the conduct of the receivership and issue further correspondence when there are material developments. Correspondence issued to Corporate Trustees and Beneficiaries can be downloaded from our website at the following link - <https://www.mcgrathnicol.com/creditors/brite-advisors-pty-ltd>.

If you have any queries, please refer to the Frequently Asked Questions page on our website, which can be accessed here: <https://www.mcgrathnicol.com/brite-advisors-pty-ltd-frequently-asked-questions/>. This page will be continually updated as new information that is relevant to Beneficiaries and Corporate Trustees becomes available.

If you have any queries which are not addressed in the Frequently Asked Questions, please contact the Receivers at briteadvisors@mcgrathnicol.com.

Yours faithfully

Brite Advisors Pty Ltd (In Liquidation) (Receivers and Managers Appointed)

A handwritten signature in cursive script that reads "Linda Smith".

Linda Smith

Receiver and Liquidator



Federal Court of Australia

District Registry: Western Australia

Division: General

No: WAD13/2024

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION and another/others
named in the schedule
Plaintiff

**BRITE ADVISORS PTY LTD ACN 135 024 412 (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)**
Defendant

ORDER

JUDGE: JUSTICE O'SULLIVAN

DATE OF ORDER: 02 September 2024

WHERE MADE: Adelaide

THE COURT ORDERS THAT:

Framework for Distribution

1. There will be three further hearings in these proceedings before any orders are made with respect to the distribution of the property, assets and undertakings held by the Defendant on trust for another (**Trust Assets**), and over which Linda Smith and Robert Kirman of McGrathNicol are appointed, jointly and severally, as receivers and managers (**Receivers**), to beneficiaries of those assets:
 - a. the **Explanatory Memorandum Application Hearing** will be held to approve an explanatory memorandum addressing the distribution proposed by the Receivers (**Proposed Distribution**), such memorandum to be provided to interested parties;
 - b. the **Interested Parties Leave to Appear Hearing** will be held to grant leave to those parties wishing to be heard in the Distribution Methodology Application Hearing (see below);
 - c. the **Distribution Methodology Application Hearing**, where, subject to the Court granting them leave to do so, interested parties can be heard before orders are made in respect of the distribution of the Trust Assets.
2. Interested parties in Order 1 refers to both:
 - a. any corporate trustee or pension administrator who itself holds its interest in the Trust Assets on trust for underlying beneficiaries (**Corporate Trustees**);



- b. any person with a beneficial interest in the Trust Assets, either directly or through a Corporate Trustee (**Beneficiaries**); and
 - c. any other person with a legal or equitable interest in the Trust Assets.
3. By on or before 23 October 2024, the Receivers shall file with this Court an application for directions relating to the distribution of the Trust Assets. That application shall include:
 - a. a minute of orders which are sought to give effect to the Proposed Distribution;
 - b. if necessary, a report prepared by the Receivers which provides any additional factual information required to explain the Proposed Distribution; and
 - c. an explanatory memorandum which explains the rationale for the Proposed Distribution and provides one or more alternative scenarios as a point of comparison.

(Explanatory Memorandum Application)

4. The Explanatory Memorandum Application Hearing shall take place on **Wednesday 13 November 2024 at 9am (AWST) / 11.30am (ACDT)**.
5. At the Explanatory Memorandum Application Hearing, the Court will consider whether it is appropriate to give a direction that the Receivers issue the explanatory memorandum to Corporate Trustees and Beneficiaries as drafted.
6. If the Court directs the Receivers as set out in order 5 above, the Court will adjourn the matter to a further hearing on a date to be fixed.
7. Following the Explanatory Memorandum Application Hearing, unless otherwise ordered by the Court the Receivers shall distribute the explanatory memorandum to all Corporate Trustees and Beneficiaries, and publish it on the Receivers' website, as soon as reasonably possible.

Verifying identities of Beneficiaries

8. The Receivers are justified and acting properly in taking steps to verify the identities of each of the Beneficiaries including, but not limited to:
 - a. engaging a third party contractor to verify the identity of each Beneficiary (**Identity Proofing**), with the costs of such an engagement to be paid only with the approval of this Court; and
 - b. requiring all Beneficiaries to successfully complete the Identity Proofing process prior to, and as a condition of, being permitted to access their Valuation Notice (defined at paragraph 10.a below).

