IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M80 of 2018

BETWEEN **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

Appellant

AND

MICHAEL LEWIS WOOLDRIDGE

First Respondent

AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED)

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. Dr Wooldridge adopts the articulation of the issues as framed by Mr Lewksi in proceeding No M79 of 2018.

Part III: Notice under s.78B of the *Judiciary Act 1903*

3. Notice pursuant to s.78B of the *Judiciary Act 1903 (Cth)* is not necessary.

Part IV: Facts

10 **4.** Dr Wooldridge adopts Part IV of Mr Lewski's submissions.

Part V: Legislation

5. Dr Wooldridge adopts Part V of Mr Lewski's submissions.

Part VI: Argument

Notice of Contention

6. Relying upon the decisions of the Victorian Court of Appeal in *360 Capital v Watts*[1]

[1] (2012) 36 VR 507 at 517.

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and Federal Court (Gordon J) in *Premium Income Fund Action Group Inc v Wellington Capital Ltd*[2] the trial judge[3] and Full Federal Court[4], held that a "member's right" within the meaning of s.601GC(1)(b) included the right of members to have a managed investment scheme administered according to the constitution (the **Administration Right**). That conclusion and the reasoning underpinning it were erroneous for the following reasons.

7. *First,* as the Full Court recognised,[5] in findings not challenged on this appeal, s.601GC of the Act is a "freestanding provision providing the statutory power to modify, repeal or replace the existing constitution irrespective of any limitation upon that power that may be found in the existing constitution."[6] However, the effect of construing members' rights as incorporating the Administration Right would necessarily render that freestanding power capable of being denuded by the terms of the constitution itself. A constitution could readily provide that all amendments must be approved by a resolution of members cast at a general meeting. Any exercise of power under s.601GC(1)(b) would necessarily interfere with the right of members to have the constitution administered in accordance with that provision, and the Administration Right, would by its operation become a charter to remove any right to amend under s.601GC(1)(b). A preferable construction, which preserves the freestanding operative function of s.601GC(1)(b) is that identified by Barrett J in *ING Funds Management Ltd v ANZ Nominees Ltd & Ors*[7], namely that "[b]ecause the power to modify is concerned with the constitution, the focus is on rights created or secured by the constitution itself".

8. *Secondly*, as the Full Court observed, the terms of s.601GC(1)(b) "clearly" contemplate there may be amendments that are not adverse to members' rights.[8] However, if the Administration Right is construed as being a members' right, there is no amendment that can be made under s.601GC(1)(b) which does not derogate from that alleged right. If it is a right of members to have maintenance of the constitutional *status quo* then *any statutory modification* must necessarily be adverse to the preservation of that *status quo* and so to the Administration Right. Adopting an analysis which evaluates the qualitative rights of members before and after the proposed amendment, necessarily employs the wrong evaluative

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[2] (2011) ACSR 600.
[3] Trial Reasons at [659]. (**AB 209**)
[4] FCAFC Reasons 1 at [232] and [234]. (**AB 581**)
[5] FCAFC Reasons 1 at [216] and [218]. (**AB 576**)
[6] Emphasis added.
[7] (2009) 228 FLR 444 at [98]. See also, *Re Centro Retail* (2011) 255 FLR 28 at [27].
[8] See, FC 1 at [232]. (**AB 581**)

framework – that is so, because under that approach the Administration Right no longer becomes the relevant comparator – it has already being infringed upon by the amendment itself. Thus, the example drawn upon by the Victorian Court of Appeal in *360 Capital v Watts*[9] did not support a construction embracing the Administration Right. The Court of Appeal implicitly considered whether the period for redemption of units from 90 days to 60 days adversely affected members' rights, by evaluating whether the substantive right of redemption had been adversely affected *rather than* whether or not the Administration Right had been adversely affected – which it clearly had, by the making of the very amendment itself.

