



COVERSHEET

Minister	Hon Andrew Bayly	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Corporations (Investigation and Management)(Du Val Group) Order 2024	Date to be published	25 September 2024

List of documents that have been proactively released		
Date	Title	Author
21 August 2024	Corporations (Investigation and Management)(Du Val Group) Order 2024	Office of the Minister of Commerce and Consumer Affairs
21 August 2024	Cabinet Minute ECO-24-MIN-0173	Cabinet Office

Information redacted

YES / NO

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of legal professional privilege and contrary to the provisions of a specified enactment.

Commercial: In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Policy Committee

Corporations (Investigation and Management)(Du Val Group) Order 2024

Proposal

- 1 This paper outlines my intention to advise the Governor General that certain Du Val Group entities (**DVG entities**) be placed into statutory management and seeks authorisation to submit the Corporations (Investigation and Management)(Du Val Group) Order 2024 to the Executive Council.

Executive Summary

- 2 A corporation can be placed into statutory management under section 38 of the Corporations (Investigation and Management) Act 1989 (**CIMA**). The statutory decision-making power sits with the Minister of Commerce and Consumer Affairs (as the Minister responsible for the Act) acting on a recommendation of the Financial Markets Authority (**FMA**). It is given effect by an Order in Council.
- 3 On Saturday 17 August, I received a recommendation from the FMA to place four central entities in the Du Val Group, together with a further 20 associated entities, into statutory management. This would cause a further (approximately) 46 subsidiary entities to also be placed into statutory management. The recommendation is at **Appendix 1** and the cover letter with reasons for the recommendation is at **Appendix 2**.
- 4 I am recommending that the Committee note my intention to advise the Governor-General, in accordance with FMA's advice, to declare that four core entities in the Du Val Group (**DVG**) namely: Du Val Group NZ Limited, Du Val Mortgage Fund Limited Partnership, Du Val Build to Rent Limited Partnership and Du Val Property Group Limited (the **Core Du Val group**), together with a further 20 associated entities, be placed in statutory management.
- 5 This recommendation is reflected in the Corporations (Investigation and Management)(Du Val Group) Order 2024. I am also seeking the Committee's authorisation, acting under the power granted by Cabinet [CAB-24-MIN-0310] to submit the Order to the Executive Council.

Background

About Du Val Group and recent FMA enforcement action

6 DVG is a property developer focussing on large-scale residential developments. Since its establishment in around 2013, it has grown significantly and used a very complex range of special purpose vehicles, including limited partnerships.

7 The FMA has recently taken enforcement action against DVG, including executing search warrants on 2 August, applying to the High Court for asset preservation orders and the appointment of John Fisk, Stephen White and Lara Bennett of PWC as interim receivers for an initial period of 10 days (**interim receivers**).

8 **Contrary to the provisions of a specified enactment**

The FMA have advised me that DVG has approximately \$250 million in external liabilities.

9 In their report to the High Court on 16 August (which is not yet publicly available), the interim receivers recommended that some entities associated with DVG be placed into statutory management, based on three key concerns:

9.1 There is evidence of accounting irregularities that merit further investigation (including creating assets that may not be legitimate or where the value claimed is not supported, and significant related party balances that require investigation as to what can be recoverable).

9.2 There are complexities in the corporate set-up, making it difficult to treat some of the members of DVG independently or separately.

9.3 There are risks to investors and creditors that would arise from a multiplicity of insolvency processes across the group (including due to concerns around certain transactions, such as the exchange of limited partnership interests for shares), meaning orthodox liquidation and receivership processes are not sufficient to preserve investor interests.

The FMA has recommended certain entities associated with DVG be placed into statutory management

10 On the basis of its own investigations **Contrary to the provisions of a specified enactment**, as well as the findings in the interim receivers' report, the FMA made a recommendation to me on 17 August that the Core Du Val group, and 20 associated persons (all limited partnerships) be placed into statutory management. This would also cause a further 46 entities to be subject to statutory management on the basis that they are subsidiaries of the Core Du Val group.

11 I note that the FMA has advised me (refer Appendices 1 and 2) that it is satisfied that:

11.1 All of the Core Du Val group are entities to which the CIMA applies.

11.2 The appointment of statutory managers to the Core Du Val group is desirable to:

11.2.1 limit or prevent the further deterioration of the affairs of the DVG;

- 11.2.2 [REDACTED] Contrary to the provisions of a specified enactment
[REDACTED]
- 11.2.3 enable the affairs of the DVG to be dealt with in a more orderly or expeditious manner than ordinary insolvency law would allow.¹
- 11.3 It is otherwise desirable and in the public interest that statutory managers should be appointed to the Core Du Val group for the purposes of preserving the interests of DVG's creditors as their interests cannot be adequately protected under the Companies Act 1993 or in any other lawful way.
- 12 The FMA has also advised me that with regards to the corporations it has recommended be placed in statutory management as associated persons, that in each case:
- 12.1 They are limited partnerships, which have each been formed as investment or delivery vehicles for DVG's business activities.
- 12.2 Each limited partnership is directly or indirectly controlled by one of the Core Du Val group entities.
- 12.3 The interim receivers have identified unusually high levels of inter-entity funds transfers amongst these limited partnerships, and both general partnership and limited partnership (ownership) interests in addition to the complex funding arrangements.
- 12.4 The FMA is satisfied that the business and affairs of the Core Du Val group are so closely connected with these limited partnerships that the statutory managers would be unable to exercise effectively the powers conferred by the CIMA in relation to the Core Du Val group unless the statutory managers are also appointed statutory managers of those associated persons.
- 13 The FMA has also recommended that one subsidiary of the Core Du Val group – Du Val HC GP Limited – be excluded as it is 50 per cent owned by a third party and operates somewhat independently of DVG.

