



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2018/2561**

Re: **Angas Securities Limited**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **Deputy President Britten-Jones**

Date: **23 January 2019**

Date of written reasons: **23 January 2019**

Place: **Adelaide**

The decision under review is affirmed.

Deputy President Britten-Jones

Catchwords

CORPORATIONS – half-year financial reports and audit of debenture issuer – exemption orders – whether company should be relieved from complying with audit requirements – balancing the benefits and burdens of compliance - whether compliance imposes an unreasonable burden – no unreasonable burden – decision affirmed

Legislation

Corporations Act (Cth) ss 302, 309(4), 313, 318(4), 320, 340(1) and 342

Cases

The Trust Company (Nominees) Ltd v Angas Securities Limited (2015) FCA 772

Re Incat Australia Pty Ltd and Another v ASIC (1999) 33 ACSR 132

Incat Australia Pty Ltd and Another v ASIC (2000) 33 ACSR 462

Dynamic Supplies Pty Ltd v ASIC [2010] FCA 806

Brightstar Logistics Pty Ltd v ASIC (No 2) (2010) 78 ACSR 429

Directors of Liquid Air (WA) Pty Ltd v Commissioner of Corporate Affairs (1989) 15 ACLR 29

Re SAQ v ASIC (2005) 86 ALD 429

Secondary Materials

ASIC Regulatory Guide 43

REASONS FOR DECISION

Deputy President Britten-Jones

23 January 2019

1. The applicant (Angas) has applied to the respondent under the *Corporations Act 2001* (the Act) for exemption with respect to certain obligations that apply to it as a disclosing entity. The respondent declined to grant the relief sought by Angas and gave reasons for its refusal on 16 April 2018.
2. Angas has applied for review of that decision.
3. The issue for determination by the Tribunal is whether Angas ought to be relieved of its obligations to comply with certain auditing requirements (the auditing requirements) set out in sections 302 (b) and (c), 318 (4) and 320 of the Act in so far as they relate to a financial report of Angas for the half year ending 31 December 2017. That financial report has been lodged with the respondent and has been made available to debenture holders. The relief sought is limited to the obligation to obtain and provide an audited report within 75 days after the end of the half year.

Background Facts

4. The following facts are not in dispute.
5. Angas holds an Australian Financial Services licence to issue fixed interest securities. As at 10 July 2015, it had issued \$219.65 million of fixed interest debenture securities and those funds were lent to borrowers secured by first ranking mortgages over real property (the Debenture Business).
6. Angas is also the responsible entity and fund manager for to managed investment schemes, being Angas Contributory Mortgage Fund (ACMF) and Angas Prime Income Fund (Prime).

7. The Debenture Business is subject to a trust deed. The trustee is the Trust Company (Nominees) Ltd (the Trustee). Angas has granted security to the Trustee for the monies owing to the debenture holders over all its real and personal property and assets.
8. As an issuer of debentures, Angas is a disclosing entity within the meaning of the Act. It is required by sections 302 and 320 to prepare half-year financial reports and to have those reports audited or reviewed. The financial report, director's report and auditor's report are required to be lodged with the respondent within 75 days of the end of the relevant half-year. Angas is also required to provide a copy of those reports to the Trustee within the same time frame.¹
9. On 28 February 2018, Angas applied to the respondent under section 340 of the Act for relief from the requirement to have the financial reports in respect of the half-year ending 31 December 2017 reviewed (and consequently to provide an auditor's report). It made the application 15 days before the deadline for lodging the reviewed or audited financial report expired. It sought such relief on the basis that the burden associated with complying was unreasonable.
10. On 15 March 2018, the respondent communicated via email to Angas that it was minded to refuse relief.
11. On 19 March 2018, Angas lodged with the respondent its half-year financial reports for the half-year ending 31 December 2017 without it being reviewed by an auditor.
12. On 16 April 2018, the respondent refused the request for relief.

The Federal Court Litigation and the Run-Off Proposal

13. To understand the context of the current application it is necessary to refer to the litigation between the Trustee and Angas in the Federal Court. Justice Beach in the *Trust Company (Nominees) Ltd v Angas Securities Ltd* (2015) FCA 772 provided reasons for his judgement dated 28 July 2015. The reasons for judgement of his Honour included the following:

¹ *Corporations Act 2001* (Cth), s 318.