10 **9.** The only "members' right" held by the trial judge and Full Court to have been adversely affected was the alleged Administration Right. ASIC now contends[10] that members had a *separate* right that the RE would not be paid any fees out of scheme property save for those specified in the constitution. Properly scrutinised, this is no more than an aspect of the alleged Administration Right. Furthermore, it illustrates the untenable nature of a construction which treats the Administration Right as being a "members' right". Under s.601GA(2), an RE can only be paid fees out of scheme property if the fees are set out in the constitution. However, the import of ASIC's contention is that an RE can never "reasonably consider" that it ought to be paid an additional or increased fee, despite the absence of statutory indication to that effect.

20 **10.** Once it is recognised that the Administration Right is not a "members' right" for the purpose of s.601GC(1)(b) and applying the test articulated by Barrett J in *ING Funds Management Ltd v ANZ Nominees Ltd*[11], the amendment introducing the listing fee satisfied s.601GC(1)(b) and was valid. Madgwicks correctly identified that the Amendments affected the "value" of unitholders' interests, but not their rights. In considering and following Madgwicks' Advice, it thus inevitably follows that the Board reasonably considered that members' *rights* were not affected.

11. As the starting foundation for ASIC's appeal is the invalidity of the Amendments, the appeal ought therefore be dismissed.

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[9] (2012) 36 VR 507 at 517 (41), adopting the explanation of JD Phillips J (as His Honour then was) in *Eagle Star Trustees Ltd v Heine Management Ltd* (1990) ACSR 232.

[10] AS [39].

[11] [2009] NSWSC 243; (2009) 228 FLR 444 at [97].

Ground 1

12. As the Full Court correctly identified, the relevant issue before it was the identification of the content of the "Constitution" *as a matter of statutory construction* after the lodgement of the "purported amendment of the Constitution".[12] The statutory text and the consequences for the parties of holding void *every* act done in breach of the condition, reinforce the correctness of the Full Court's conclusion that amendments to a scheme constitution, once lodged with ASIC, were intended to be ordinarily valid until set aside.[13]

13. In ascertaining the legislative intention, the Full Court correctly focused upon the structure of the Act and the nature of the regulatory regime in question.[14]

10 **14.** The features include the following: An application to register a scheme must include certain documents, including a copy of the scheme's constitution.[15] An RE must operate each scheme.[16] S.601FC(1) prescribes the RE's obligations. The RE must ensure that the scheme's constitution meets the requirements of ss 601GA and 601GB.[17] It must also ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and the Act,[18] and carry out or comply with any other duty, not inconsistent with the Act, that is conferred on the responsible entity by the scheme's constitution.[19] Where a change to a constitution is to be effected, the RE must lodge with ASIC a copy of the modification or the new constitution. The changes cannot take effect until the copy has been lodged.[20] ASIC can require the RE to lodge a consolidated constitution.[21] Pursuant to s.1274(1) of the Act, ASIC
20 may keep registers, and it keeps a register of scheme constitutions that a person can inspect.[22]

15. Critically, as the Full Court recognised, the regulatory framework establishes a regime by which an RE is to have control of the scheme, but its powers and functions are limited by the scheme constitution.[23] Thus a member, or proposed member, can analyse the scheme

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[12] FC 2 [185]. (**AB 701**)
[13] FC 1[253]-[256] and [324]. (**AB 585-586, 606**) FC 2 [185]-[196]. (**AB 701-704**)
[14] FC 2 [189]. (**AB 703**) FC 1 [252]-[256]. (**AB 585-586**)
[15] Section 601EA(4).
[16] Section 601FB.
[17] Section 601FC(1)(f).
[18] Section 601FC(1)(k).
[19] Section 601FC(1)(m).
[20] Section 601GC(2).
[21] Section 601GC(3).
[22] Section 1274(2).
[23] FC 1 [254]-[256]. (**AB 585-586**)

constitution.[24] Importantly, in a commercial sense, the constitution must set out what fees or benefits are payable to the RE from scheme property. The rights and entitlements in the constitution are fundamental to the scheme and also to the legislative regime that regulates schemes. The RE is mandated to make payments out of the scheme property (whether by way of investment or remuneration to itself or otherwise) in accordance with, and only in accordance with, the scheme's constitution.[25] The RE must also carry out and comply with any duty conferred on it by the constitution.[26] A scheme member must be able to enforce rights arising under the constitution.[27] The rights and entitlements that exist under the constitution are not fixed.

