IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S275 of 2013

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

B E T W E E N:

WELLINGTON CAPITAL LIMITED ACN 114 248 458
Appellant

and

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
First Respondent

PERPETUAL NOMINEES LIMITED ACN 000 733 700
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Did clauses 13.1 and/or 13.2.5 of the Constitution of the Premium Income Fund ("***Fund***") authorise the appellant to distribute the shares in Asset Resolution Limited ("***ARL***") to the unit holders of the Fund?
3. Did the unit holders of the Fund to whom ARL shares were distributed become members of ARL at that time, having prospectively assented to becoming members, for the purposes of sec 231(b) of the *Corporations Act 2001* (Cth) ("***Act***") by applying for and being issued with units in the Fund?
4. Did the Full Court of the Federal Court ("***Full Court***") err in exercising its discretion to grant relief?

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Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

6. The decision of the primary judge (Jagot J) is reported at *Australian Securities and Investments Commission v Wellington Capital Limited* (2012) 91 ACSR 514; [2012] FCA 1140 ("***PJ***").

7. The decision of the Full Court is reported at *Australian Securities and Investment Commission v Wellington Capital Limited* (2013) 94 ACSR 293; [2013] FCAFC 52 ("***FC***").

Part V: Facts

8. The Fund is a managed investment scheme the units of which are listed on the National Stock Exchange. The appellant is the responsible entity of the Fund {FC [1]}.

9. The Fund was established in 1999. Since then, its principal activity has been the investment of unit holders' funds in mortgages, equities, debt instruments and cash {FC [2]}.

10. The second respondent is the custodian of the fund {PJ [3(3)]}.

11. On or about 4 September 2012, the applicant sold assets comprising approximately 41% of the assets of the Fund to ARL, which is an unlisted public company, in consideration for all of the issued share capital of ARL {FC [3]}.

12. On 4 September 2012, the ARL shares were issued by ARL to the second respondent as custodian of the Fund. The appellant instructed the second respondent to effect the transfer of the ARL shares to unit holders of the Fund. The second respondent signed a master transfer form for the purpose of transferring the ARL shares to unit holders in proportion to their unit holding. The unit holders to whom ARL shares were transferred were registered as shareholders in ARL's share register {PJ [4(a) to (e)]}.

13. On 5 September 2012, the sale of assets by the Fund to ARL and the transfer of the ARL shares to unit holders was announced to the National Stock Exchange {PJ, [3(5)] and [4(f)]}.

14. By 19 September 2012, holding statements had been printed and dispatched to all holders of ARL shares, together with a copy of the announcement of 5 September 2012 {PJ, [4(h)]}.

15. The first respondent alleges that that the distribution of the ARL shares to unit holders of the Fund was *ultra vires* the appellant. It does not allege that the sale of assets to ARL or the distribution of ARL shares to unit holders was contrary to the interests of unit holders or otherwise a breach of trust. It does not allege (and there is no evidence to suggest) that the unit holders have suffered any detriment by reason of the distribution.

16. The powers of the appellant vis-à-vis the Fund are conferred on it by a document entitled "Consolidated Constitution" contained in the Premium Income Fund Supplementary Deed Poll made on 5 September 2011 ("***Constitution***").[1]

17. The appellant relies on clauses 13.1 and 13.2.5 of the Constitution as the source of its power to distribute the ARL shares to unit holders.

18. Clause 13.1 of the Constitution provides that:

> The Responsible Entity shall have all the powers in respect of the Scheme that is legally possible for a natural person or corporation to have and as though it were the absolute owner of the Scheme Property and acting in its personal capacity.

19. Clause 13.2 of the Constitution provides that:

> In the administration of the provisions of this Constitution, and the Corporations Act, in relation to the Scheme and the Scheme Property, the Responsible Entity shall have the following powers. These powers shall be in addition to the powers, authorities and discretions vested in it by any other provision of this Constitution or by the Corporations Act and which shall not limit or be limited by, or be construed so as to limit or be limited by the powers, authorities and discretions otherwise by this Constitution or by the Corporations Act vested in the Responsible Entity, that is to say:

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[1] No other version of this document was in evidence {PJ, [15]}. This is relevant because it is a consolidated document and does not reproduce all provisions of the constitution. However, it contains all the provisions that are most relevant to the present dispute.

...

13.2.5 acquire, dispose of, exchange, mortgage, sub-mortgage, lease, sub-lease, let, grant, release or vary any right or easement or otherwise with Scheme Property as if the Responsible Entity were the absolute and beneficial owner.