- (a) In around October 2012, the Trustee expressed concern in relation to Angas' financial position and performance.
 - (b) The Trustee engaged its own accountants to conduct a review of Angas.
 - (c) That review was concluded in March 2015. On 29 April 2015, the Trustee commenced proceedings in the Federal court seeking, inter alia, a freeze on payments to debenture holders and an order that the security granted to the trustee was enforceable immediately.
 - (d) The hearing of the Trustee's originating application commenced on 2 June 2015.
 - (e) On the second day of the hearing (9 June 2015), the Trustee and Angas agreed to orders being made by consent for a procedure to be put in place for Angas to put a commercial proposal to a meeting of debenture holders (the run-off proposal). The agreement involved an extraordinary resolution being put to the debenture holders for their approval at a meeting to be held on 10 August 2015.
 - (f) The objective of the run-off proposal was the realisation of Angas' loan portfolio and other assets to enable the repayment of all debentures in full and in an orderly and equitable manner by 31 December 2016.
14. The orders made by Justice Beach on 9 June 2015 are set out in an annexure to these reasons. Pursuant to those orders a loans realisation committee (LRC) was formed comprising a representative of the Trustee, a representative of Angas and an independent appointee to be agreed or determined by the court. Paragraph 8 of those orders required Angas to provide the loans realisation committee with updated information as to assets held by it on a monthly basis. This information was set out in paragraph 3 of the orders made on 9 June 2015.
15. There was a further hearing on 14 August 2015 before Justice Beach who noted that there was a meeting of debenture holders on 10 August 2015 at which the proposed extraordinary resolution was approved by the debenture holders.
16. In 2016, the period of the run-off was extended to 30 June 2017. In 2017, the run-off period was further extended to 30 June 2019. These extensions were approved by further hearings in the Federal Court on 19 August 2016 and 1 September 2017 respectively.

The Evidence from Mr Hower and the Documents

17. Angas called its managing director, Matthew Hower, to give evidence. His evidence was largely uncontroversial. Mr Hower provided a written witness statement and was then cross-examined by counsel for the respondent. I make the following factual findings based upon his evidence.
18. The Debenture Business of Angas has been in run-off since 14 August 2015. This means that the debenture holders' investments with Angas have been frozen since that date. Debenture holders are not able to redeem their debenture investments at will. Debenture holders receive interim payments from Angas throughout the run-off. As at 1 August 2018, Angas has paid 55 cents in the dollar to its debenture holders and has 45 cents in the dollar still to be paid. As at the date of the hearing, the amount paid by Angas had increased to 56.5 cents in the dollar.
19. Angas is also the responsible entity and fund manager of the two managed investment schemes referred to above. Angas manages approximately \$85 million of investor funds under these two managed investment schemes. In the financial year ending 30 June 2017, Angas received management fees with respect to the managed investment schemes of \$4,363,161. In the previous year, ending 30 June 2016, management fees were \$2,366,474.
20. There is some overlap between investors in Angas' debenture business fund and the two managed investment schemes. With respect to Prime, 126 of the 293 accounts are held by debenture holders. With respect to ACMF, 11 of the 101 active accounts are held by debenture holders.
21. The LRC was established pursuant to the orders of Justice Beach on 9 June 2015 and is comprised of Mr Clive Guthrie, non-executive director of Angas, Mr Chris Green for the Trustee, and Mr John Powell independently appointed by the court. Angas has not informed Justice Beach of the application to be relieved from the auditing requirements.
22. Pursuant to the orders made on 9 June 2015, the LRC has responsibility to receive and consider reports from Angas on the progress of the run-off. A bundle of these monthly reports were provided to the Tribunal. They contain:

- (a) a schedule setting out the forecasted timing of the election by Angas from the realisation of its remaining assets;
 - (b) a debenture loan portfolio run-off summary which provides key information about remaining loans, amounts outstanding, and commentary on the status of Angas' realisation of the security for the loans;
 - (c) security summaries for key borrower groups;
 - (d) a management cash flow forecast setting out forecast inflows and outflows for the remainder of the run-off;
 - (e) a schedule of subordinate matured loans from related parties of Angas to Angas' borrowers;
 - (f) a schedule of the bench balance and maturity analysis; and
 - (g) a repayment schedule record of realisations of loan assets and payments since the commencement of the run-off.
23. The LRC is provided the opportunity at monthly meetings to ask questions about the content of the monthly reports and the run-off generally.
24. In addition to the monthly reports, Angas also engages in a number of reporting practices, including:
- (a) quarterly run-off updates to the debenture holders of Angas;
 - (b) updates to the National Stock Exchange of Australia;
 - (c) monthly and quarterly reports to the Trustee; and
 - (d) preparation and dissemination of audited end of financial year reports, the last of which was prepared for the financial year ending 30 July 2017.
25. The Angas financial statements up to 30 June 2018 audited by Deloitte are expected to be provided later this week.