10 **16.** Thus, the constitution serves to enable members to understand what rights they will have and also what rights the RE will have - and facilitates *inter alios* members, prospective members and officers exercising judgments with the requisite certainty. That certainty is particularly important, having regard to the prominence of the "constitution" as a touchstone under, for example, ss.601FC(1)(k), 601FD(1)(f)(iii) and 208(3) (as amended by s.601LC).

17. Having regard to the regime implemented by Part 5C and the central role played by the constitution in facilitating the acts and judgments of the parties – based on the registered and publicly available constitution, it cannot be sensibly contended that a purpose of the Act was to render void every act done in breach of s.601GC(1)(b). To the contrary, the structure of the Act strongly suggests that it was intended that amendments to a scheme constitution,
20 once lodged with ASIC, would be valid until set aside. Applying the statement of the majority in *Project Blue Sky,* it is unlikely that it was a purpose of the Act that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.[28] Having regard to the obligations imposed on the RE by s.601GC(1)(b) and the ability for contestable matters of judgment to readily arise by reason of the "*reasonably considers*" criterion,[29] the likelihood of an RE breaching those obligations is far from fanciful, and, if acts done in breach of s.601GC(1)(b) are immediately invalid, it is likely to result in much inconvenience to those members of the public who have acted in

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[24] FC 1 [254]. **(AB 585-586)**

[25] Section 601FC(1)(k).

[26] Section 601FC(1)(m). Similarly, officers of the RE must take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the RE complies with the scheme constitution: section 601FD(1)(f).

[27] Section 601GB.

[28] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392 [97] per McHugh, Gummow, Kirby and Hayne JJ and the cases there cited.

[29] Cf AS [52].

reliance on the RE's conduct.[30] In fact, the public inconvenience would be manifest. Members and officers (including those who become members and officers many years after an amendment), would be required to "second guess" any amendments previously made, before proceeding with inevitably reduced confidence as to their efficacy for the purpose of any consequential acts. Analogously to the licensees in *Project Blue Sky*, they would have great difficulty in ascertaining whether the RE, in performing an historical act, had reasonably considered whether the amendment would adversely affect members' rights.[31]

18. The foregoing considerations also reinforce the conclusion that properly construed, s.601GC(1)(b) confers both a power of amendment upon an RE and regulates the manner in which that power can then be validly exercised – i.e. "*if the responsible entity reasonably considers*". The objects of commercial certainty and public convenience militate strongly in favour of a construction of s.601GC(1)(b) which renders any failure to "reasonably consider" as being an abuse of power (and therefore voidable) rather than an excess of capacity (and therefore wholly void).[32]

19. Dr Wooldridge otherwise adopts Mr Lewski's submissions in respect of Ground 1.

Ground 2:

20. The manner in which ASIC frames the issue[33] seeks to set up a false debate, as the question is not whether a director's subjective honest belief is sufficient to absolve the director and the RE of breaches of duty, but rather whether there were breaches of duty. Further, the matters advanced by ASIC in support of Ground 2 are not directed towards, and fail to grapple with, the actual factual context in which the Lodgement Resolution and Payment Resolutions were made.

21. In particular, ASIC's submission elides the critical enquiry – namely – what, at the time of the Lodgement Resolution and Payment Resolutions were the issues for decision and having regard to those issues what considerations were relevant to the decision making of the directors?[34] Contrary to AS [67]-[68], the Full Court did not approach the analysis without appreciating and giving force to the "objective elements" of the enquiry. The Full Court

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[30] Ibid.

[31] *Project Blue Sky* at [98].

[32] Cf AS [48] and [51]. See further, *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 302-303 (cited by Gageler J in *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 at [60]).