Rationale for statutory management

- 14 Statutory management is very rarely recommended. It is used for complex corporate failure where ordinary rules of law and insolvency cannot deal with the problem. Complexity and its effect on the ability of ordinary insolvency law to cope with investigating and resolving the affairs of the business are the main considerations.
- 15 Previous examples of where statutory management have been used are listed in **Appendix 3**.

¹ Under ordinary insolvency law, there is a likelihood of competing separate administration processes, resulting in:

(i) significant legal and administrative costs, diminishing the assets ultimately able to be returned to creditors, because of the complex way in which funds have been distributed within DVG;

(ii) delay in resolving claims, potentially over a number of years; and

(iii) immediate impacts on the core business of DVG.

- 16 The size of the enterprise has not been a significant factor in the past and does not form part of the statutory criteria for recommending statutory management. Statutory management has been used for situations involving differing amounts of money, including where the funds at stake were significantly less than in this instance – an example being IMI Pacific Group Ltd where the amount was around \$8 million.
- 17 The interim receivers have advised that DVG is in a precarious position, with various creditors for differing entities who may act soon. Receivers have already been appointed by some creditors over certain entities – in particular the China Construction Bank (NZ) over the Du Val Build to Rent fund – and liquidation proceedings have been begun with respect to others. The more these claims multiply, the more complex the range of actions against the various entities associated with DVG become. This poses an increasing risk to other creditors and investors.
- 18 DVG’s creditors include around 120 – 150 investors, home buyers, commercial lenders, subcontractors (across several developments), the IRD, a vendor financier (on one site) and other construction services and goods suppliers.
- 19 There are 70 entities in total that will be subject to statutory management. There is evidence of substantial inter-entity balances, without a consolidated balance sheet for the group. The position is complex, both in terms of understanding the reason and basis for the transactions and the way in which they were accounted for.
- 20

Contrary to the provisions of a specified enactment

[Redacted]
- 21 Statutory management would suspend all current insolvency processes and enable the affairs of the Group to be dealt with in an orderly and expeditious way. It would also ensure value is maintained at the significant development sites where work is ongoing. There are multiple sale agreements in place for these properties. To preserve their value, completion arrangements must be negotiated, which involves further funding, continuity of work by contractors and supply of materials. All of this is at increasing risk the longer the entities remain in receivership and subject to various claims.

Process for initiating statutory management [Legally privileged]

- 22

Legal professional privilege

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

23.1.1 [REDACTED] Legal professional privilege
[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]
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My recommendations

27 Accordingly, my advice is that it is appropriate to:

- 27.1 declare that the four corporations in the Core Du Val group and 20 associated persons are subject to statutory management through Order in Council, under section 38 of the CIMA;
- 27.2 declare that Du Val HC GP Limited is a subsidiary to which statutory management does not apply; and
- 27.3 appoint John Fisk, Stephen White and Lara Bennett of PWC as the statutory managers of these entities.

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- 28 For the reasons discussed above, I consider it necessary that statutory management commence with some urgency. I therefore propose that the Order in Council come into effect at 12am on Thursday, 22 August.
- 29 This Committee has been given power to act in this matter [CAB-24-MIN-0310] and I will request that the Governor General convene a meeting of the Executive Council as soon as possible.
- 30 My officials are working to set out the terms of reference of the appointment of the statutory managers and to advise me on whether they consider it necessary to set up an advisory committee (as permitted under section 60 of the CIMA) to advise the statutory managers on the conduct of the statutory management.

Timing and 28-day rule

- 31 I am seeking a waiver of the 28-day rule for the Corporations (Investigation and Management)(Du Val Group) Order 2024. As outlined above, it is necessary to act quickly in order to protect the interests of DVG's creditors and investors.

Compliance

- 32 The Order in Council complies with:
- 32.1 the principles of the Treaty of Waitangi;
 - 32.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 32.3 the principles and guidelines set out in the Privacy Act 2020;
 - 32.4 relevant international standards and obligations; and
 - 32.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.
- 33 I have acted on the recommendation of the FMA as required by section 38 of the CIMA.

Regulations Review Committee

- 34 There are no grounds for the Regulations Review Committee to draw the Order in Council to the attention of the House of Representatives under Standing Order 327.

Certification by Parliamentary Counsel

- 35 Parliamentary Counsel Office has certified that the Order in Council is in order for submission to the Executive Council.

Impact Analysis

- 36 The Ministry for Regulation has determined that a Regulatory Impact Statement is not required for the proposal to place DVG's entities into statutory management on the

grounds that the government has limited statutory decision-making discretion or responsibility for the content of proposed delegated legislation. The information provided by the FMA in support of their recommendations satisfies the required statutory test under the CIMA.

Publicity

- 37 A public announcement will be made confirming the appointment of a statutory manager immediately on the Order in Council being published in the Gazette.

Proactive release

- 38 I propose to release this paper within 30 business days of Cabinet’s decision or as soon as possible thereafter if affected by ongoing Court proceedings. Any redactions made will be consistent with the Official Information Act 1982.

Consultation

- 39 In preparing this Cabinet paper, MBIE has consulted with the Treasury and the FMA. The Department of Prime Minister and Cabinet was informed.