26. On 15 March 2018, Angas lodged a half-year financial report for the six-month period ending 31 December 2017 with the National Stock Exchange of Australia who declined to release it to the market as the half-year report was not reviewed by Angas' auditor. The half-year report for the period ended 31 December 2017 has been lodged with the respondent as at 19 March 2018.
27. On 26 April 2018, a public announcement was made on the website of Angas regarding the refusal by the respondent to grant the relief sought by Angas in its application. Angas said that if the relief sought was granted then it would still prepare and lodge a half-year report (which has been done), but it would avoid the significant cost to debenture holders of an external review as well as the significant distraction to Angas management associated with the auditor review process. There have been no queries received by Angas from the debenture holders about this announcement but Angas has not canvassed the views of the debenture holders with respect to whether the half-year financial report for the six-month period ending 31 December 2017 should be audited or reviewed externally.
28. Deloitte has not provided a quote for the provision of its review as auditor for the half-year financial report for the six-month period ending 31 December 2017 but, based on previous reports, the costs are likely to be between \$350,000 and \$400,000. In addition to this cost, there is a cost to Angas for the time spent by its management and staff during the audit and review processes. It is contended by Angas that the total cost will amount to something in excess of \$500,000.
29. On 28 November 2018, Angas applied to the respondent for an extension of time within which to hold its Annual General Meeting (AGM). The reason stated for the extension is that Angas had been informed by its auditor that the audit of its financial statements for the year ending 30 June 2018 were expected to be finalised on or around 12 December 2018; because those financial statements would not be fully audited in time to distribute to shareholders, Angas requested an extension to hold its AGM to 28 February 2019. The respondent refused the request for an extension by letter dated 16 January 2019. No date has been set for the AGM.

30. In the period 1 July 2015 to 26 July 2017, Angas spent \$16.2 million running its mortgage Debenture Business. Angas has forecasted spending a further \$12.1 million running its business over the next two years.
31. The auditor's report from Deloitte for both the half-year ending 31 December 2016 and the full year ending 30 June 2017 drew attention to matters in Angas' financial reports for the same periods which indicated that a material uncertainty exists that may cast significant doubt on Angas' ability to continue as a going concern. The report for the period ending 31 December 2016 noted that the performance of Angas during that period varied materially from the run-off proposal.
32. The unaudited half-year financial statements to 31 December 2017 include the following matters:
- (a) a gain on the derecognition of financial liability in the amount of \$57,975,740 without which Angas' reported result for the period would be reduced from a profit of \$43,303,136 to a loss of \$14,672,604;
 - (b) net cash outflows from financing and investing activities were \$13,054,985, an increase of \$10,548,222;
 - (c) there was material uncertainty as to whether the consolidated entity would continue as a going concern;
 - (d) Angas had breached the conditions of its Australian Financial Services licence prior to 1 September 2017; and
 - (e) the forecast cash surplus after paying debenture holders 100 cents in the dollar had reduced from \$410,730, as put to debenture holders in support of the most recent run-off proposal, to \$117,398.
33. Angas advised in the market update as to progress of the debenture run-off dated 17 June 2019 that:
- (a) the progress of realisation of all available assets has been slower than expected;
 - (b) \$133,150,588 has been distributed by Angas to debenture investors since commencement of the run-off;

- (c) the costs of operating Angas have been reduced with the direct operating costs being broadly covered by revenue from the continuing funds management businesses known as Angas Prime and Angas Direct. Angas is now two businesses. One is in run-off being the debenture fund. The other is an ongoing funds management business. The revenue earned from running the ongoing business defray the costs of finalising the former debenture business.
- (d) The debenture run-off expires on 30 June 2019. The view of the directors is that the run-off will not be finalised by then.
- (e) The principal return to investors is now projected to be less than 100 cents in the dollar.

Third party submissions

- 34. The chair of the LRC and the Trustee were consulted by the respondent in respect of Angas' application for relief.
- 35. The chair of the LRC supported the application on the basis that information as to the quantum of money that debenture holders were likely to receive was contained in the reports provided monthly, the investor communications by Angas, and due to the cost.
- 36. The Trustee did not support the application by Angas for relief "or any relaxation in the independent oversight of ASL's financial statements provided by the company's auditors". The Trustee's submission included the following matters:
 - (a) audited half-year and year financial statements are an important check and balance on Angas' financial position;
 - (b) the views of debenture holders on the proposed change to Angas' reporting obligations have not been canvassed;
 - (c) the 30 June 2017 audited financial statements had been lodged two months late;
 - (d) the Trustee had concerns about the \$39.92 million write down of Angas' liabilities to debenture holders and the explanation that had been provided;

- (e) the reporting to the LRC does not correspond to the level of reporting in audited financial statements, and reporting and forecasts in these reports do not generally correspond to Angas' actual performance;
- (f) the Federal Court's role is limited and it does not provide independent monitoring of Angas' operations;
- (g) the quarterly reports to debenture holders are anecdotal and not a substitute for the bi-annual financial statement and audit process;
- (h) the audit fees referred to in Angas' application for relief are not an excessive expense in the context of Angas' average annual running costs of between \$5-\$6 million and its distressed \$120 million debenture fund; and
- (i) certain covenants in the Trust deed which provided a tool to monitor the debenture business' performance had been removed as part of the court approval of the run-off, and the removal of the benefit of audited financial statements would heighten the trustee's concerns regarding the lack of independent and thorough monitoring of Angas' run-off process.

