

CONTACT 72 2010

- 2 **FEATURE** DISCRETIONARY TRUSTS – ARE THEY DEAD YET?
- 3 **BAKER TILLY** NEW FIRM IN CHINA
- 4 **FEATURE** GETTING THE NUMBERS RIGHT
- 5 **UPDATE** ON GLOBAL ACCOUNTING STANDARDS
- 6 **FEATURE** BUSINESS EXITS: MAXIMISING VALUE – PART 1
- 7 **CLIENT PROFILE** AUSTRALIAN DIGITAL TESTING **ADVOCACY**
- 8 **WHAT'S NEW** TAX DIARY

Whistleblowing *and the Australian workplace*

Chris Watson
Senior Fraud Investigator
Sydney

Whistleblowing in the Australian workplace goes against the Aussie 'fair go' ethos. No one dobs in a mate. However, those who knowingly engage in obviously unethical behaviour typically believe that they will never get caught or that the rules do not apply to them. The cost of fraud and corruption accounts for 40% of the cost of all crime in Australia, according to the Australian Institute of Criminology.

Australia has had its fair share of political scandals such as the ongoing Railcorp saga and the Fitzgerald and WA Inc inquiries of the 1980s which deal with widespread government corruption and associated misconduct. There are also numerous examples of fraud and corruption in many sectors of Australian business, both on a small and large scale.

This clearly shows the need for a thorough 'whistleblowing' or 'ethical hotline' program throughout Australian organisations, yet most organisations do not have such a program.

Fraud and corruption are the main reasons for implementing a whistleblowing program. The Australian Standard AS 80074-2003 identifies other drivers, notably: more effective

compliance with relevant laws; more efficient fiscal management of the organisation through, for example, the reporting of waste and improper tendering practices; a healthier and safer working environment through the reporting of unsafe practices; and more effective management and improved morale.

A properly implemented program made available to all employees will encourage the reporting of unethical, corrupt and ultimately damaging behaviour.

An effective and successful program should display several characteristics. Mechanisms need to be implemented that ensure people who are contacting the service are provided with suitable protection from harassment or vilification as a result of the information they have provided.

Additionally, it is important that potential whistleblowers are confident that an independent assessment of their report will be made without bias or recourse to the person or department that the issue has been raised about. Clear and multiple reporting paths must be made available to further encourage the reporting of any wrongdoing.

Similarly, policies and procedures must be made available to all employees and clearly set out the investigation and reporting protocols.

A clear commitment to ethical behaviour, 'setting the tone at the top', should be displayed by senior management, complemented by the communication of,

(continued on page 2)

Whistleblowing and the Australian workplace

(continued from page 1)

and subsequent training in, all the relevant policies and procedures so that all employees understand the required paths to reporting – and indeed their obligation and duty to do so.

By implementing such a program, the reporting of unethical, corrupt and other damaging behaviour will be encouraged. The benefits may never be known because the cost is only identified when things go wrong. The best result is to have systems that stop things going wrong in the first place but with sound policies and processes to rely on should they be required.



Feature

Many people are asking whether or not they should still use family discretionary trusts as business or investment vehicles. Some have suggested that it is all too hard particularly given the recent ATO announcements in this area.

Discretionary Are they

Whilst the ATO has sought to clarify the position in relation to treatment of distributions to corporate beneficiaries and in respect of distributions by trusts generally, in many ways matters are more confused than ever.

What is new?

The ATO issued various pronouncements on 2 June 2010 in relation to unpaid present entitlements to corporate beneficiaries including a final Taxation Ruling, a draft Practice Statement and a Ruling Compendium. These documents apply to distributions made on or after 16 December 2009.

As outlined in Contact Issue 70, the ATO approach is that any unpaid present entitlements to a corporate beneficiary will be regarded as loans. Accordingly, the deemed dividend provisions in Division 7A will apply where the cash is retained by the trust rather than distributed to the corporate beneficiary. This will not occur where the loan is put on Division 7A terms or an ATO approved rate of return methodology is applied to the unpaid entitlement.

In brief, the ATO rate of return methodology requires that the corporate beneficiary has the sole benefit of income and capital arising from the cash retained by the trust. At this stage, it appears that there is no requirement for annual principal repayments, unlike Division 7A.

The other key development is the release of ATO's Practice Statement in relation to the Bamford case.

In the ATO's view the Bamford case calls into question a significant number of practices which have been allowed either administratively or specifically in published tax rulings by the ATO for many years. These rulings relate to key issues such as flow through of imputation credits, taxation of capital gains and streaming of income generally.