...

20. Clause 16 is relevant to the construction of clauses 13.1 and 13.2.5. It provides as follows:

Determination of income and reserves

16.1 The Responsible Entity is to determine, according to generally accepted accounting principles and practices which apply to trusts:

16.1.1 the Income of the Scheme, and in particular, whether any receipts or outgoings of the Responsible Entity are on income account or capital account; and

16.1.2 the extent to which the Scheme needs to make reserves or provisions.

Distribution of Distribution Entitlement

16.2

16.2.1 *Calculating the entitlement*

After each Distribution Calculation Date the Responsible Entity must calculate for the relevant Distribution Recipient each Unit Holder's Distribution Entitlement.

16.2.2 *Determining who has the entitlement*

At the end of each Distribution Period each Unit Holder at the end of the day on the Distribution Calculation Date is presently entitled to its Distribution Entitlement.

16.2.3 *Payment of entitlement to a person entitled to it*

For each Distribution Recipient the Responsible Entity must pay to each Distribution Recipient its Distribution Entitlement on or before that date being 10 days after the Distribution Calculation Date.

Calculation of Distribution Entitlement

16.3

16.3.1 *Calculation of Distributable Amount*

The 'Distributable Amount' for a Distribution Period is to be determined in accordance with the following formula:

DA = I + C

Where:

DA is the Distributable Amount;

I is the Income of the Scheme for the Distribution Period minus any amount of the Income that is set aside during the Distribution Period as reserves or provisions under sub-clause 16.1; and

C is any additional amount (including capital, previous reserves or previous provisions) that the Responsible Entity has determined during the Distribution Period is to be distributed.

16.3.2 *Calculation of Distributable Entitlement*

The Distributable Entitlement of each Distribution Recipient is the total of each Unit Entitlement in relation to each Unit held by the Distribution Recipient at the end of the day on the Distribution Calculation Date, as determined in accordance with paragraph 16.3.3.

16.3.3 *Calculation of Unit Entitlement*

The Unit Entitlement in relation to a Unit is to be determined in accordance with the following formula:

$$UE = \frac{DA}{\Sigma U}$$

Where:

UE is the Unit Entitlement

DA is the Distributable Amount

ΣU is the total number of Units on issue in the SchemeMeans of payment [sic]

16.4 The Distributable Amount shall be paid to a Unit Holder by depositing into an account with a bank or other financial institution nominated by the Unit Holder and approved by the Responsible Entity or by being reinvested in the Scheme or otherwise as directed by the Unit Holder.

Payment to Joint Unit Holders

16.5 If two or more Persons are entered in the Register of Unit Holders as joint Unit Holders of any Units then the receipt of one of these Persons for the monies, from time to time payable in respect of the Units, shall be as effective a discharge to the Responsible Entity as if the Person signing the receipt was the sole Unit Holder of such Units.

21. Clause 26 deals with the winding up of the scheme. It provides as follows:

Section 601NC(2)

26.1 The Responsible Entity must not resolve to wind up the Scheme unless the Responsible Entity has complied with Section 601NC(2) of the Corporations Act.

Termination Event

26.2 Upon the happening of one of the following events, (identified as a '**Termination Event**'), the Scheme shall be wound up, the Scheme shall be wound up:

26.2.1 the Unit Holders by *Special Resolution*, direct the Responsible Entity to wind up the Scheme;

26.2.2 **[Not Altered not reproduced]**;

26.3.3 the Court makes an order directing the Responsible Entity to wind up the Scheme pursuant to Section 601ND of the Corporations Act;

26.2.4 the Unit Holders pass an Extraordinary Resolution to remove the Responsible Entity and do not appoint a new Responsible Entity;

26.2.5 the Responsible Entity gives at least three (3) months' notice of termination of the Scheme to Unit Holders;

26.2.6 the Responsible Entity gives notice under Section 601NC(2) of the Corporations Act and no meeting of Unit Holders is called pursuant to Section 601NC(2)(b).

Realisation

26.3 As soon as practicable after a Termination Event, the Responsible Entity must realise the Scheme Property and satisfy the Liabilities.

Final distribution to Unit Holders

26.4 Only after all Liabilities have been discharged, and all expenses of termination – including anticipated expenses – have been met or accounted for, is the net proceeds of realisation to be distributed to the Unit Holders in proportion to the paid up value of the Units that they hold. The net proceeds of realisation may be distributed in instalments. The final distribution to Unit Holders must occur prior to the 80th anniversary of the date of this Constitution.

