IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M79 of 2018

BETWEEN

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Appellant

AND

WILLIAM LIONEL LEWSKI

First Respondent

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

Second Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 *In relation to Grounds 1 and 2*: For the purposes of Chapter 5 of the *Corporations Act 2001* (Cth) (**the Act**), what is the status of a modified managed investment scheme constitution, registered with ASIC under sect 601GC(2) of the Act, in the period between the modification and any later time at which the purported exercise of a power to modify is reviewed by a court and found to have been improper?

3 What effect does the answer to that question have (a) on the standard of liability imposed on REs and officers of REs in relation to compliance with duties under sections 601FC(1) and 601FD(1) of the Act and (b) on the operation of the jurisdictional time limit for prosecuting contraventions under sect 1317K?

4 Leaving aside claims available in equity, is an act undertaken by an RE or its officers in reliance on and in accordance with a modified scheme constitution registered with ASIC pursuant to the Act, a standing or continuing contravention of sections 601FC(1) or 601FD(1) of the Act (and liable to prosecution under the civil penalty provisions of the Act), if it is later found, at some stage after modification and the relevant acts, that the authority to so act was originally introduced by a modification made in excess of power, and irrespective of whether the RE or its officers had acted in accordance with the purported modification honestly and

Filed on Behalf of the First Respondent, by:
SBA Law
Level 15, 607 Bourke Street
Melbourne Victoria 3000

Date of Document: 1 August 2018
Tel: 039614 7000
Email: sbond@sbalaw.com
Ref: SB:KP:171035

reasonably (without prior notice of any deficiency) in relying on the validity of the earlier modification?

5 *In relation to Ground 2*: What was the scope of the directors' duties to be discharged by the directors on the 22nd August 2006 and as at the Payment Resolutions, having regard to the "whole of the existing circumstances" at those times, including that the modified constitution was registered and existed as a historical fact and that the directors had no reason to doubt the validity of decisions made by the Board prior to 22nd August 2006?

6 *In relation to Ground 3*: Is sect 208(3) of the Act, on its proper construction, an element of sect 208 of the Act (as replaced by sect 601LC), such that the onus to establish a breach of sect 208 rests with the party alleging such a breach?

7 *In relation to the Notice of Contention*: Does the concept of "members rights," in sect 601GC(1)(b) of the Act, include the right to have the scheme administered in accordance with the constitution? If so, what is the remaining content of the power, if any, in sect 601GC(1)(b) to enable an RE to amend a scheme constitution?

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

8 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: Facts

9 The material and non-contentious background facts are those as determined by the trial judge and accepted on appeal before the Full Court, as set out in {2AB 527-538 FC1 [71]-[107]}, {2AB 636-646 FC2 [24]}. The appellant (**ASIC**) by Part V of its submissions filed 6th July 2018 (**AS**) in several instances relies on inferences drawn or conclusions of the trial judge that were disputed in the Full Court below on the basis that the trial judge's errors included elevating non-material facts into purported relevant ones and thereby mischaracterising (as to what occurred or the purpose of) particular events {2AB 526-527 FC1 [67]-[69]}, {2AB 587-588 FC1 [260]-[268]}.

10 The Full Court determined that ASIC was to be confined strictly to its pleaded case {2AB 586 FC1 [260]} as, in the context of civil penalty proceedings, courts are astute to ensure that defendants are not subjected to findings and consequential declarations and penalties, derived from a case which was not pleaded or advanced (*Whitlam v Australian Securities & Investments Commission* (2003) 57 NSWLR 559 at [164], *Australian Securities & Investments Commission v Healey* (2010) 196 FCR 291 at [231]).

11 The issue of what happened at, and the separate purposes of, each of the Board meetings on the 19th July 2006 (per AS [16]) and the 22nd August 2006 (AS [20]) was of