Financial implications

- 40 Under section 65 of the CIMA, the properly incurred costs, charges and expenses of the statutory manager or a member of an advisory group are payable out of the property of the corporations under statutory management and not by the Crown. Officials have confirmed with the statutory managers that they will be charging standard All-of-Government (AoG) rates to ensure good value is obtained for creditors.
- 41 Section 63 of the CIMA provides that all relevant persons acting under the CIMA are indemnified by the Crown for any liability relating to the exercise, of any power conferred by the CIMA unless done in bad faith. These costs are required to be paid out of a Crown Bank account “without further appropriation than this section”. This indemnity extends to legal costs incurred in defending any legal proceedings. If this indemnity is triggered, this will result in a cost to the Crown. A liability will be recognised on the balance sheet as well as an associated expense being incurred. This cost to the Crown (if the indemnity is triggered) will have an adverse impact on the operating balance and net core Crown debt
- 42 Section 66 of the CIMA permits advances to be made to a statutory manager in respect of costs, charges and expenses incurred by them with the consent of the Minister of Finance. These advances are to be refunded to the Crown through the money payable to that person under section 65. This is intended to allow the Crown to prepare for statutory management, which should then be self-funding out of the assets of the relevant corporations. I have not yet received advice as to whether any such advance may be required.
- 43 There may also be a cost associated with any advisory group that is established.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Cabinet Economic Policy Committee:

1 **note** that the Financial Markets Authority (**FMA**) has recommended that certain entities associated with the Du Val Group (as set out in the FMA’s recommendation attached at **Appendix 1**) be placed into statutory management under section 38 of the Corporations (Investigation and Management) Act 1989:

Noted

2 **note** that the FMA has recommended that John Fisk, Stephen White and Lara Bennett of PWC be appointed as the statutory managers under section 38 of the Corporations (Investigation and Management) Act 1989;

Noted

3 **note** that the recommendations of the FMA referred to in recommendations 1 and 2 are a sufficient basis for the Minister of Commerce and Consumer Affairs to advise the Governor-General to make an Order in Council to place those entities into statutory management;

Noted

4 **note** that the Minister of Commerce and Consumer Affairs intends to advise the Governor-General, in accordance with a recommendation of the FMA, to declare that the corporations referred to in the FMA’s recommendation attached at **Appendix 1** be placed into statutory management;

Noted

5 **note** that the Minister of Commerce and Consumer Affairs has instructed the Parliamentary Counsel Office to draft an Order in Council to give effect to his intention referred to in recommendation 4;

Noted

6 **note** that the costs associated with statutory management are to be recovered from the assets of the Du Val Group entities in statutory management;

Noted

7 **note** that section 63 of the Corporations (Investigation and Management) Act 1989 provides that the statutory manager is indemnified by the Crown in relation to any liability arising from the exercise of their powers and this indemnity extends to legal costs incurred in defending any legal proceeding, and that any monies required shall be paid without any further appropriation under that section;

Noted

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8 **note** that if the indemnity referred to in recommendation 7 is triggered, this will result in a cost to the Crown. Liability will be recognised on the balance sheet as well as an associated expense being incurred. This cost to the Crown (if the indemnity is triggered) will have an adverse impact on the operating balance and net core Crown debt;

Noted

9 **authorise** the submission to the Executive Council of the Corporations (Investigation and Management)(Du Val Group) Order 2024;

Authorised / Not authorised

10 **note** that Cabinet has granted the Cabinet Economic Policy Committee power to act in relation to the matter in recommendation 8 [CAB-24-MIN-0310];

Noted

11 **note** that a waiver of the 28-day rule is sought for the Corporations (Investigation and Management)(Du Val Group) Order 2024 in order to preserve the interests of creditors and investors of the DuVal Group entities;

Noted

12 **agree** to a waiver of the 28-day rule for the Corporations (Investigation and Management)(Du Val Group) Order 2024;

Agreed / Not agreed

13 **note** that the Corporations (Investigation and Management) (Du Val Group) Order 2024 would come into force on 22 August 2024 at 12.00am.

Noted

Authorised for lodgement

Hon Andrew Bayly

Minister of Commerce and Consumer Affairs

IN CONFIDENCE

Recommendation for Statutory Management

(Pursuant to s 38 of the Corporations (Investigation and Management) Act 1989)

Du Val Group NZ Limited and its related entities

To: Minister of Commerce

Parliament Buildings
Wellington

1. Pursuant to s 38 of the Corporations (Investigation and Management) Act 1989 (**Act**), the Financial Markets Authority (**FMA**) recommends that:
 - (a) the following corporations, being incorporated bodies of persons, be declared subject to statutory management:
 - (i) Du Val Group NZ Limited 9429042332930;
 - (ii) Du Val Mortgage Fund Limited Partnership 9429048486385;
 - (iii) Du Val Build to Rent Limited Partnership 9429047851443; and
 - (iv) Du Val Property Group Limited 9429050961603,(together, **Core Du Val Corporations**);
 - (b) the associated persons listed in the **Schedule** to this document (**Associated Persons**) be declared subject to statutory management;
 - (c) Du Val HC GP Limited: NZBN 9429047124073, a subsidiary of Du Val Clubs Limited, itself a subsidiary of Du Val Group NZ Limited, be declared to be a subsidiary to which the statutory management does not apply; all other subsidiaries of any of the Core Du Val corporations be subject to statutory management by operation of s 38 (2) of the CIMA; and
 - (d) Mr John Howard Ross Fisk, Mr Stephen Robert White and Ms Lara Maree Bennett of PricewaterhouseCoopers, Chartered Accountants and licensed insolvency practitioners, be appointed as statutory managers, with power to act individually, of each of the Core Du Val Corporations and Associated Persons.
2. The FMA, having regard to the requirements of the Act, and having considered evidence in respect of each of the Core Du Val Corporations, is satisfied on reasonable grounds that:
 - (a) Each of Core Du Val Corporations are, or may be, corporations to which the Act applies in that:
 - (i) **Contrary to the provisions of a specified enactment**
 - (ii) it is desirable that the Act should apply to each of the Core Du Val Corporations for the purpose of preserving the interests of the Core Du Val