The Legislative Scheme and Case Law

37. The default position under the Act is that a disclosing entity must prepare a financial report and directors' report for each half-year.² That report must be audited or reviewed in accordance with Division 3 and obtain an auditor's report.³ Once this has been obtained, the disclosing entity must lodge the financial report, the directors' report and the auditor's report on the financial report with the respondent.⁴
38. The information that must be included in the half-yearly report is set out in section 303 of the Act. Essentially, the half-yearly report must include financial statements⁵, notes to financial statements⁶ and the directors' declaration.⁷

² Ibid s 302(a).

³ Ibid s 302(b).

⁴ Ibid s 302(c).

⁵ Ibid s 303(2).

⁶ Ibid s 303(3).

39. The financial report must also comply with both the accounting standards and any further requirements in the regulations⁸ as well as the auditing standards.⁹ The report must give a true and fair view of the financial position and performance of the disclosing entity.¹⁰
40. The importance of engaging an auditor to review the half-year financial report is that the auditor must report to members on whether the auditor became aware of any matter in the course of the review that makes the auditor believe that the financial report does not comply with Division 2¹¹ and then provide a written explanation as to why the auditor believes the financial report is not compliant with the Act.¹²
41. Where the audit is of debenture issuers, as is the case in this matter, the auditor must give the trustee for debenture holders copies of the report and certificate.¹³ Moreover, if the auditor does form a view that the financial report includes matters prejudicial to the debenture holders, then the auditor must provide the trustee for debenture holders with a copy of the report within 7 days.¹⁴
42. The disclosing entity must also provide the trustee for debenture holders with a copy of the half-year financial report, directors' report and auditor's report within 75 days after the end of the half-year.¹⁵ The disclosing entity must also lodge these documents with the respondent within 75 days after the end of the half-year.¹⁶
43. In certain situations, the respondent can order that a disclosing entity is relieved of its obligations under sections 302, 303, 304, 305, 307A, 309, 313, 318 and 320. The power to do this is contained in section 340 of the Act which states that the respondent may

⁷ Ibid s 303(4).

⁸ Ibid s 304

⁹ Ibid s 307A(1)(b).

¹⁰ Ibid s 305(a).

¹¹ Ibid s 309(4).

¹² Ibid s 309(5).

¹³ Ibid s 313(1).

¹⁴ Ibid s 313(2).

¹⁵ Ibid s 318(4).

¹⁶ Ibid s 320.

make an order in writing relieving a disclosing entity from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4).

44. In deciding whether an exemption is warranted under section 340 of the Act, section 342 of the Act stipulates the criteria for making an exemption order. Section 342 states that to make an order under section 340, 340A, 341, or 341A, the respondent must be satisfied that complying with the relevant requirements of Parts 2M.2, 2M.3 and 2M.4 would:
 - (a) make the financial report or other reports misleading; or
 - (b) be inappropriate in the circumstances; or
 - (c) impose unreasonable burdens.

45. In deciding for the purposes of subsection 342(1) whether the audit requirements for a proprietary company, or a class of proprietary companies, would impose an unreasonable burden on the company or companies, the respondent is to have regard to:
 - (a) the expected costs of complying with the audit requirements; and
 - (b) the expected benefits of having the company or companies comply with the audit requirements; and
 - (c) any practical difficulties that the company or companies face in complying effectively with the audit requirements...; and
 - (d) any unusual aspects of the operation of the company or companies during the financial year concerned; and
 - (e) any other matters that the respondent considers relevant.

46. In assessing expected benefits under subsection 342(2), the respondent is to take account of:
 - (a) the number of creditors and potential creditors; and
 - (b) the position of creditors and potential creditors (in particular, their ability to independently obtain financial information about the company or companies); and

(c) the nature and extent of the liabilities of the company or companies.

47. In assessing whether a requirement under the Act imposes an unreasonable burden on a disclosing entity, Deputy President Forrest stated the following:

while a burden that is overwhelming is an unreasonable one the converse is not necessarily true. Whether a burden may fairly be described as 'unreasonable' is essentially one of fact requiring an evaluation of the evidence, having regard to the nature of the requirements to be performed, keeping in mind the policy objective of the legislation that companies of economic significance lodge accounts and the extent of economic detriment (if any) likely to flow to the applicants as a result of compliance.¹⁷

48. This statement of the law was upheld by Heerey J in *Incat Australia Pty Ltd and Another v Australian Securities and Investments Commission* (2000) 33 ACSR 462.

49. Although not directly on point, counsel for the respondent referred the Tribunal to two Federal Court decisions for guidance: *Brightstar Logistics Pty Ltd v Australian Securities and Investments Commission (No 2)* ("*Brightstar*")¹⁸ and *Dynamic Supplies Pty Ltd v Australian Securities and Investments Commission* ("*Dynamic*").¹⁹

50. As stated by Reeves J in *Dynamic*, the combined effect of sections 342(1)(c) and 340 of the Act is to establish a two-stage process. First, whether under section 342(1)(c) the decision-maker can be satisfied that complying with the relevant requirement under the Act would impose an unreasonable burden on the party seeking the relief.²⁰ Second, whether the respondent should exercise its discretion to grant relief from that requirement under section 340(1).²¹

51. The first stage in the process requires the Tribunal in review to "engage in a balancing exercise between the benefits associated with public disclosure of the information in the

¹⁷ *Re Incat Australia Pty Ltd and Another v ASIC* (1999) 33 ACSR 132, [20].