By way of example, whilst not specifically outlawing the practice, the ATO has questioned practices such as streaming capital gains to individuals in order to access the CGT discount and streaming franked dividends to corporate beneficiaries.

Whilst there has been some movement in the last few months particularly in relation to unpaid distributions to corporate beneficiaries, the ATO approach has done nothing to alleviate the complexity or confusion. More than one commentator has suggested that the ATO is deliberately making things complicated in order to encourage a push for legislative reform.

What do I do now?

The following checklist of questions may be helpful in analysing your position:

- Should I distribute to a corporate beneficiary or not?
- If I distribute to a corporate beneficiary which methodology should I adopt if I want to retain the funds for business or investment purposes with the trust.
 - What are the implications if I have a Division 7A loan agreement in place?
 - What are the rate of return methodologies?

Trusts— dead yet?

Ray Cummings
Executive Director – Tax Consulting
Melbourne

- Do these rate of return methodologies give me a better outcome than having a Division 7A loan agreement in place?
- Should I just transfer the business into a company and then I don't need to worry about any of this?
- Do I need to amend the Trust Deed?
- Can I still stream income and capital gains to particular beneficiaries.

Answers to the questions

Unfortunately there is no one-size-fits-all answer to these questions.

One thing that is clear is many businesses operating in trusts will now have potentially significant cash flow issues as they will no longer be able to retain profits indefinitely in a 30% tax paid environment. Compliance with Division 7A will essentially require the company to pay a dividend and that will mean shareholders will have to pay additional tax. The outcome is the same with the ATO rate of return methodologies, although the timing may be different.

Operating a business through a company will not face this cash flow disadvantage but there are trade offs in relation to capital gains. This occurs as access is available to the 50% CGT discount for individuals reviewing a distribution of a capital gain made by a trust. This is not a possibility if an asset is sold by a company. In effect, the amount of capital gains tax is doubled in a corporate structure.

The other difficulty with the corporate structure is whether or not a pre-existing business can be transferred into the corporate structure without crystallising a tax liability. There is CGT roll-over relief but the matters need to be considered carefully.

Trust Deeds should be reviewed very carefully, particularly in relation to definitions of income and in relation to the trustee's distribution powers. If amendments are required, these should only be made if they do not cause a resettlement of the trust.

Whilst the ATO withdrew a number of rulings in its response to Bamford, it also made a statement that it would accept

past practice in relation to distributions up to 30 June 2010 provided there has been no 'deliberate attempt to exploit' the legislation. This may well beg the question if the ATO takes exception to a particular treatment.

Where to from here?

There is some suggestion that the ATO is still reviewing the rate of return methodology to only apply this approach where the trust has applied the funds for the private benefit of one of the individuals related to the trust. However, there is no firm program or plan at this stage for release of a revised view.

In relation to the Bamford issues such as treatment of capital gains and streaming of income, the ATO has stated that it is reviewing all of these associated issues. Hopefully they will provide us with some meaningful guidance well before 30 June 2011.

New Baker Tilly Firm in China

Vocation International CPAs (VICPA) has joined the Baker Tilly International Network and will re-brand as Baker Tilly China. VICPA is headquartered in Beijing and has offices in all of the other major financial centres including Shenzhen, Shanghai and Hunan. It is currently ranked 9th in China. This new member firm will provide a strong and important presence for the Baker Tilly International

network in China at a time of enormous change and opportunity for the accounting profession and for businesses wishing to do business both inbound and outbound.

For more information on Baker Tilly International in the Asia Pacific Region, please consult your local Pitcher Partners contact.



Getting the Numbers Right

Michael Langhammer, Partner/Executive Director –
Business Advisory and Assurance, Melbourne

Andrew Clugston, Senior Manager –
Business Advisory and Assurance, Melbourne

Whilst Australia continues to defy the global economic downturn, constrained credit conditions have hampered the property industry's attempts to finance new projects as well as refinance existing assets. Now more than ever, presenting a professional, complete and accurate finance proposal has become crucial in securing finance.

Pitcher Partners has regularly worked closely with its property developers and property investor clients to procure finance. Recent experiences combined with open and frank discussions with senior bankers have taught us a great deal about presenting a property finance proposal to maximise the chances of success in the current economic environment.

Property developers – get the numbers right

It might sound strange but the inability of developers to accurately forecast cash flow requirements, in particular peak debt, continues to frustrate many bankers with the risk that the success of finance proposals may be jeopardised.