Corporation's members or creditors, any beneficiary under any trust administered by the Core Du Val Corporations, and/or the public interest,

the FMA being of the view that these interests cannot be adequately protected under the Companies Act 1993 or in any other lawful way; or

- (b) It is desirable for each of the Core Du Val Corporations to be declared subject to statutory management for the purpose of:
 - (i) limiting or preventing the risk of further deterioration of the financial affairs of the Core Du Val Corporation; and
 - (ii) **Contrary to the provisions of a specified enactment**
 - (iii) enabling the affairs of the Core Du Val Corporation to be dealt with in a more orderly or expeditious way;
- (c) It is desirable for each of the Core Du Val Corporations to be declared subject to statutory management for the purpose of:
 - (i) preserving the interests of their creditors or beneficiaries or the public interest; and
 - (ii) enabling the affairs of the Core Du Val Corporations to be dealt with in a more orderly or expeditious way.

3. The FMA, having regard to the requirements of the Act, and having considered evidence in respect of each of the Associated Persons, is satisfied on reasonable grounds that each of the Associated Persons:

- (a) is an associated person of the Core Du Val Corporations; and
- (b) should be subject to statutory management in that the business and affairs of the Core Du Val Corporations are so closely connected with the Associated Persons that the statutory managers would be unable to exercise effectively the powers conferred by the Act in relation to the Core Du Val Corporations unless the statutory managers are appointed as statutory managers of each of the Associated Persons.

Dated this 17th day of August 2024

Delegate (Head of Enforcement)

Delegate (General Counsel)

Schedule of Associated Persons

1. Alpha Centauri Limited Partnership
2. Bernards Star Limited Partnership
3. Du Val Commercial and Mixed-Use Fund Limited Partnership
4. Du Val Development Fund No. 14 Limited Partnership
5. Du Val Education Limited Partnership
6. Du Val New Homes Limited Partnership
7. Du Val Opportunity Fund Limited Partnership
8. Earlsworth Limited Partnership
9. Edmonton Road Limited Partnership
10. Epsilon Tauri Limited Partnership
11. Hill Top Apartments Limited Partnership
12. Hillside Crossing Limited Partnership
13. Investment Portfolio Management Limited Partnership
14. Lalande Limited Partnership
15. Parry Limited Partnership
16. Sunnyvale Terraces Limited Partnership
17. Te Awa Terraces Limited Partnership
18. Theta Scorpii Limited Partnership
19. Trans-Tasman Pacific Limited Partnership
20. Wolf 359 Limited Partnership

17 August 2024

Minister of Commerce
Parliament Buildings
Wellington

CONFIDENTIAL

Dear Minister,

Recommendation for Statutory Management under the Corporations (Investigations and Management) Act 1989: Du Val Group NZ Limited and its related entities

Introduction

1. The Financial Markets Authority (**FMA**) has decided to recommend that a group of New Zealand-based property investment and development entities, trading as **Du Val**, be placed under statutory management pursuant to s 38 of the Corporations (Investigations and Management) Act 1989 (**CIMA**) (**Recommendation**). A formal recommendation to this effect is attached. This matter was considered yesterday afternoon by a division of the FMA, which supported the grounds for statutory management and delegated authority to make a recommendation to the Head of Enforcement and General Counsel of the FMA, under s 73 of the Crown Entities Act 2004.
2. In this letter, we set out:
 - (a) overview of Du Val;
 - (b) summary of the FMA's investigation into Du Val;
 - (c) summary of the FMA's concerns about solvency of Du Val;
 - (d) summary of the FMA's recent actions;
 - (e) summary of the receivers' report; and
 - (f) the FMA's grounds for recommending statutory management.

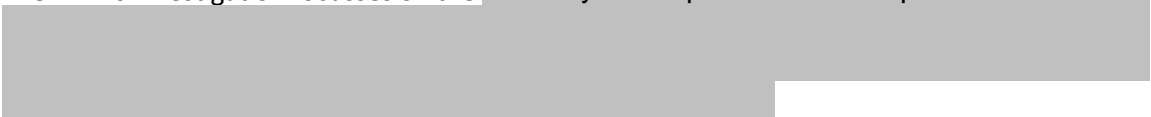
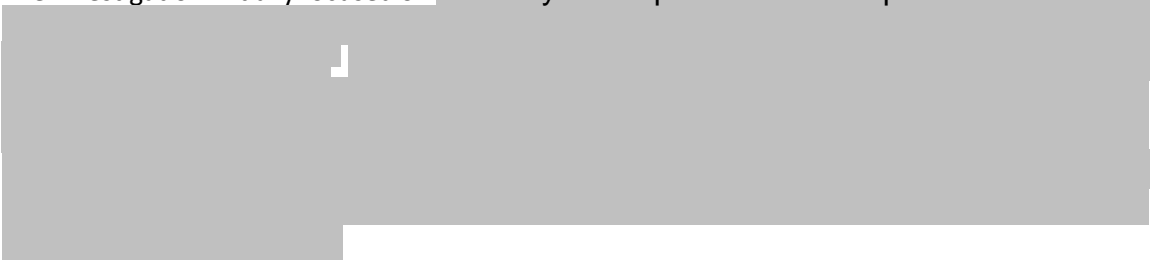