¹⁸ (2010) 78 ACSR 429.

¹⁹ (2010) 79 ACSR 319.

²⁰ *Ibid* [25].

²¹ *Ibid*.

financial report, on the one hand, and the burdens imposed on the company by such public disclosure, on the other".²²

52. Counsel for the Applicant also referred to the decision by Deputy President Forgie in *Re SAQ v Australian Securities and Investments Commission* (2005) 86 ALD 429. In that decision, the Tribunal stated that:

an unreasonable burden is not a matter that is assessed by reference to the company's own terms of reference. The notion of unreasonableness imports an objective standard just as it does in other contexts.²³

The Respondent Regulatory Guide

53. In addition to the legislative scheme and the associated case law, the respondent has complied Regulatory Guide 43 that explains when and how the respondent will exercise specific powers under legislation, how the respondent interprets the law, and the principles underlying the respondent's approach.

54. In accordance with Bowen CJ and Deane J's decision in *Drake v Minister for Immigration and Ethnic Affairs*²⁴, where:

the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the AAT to take into account in reviewing the decision.²⁵

55. The purpose of the audit provisions that are contained in Chapter 2M of the Act is to "provide users with an independent opinion on the information in the financial report".²⁶ They also assist in "maintaining investor confidence, enhancing market efficiency and

²² Ibid [26].

²³ *Re SAQ v Australian Securities and Investments Commission* (2005) 86 ALD 429, 453.

²⁴ (1979) 2 ALD 60.

²⁵ Ibid 69-70.

²⁶ Australian Securities and Investments Commission, 'Regulatory Guide 43: Financial reports and audit relief' (Policy Paper, May 2011) 4, [43.1].

ensuring the accountability of management through the provision of timely and reliable financial information”.²⁷

56. The term “users” should not be construed too narrowly. In *Re Incat Australia Pty Ltd and Another v ASIC* (1999) 33 ACSR 132, the Tribunal stated that “users” should be given a wide interpretation and does not only include present and prospective shareholders, present and prospective creditors and customers.²⁸ Counsel for the respondent suggested that “users” also incorporates current and prospective employees of the company, third-party service providers, and defendants in litigation.
57. In relation to section 342(1)(c), the factors that are relevant in determining whether the requirement from which relief is being sought imposes an unreasonable burden include:
- (a) information needs of users and potential users of the financial report;
 - (b) objectives of the financial reporting and audit provisions; and
 - (c) intentions of the Australian Accounting Standards Board and the Auditing and Assurance Standards Board.²⁹
58. An example of where the respondent will consider a burden to be unreasonable is if complying with the requirement will cause the entity serious economic detriment with *little or no compensating benefit to users of the financial reports* (emphasis added).³⁰ In determining what the needs of the “users” are, the respondent considers who the users of the financial report are likely to be, what their information needs are and how those users are likely to be impacted if relief is granted.³¹
59. It is also noted in the Regulatory Guide that the administrative cost of preparing and lodging financial reports or complying with a particular requirement would rarely of itself be an unreasonable burden as it is the cost of doing business using a corporate structure.³²

²⁷ Ibid.

²⁸ Ibid [43.3].

²⁹ Ibid 9, [43.27].

³⁰ Ibid [43.28].

³¹ Ibid 10, [43.29].

³² Ibid [43.31].

60. Relief will also not be granted because the cost of complying with a financial reporting requirement would impose an unreasonable burden by reducing returns to members due to an entity's poor financial condition.³³
61. The respondent instructs parties that section 340 applications should normally be lodged no later than one month before the end of the financial period for which the relief is being sought.³⁴ Finally, the respondent is not required to grant relief under section 340 even if one or more of the pre-conditions in section 342(1) have been met.³⁵ The power to grant relief remains a discretionary power.

The Contentions of Angas

62. Angas contends that:
- (a) a significant component of Angas' business between 2001 and 2015 was the mortgage debenture business;
 - (b) the requirement to have the half-yearly reports audited imposes an unreasonable burden on Angas;
 - (c) the unique situation of the run-off has led to increasingly time intensive and expensive audit processes throughout the run-off to date;
 - (d) the time and money is spent on audit processes has caused Angas and the debenture holders serious economic detriment and delayed the progress of the run-off. The vast majority of amounts paid to Angas' auditor, Deloitte, are amounts that could otherwise have been paid to debenture holders. The time spent by Angas' management and staff during the audit and review processes is time that could be spent working towards realising Angas' remaining debenture loan assets for the benefit of debenture holders;
 - (e) the expected cost of the auditor review, both in terms of the fees to be charged by Deloitte and the internal cost to Angas of diverging resources to the review, may

³³ Ibid 14, [43.47].