Calculating entitlements of Beneficiaries

9. The Receivers are justified in calculating Beneficiaries' entitlements:
 - a. by reference to the value of the money and investments, where possible assessed on a mark-to-market basis, which were recorded as being held by each such Beneficiary in the defendant's systems as at 13 December 2023; and



- b. setting off positive balances and investment values held by a particular Beneficiary against negative account balances or debts incurred by the same Beneficiary.
10. The Receivers are justified in adopting the following approach to verification of Beneficiaries' entitlements, such process to take place concurrently with orders 1 to 7 above.
- a. The Receivers are to email each Beneficiary (or, if email is not, in the Receivers' opinion, possible, viable, or the most appropriate means of communication with an individual Beneficiary, post to the Beneficiary's last known address) a notification providing them with unique login details to a secure, web-based portal ("**Beneficiary Portal**") and instructing them that, upon logging into the Beneficiary Portal, and subject to successfully completing the Identity Proofing process, they will be notified of the value of their entitlement as at the Relevant Date and the basis for that valuation ("**Valuation Notice**"). For clarity, the value of each Beneficiary's distribution will not be stated in the Valuation Notice.
 - b. In the Beneficiary Portal, the Receivers are to ask clients to confirm that the value of their entitlement is as stated in the Valuation Notice.
 - c. If a Beneficiary disputes the value of their entitlement, the Receivers must ask the Beneficiary to notify the Receivers of this and provide reasons and supporting documentation (if any) in support of their position.
 - d. Beneficiaries are to be given 21 days to respond to the Valuation Notice by logging into the Beneficiary Portal and completing the step identified above, after which the Receivers can treat that Valuation Notice as having been accepted. In circumstances where Beneficiaries have not successfully completed their Identity Proofing at the time when the Valuation Notice is ready, the Receivers may, in their discretion, grant an extension of up to 7 calendar days to respond.
 - e. If a Beneficiary affirmatively disputes the value of their entitlement then, on the condition that their response is accompanied by both reasons and any necessary supporting documents:
 - i. the Receivers are to assess whether the dispute is well-founded;
 - ii. if the dispute is well-founded, the Receivers are to notify the Beneficiary that the Receivers agree with the issues raised in the dispute and have agreed to amend the value of the entitlement, issuing concurrently a revised Valuation Notice;
 - iii. if there is insufficient particularity or insufficient supporting documentation, the Receivers are to notify the Beneficiary as such and that their dispute must be further particularised or supported within 21 days of this notification being sent, failing which the dispute will be determined to be not well-founded;
 - iv. if the dispute is not well-founded, the Receivers are to notify the Beneficiary that they may apply to the Court (in this proceeding) if the Beneficiary considers that their dispute is well-founded and that



otherwise the Receivers may, if no such application is made within 21 days, proceed to distribution on the basis of the value of the entitlement as set out in the Valuation Notice.

Increase to cap on pension withdrawals

11. Order 4(b) of the Orders made on 21 December 2023 in WAD262/2023 be varied by deleting the words “30% of the value of the Beneficiary's investment recorded in Salesforce as at 9 November 2023” and replacing them with “50% of the value of the Beneficiary's cash holdings and model portfolio assets recorded in the transactional data set obtained by the Receivers showing the value of each Beneficiaries’ investments they ought to have had as at 13 December 2023, and referred to in the Receivers’ Fourth Report dated 9 August 2024 as the 13 December 2023 Data”.
12. Order 9(b) of the Orders made on 6 February 2024 in WAD13/2024 be varied by deleting the words “30% of the value of the Beneficiary's investment recorded in Salesforce as at 9 November 2023” and replacing them with “50% of the value of the Beneficiary's cash holdings and model portfolio assets the transactional data set obtained by the Receivers showing the value of each Beneficiaries’ investments they ought to have had as at 13 December 2023, and referred to in the Receivers’ Fourth Report dated 9 August 2024 as the 13 December 2023 Data 13 December 2023 Data”.

Publication of materials

13. The Receivers be authorised to publish the eleventh affidavit of Linda Methven Smith affirmed on 30 August 2024 filed in these proceedings on the creditor website established by them with respect to their appointment.

Date orders authenticated: 2 September 2024


Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.



Schedule

No: WAD13/2024

Federal Court of Australia

District Registry: Western Australia

Division: General

Interested Person LINDA METHVEN SMITH AND ROBERT KIRMAN IN THEIR CAPACITY AS RECEIVERS AND MANAGERS OF BRITE ADVISORS ACN 135 024 412 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

Interested Person ADRIAN CHARLES HYDE AND JOANNE SANDRA WILD IN THEIR CAPACITIES AS JOINT ADMINISTRATORS OF RELAY ADMINISTRATION LIMITED, CORINTHIAN PENSION TRUSTEES LIMITED AND PANTHEON TRUSTEES LIMITED (ALL IN ADMINISTRATION)