[33] AS [3]

[34] The Full Court correctly framed the analysis in such a way: FC 1 [162], [268]. (**AB 555, 588**)

expressly and correctly identified,[35] that one must necessarily look "at the matter objectively, *taking into account the surrounding circumstances confronting the director*"[36].

22. The critical surrounding circumstance in the present context was that the Directors and their advisers understood that the Amendments were valid. No contrary suggestion was made at trial or on appeal in the Full Court. In reasoning equally applicable to the Payment Resolutions, the Full Court found that "[n]o case was put by ASIC that the Directors needed to proceed other than on the basis that the previous actions were (and were able) to be treated by the Directors as valid"[37]. Further, as the Full Court recognised, there was no allegation that the Directors were required to reconsider the decisions made prior to the Lodgement Resolution or that the Directors knew or ought to have known that they had acted improperly prior to 22 August 2006.[38]

23. Neither the Lodgement Resolution nor the Payment Resolutions modified, confirmed or revisited the 19 July 2006 resolution.[39] The Lodgement Resolution was directed, singularly, to the *timing* of the lodgement of the Amended Constitution.[40] As the Full Court identified, the Board would not have approved the Amendments on 19 July 2006 if it did not want the Amendments to be legally effective[41] and clause 4(a) of DOV 7 required the Supplementary PDS to be prepared, so that that the Amendments could be lodged with ASIC as required by s.601GC(2) of the Act, "as soon as practicable".[42]

24. Similarly, the Payment Resolutions were necessarily directed to the question of whether the occasion for payment of the Listing Fee had arrived, in a context where the directors' understanding, informed by independent advice, was that the RE had a legal obligation to make the payments.[43] Put differently, *all of the surrounding circumstances*, as known to each of the directors at the time of the Payment Resolutions indicated that there was a legal obligation to pay the Listing Fee.

25. It is these matters of context that relevantly and necessarily defined the scope of the directors' duties at the time of the Lodgement Resolution and the Payment Resolutions. Once

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[35] See eg, FC1 [265], [282], [298]. (**AB 588, 592, 597-598**)
[36] FC 1 [298]. Emphasis added. (**AB 597-598**)
[37] FC 1 [301]. (**AB 598-599**)
[38] FC 1 [38], [39], [53], [266] and [301]. (**AB 509-510, 510, 517, 588, 598-599**)
[39] FC [281], [341]. (**AB 591-592, 613**)
[40] FC 1 [269]-[274] and [281]-[283]. (**AB 588-589, 591-592**)
[41] FC 1 [174]. (**AB 560**)
[42] FC 1 [172]. (**AB 560**)
[43] FC 1 [334]. (**AB 608-609**)

the context is properly recognised, no relevant error in the Full Court's approach can be identified. By its appeal submissions, ASIC has eschewed any attempt to identify with precision the matters that *ought to have been taken* into account by the directors at the time of passing the Lodgement Resolution and Payment Resolutions. Implicit in ASIC's approach is the imposition of an obligation, erroneously embraced by the trial judge,[44] that at the time of passing each of the Lodgement and Payment Resolutions, the directors should have reflected on the earlier failing on 19 July 2006 and on whether there was any doubt as to the validity of the lodged constitution.

26. Inherent within the statements of general principle[45] is a recognition that the role of a director is to *guide* and *supervise*. Consistent with that role, it is not the function of a board or its directors to continually re-evaluate or second guess their earlier decisions, *unless* the circumstances warrant such a re-consideration. The Full Court recognised that directors, honestly believing previous decisions to be adequate, would not normally revisit those decisions.[46] To require otherwise would be more than a counsel of perfection – it would invite stagnation and "paralysis by analysis" in decision making rather than progress, and inhibit the responsible performance of management's operational responsibilities. Such an unworkable and onerous obligation is unnecessary. It ought to be remembered that ASIC is driven to seeking the imposition of such an obligation in the unique circumstances of this case, because relying on the events of 19 July 2006 as grounding a contravention was precluded by s.1317K of the Act.[47]