³⁴ Ibid 16, [43.57].

³⁵ Ibid 15, [43.54]

exceed \$500,000. This cost is a serious economic detriment that has little or no compensating benefit to users of the Angas financial reports;

- (f) the principal users of the Angas financial reports are debenture holders whose information needs are satisfied by the provision of unaudited financial statements, the LRC reports, the debenture holder quarterly run-off dates and the market updates prepared by Angas;
- (g) the expected benefits of having the accounts audited are outweighed by the costs of doing so;
- (h) this cost benefit analysis must be considered in the context of the circumstances where there is a regime imposed by the Federal Court involving the trust company as representative of the debenture holders. This regime insures that all of the necessary financial information about Angas is made available to the debenture holders; and
- (i) preparation of the Angas full year accounts for the period ending 30 June 2018 and the audit of those has commenced. The audited accounts are expected to be provided this week. Once released, the report from the auditors will provide users with the most relevant and up-to-date information of the circumstances of Angas, rendering the review of the Angas half-yearly report ended 31 December 2017 unnecessary.

The Contentions of the respondent

63. The respondent contended that:

- (a) the objectives of the financial reporting and audit requirements in the act include ensuring the accountability of management through the provision of timely and reliable financial information. It enables users of the financial statements to make informed economic decisions;
- (b) the presumption of the Act is that disclosing entities, such as Angas, will meet their financial reporting and audit requirements;

- (c) there must be a causal connection between compliance with the requirement to have the half-year financial statements audited or reviewed, and the detriment relied upon: s 342(1)(c) of the Act;
- (d) the cost of preparing and lodging audited financial reports in accordance with the requirements of the Act is a cost of doing business using a corporate structure. It is not itself an unreasonable burden;
- (e) the need for independently reviewed or audited financial statements is increased when a company is in a difficult financial position;
- (f) half-year financial statements are not only used by investors in a company. The concept of users of such reports should be given a wide interpretation. Half-year financial statements are also potentially used by:
 - (i) persons who have or are seeking to enter into contracts for the supply of goods and services to the company, who wish to ascertain the credit worthiness of the company;
 - (ii) creditors of the company;
 - (iii) persons who are employed or who are considering employment with the company, who wish to ascertain its financial position and the stability of the current or prospective employment;
 - (iv) defendants to litigation who wish to understand the potential for them to recover their costs if successful and to determine whether to bring an application for security for costs;
- (g) even if it is accepted that the primary users of the half-year financial statements will be debenture holders, absent an audit or review of those statements debenture holders do not have the benefit of:
 - (i) an independent assessment and challenging of methodologies, assumptions and estimates used and made by management in respect of the recoverable amount of assets, and methodologies used to determine the fair value of the mortgage debenture liability;

- (ii) an independent assessment as to the capacity or likelihood that Angas will meet the requirements of the run-off proposal, which has already been extended on two occasions;
 - (iii) an independent assessment of the likely value of the security that the trustee holds in their favour over the real and personal property and assets of Angas;
- (h) the role and value of half-year financial statements that have been independently reviewed audited is demonstrated by the fact that it was the review of Angas' financial report for the half-year ending 31 December 2014 by Angas' auditor which included the identification of several material risks to Angas' financial position that resulted in the trustee's institution of proceedings in the Federal Court and led to the run-off;
- (i) the view of the trustee of the debenture business, which represents the debenture holders, should be given significant weight;
- (j) Angas' estimated cost of having the financial statements for the half-year ending 31 December 2017 reviewed or audited in the vicinity of \$500,000 is not a serious economic detriment when viewed in the context of its running costs over the period July 2015 to July 2017 having been \$16.2 million and forecasted to be further \$12.1 million over the period July 2017 to June 2019; and
- (k) The requirement in section 302 of the Act to have the financial statements for the half-year ending 31 December 2017 reviewed or audited and to lodge those statements with ASIC and the trustee is required by sections 318(4) and 320 of the Act does not impose an unreasonable burden on Angas.

Consideration

64. Before exercising its discretion to grant relief under s 340(1), the tribunal must be satisfied that complying with the relevant statutory requirements would either be inappropriate in the circumstances or impose unreasonable burdens. The key submission made by Angas was that the auditing requirements imposed an unreasonable cost on Angas in circumstances where little or no benefit arose from compliance with those requirements. Angas submitted that it was open to the tribunal to make a finding that compliance with

the relevant statutory requirements was inappropriate in the circumstances but it did not strongly press this submission. Instead it focused on the unreasonable burden element found in section 342(1)(c) of the Act.