Overview of Du Val

3. Du Val is a group of property investment and development entities based in New Zealand. The main company is Du Val Group NZ Limited (**Du Val Group**), which has around 20 subsidiaries with

various responsibilities including property development, financing, and management of residential property.¹ We attach as **Appendix A** an organisation chart of Du Val.²

4. Du Val Group:
 - (a) has two directors: Kenyon Clarke (**Mr Clarke**) (founder and former CEO of Du Val) and Owen Culliney (**Mr Culliney**) (founding partner of C.A.P.A.C Limited, a law firm which trades as iCLAW and acts for Du Val); and
 - (b) is wholly owned by Charlotte Clarke (Mr Clarke's wife and current CEO of Du Val) (**Mrs Clarke**) and Karapiro Corporate Trustee Limited, as trustees of the JK & CM Clarke Trust, which is Mr and Mrs Clarke's family trust (**Clarke Trust**).
5. To fund its development activities, Du Val borrowed funds from third-party commercial lenders and raised funds from the public by offering investments to wholesale investors³ through offering units in the following funds, which are limited partnerships registered in New Zealand:
 - (a) Du Val Build to Rent Limited Partnership (**BTR Fund**);
 - (b) Du Val Mortgage Fund Limited Partnership (**Mortgage Fund**); and
 - (c) Du Val Opportunity Fund Limited Partnership (**Opportunity Fund**).


Summary of the FMA's investigation

6. The FMA's investigation focusses on the **Contrary to the provisions of a specified enactment**

7. The investigation initially focused on **Contrary to the provisions of a specified enactment**

8. As the investigation progressed, its scope expanded to consider **Contrary to the provisions of a specified enactment**


¹ Some of the subsidiaries also appear to engage in activities outside of property, such as fashion and healthcare services.

² This organisation chart was prepared by the FMA in advance of obtaining search warrants and orders to protect the interests of aggrieved persons within the meaning of the FMA Act. Since it was prepared, the Receivers have identified 13 additional corporate entities in Du Val.

³ Wholesale investors are defined in cl 36, Sch 1 of the Financial Markets Conduct Act 2013 (**FMC Act**) and, broadly speaking, are investors who have sufficient previous investing experience and do not require disclosure.

⁴ **Contrary to the provisions of a specified enactment**


Contrary to the provisions of a specified enactment

9.

Contrary to the provisions of a specified enactment

11. Amongst other things, our analysis of the evidence indicates that:

Contrary to the provisions of a specified enactment

Contrary to the provisions of a specified enactment

12. In light of the above, the FMA considers that Contrary to the provisions of a specified enactment

Summary of the FMA's concerns about solvency of Du Val

13. In April 2024, the FMA began an inquiry into the current financial position of Du Val. Contrary to the provisions of a specified enactment

15. The concerns about Du Val's solvency were also apparent to the FMA from public sources. For indicative purposes, these include:

- (a) The Mortgage Fund appeared to be experiencing financial challenges, having lent out all investor money and having ceased distributions to investors in 2022 and then having offered investors the opportunity to swap their debt for equity.
- (b) The BTR Fund had defaulted on the \$17.38m loan from CCB, who has since appointed a receiver.
- (c) On 17 July 2024, a media article stated that Du Val Construction Limited is "in ongoing discussions with subcontractors owed for work". The article said that the High Court in Hamilton was due to hear a liquidation application, initially set down for a hearing in August 2024 and now adjourned to September 2024.
- (d) In April 2024, Du Val renamed many of its subsidiaries, dropping "Du Val" from its name and adopting seemingly random names like Orange Pineapple Ltd, Flipping Lids Ltd, and Woodle Ltd.

Summary of the FMA's recent actions

16. On 1 August 2024, the FMA applied to the High Court for search warrants and interim asset preservation orders (APOs) under ss 522 and 523 of the FMC Act, including the appointment of interim receivers. Search warrants were aimed at securing evidence and the APOs were aimed at protecting assets and aggrieved persons, including creditors and investors. The orders were made on the same day.

⁶ Contrary to the provisions of a specified enactment

17. On 2 August 2024, the FMA executed search warrants at four addresses, including Mr and Mrs Clarke's residence and Du Val office premises.
18. On 2 August 2024, the High Court appointed John Fisk, Lara Bennett and Stephen White of PwC as receivers (**Receivers**) over 64 Du Val corporate entities and also over Mr and Mrs Clarke personally. The Court required the Receivers to report back to it within ten working days as to whether, in the Receivers' opinion:
 - (a) any person not subject to their receivership should in their opinion have a receiver appointed;
 - (b) any respondent should in their opinion be released from that receivership;
 - (c) the powers granted by the order should be varied, modified, or extended, and if so, in what way; and
 - (d) any additional or alternative form of administration is appropriate, including (without limitation) statutory management.

Summary of the Receivers' report (Report)

19. The Receivers' Report was filed in Court on 16 August 2024. The Report is attached as **Appendix B**.
20. The Receivers recommend:
 - (a) that the majority of the Du Val entities be placed under statutory management under the CIMA;
 - (b) to keep Mr and Mrs Clarke and Karapiro Corporate Trustees Limited in receivership; and
 - (c) to place the Clarke Trust in receivership on the basis that the personal affairs of Mr & Mrs Clarke, which may include transactions involving the associated trust, have been closely intertwined with the affairs of the Du Val Group, including in respect of funds flows via the extensive related party transactions and personal expenditure.
21. The Receivers' reasons for recommending statutory management for the majority of the Du Val entities include:
 - (a) irregularities that warrant further investigation;
 - (b) complexities which make it difficult to treat some of the entities within Du Val independently or separately; and
 - (c) risks to investors and creditors that would arise from a multiplicity of insolvency processes across Du Val.
22. More specifically, the Receivers say:
 - (a) There is evidence of irregular accounting entries that have created assets that may not be legitimate and / or for which the recorded value is insufficiently supported.
 - (b) They have concerns about the status and basis of the transaction by which some limited partner investors in two of the funds (Mortgage Fund and Opportunity Fund) agreed to

subscribe for shares in Du Val Property Group Limited (in receivership), in exchange for their limited partnership interests.