Bankers have confirmed that property developers regularly approach banks without preparing a detailed monthly cash flow forecast. Such forecasts should take into account the impacts of staged settlements, GST facilities and realistic finance costs based on the monthly loan balance.

Critical to any financial modelling is the ability to undertake some sensitivity analysis and consider some 'what if' scenarios. For example what if:

- Construction is delayed by 3 months
- 5% of pre-sales fail to settle
- Unsold lots do not sell
- Impact of rental guarantees

Too often this analysis is left up to the banker to model which is less than ideal for the developer on two counts.

Firstly, banks are currently inundated with new applications for property projects to finance whilst being faced with limited capital to lend. Any proposal requiring significant work to be undertaken by the banker risks being placed in the 'too hard basket'.

Secondly, providing no cash flow or sensitivity analysis leaves the bank to draw their own conclusions as to the risk profile of the project. The developer will have little opportunity to review the analysis presented for credit approval. In our experience this is why some credit approved offers come in at substantially lower than expected LCRs (Loan to Cost Ratio) or higher margins.

Evidence of risk mitigation

Developers spend much of their time and effort de-risking their projects. This often results in several strategies available to mitigate most major risks. However, these strategies are rarely communicated to the bank in a clear and concise format.

Bankers have commented that this area of the finance application receives considerable attention from their credit committees but too often the bank receives little input from the developer. Any banker with sound property experience will be able to identify most of the major risks but will rarely be aware of all the work undertaken to mitigate these.

A finance proposal should always include a section devoted to risk assessment. This assessment involves the identification of

risks, attributes a probability of the risk occurring (high, medium, low) and assesses the magnitude of the financial impact. In addition, the analysis should detail the various mitigating circumstances and actions that have been undertaken to help address each risk.

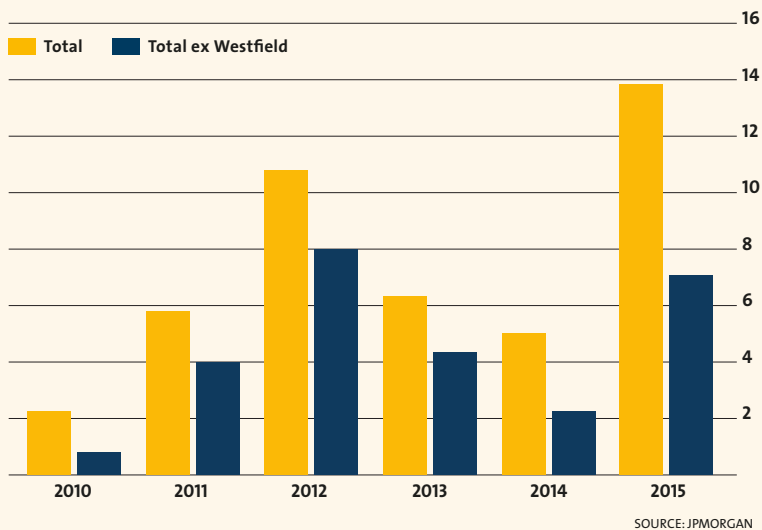
Property investors – don't get left behind in the rush

Property investors unfortunate enough to have gone through the refinancing of a property post 2008 can confirm that pre Global Financial Crisis 'GFC' gearing levels are a thing of the past. Banks have reduced Loan to Value Ratios 'LVRs' by around 10% across all property classes. With stagnant or declining commercial property values, investors are faced with the task of bridging the gap between their previous debt facility and the reduced level of gearing currently offered by the banks.

Some of our clients have recently succeeded in bridging this gap via mezzanine finance and private equity from private investors and superannuation funds. However, obtaining such finance can take time and obtaining the approval of the senior lender is not always guaranteed. As such, this process should not be left to the last minute.

Adding to the difficulty facing investors is the waive of property debt set to expire within the next two years. The following graph, prepared by JP Morgan and reported in the Australian Financial Review on 8 July, illustrates the increase in debt due to expire over the next five years. In particular, 2012 and 2015 look set to see refinancing activity

REIT SECTOR DEBT EXPIRY PROFILE FINANCIAL YEARS (\$BN)



among Real Estate Investment Trusts peak at 7 to 8 times the current levels. No doubt this refinancing activity will be replicated in the private sector.

Such refinancing activity will place additional strain on your bank's property division. This may result in delays in processing applications and less time spent structuring the finance to best suit your needs.