27. Measuring the responsibilities of the directors by reference to "the true constitution in law"[48] in an uncritical manner divorced from the actual context in which the duties are performed, would also create an unworkable norm. It posits that directors can be held liable, in a strict sense, for acting on the basis of what is then known and understood to be the existing "constitution" in circumstances where at a later indeterminate point in time, it may be established that the constitution being acted upon was not relevantly the "true constitution". Such an indeterminate norm also carries with it the impracticable obligation on the part of directors to continually consider whether the constitution they are acting upon is in fact the

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[44] See eg, LJ [757]-[758] and [766] (**AB 239-240, 241**)

[45] See for example, *Mills v Mills* (1938) 60 CLR 150 at 164; *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287 per Gzell J at [255]; *Daniels v Anderson* (1995) 37 NSWLR 438 at 501, 504; *Australian Securities and Investments Commission v Vines* (2007) 233 FLR at [372], [731].

[46] FC 1 [301]. (**AB 598-599**)

[47] FC 1 [109]. (**AB 538**)

[48] AS [62].

"true constitution". Furthermore, in the present context, this implicit premise impermissibly and directly transmutes ASIC's case into one in which there was an ongoing duty on the part of the directors to reconsider their actions on 19 July 2006.

28. Contrary to AS [75]-[83], the relevant enquiry on the "conflict" and "improper use" claims cannot be conducted by ignoring the *historical surrounding fact* that the Board of the RE passed a resolution authorising the Amendments in circumstances where all participants understood the resolution and subsequent Amendments to be valid and had received legal advice to support that understanding. The subjective understanding of the directors cannot therefore be wholly ignored. In an analogous context to the "improper use" claims, this Court has observed that:[49]

> "when impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important [citation omitted]: the alleged offender's knowledge or means and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do."

29. ASIC contends, in absolute terms, that the resolution of the "conflict" claims is not dependent on whether or not the directors of the RE were *even* conscious of the conflict or their subject beliefs about the resolution.[50] Such an absolute standard, divorced from the actual circumstances in which the relevant act is occurring, is untenable. On ASIC's case, directors who effect a transaction (Transaction A) in preference to another transaction (Transaction B) reasonably believing Transaction A to be in the best interests of members having regard to existing circumstances known to them at the time, will nonetheless be held liable if a court subsequently holds that, although the directors reasonably believed Transaction A was in the best interests, Transaction B was *in fact* in the best interests of members. Similarly, on ASIC's construction of s.601FC(1)(c), a director who acts in a way which gives priority to the RE's interests over the members' interest will be liable, even if the conflict was then unknown or unknowable to that director. Thus, in truth, on ASIC's construction, s.601FD(1)(c) would become a warranty that best interests will always be served, without contextual qualification, and would remove the need for the protection afforded by s.601FD(1)(b). A far more preferable construction is one which avoids imposing liability where directors act in accordance with a bona fide belief as to what is in the best

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[49] *R v Byrnes* (1995) 183 CLR 501 at 514-515.
[50] AS [76].

interests of members and there are existing grounds upon which a reasonable director *could* come to the same conclusion.[51]

30. The trial judge[52] conflated the question of whether there had been a breach of trust with the question of whether the Directors had acted in breach of duty *in connection* with the breach of trust, thereby producing a result which amounted to putting directors of responsible entities under obligations of strict liability. Put another way, the effect of his Honour's objective approach was that whether or not there has been a contravention of s.601FC(1)(c) or s.601FD(1)(c) of the Act would not turn on the responsible entity's or the directors' knowledge or other relevant matters, but rather on whether or not there has been a breach of trust. By positing that the directors' duty required "adherence to the [true] constitution" [53]ASIC's submission on s.601FD(1)(c) creates the same problem. For example, a director who became a director of APCHL, say in April 2008, and who had no knowledge of the circumstances giving rise to the amendments in July and/or August 2006, would nevertheless be in breach of duty by authorising payments for fees made pursuant to apparently valid constitutional provisions, because the s.601FD(1)(c) duties to act in the best interests of the members and to resolve conflicts in favour of members "includes a requirement that the *trustee* strictly adhere to the terms of the trust"[54].