- (c) They have found significant related party balances requiring further investigation to determine what is recoverable within Du Val and what creditor claims may exist. The position is complex, both in terms of understanding the reason and basis for the transactions and the way in which they were accounted for.
- (d) They are particularly concerned about maintaining value in the development sites. There are multiple sale agreements in place. To preserve value in the developments for the investors and creditors they need to negotiate completion arrangements with secured creditors. Those arrangements include further funding and continuity of work by contractors and supply of materials.
- (e) Statutory Management will provide greater certainty to all parties, including contractors and suppliers to those sites.
- (f) Statutory Management will enable the affairs of Du Val to be dealt with in a more orderly and expeditious way. It will reduce the risk of action being taken by individual creditors and others that may be detrimental to the interests of other creditors through reductions in realisable value.
- (g) It will also reduce the risk of inefficiency caused by multiple insolvency processes. While it would be possible to apply to pool multiple liquidations, it may be that different liquidators are appointed to various entities and any pooling or other co-ordination that is required would take time and would be uncertain.
- (h) In light of their concerns about certain transactions, especially the agreements to swap limited partnership interests for shares, orthodox liquidation and receivership processes are not sufficient to preserve the interests of the investors in particular.
- (i) Statutory management would enable full investigations to be completed in an orderly way in respect of the whole Du Val group.

The FMA's grounds for recommending statutory management

- 23. In broad terms, the CIMA provides for corporations that may be or are operating fraudulently or where the public interest calls for it, to be placed under statutory management.
- 24. Under s 38 of the CIMA, the Governor-General can, on the advice of the Minister of Commerce given in accordance with a recommendation of the FMA, declare that any corporation, and any associated person of that corporation, is subject to statutory management. When a corporation is placed under statutory management, its subsidiaries (if any) automatically fall under statutory management unless they are expressly excluded.⁷
- 25. The FMA recommends that the Minister advise the Governor-General to make an Order-in-Council declaring the "Core Du Val Corporations" and the "Associated Persons", both terms defined in the Recommendation, be placed under statutory management and appointing John Fisk, Lara Bennett, and Stephen White, as statutory managers.
- 26. In making this recommendation, the FMA is satisfied on reasonable grounds on the matters specified in ss 39 and 40 of the CIMA, which respectively deal with the circumstances in which

⁷ Section 38(2).

the FMA can recommend corporations and associated persons be placed under statutory management. We address these tests in turn below.

When the FMA can recommend a corporation be placed under statutory management

27. The FMA must not recommend that a corporation be placed under statutory management unless it is satisfied on reasonable grounds that:
- (a) the corporation is, or may be, a corporation to which the CIMA applies (which involves applying the test in s 4 of the CIMA);⁸ and
 - (b) the circumstances outlined in s 39 of the CIMA are present in relation to that corporation.⁹
28. In terms of the s 4 test, the FMA can be reasonably satisfied the corporation is, or may be, a corporation to which the CIMA applies if:
- (a) the corporation is, or may be, operating fraudulently or recklessly;¹⁰ or
 - (b) the corporation is, or may be, a corporation to which it is desirable that CIMA should apply:
 - (i) for the purpose of preserving the interests of the corporation's members or creditors; or
 - (ii) for the purpose of protecting any beneficiary under any trust administered by the corporation; or
 - (iii) for any other reason in the public interest,if those members or creditors or beneficiaries or the public interest cannot be adequately protected under the Companies Act 1993 or in any other lawful way.
29. The question to be answered under s 39 depends on which of these two possible reasons the CIMA applies, or may apply, to the corporation are present:
- (a) Where the CIMA may apply because the corporation may be operating fraudulently or recklessly, the FMA may make a recommendation of statutory management if satisfied on reasonable grounds that it is desirable that the corporation be declared to be subject to statutory management for the purpose of:¹¹
 - (i) limiting or preventing the risk of further deterioration of the financial affairs of the corporation; or
 - (ii) limiting or preventing the carrying out, or the effects of, any fraudulent act or activity; or
 - (iii) enabling the affairs of the corporation to be dealt with in a more orderly or expeditious way.

⁸ CIMA, s 39(a).

⁹ CIMA, s 39(b)-(c).

¹⁰ Defined as (in summary) contracting debts that its officers did not honestly believe on reasonable grounds that it could pay; carrying on business or operating in a reckless manner; or carrying on any business or operating with intent to defraud creditors, members or others, or for any other fraudulent purpose.

¹¹ CIMA, s 39(b).

- (b) Where the CIMA may apply because it is otherwise desirable that the Act applies, the FMA may make a recommendation of statutory management if satisfied on reasonable grounds that it is desirable that the corporation be declared to be subject to statutory management for the purpose of:¹²
 - (i) preserving the interests of its members or creditors or beneficiaries in the public interest; or
 - (ii) Enabling the affairs of the corporation to be dealt with in a more orderly or expeditious way.