...

Retention of Scheme Property

26.6 Subject to this Clause 26, and the Corporations Act, the Responsible Entity may retain in its hands, or under its control, any Scheme Property as may be required in its reasonable opinion to meet any Liabilities or any of the investments of the Scheme provided that any Scheme

Property so retained to the extent they [sic] are ultimately found not to be required, will remain subject to the Scheme for conversion and distribution pursuant to this Constitution.

Unclaimed money to be paid to ASIC

26.7 If, on completion of the winding up of a registered scheme, the Person who has been winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property, the Person must, as soon as practicable, pay the money or transfer the property to ASIC to be dealt with under Part 9.7 of the Corporations Act.

Part VI: Argument

First issue: Did the Constitution of the Fund authorise the appellant to distribute the shares in ARL to the unit holders of the Fund?

22. It is submitted that each of clauses 13.1 and 13.2.5 conferred power on the appellant to distribute the ARL shares to unit holders for the reasons set out below.

Clause 13.1

23. It is not disputed that the ARL shares comprised part of the Scheme Property. The appellant, therefore, had power, pursuant to clause 13.1, to deal with the ARL shares "as though it were the absolute owner" of them.

24. The absolute owner of shares has the power to transfer the legal interest in them to another person. By definition, the premise of the Scheme was that the beneficial ownership was already enjoyed by the unitholders. Thus the "as though ..." power must be read as permitting a legal owner to do as much as a beneficial owner could have. The appellant therefore had the same power to transfer the legal interest in the ARL shares because it must be treated "as though it were the absolute owner" of them.

25. It follows that the express words of clause 13.1 authorised the transfer of the legal interest in the ARL shares to unit holders, which is what occurred when they were distributed.

26. Any conclusion to the contrary must depend on some implied limitation on the power conferred by clause 13.1.

27. Such a limitation is not necessary for the effective operation of the Constitution and there is therefore no basis for such a limitation to be implied. For this reason alone, the Full Court's construction of clause 13.1 was erroneous.

28. The Full Court erred in its construction of clause 13.1 for the following additional reasons.

29. In concluding that the distribution was *ultra vires* the appellant {FC [51] to [55]}, the Full Court assumed that clause 13.1 is "no more than a saving provision" {FC [53]} applying only to the appellant's dealings with outsiders and "is not concerned with the powers of the Responsible Entity in relation to Unit Holders" {FC [54]}.

30. There is nothing in the words of clause 13.1 (or elsewhere in the Constitution) that requires or even suggests that it should be interpreted in this way. The Full Court's conclusion (as is most clear from {FC [52] to [53]} ultimately depends solely on the status of the appellant as a trustee rather than the words of or presumed intention behind clause 13.1. It is respectfully submitted the appellant's status as a trustee should not be given such specific importance in the construction of clause 13.1, given that it follows necessarily and generally from the appellant's role as responsible entity of the Fund: sec 601FC(2) of the Act .

31. To the contrary, clause 13.1, on its face, amounts to a grant of power in the broadest terms possible. It is highly unlikely that the drafter of the provision intended, in using such language, that the effect of the clause was to be limited as found by the Full Court. It is respectfully submitted that the Full Court erred in implying such a limitation into the clause.

Clause 13.2.5

32. The same arguments apply to clause 13.2.5, as do additional arguments set out below.

33. Clause 13.2.5 confers a power on the appellant to "dispose of... or otherwise deal with Scheme Property as if the Responsible Entity were the absolute and beneficial owner." When one treats the appellant as if it were the absolute and beneficial owner of the ARL shares, there can be no doubt that it was

empowered to dispose of or otherwise deal with the legal interest in them by transferring it to unit holders.

34. Contrary to the finding of the Full Court {FC [72] to [74]}, the language of clause 13.2.5 captures the in specie distribution the subject of this dispute given that it was the legal interest in the ARL shares that was disposed of or otherwise dealt with upon its transfer by the appellant to the unit holders.

35. The limitation on the power conferred by clause 13.2.5 found by the Full Court is contrary to the meaning of the express words of the clause. It could only be found to exist as a matter of implication. Such an implication is not necessary and, on that basis alone, it is respectfully submitted that the Full Court erred in its construction of clause 13.2.5.