65. In deciding whether the audit requirements would impose an unreasonable burden on Angas I am required to have regard to the expected costs of complying with the audit requirements and the expected benefits of having Angas comply with the audit requirements.³⁶ It was not suggested by Angas that it would face any practical difficulties in complying effectively with the audit requirements.³⁷

Expected Costs of Compliance

66. Angas has quantified expected costs of complying with the audit requirements at an amount in the vicinity of \$500,000. This includes the expected costs to be incurred with Deloitte in the estimated range of \$350,000 to \$400,000. The balance of the costs are Angas' internal costs related to the time spent by its management and staff during the audit and review process. Angas did not obtain a quote from Deloitte nor has it provided any material information to justify its internal costs. Instead, Angas has relied on costs incurred in previous years with respect to auditing requirements to justify the quantification of expected costs for the half-year ending 31 December 2017.
67. I do not consider it necessary to apply much scrutiny to the estimate of expected costs as quantified by Angas. I am prepared to accept that the expected costs may be in the vicinity of \$500,000. This cost must be considered in the context of Angas incurring average annual running costs of between \$5-\$6 million and in the context of Angas having issued \$219.65 million of fixed interest debenture securities as at 10 July 2015.
68. Angas did not calculate the impact on the return to debenture holders of an additional \$500,000 but merely submitted that any such cost would reduce the amount that could be returned to debenture holders. Whilst that submission is no doubt correct it should also be noted that the expected cost is not prohibitive and will not have a significant impact on the return to debenture holders in terms of the cents in the dollar that they will receive.

³⁶ *Corporations Act 2001* (Cth), ss 342(2)(a) and (b).

³⁷ *Ibid* s 342(2)(c).

Expected benefits of compliance with the audit requirements

69. In assessing the expected benefits of having Angas comply with the audit requirements I am required to take account of the number of creditors and potential creditors and their position (in particular, their ability to independently obtain financial information about Angas) and the nature and extent of the liabilities of Angas.³⁸
70. It was not in dispute that there are a significant number of debenture holders who are creditors of Angas. It was submitted by Angas that these debenture holders would not be impacted adversely if relief was granted with respect to the audit requirements because they received all necessary information from Angas in its financial statements, market updates, quarterly reports and the monthly LRC report. Further, it was submitted that these debenture holders had the benefit of the court imposed regime to which Trust Company (Nominees) Ltd, as representative of the debenture holders, was a party. True it is that Angas was providing information to debenture holders, if the relief sought is granted, the debenture holders will not have had the benefit of an external review of that information by an independent auditor. This is particularly important in the circumstances where past forecasts by Angas have not been met and the debenture holders are now being told that less than 100 cents in the dollar will be returned to them. Independent scrutiny is required to ensure that the accounting methodologies and assumptions and estimates used and made by Angas management are fair and appropriate.
71. It was submitted by Angas that any potential for an adverse impact on debenture holders was mitigated by the court imposed regime and in particular the LRC. Angas considered that sufficient protection was provided to debenture holders because their representative from the trustee was on that committee. I do not accept this submission because it is clearly rejected by the trustee itself. In its letter dated 14 March 2018, the trustee provided detailed reasons why it was opposed to the application for relief from the audit requirements. Mr Chris Green (who sits on the LRC) for and on behalf of the trust said inter alia:
- (a) the requirement for Angas to lodge audited financial statements at the half-year is an important check and balance on Angas' financial position;

³⁸ Ibid s 342(3).

- (b) there was an effective write down of Angas' liabilities to debenture holders in the last set of audited financial statements for the year ending 30 June 2017 that was never satisfactorily explained;
- (c) the monthly reporting by Angas to the LRC is not comparable to the audited financial statements which Angas is required to produce;
- (d) the LRC has little to no capacity to verify the monthly reporting prepared by Angas as it has no access to Angas' records;
- (e) the reporting by Angas to the LRC is not a substitute for audited financial statements which provide a level of independent scrutiny with recourse to Angas' books and records;
- (f) Angas' reporting and forecasts provided to the LRC do not generally correspond to Angas' actual performance;
- (g) it would not overstate the extent to which the court provides "oversight" of the run-off process or of Angas' broader debenture mortgage business because the court does not engage in any form of independent monitoring of Angas' operations and its involvement in the run-off process is not a substitute for the requirement that Angas lodge audited financial statements;
- (h) the quarterly updates to debenture holders from Angas are anecdotal and do not substitute for the biannual audit process;
- (i) the audit fees disclosed by Angas in its submission are not an excessive expense in the context of a distressed \$120 million debenture fund, particularly in view of Angas' average annual running costs of between \$5 million and \$6 million.

72. I give considerable weight to the fact that the trustee does not support the application for relief by Angas. Each of the matters raised above in the letter of 14 March 2018 are factors that weigh against my being satisfied that complying with the relevant statutory requirements would impose an unreasonable burden on Angas.