When the FMA can recommend associated persons be placed under statutory management

30. The FMA must not make a recommendation in respect of an associated person of a corporation unless it is satisfied on reasonable grounds that:
- (a) there would be grounds to recommend the associated person themselves be made subject to statutory management under s 39;¹³ or
 - (b) the business and affairs of the corporation are so closely connected with that associated person that the statutory manager or statutory managers would be unable to exercise effectively the powers conferred by this Act in relation to the corporation unless the statutory manager or statutory managers is or are appointed as statutory manager or statutory managers of the associated person.¹⁴
31. A person is an associated person of a corporation (for the purposes of the statutory management provisions) if:¹⁵
- (a) that person directly or indirectly controls the management of the corporation (such as directors, those in the position of directors, directors of holding or ultimate holding companies, etc); or
 - (b) that person owns directly or indirectly 20% of the issued shares of the corporation that carry voting rights (such as with, for example, shareholders, shareholders of shareholding companies, holding companies, ultimate holding companies, etc);
 - (c) the corporation directly or indirectly controls that person (such as with subsidiaries of the corporation, general partners of limited partnerships, etc); or
 - (d) the corporation owns directly or indirectly 20% or more of the issued shares of that person that carry voting rights.

The FMA's analysis of grounds for recommending statutory management

32. The **Core Du Val Corporations** as defined in the Recommendation are:
- (a) Du Val Group NZ Limited;¹⁶

¹² CIMA, s 39(c).

¹³ CIMA, s 40(a).

¹⁴ CIMA, s 40(b).

¹⁵ CIMA, s 2(2).

¹⁶ This is the parent company of the majority of corporate entities in Du Val and is wholly owned by the JK & CM Clarke Trust, a trust for which Kenyon and Charlotte Clarke are the beneficiaries.

- (b) Du Val Mortgage Fund Limited Partnership;
- (c) Du Val Build to Rent Limited Partnership;
- (d) Du Val Property Group Limited.

33. A summary of the concerns identified in each of the Core Du Val Corporations is as follows:

(a) *Du Val Group NZ Limited*: this is the main holding company in Du Val and, apart from holding shares in other entities, its main reported asset was essentially intellectual property of \$15M purchased from the Clarke Trust. This appears to be a suspicious transaction and does not appear to make commercial sense. It created a corresponding loan balance owing to the Clarke Trust which, as at 31 March 2023, had been reduced to \$5.5m. As Xero accounting records are not maintained for Du Val Group NZ Limited the detailed funds flows supporting the position cannot be ascertained without further investigation. Contrary to the provisions of a specified enactment

(b) *Du Val Mortgage Fund Limited Partnership (Mortgage Fund)*: The Du Val Mortgage Fund (Mortgage Fund) was set up to raise up to \$100M of wholesale funds intended to be used to lend to SPVs for property development. There would often be prior ranking third party secured finance, and sometimes money from Opportunity Fund treated as equity in the SPV. There are two key areas of concern: Contrary to the provisions of a specified enactment and the partially executed debt/share swap transactions with a newly-established company named Du Val Property Group Limited which occurred over the last 12 months. The debt/share swap was designed to transfer Mortgage Fund investors' interests in the Mortgage Fund so as to become a shareholder in Du Val Property Group Limited. The Receivers have expressed concern about what investors knew about that transaction before agreeing to transfer into the Property Group to save any value that they thought they had. Contrary to the provisions of a specified enactment

(c) *Du Val Build to Rent Limited Partnership (BTR Fund)*: Contrary to the provisions of a specified enactment

(d) *Du Val Property Group Limited*: this is the company that was established for the debt/share swap transaction for investors in the Mortgage and Opportunity Funds (already described above at paragraph 5. The Receivers consider that the Mortgage Fund investors who took up the debt/share swap have been prejudiced by that transaction. They note further that

the information memorandum for the debt/share swap offer included a \$400m valuation from the directors, which does not appear to have been independently verified and that the information memorandum names several advisers, two of whom have advised the Receivers that they were not involved in preparing the document. Contrary to the provisions of a specified enactment

34. As shown in the organisational chart (Appendix A), Du Val has a complex corporate structure. The FMA considers the each of the Core Du Val Corporations are, or may be, corporations to which the CIMA applies, and that those identified as the Associated Persons in the Recommendation satisfy the “associated person” test under s 40.

35. The FMA is satisfied, based on the investigative findings that justified seeking search warrants, the imposition of APOs, and receivership and the findings in the Receivers’ report that:

(a) The Core Du Val Corporations are each corporations to which the CIMA applies. Contrary to the provisions of a specified enactment

, and in light of the complex mix of corporate entities and transactions it is desirable that the CIMA should apply for the purpose of protecting the interests of creditors and members of the corporations, including the interests of the investors in the Du Val enterprises, the beneficiaries of any trusts administered by the Cor Du Val Corporations, and in the public interest, and those interests cannot adequately be protected under the Companies Act 1993 or in any other lawful way as set out below.

(b) The appointment of statutory managers is desirable to limit or prevent the further deterioration of the affairs of Du Val, Contrary to the provisions of a specified enactment, and enable the affairs of Du Val to be dealt with in a more orderly or expeditious manner than ordinary insolvency law would allow. Under ordinary insolvency law, there is a likelihood of competing separate administration processes, resulting in:

(i) significant legal and administrative costs, diminishing the assets ultimately able to be returned to creditors, because of the complex way in which funds have been distributed within Du Val;

(ii) delay in resolving claims, potentially over a number of years; and

(iii) immediate impacts on the core business of Du Val.

(c) It is otherwise desirable and in the public interest that statutory managers should be appointed for the purposes of preserving the interests of Du Val’s creditors as, for these same reasons, their interests cannot be adequately protected under the Companies Act 1993 or in any other lawful way.

(d) The complex and opaque manner in which Du Val’s business has been conducted, and in particular the complex “inter-locking” of its entities and the level and number of intra-group balances, means that it is appropriate that these companies not be viewed as wholly separate, such that statutory management is appropriate in order to ensure practical control can be achieved over the group as a whole.