Just as concerning is the impact this level of refinancing may have on available funds for mezzanine finance and private equity. Developers and investors seeking to refinance a property within the next couple of years would be well advised to start the process now.

As with developers, a detailed finance proposal should be prepared by investors seeking to refinance an asset. The proposal can be provided to the bank as well as potential mezzanine financiers and private equity participants. In addition to the normal contents of a finance proposal, the document should focus on:

- Quality of the tenants
- Weighted Average Lease Term Duration (WALD)
- A funding term aligned with WALD
- Forecast Interest Cover Ratio (including mezzanine interest)
- Demonstrate that the mezzanine financier is protected even with a possible drop in the future value of the asset
- Sensitivity analysis focused on varying interest rates, rental reviews and valuations

Whilst mezzanine finance or private equity may not ultimately be required, given the uncertainty surrounding credit markets it is prudent to explore the options available well before your current facility expires. Considerable time may be required to ensure the bank is comfortable with the mezzanine financier and any possible second mortgage arrangement.

In the event that mezzanine finance is not a viable option, introducing an equity partner may be the only alternative to selling the asset. Introducing an equity partner brings about several taxation issues including Stamp Duty and Capital Gains Tax. This is yet further evidence of the need to start planning early.

A strategy of deferring the refinancing process until the last minute, in the hope that things will improve, is fraught with danger. A little time now can avoid many sleepless nights in the future.

We would be pleased to talk to you about how we can assist in providing cash flow budgets and framing finance proposals that will address the key issues that will be considered by a financier.

Update on Global Accounting Standards

"The International Accounting Standards Board (IASB) is working on a number of significant projects including revenue recognition and leasing.

In the meantime, the IASB continues to seek political acceptance for the changes that it has made to its constitution. This is against the background of a lack of progress on the G20's commitment to a single set of global accounting standards, although the Securities Exchange Commission (SEC) has issued a further paper.

The move to global accounting standards is seen as an important step in making financial markets around the world more transparent. There are still major difficulties for US adoption as a result of their legal treatment of accounting compliance which could lead to difficulties in applying principle based standards.

Many countries are now discussing the approach they should adopt for non-public interest entity financial reporting. The IASB's International Financial Reporting Standards (IFRS) for SME's is beginning to be accepted, with 15 countries already having introduced it, and many more considering their position. This standard recognises the primary target for IFRS's are public interest companies and that complex IFRS's may not be the most appropriate form for other companies."

Paul Ginman
Chief Operating Officer
Baker Tilly International

In Australia

In Australia the AASB has adopted an alternative path with the introduction of the 'Reduced Disclosure Regime' (RDR) which is available for the year ended 30 June 2010 and with mandatory application in 2013. Companies reporting under the Corporations Act 2001 in Australia have been required to adopt the measurement and recognition criteria of the IFRS's since 2006, and therefore the RDR provides a half-way house to eliminate some of the more extensive disclosures under IFRS. Unfortunately, user need for financial information has remained a second consideration. Both IFRS for SME's and the RDR use full IFRS as a starting point with the primary focus being to reduce complexity rather than to provide relevant information.

Dianne Azoor Hughes
Technical Partner/Executive Director –
Audit & Accounting
Melbourne

Business Exits

Maximising Value **PART 01**

Matthew Pringle
Partner/Executive Director –
Transaction Services, Melbourne

Rohan Filer
Director – Transaction Services, Melbourne

As more and more business owners approach retirement they are looking for ways to fund their retirement as well as passing wealth on to the next generation. Liquidating one of their most significant assets – their business – is one obvious course of action; but is it always the right course to pursue? What are the alternatives and how do you maximise value?

You've spent many years building a business and growing its value. Ultimately, you want to capture that value so it can be enjoyed by you and your family.

The key is to maximise the value you extract and this requires planning and preparation. Rushing headlong into a sale process may result in you leaving behind value that you otherwise could have taken away.

Ownership vs management

Before you even consider exit options, a clear distinction needs to be made between your role as the owner of a business (which involves a financial commitment) and your role as the manager of that business (which involves a time commitment). These commitments are different and an exit may involve the reduction in either one or both.

Although distinct in many cases, it is a change in ownership that acts as a catalyst for a change in management. Selling your business and bringing in a new owner who can also run the business allows you to exit from your role as manager either immediately or over a transition period. This can be one of the most significant reasons for selling your business as it provides a route for the business to reduce its dependency on you, allowing you to move on.