36. Furthermore, there is nothing in the language of or presumed intention behind clause 13.2.5 to justify the Full Court's finding {FC [69]}, that the provision addresses only the question of the power of the appellant to deal with outsiders in respect of the Scheme Property. That conclusion is directly contrary to what appears to have been the intention of the draftsman in conferring a power expressed in extremely broad terms. The breadth of the power is emphasised by the express prohibition, set out in the chapeau to clause 13.2, of any construction of the clause so as to limit it by any other powers, authorities and discretions conferred on the appellant by the Act or the Constitution.

The relevance of clauses 16 and 26

37. The primary judge held {PJ [54]} that the existence of clause 16 did not operate to restrict the powers conferred by clauses 13.1 and 13.2.5. The Full Court did not address the question whether, as a matter of implication, the appellant's power to distribute Scheme Property limited to the power conferred by clause 16.

38. It is respectfully submitted that the primary judge's finding in this respect was correct for the following six reasons.

39. First, the chapeau of clause 13.2 prohibits the clause from being construed in a manner limited by the conferral of other powers on the appellant. The Court is therefore prohibited from construing clause 13.2.5 on the basis that

the power conferred by clause 16 serves to limit the power conferred by clause 13.2.5

40. Secondly, there is nothing in the text of clause 16 that states or even suggests that it is a compendious statement of the appellant's power to distribute Scheme Property. It is not necessary to the commercial efficacy of the Constitution that this be implied into it and it should not be.

41. Thirdly, the notion that clause 16 was intended to cover the field in terms of the appellant's power to distribute Scheme Property does not sit comfortably with the breadth of the powers conferred by clauses 13.1 and 13.2. It is unlikely that the drafter of the Constitution, who was at pains to confer powers on the appellant in the broadest terms possible in clauses 13.1 and 13.2, should have intended those powers to be limited by clause 16 in circumstances in which no such intention was expressed in the terms of the Constitution.

42. Fourthly, where some of the assets of the Fund are illiquid and it is in the interests of unit holders for those assets to be distributed to them rather than remaining under management as Scheme Property (and thereby attracting management fees), the construction for which the first respondent contends leads to the result that the responsible entity would have no option other than to wind up the entire Fund or retire in order to divest itself of them. That is unlikely to have been the intention of the drafter of the Constitution, especially given the breadth of the powers conferred on the appellant by clauses 13.1 and 13.2, which suggests that the drafter was at pains to ensure that the responsible entity of the Fund had sufficient powers to permit commercial flexibility in its response to particular issues arising in the management of the Fund.

43. Fifthly, the winding up provisions in clause 26 of the Constitution do not authorise the responsible entity to perform an in specie distribution of Scheme Property. Clause 26.4 provides only for the "net proceeds of realisation to be distributed to Unit Holders". Therefore, on the first respondent's construction of the Constitution, the appellant has no power at all to make an in specie distribution of Scheme Property, even in the winding

up of a Scheme. Where some of the Scheme Property was illiquid and incapable of realisation, that would lead to the surprising result that the person winding up the scheme was obliged to transfer that property to the first respondent pursuant to clause 26.7 of the Constitution. It is submitted that this was not the intention of the drafter of the Constitution and, rather, that clauses 13.1 and 13.2.5 were intended to confer on the responsible entity a power to make an in specie distribution of Scheme Property where it was in the best interests of the unit holders that this occur.

44. Sixthly, clause 26.7 of the Constitution requires the person winding up the scheme to pay or transfer to the first respondent, "any unclaimed or undistributed money or other property that was part of the Scheme Property" (emphasis added). This passage assumes that property other than cash that forms part of the Scheme Property is capable of being distributed to unit holders in the winding up of the scheme and provides that any Scheme Property that is not so distributed is to be transferred to the first respondent. In short, clause 26.7 assumes that the appellant has the power to make an in specie distribution of property other than cash to unit holders.

Second issue: Did the unit holders of the Fund become members of ARL upon their entry into the register of ARL?

45. The primary judge held {PJ [63]} that, because the Constitution authorised an in specie distribution of shares to unit holders, by applying to be issued with and receiving units, unit holders in the Fund, who are taken to be bound by the Constitution, assented to become members of a company, such as ARL, upon receiving an in specie distribution of shares in it. Her Honour therefore held that the requirement in sec 231(b) of the Act (which is set out in Part VII below) was satisfied.