36. In terms of the statutory tests summarised above, this provides reasonable grounds to be satisfied, and the FMA is satisfied, that in respect of each of the Core Du Val Corporations:

- (a) the CIMA may apply to the corporations because they may have been operated Contrary to the provisions of a specified enactment or reckless purpose;
- (b) the CIMA may also apply to the corporations because it is desirable that the CIMA should apply to them for the purpose of preserving the interests of their creditors or members, who cannot be adequately protected under the Companies Act 1993 or in any other lawful way;
- (c) it is desirable that the corporations be declared to be in statutory management for the purposes of preventing the further deterioration of their financial affairs, thereby limiting the prejudicial effects Contrary to the provisions of a specified enactment on creditors and preserving their interests;
- (d) it is desirable that the corporations be declared to be in statutory management for the purposes of enabling the affairs of the corporations to be dealt with in a more orderly or expeditious way than would otherwise be possible;
- (e) by operation of s 38(2) of the CIMA, every subsidiary (with the exception of Du Val HC GP Limited as further described below) of the Core Du Val Corporations will, if those corporations are declared to be subject to statutory management, also be subject to statutory management, and the statutory manager or statutory managers so appointed shall be the statutory manager or statutory managers of every such subsidiary; and

In respect of the Associated Persons:

- (f) the corporations that the FMA recommends be placed in statutory management as associated persons are all limited partnerships, which have each been formed as investment or delivery vehicles for the Du Val's business activities, principally being property development and construction businesses. Each of these limited partnerships is directly or indirectly controlled by one of the Core Du Val Corporations, in most cases through subsidiary companies that have been appointed as the general partners of the limited partnerships. In one case, the general partner has been removed from the Companies Register.¹⁷ The Receivers have identified unusually high levels of inter-entity funds transfers amongst these limited partnerships, and both general partnership and limited partnership (ownership) interests in addition to the complex funding arrangements. On this basis, the FMA is satisfied that the business and affairs of the Core Du Val Corporations are so closely connected with these limited partnerships that the statutory managers would be unable to exercise effectively the powers conferred by the CIMA in relation to the corporation unless the statutory managers are also appointed statutory managers of those associated persons.

Subsidiary expressly excluded from recommendation

37. One Du Val subsidiary is expressly excluded from this recommendation. This is Du Val HC GP Limited, which is the general partner of a limited partnership called Du Val Health Clubs Limited. We do not consider that either of these entities should be subject to statutory management on the basis of the Receivers' advice that they are 50% owned by a third party and operate somewhat independently of the Du Val Group. As a subsidiary of one of the corporations that is subject to this recommendation, Du Val HC GP Limited would be added to any statutory management by

¹⁷ Te Awa Terraces Limited Partnership – the general partner is recorded as Du Val GP 12 Limited, but that company was removed from the Companies Register on 20 June 2024.

operation of section 38(2) of the CIMA, unless expressly excluded. For this reason the recommendation expressly excludes this company.

Urgency

38. The Receivers have advised that Du Val is in a precarious position, with various creditors for differing entities who may act soon. Accordingly, we ask that you consider this as a matter of urgency.

Conclusion

39. Please let us know if you need any further information or if you have any queries. We are available to discuss at short notice, should that be required.

Yours faithfully,

Handwritten signature in blue ink, appearing to read 'Liam Mason/Margot Gatland'.

Liam Mason/Margot Gatland
General Counsel/Head of Enforcement
Financial Markets Authority

Appendix 3: Previous examples of entities that have been placed in statutory management

- 1989 – Equiticorp: Occurred following the collapse of Equiticorp.
- 1989 – Richmond Smart Corporation: Involved 121 subsidiary companies.
- 1989 – Chase Corporation: A large-scale property developer listed on NZX. Market Cap had reached \$3.6 billion. Involved 110 companies.
- 1994 – The Peninsula Club entities: Companies associated with a medium sized (80 units) retirement village where it appeared the public interest in maintaining a secure and orderly environment for residents and protecting their interests as creditors required this. (Gwin Corporation is one of these entities and its removal from statutory management will be consider at the LEG committee on Thursday 22 August)
- 1999 – IMI Pacific Group Ltd and associated persons: These companies and individuals were at the centre of a fraudulent “prime bank” scheme that raised about \$6 million from members of the New Zealand public.
- 2003 – CH Finance Ltd and associated persons: A home buy-back scheme. Borrowers signed over ownership of their homes and were saddled with loans they could not service. Many defaulted. The schemes involved at least 90 properties, valued at more than \$20 million.
- 2003 – International Investment Unit Trust: Ponzi scheme that raised around \$29 million from around 300 investors.
- 2010 – Aorangi Finance, seven charitable trusts and Allan Hubbard and Margaret Hubbard: Finance company run by Alan Hubbard that made loans of approximately \$134 million unlawfully funded by deposits received from 407 investors in Otago and Canturbury. Statutory management required due to the informal nature of the advances made, and the complexity of tracing securities and ownership of assets.
- 2010 – Hubbard Management Funds: Two companies that hold assets connected with Hubbard Management Funds, which is a funds management business ran informally by Hubbard through his accounting firm, which had raised funds unlawfully from around 300 investors, and had assets of approximately \$82 million.
- 2010 – Idea Services Ltd: Two subsidiaries of IHC New Zealand Inc, provided residential care services to around 2,700 people with intellectual disabilities and other services to around 9,000 people and their families. Statutory management was recommended in the public interest to preserve the continuity of services by the companies.