73. In addition to consideration of the debenture holders as creditors, I must also take into account the other creditors and potential creditors who provide goods and services to Angas in the course of the operation of Angas' other business involving the managed

investment schemes. It was not in dispute that, as part of this other business, Angas deals with and obtains services from a wide range of service providers such as real estate agents, valuers, town planners, lawyers and accountants. This is not an insignificant business in that Angas manages approximately \$85 million of investor funds in these managed investment schemes. Mr Hower estimated that in 2018 Angas received over 100 applications for finance for the managed investment schemes and that approximately 20 loans were made at an average of \$3 million per loan resulting in advances of approximately \$60 million for that year. The financial statements of Angas record that it received revenue in the form of management fees for the 2017 financial year totalling \$4,363,161. It can be inferred that there are a significant number of creditors and potential creditors who deal with Angas with respect to the business involving the managed investment schemes. These third parties benefit from Angas complying with its audit requirements because of their reliance on audited accounts to give a fair and accurate view of the financial position of the company with whom they are dealing.

74. There is a third category of potential creditors, namely those persons involved in litigation with Angas. Mr Hower gave evidence that Angas is a party to numerous legal actions. The other parties to these actions are potential creditors who have a genuine interest in being able to access audited accounts for the purpose of determining the potential for them to recover their costs if successful and for the purpose of determining whether to bring a security for costs application.

Is there an Unreasonable Burden? Balancing of the Benefits and Burdens of Compliance

75. The consideration of whether compliance with the audit requirements would impose an unreasonable burden on Angas pursuant to section 342(1) involves a balancing exercise between the benefits of the audit requirements, on the one hand, and the burden imposed on Angas by such compliance, on the other.³⁹

³⁹ *Dynamic Supplies Pty Ltd v ASIC* [2010] FCA 806 at [26] citing *Directors of Liquid Air (WA) Pty Ltd v Commissioner of Corporate Affairs* (1989) 15 ACLR 29 at 33, *Incat Australia Pty Ltd and Another v ASIC* (1999) 33 ACSR 132 at [9] and *Brightstar Logistics Pty Ltd v Australian Securities and Investments Commission (No 2)* (2010) 78 ACSR 429 at [58]

76. I take into account the object intended to be achieved by the requirement in respect of which exemption is sought. Review by an auditor of the Angus financial reports provides an independent and professional assessment as to whether the financial report is compliant with the Act. The object is also to provide a safeguard to the interests of debenture holders and in particular to identify any matter that is prejudicial to the interests of debenture holders.⁴⁰ There is a real benefit to debenture holders and the other users of the financial reports from compliance with the audit requirements.
77. The burden relied upon by Angus is the cost of obtaining a report from an auditor. The administrative cost of complying with the audit requirements (including paying for expert assistance from an auditor) would rarely of itself be an unreasonable burden.⁴¹ The quantum of the expected cost is not prohibitive when considered by reference to the level of other costs incurred by Angus in operating its business and by reference to the impact that it will have on the return to individual debenture holders (which is not significant).
78. Angus identifies no other detriment to it other than the incurring of costs associated with obtaining an auditor's report. It is questionable whether any detriment arises as a result of paying for an auditor's report. It is a cost of doing business using a corporate structure.
79. A burden would be unreasonable if complying with the requirement would cause Angus serious economic detriment with little or no compensating benefit to the users of the financial reports.⁴² First, no serious economic detriment would be caused by Angus complying with the audit requirements. In fact, the economic detriment is probably non-existent or at least minimal and insignificant when considered in the context of Angus' operations. Second, as set out above, there is a significant benefit to creditors and other users of the audited accounts which arises from compliance with the audit requirements.
80. The mere fact that Angus' debenture business is in run-off mode does not give rise to circumstances in which Angus should be relieved of its obligations to comply with audit requirements. Those audit requirements continue to have an important role to play both

⁴⁰ *Corporations Act 2001* (Cth), s 313(2).

⁴¹ Australian Securities and Investments Commission, 'Regulatory Guide 43: Financial reports and audit relief' (Policy Paper, May 2011) 4, [43.1].

⁴² *Ibid* 9, [43.28] citing *Directors of Liquid Air (WA) Pty Ltd v Commissioner of Corporate Affairs* (1989) 15 ACLR 29.

with respect to the debenture business and the ongoing operations of the managed investment schemes.

81. The benefits associated with compliance with the audit requirements significantly outweigh the burdens imposed on Angus by such compliance. The balancing exercise establishes that compliance with the audit requirements does not impose any unreasonable burdens on Angus. Nor can it be said that compliance with the audit requirements would be inappropriate in the circumstances. Having not attained the requisite degree of satisfaction required by section 342(1), there is no question of exercising a discretion to relieve Angus from the audit requirements pursuant to section 340(1).

Conclusion

82. I am not satisfied that complying with the audit requirements would be inappropriate or would impose unreasonable burdens on Angus. The decision under review is affirmed.

I certify that the preceding 84 (eighty-four) paragraphs are a true copy of the reasons for the decision herein of Deputy President P Britten-Jones

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Administrative Assistant

Dated: 23 January 2019

Date(s) of hearing:	21-23 January 2019
Counsel for the Applicant:	Mr P Adams
Solicitors for the Applicant:	Johnson Winter & Slattery
Counsel for the Respondent:	Ms G Walker
Advocate for the Respondent:	Ms E Lee of ASIC