31. The incongruity in applying a strict liability test of the type advanced by ASIC is magnified when one considers that the law places the onus on those impugning a director's decision. A Court does not begin by assuming impropriety.[55] The burden rests with a person impugning an exercise of power.[56] Yet ASIC's unworkable standard would require directors to "second-guess" or revisit the propriety of historical decisions, absent any existing challenge to those decisions.

32. The enquiry into whether a director has breached s.601FD(1)(c) cannot occur in a factual vacuum divorced from things that had been actually done and were actually known. Thus, in *Charterbridge Corporation Ltd* v *Lloyds Bank Ltd*[57] Pennycuick J held that it was

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[51] See *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1927] 2 KB 9 at 23.

[52] LJ [485] to [487], [613] and [752]. (**AB 155, 193, 237**)

[53] AS [75].

[54] LJ [749]. (**AB 237**)

[55] *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 per Owen J at [4596] (**Bell**); *Australian Metropolitan Life Assurance Co Ltd v Ure.*(1923) 33 CLR 199 per Knox CJ at 220 and Isaacs J at 221; *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112.

[56] Ibid.

[57] [1970] Ch 62. Cited at AS[68] and footnote 62.

necessary for the plaintiffs to prove whether an intelligent and honest person in the position of a director could, in the whole of the circumstances, have reasonably believed that the transactions were for the benefit of the company.[58] The "transactions" in question here were the Lodgement and Payment Resolutions. In the case of the Lodgement Resolution – an administrative or ministerial exercise in "circumstances" where the decision to amend had already been made and a reasonable director would believe that the question was one of *timing* rather than revisiting *whether or not* the Amendments should be made. In the case of the Payment Resolutions – a "transaction" to effect a payment appearing in the Constitution – in "circumstances" where the amendment giving rise to that apparent legal obligation had already been lodged.

33. Such a conclusion is fortified when regard is had to s.601FD(1)(f) of the Act. That section, when dealing with the duty to take all steps to ensure that the responsible entity complies with the constitution, fashions the content of that duty by reference to the steps that a reasonable person would take "if they were in the officer's position". In other words, in determining whether or not there has been a breach of duty by officers of a responsible entity in connection with a failure by the responsible entity to comply with the constitution, liability is not strict, but informed by an enquiry *as to the position of the officer in question in fact*. In the absence of an express indication to the contrary in the Act or legislative aides to interpretation, it cannot be the case that Parliament intended responsible entities and their directors to be held accountable by reference to such an unworkable standard of conduct.

34. Dr Wooldridge otherwise adopts Mr Lewski's submissions in respect of Ground 2.

Ground 3:

35. Ground 3 arises as a consequence of ASIC's allegation that the Directors were "involved" within the meaning of s.79 of the Act in APCHL's alleged breach of s.208 (as modified by s.601LC) of the Act.[59] It was accepted at trial and on appeal that to establish the requisite "involvement" ASIC needed to prove *inter alia* that the Directors had actual knowledge of all of the essential elements of the contravention of s.208 (as modified by s.601LC).[60] Thus the decisional issue was whether or not s.208(3) of the Act, as a matter of construction, operated as an element of a contravention of s.208 (so that knowledge of the

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[58] Ibid 74.

[59] See FC 1 [303]-[313]. (**AB 599-601**)

[60] FC 1 [310]. (**AB 601**)

absence of provision for the fees in the constitution was to be proved by ASIC), or as an exception to liability - so as to place the burden of proof on the Directors.

36. In undertaking the requisite task of construction and concluding that s.208(1) was simply not engaged if the fees were provided for in the scheme constitution,[61] the Full Federal Court applied well settled and long standing High Court doctrine.[62] For the reasons that follow, there was no demonstrable error in the Full Federal Court's analysis.

37. *First*, properly construing s.208(3), the structure of s.208 (as modified) is such that s.208(1) is not *even* engaged if the fees are provided for in the scheme constitution.[63] The language used in s.208(3) is "*Subsection (1)* ***does not prevent***"[64].