Setting in place an appropriate exit strategy that deals with both your financial and time commitments can ensure you maximise the wealth you extract from the business as well as your ability to enjoy that wealth.

So how do you maximise value?

You will often hear people talk about buying or selling businesses for a multiple

of earnings or profits. So, in simple terms you should be considering two basic questions:

How do I maximise the earnings of my business?

How do I maximise the multiple someone will be willing to use to value my business?

Maximising earnings may be achievable through an analysis of your business and implementing measures to increase revenue and/or reduce costs. It may also be achieved through acquiring another business or businesses. In either case you should analyse your business and, with appropriate advice, put in place a strategy which seeks to enhance your earnings.

The multiple someone may be willing to pay for your business, is broadly based on two key factors: growth; and risk. Maximising your growth prospects and reducing the risks inherent in your business may lead to a higher value for your business. Once again, a careful analysis is required to establish the best way to achieve this outcome.

Acquisitions as a route to disposal

It may seem counter-intuitive to suggest acquisitions as the route to a disposal, but as a business owner looking for an exit you should remain patient and focused on maximising value.

An acquisition can increase your earnings – importantly not just by the level of the earnings acquired, but by a further amount where additional revenues and cost savings can be found through combining businesses. These 'synergies' can lead to the combined business generating higher income than the sum of the individual parts.

Just as importantly, an acquisition can increase the multiple that a purchaser may be willing to ascribe to your business. Through a combination of having a higher growth trajectory and reduced risks, a larger business may put you in a position where you can seek a higher return on an exit for every dollar of earnings.

Whilst taking an acquisitions path prior to exit may not suit everyone, it should be considered as one of a number of options.

Partial disposal

A further option may be to sell a stake in the business rather than the entire business. This may provide a number of benefits, including:

- Additional capital injected into the business which can assist in a growth plan
- The introduction of a new manager with some skin in the game who can drive the business forward
- The opportunity to take some cash off the table which you can invest elsewhere, use as a retirement nest egg or pass on to the next generation
- The ability to maintain a stake in the company which can continue to grow and may generate dividends or longer term growth.

A partial disposal may involve the introduction of a financial investor, for example a venture capital or private equity fund, or a strategic partner who can help develop the business into further markets and may ultimately provide an option for a full exit.

In either case, the key is to ensure your long term value is maximised. A partial disposal allows you to get access to some cash now whilst ensuring the continued viability and growth of the business.

In the next issue we will explore the process of getting a business ready for sale, conducting a sale process and moving beyond.

How Pitcher Partners can help

Pitcher Partners offers a full Mergers & Acquisitions advisory service, including:

- Developing a disposal strategy
- Value assessment
- Preparing a business for sale
- Buyer identification
- Marketing a business
- Running a sale process
- Negotiation of terms
- Post transaction advice.

We also provide a range of other services, such as wealth management and taxation advice.

For further information, please call your local Pitcher Partners contact.

Client Profile

Australian Digital Testing is an Australian company which provides digital TV conformance testing and energy efficiency performance testing and research services. The company is in a unique position providing software updating services to manufacturers of digital TV's, digital recorders and set top boxes.



Australian Digital Testing

Wayne Wilson
Managing Partner
Sydney

Australian Digital Testing has a datacasting licence and has agreements in place with the ABC to transmit software updates over the air to digital receivers anywhere in Australia. This allows a TV manufacturer to fix software bugs and update the software version seamlessly without any interruption to the viewer. The alternative is comparatively expensive and requires a service call, or the viewer manually connecting their TV to the internet or loading the software update from a memory card or disk.

The company aims to be a centre of excellence in consumer electronics performance testing, research and market investigation for consumer electronic suppliers, government and the broadcasting industry in Australia. In pursuing this goal, Australian Digital Testing already has an impressive list of

major clients including the Department of Broadband, Communications & Digital Economy, the Department of Climate Change and Energy Efficiency, Sony, Panasonic, Samsung, LG, Toshiba and Sanyo.

At the end of 2009 Australian Digital Testing was commissioned by the Government to report on the issues facing residents in buildings such as apartments, townhouse developments and public facilities with receiving free-to-air digital TV in a number of areas. This then led to centre stage at the Broadcast Asia industry forum in Singapore where stakeholders were able to learn from Australian Digital Testing's experience with consumer hardware necessary to enable digital TV reception.

"This was an important platform for us to launch our next phase, which is to export the testing and research services to South East Asia," Director, Tim O'Keefe said.