46. Her Honour's reasoning was consistent with the approach taken by the Supreme Court of Queensland in *Re Crusader* (1996) 1 Qd R 117 (to which her Honour referred to at {PJ [47] to [48]}, where Thomas J held, at 128-9, that no formal agreement is necessary to satisfy the predecessor of sec 231(b) of the Act and that the holders of convertible notes, by assenting to the trust deed governing those notes, "had bound themselves to whatever

amended obligations might lawfully be effected under that deed". That included an obligation to take shares in the company upon the exercise of a power on the part of the beneficiaries of the trust to resolve in meeting to convert the notes into shares. Accordingly, the minority was taken to have assented to become members of the company and became members despite their opposition to the resolution.

47. The Full Court {FC [78]} declined to decide the question, having come to the view that the Constitution did not authorise the appellant to distribute the shares in ARL to unit holders.

48. It is submitted that the legislature must have intended that the assent required by sec 231 of the Act could be satisfied prospectively in the manner contemplated by Jagot J and Thomas J for the following reasons.

49. If the specific consent of unit holders to the particular transaction by which they received the ARL shares were required in order for them to become members, it would follow that any commercial arrangement that authorised one party to the arrangement to transfer shares to another party could only operate according to its terms were the recipient to consent to receiving the shares by some act additional to entry into the commercial arrangement. That is likely to have far-reaching consequences into arrangements such converting notes, call and put options, reductions of share capital and in specie distributions of shares. It is unlikely that the legislature intended that commercial parties should be unduly restricted in their dealings by the construction of sec 231 for which the first respondent contends.

50. To the contrary, it is clear from the provisions of the Act in relation to reductions of share capital that sec 231 was not intended to operate in this way. Specifically, the regime set out in Part 2J.1 of the Act regarding share capital reductions could only operate if sec 231 is construed as the appellant contends.

51. A reduction in share capital may occur by way of a distribution to shareholders of property as opposed to cash provided that the constitution of the company authorised in specie distributions to shareholders: *Archibald Howie v Cmr of Stamp Duties (NSW)* (1948) 77 CLR 143 (especially at 152-3

per Dixon J, with whom Rich J agreed); see also the transactions under consideration in *Idameneo (No 123) v Symbion Health* (2007) ACSR 64 ACSR 680; [2007] FCA 1832, *Westchester Financial Services v Acclaim Exploration* (1999) 32 ACSR 499; [1999] WASC 87 and *Re Cracow Resources* (1993) 10 ACSR 749; (1993) 11 ACLC 702.

52. In *Archibald Howie*, Dixon J (with whom Rich J agreed) said, at 152-3, that:

> A reduction of share capital involving the payment off of any paid up share capital, or what is in essence the same thing, the distribution of assets in specie in satisfaction of paid up share capital, is a transaction which must be provided for by the articles of association. We have not been furnished with the articles in the present case, but they must contain the requisite clauses. While a shareholder has not a proprietary right or interest in the assets of an unincorporated company, his "share" is after all an aliquot proportion of the company's share capital with reference to which he has certain rights. He is entitled among other things to have share capital applied in pursuance of the memorandum and articles of association and, so far as assets are available for the purpose to have his paid up capital returned in a liquidation or upon a reduction of capital if that method of returning it is decided upon pursuant to the articles of association. These rights all arise out of the contract inter socios.
>
> It is not unimportant that s 158(1) of the Companies Act 1936 (NSW) (which is based on s 55(1) of the English Companies Act 1929) empowers a company to reduce its capital only "if so authorized by its articles." The reduction involving the payment off of part of the paid up share capital must therefore be considered an effectuation of a provision of the contract of membership. The allotment of the share and the payment up of the liability thereon conferred upon the holder for the time being of the share a right to have the assets of the company used and applied in the various ways in which the articles expressly or impliedly require or authorize and this is one of them. It is an effectuation or realization of the rights obtained by the acquisition of the share in the same way as is the distribution of a dividend. The consideration given is the payment up of the share capital in satisfaction of the liability for the amount of the share incurred on allotment.

53. Sections 256B and 256C of the Act have the effect that the members of a company can resolve (by ordinary resolution for equal capital reductions and by special resolution for selective capital reductions) to reduce the company's share capital provided that the criteria in subsec 256B(1) are satisfied, including that the reduction is fair and reasonable to the company's shareholders as a whole. It is clear that the legislature intended that a

minority of members voting against a reduction in share capital of a company could be compelled to accept the transaction provided that the requirements of Part 2J.1 were met.