10 **38.** The words in s.208(3) do not purport to create an *exception* to the operation of the liability in s.208(1). To opposite effect, the consideration of s.208(3) logically occurs first. This should be contrasted with the language of "*must fall within an exception*" in s.208(1)(e). If the Parliament had intended s.208(3) to operate as an exception to liability, it could have used the language of exception as deployed in s.208(1)(e). Rather, the language chosen by Parliament makes it plain that s.208(1) does not *prevent, stop or apply* to the payment of all fees to a responsible entity payable under the constitution.

39. As the Full Court held, adapting the language of the High Court in *Vines*, s.208(3) does not assume the existence of the general or primary grounds from which liability arises under s.208(1).[65] Adapting the language of McHugh J in *Avel*, the obligation to comply with
20 s.208(1) is only imposed in circumstances where a fee to an RE is not provided for in the constitution.[66]

40. *Secondly*, *Waters v Mercedes Holdings Ltd* establishes that a putative plaintiff (or prosecutor) bears the onus of establishing as an "essential element" that a relevant financial benefit was not approved by members (s.208(1)(d)).[67] Placing the onus under s.208(3) upon a defendant would be "disharmonious"[68], as it would create the prospect that a plaintiff would

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[61] FC 1 [323]. **(AB 606)**

[62] *Vines v Djordjevitch* (1955) 91 CLR 512 (***Vines***) and *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited and Another* (1990) 171 CLR 88 (***Avel***). See FC 1 [318], [319] and [323]. **(AB 604-605, 605, 606)**

[63] FC 1 [323]. **(AB 606)**

[64] Emphasis added.

[65] FC 1 [323]. **(AB 606)**

[66] FC 1 [323]. **(AB 606)**

[67] *Waters v Mercedes Holdings Ltd* (2012) 203 FCR 218 at [37]. FC 1 [320]. **(AB 605)**

[68] FC 1 [320]. **(AB 605)**

bear the onus of establishing a lack of member approval under 208(1)(d) and yet, in respect of the same alleged contravention, a defendant would *then* bear the onus under s.208(3) of establishing the existence of a constitutional entitlement to a fee which the defendant contends was *approved* by the members. Such inconsistency cannot have been intended and would undermine the unity of the statutory scheme.[69]

41. *Furthermore,* the policy underpinnings of s.208(1)(d) and s.208(3) cannot be relevantly distinguished. S.208(1)(d) seeks to ensure that fees *already* approved by members do not form part of the obligation created by s.208(1). In other words, the financial benefit prohibition *does not apply* to benefits approved by the members. S.208(3) is similar in its type or character. Fees can be payable if they form part of, and are authorised by, the underlying contract as between the members and the RE (the scheme constitution) and the financial benefit prohibition *does not apply* in those circumstances.

42. In the foregoing circumstances, one cannot discern a legislative intention to impose the ultimate burden on an RE (and its directors) of bringing themselves within s.208(3) of the Act.[70] This case presents a paradigm example as to why such an outcome would be perverse – an RE and directors who are able to identify a right to the relevant payment in the lodged Constitution, would be required to prove that the fee was contained in the "true constitution". Not only would such an exercise be absurd, it would be contrary to the principle identified above that a person whose power to perform an act (such as paying a fee) is being impugned does not bear the onus of proof.

43. Thus, in substance, the text and structure of s.208 (as modified) demands the conclusion that the absence of a constitutional entitlement to the fee, is a gateway or precondition to the existence of the obligation or liability created by s.208(1) (as modified). As a result, the absence of a constitutional entitlement is an essential element for establishing a contravention of s.208(1) as against an RE.

Part VII: Time estimate

44. It is estimated that the presentation of oral argument on behalf of Dr Wooldridge, Mr Butler and Mr Jaques will require 2.5 hours.

Date: 3 August 2018

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[69] Being, of course, a relevant consideration in the task of construing s.208(3). See *Project Blue Sky* at [70].

[70] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257.

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