Tim O'Keefe has a longstanding association with Pitcher Partners Sydney. This relationship began in 1978 when Tim was an employee of the Sydney firm. Tim then left to pursue other opportunities, however Managing Partner Wayne Wilson has continued to support Tim along the way, providing tax and business advice.

"We are very proud to have Tim as a part of the Pitcher Partners alumni and are delighted to have played a small part in the beginnings of his successful career and continue to be involved in his various business ventures," Wayne Wilson said.

Advocacy

Pitcher Partners working with legislative bodies to bring about fairer legislation for our clients

Financial reporting requirements in Australia continue to be plagued with a 'quick fix' approach to finding a solution to the onerous reporting requirements that were introduced with IFRS in 2005 for all entities reporting under the Corporations Act 2001. Pitcher Partners has actively participated in the differential reporting debate calling for more relevant accounting standards for privately held entities. Regrettably the alternatives put forward by the AASB in February 2010

failed to recognise user needs, seeking to simplify requirements that are largely not fit for purpose. Pitcher Partners has supported the Reduced Disclosure Regime rather than introduction of IFRS for SME's. IFRS for SME's requires mandatory amortisation of goodwill, prohibits the revaluation of property and includes various other measurement criteria which are not necessarily suitable for the non-listed market. This debate is not yet over!

What's New

New Partner Announcement



Pitcher Partners Sydney is pleased to announce that Steven Fornasaro has joined the Private Clients team as a partner from 2 August 2010.

Steven's specialist expertise in the film and television industry including raising capital for film funding and the conduct of production and royalty audits complements Pitcher Partners' experienced Private Clients team. Steven will add significant value to developing businesses by partnering with them from set up through to the growth and maturity stages of the business lifecycle.

Pitcher Partners sleep out for charity



On a chilly night in mid June, Managing Partner – Perth, Bryan Hughes, slept on the WACA ground in a cardboard box to raise money for the inaugural St Vincent de Paul Society CEO sleepout. The event raised over \$2 million nationally to support the homeless.

Congratulations

Pitcher Partners Melbourne congratulates Brian Lee Master Builder Pty Ltd who recently won the HIA Australian Townhouse/Villa Development of the Year 2010, having previously won the same award for the best development in Victoria.

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For comments on this edition or if you wish to be removed from the *Contact* mailing list please email us at editor@pitcher.com.au

Tax Diary – October, November & December 2010

21 October 2010

Lodgement and payment of annual PAYG instalment notices.

Lodgement and payment of the September monthly BAS/IAS.

Lodgement and payment of first quarter 2010/2011 year PAYG instalment activity statement for head companies of tax consolidated groups.

28 October 2010

Lodgement and payment of the first quarter 2010/2011 year quarterly BAS/IAS.

Payment of superannuation guarantee contributions for the first quarter.

31 October 2010

Lodgement of PAYG withholding annual reports (interest, dividend and royalty payments paid to non-residents).

21 November 2010

Lodgement and payment of the October monthly BAS/IAS.

1 December 2010

Payment of 2010/2011 income tax for taxable large/medium business companies (including head companies of tax consolidated groups with a member that is a large/medium business) and superannuation funds. Tax returns for large/medium business companies and superannuation funds are due for lodgement by 15 January 2011.

21 December 2010

Lodgement and payment of the November monthly BAS/IAS.



MELBOURNE

Don Rankin, Managing Partner
Level 19, 15 William Street
Melbourne VIC 3000

Telephone +61 3 8610 5000
Facsimile +61 3 8610 5999
partners@pitcher.com.au

SYDNEY

Wayne Wilson, Managing Partner
Level 22, MLC Centre, 19 Martin Place
Sydney NSW 2000

Telephone +61 2 9221 2099
Facsimile +61 2 9223 1762
partners@pitcher-nsw.com.au

PERTH

Bryan Hughes, Managing Partner
Level 1, 914 Hay Street
Perth WA 6000

Telephone +61 8 9322 2022
Facsimile +61 8 9322 1262
partners@pitcher-wa.com.au

www.pitcher.com.au

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ADELAIDE

Tom Verco, Principal
160 Greenhill Road
Parkside SA 5063

Telephone +61 8 8179 2800
Facsimile +61 8 8179 2885
partners@pitcher-sa.com.au

BRISBANE

Chris Ball, Managing Partner
Johnston Rorke
Level 30, Central Plaza 1
345 Queen Street
Brisbane QLD 4000

Telephone +61 7 3220 0355
Facsimile +61 7 3221 7779
partners@pitcher-qld.com.au

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