54. In the case of a reduction of share capital by way of in specie distribution of shares forming part of the capital of the company (as in *Archibald Howie*), that intention would be thwarted were sec 231 to be construed so as to require the consent to the particular transaction of each member of the minority of the meeting required by sec 256C. It follows that the legislature cannot have intended sec 231 to be construed in that way. Rather, where constitution of the relevant company authorises a reduction of share capital by in specie distribution of shares (as contemplated by Dixon J in the passage quoted above), sec 231 has been complied prospectively by the shareholder's acquisition of their shares in the company undertaking the capital reduction.

55. By parity of reasoning, the unit holders of the Fund assented to become members of ARL, for the purposes of sec 231 upon their application for and acquisition of.

Third issue: Did the Full Court err in exercising its discretion to grant relief?

56. This issue only arises if the appellant is unsuccessful in respect of one or both of the issues discussed above.

57. The primary judge ordered[2] that two parties be joined to represent the interests of different classes of unit holders. However, beyond being the subject of that order, the representative defendants did absolutely nothing in the proceedings. They did not even enter an appearance (submitting or otherwise).

58. Even had they appeared, the two representative defendants would not adequately have represented the different classes of persons interested in the outcome of the proceedings.

59. According to the terms of the primary judge's order of 17 October 2012, one of them (Charles Hodges) was to represent the interests of unit holders who

[2] The orders were made by the primary judge on 17 October 2012.

had been issued with ARL shares and had retained them, unit holders who had been issued with ARL shares and sold them to third parties and persons who had purchased ARL shares since then. There is an obvious potential for a conflict of the interests of those classes of persons such that it was inappropriate for a single representative to be appointed in respect of all of them. Further, there was no evidence to suggest that Mr Hodges fell into any, let alone each, of these classes.

60. The other representative defendant (IOOF Investment Management Ltd) was appointed to represent the interests of those persons who had been unit holders at the time at which the ARL shares were distributed but had since sold their units.

61. No provision was made for the representation of persons who had both sold their units and their ARL shares (if any such persons existed).

62. It is beyond doubt and has long been the rule that all persons materially interested in the subject matter of the proceedings ought to be joined as parties. The use of representative parties in disputes such as the present is a relaxation of that rule as a matter of convenience: *Silkfield v Wong* (1999) 199 CLR 255 at [13] to [14]; *John Alexander's Clubs v White City Tennis Club* (2010) 241 CLR 1 at [139].

63. It is submitted, on that basis, that a failure properly to ensure that separate classes of beneficiaries of a trust are adequately represented renders the proceedings improperly constituted such that no relief ought to have been granted by the Full Court.

64. This factor was relevant to the exercise of the Full Court's discretion but not taken into account. This Court should now decide how that discretion should be exercised in the event that the appellant is otherwise unsuccessful in the appeal.

65. The following factors, in addition to the problems associated with the representative defendants, tended against the exercise of the Full Court's discretion in favour of granting relief.

66. First, the relief granted was purely declaratory in nature. No orders were sought by the First Respondent having the effect of undoing the distribution of ARL shares to unit holders.

67. Secondly, the First Respondent does not contend that the distribution of the ARL shares was contrary to the interests of unit holders.

68. Thirdly, there was no evidence of any detriment to unit holders. There was not even any evidence of complaints by unit holders.

69. Fourthly, the only contravention of the Act found to exist was the contravention of subsec 601FB(1), which requires the responsible entity of a registered scheme "to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act."

70. It is submitted for these reasons that the Court would not exercise its discretion in granting relief in the event that the appellant is otherwise unsuccessful in the appeal.

Part VII: Legislation

71. The following provisions are relevant to the argument in this case. They appear below in the form they took at the time of the hearings and decisions below. They have not been materially amended since then.

72. Subsection 601FB(1) of the Act provides that:

> The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act.

73. Section 231 of the Act provides that:

> A person is a member of the company if they:
>
> (a) are a member of the company on its registration;
>
> (b) agree to become a member of the company after its registration and their name is entered on the register of members; or
>
> (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares.

Part VIII: Orders sought

74. The appellant seeks orders that:

(a) the appeal be allowed;

(b) the orders of the Full Court, including as to costs, be set aside;

(c) in lieu thereof, the appeal to the Full Court be dismissed; and

(d) the first respondent pay the appellant's costs of the appeal to the Full Court, the application for special leave to appeal and the appeal to the High Court.

Part IX: Time estimate

75. The appellant would seek no more than one-an-a-half hours for the presentation of the appellant's oral argument.

Dated: 11 December 2013

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