central importance to the idiosyncratic litigation below arising from the peculiar, self-imposed, restrictions placed on ASIC at trial and on appeal. ASIC could not plead or rely on any conduct prior to 21st August 2006 to establish any contraventions under the Act because it was barred by sect 1317K from doing so (which matter is not in question in the appeal). The Full Court therefore did not find, as a material fact, that the Board "gave no proper consideration" (AS [16]) to various matters on 19th July 2006. Nevertheless, the appeals before the Full Court proceeded on the basis that on 19th July 2006, the Board resolved to amend the constitution by DOV 7 and that duties to consider various matters fell due at that time. The sufficiency of considerations at the 19th July meeting, set out in AS [16], whilst in issue at first instance, was not included in the Full Court's recitation of relevant facts regarding the 19th July and 22nd August 2006 meetings at {2AB 532-535 FC1 [85]-[96]}. The relevant question, in relation to alleged contraventions arising on 22nd August 2006 and the "considerations" materially in issue was, whether or not on the 22nd August 2006 the Lodgement Resolution could and should have been made and what were the considerations relevant to *that* decision {2AB 555 FC1 [162]}. The material issues therefore only concerned the conduct of directors on and between 22nd August 2006 and the 27th June 2008 {2AB 584 FC1 [246]}.

12 Contrary to what is implicit in AS [28]-[30], ASIC's pleaded case was not one of an improper continuing course of conduct. Nor was it ASIC's case that that the directors were required to reconsider the 19th July 2006 decision again at the 22nd August 2006 meeting and at the times of the Payment Resolutions. Nor was it ASIC's case that the RE and Board, acting reasonably, should have known their earlier considerations were 'improper' or deficient, such as to warrant a reconsideration on 22nd August 2006 (or at the time of the later Payment Resolutions) of the efficacy of the 19th July 2006 resolution (ASIC's pleading, at [23] (ASIC's book of further materials (**AFM**) {AFM 262-263}, contained no such allegation), {2AB 517 FC1 [53]}. That is, not only did ASIC *not* allege "conscious impropriety in the RE or directors..." or that on or after 22nd August 2006 they had "actual subjective knowledge" of past failings (as noted in AS [28]), ASIC's case additionally did not allege that objectively the RE or Board *should reasonably have known*, on 22nd August 2006 or at the Payment Resolutions, of any prior delinquency. The Full Court made express reference to ASIC's forensic pleading decisions (for example, at {2AB 539 FC1 [111], 2AB 598 FC1 [301]}).

13 ASIC's pleading against the directors in relation to the breaches alleged to have arisen on 22nd August 2006 was limited to an allegation that the directors contravened subsect

601FD(1)(b), (c), (e) and (f) of the Act by voting or assenting to the vote in favour of "the resolution to lodge the Amended Constitution on 22 August 2006" {AFM 267-270 [28]} and it is relevant that the particulars to that paragraph were amended to *remove* reference to the Board's considerations at the earlier meeting on 19th July 2006). In that respect, as a matter of fact and as a matter of holding ASIC to its pleaded case, the Full Court was correct to reject the trial judge's finding that on the 22nd August 2006 it was necessary for the Board to have considered (again) the matters before it on the 19th July 2006 {2AB 597-599 FC1 [293]-[302], 2AB 684 FC2 [114]}.

14 In that context, it is incorrect for ASIC to now claim (AS [28]) that its case was one that pleaded and relied on Board considerations on the 19th July 2006 "as part of the circumstances that grounded the nature and extent of the duties of the RE and the directors on the subsequent occasions of the [22nd August 2006] Lodgement Resolution and later the Payment Resolutions."

15 It is similarly incorrect for ASIC to claim (at AS [29]) that the allegations material to establishing the pleaded contraventions of the Act included that "at the stage of the [22nd August 2006] Lodgement Resolution, the directors and the RE had not then, *or in the [19th July 2006] Amendment Resolution leading up to it*, given any or sufficient consideration to the central questions..." (emphasis added).

16 Additionally, it was never in dispute that at all times from 23rd August 2006, scheme members, investors and regulators, including ASIC, were aware (by the amended Product Disclosure Statement and amended constitution lodged with ASIC) of the Listing Fee amendment and the terms by which payment was to be made.

17 Mr Lewski otherwise accepts the facts as stated by ASIC in AS Part V.

Part V: Legislation

18 ASIC has included no statement of applicable legislative provisions relevant to the appeal. The relevant provisions are those as set out in Annexure A to ASIC's application for special leave and, additionally, sections 124-129, 1274, 1274A, and 1274B of the Act.

Part VI: Argument

The status of the modified constitution (Grounds 1 and 2).

19 ASIC's contentions under Ground 1 (and related submissions in support of Ground 2 in AS [59]-[62], [77]-[79]) rely on an assertion that the Full Court erroneously "*embraced a notion of 'interim validity' ...that an amendment made by the RE beyond power under s601GC(1)(b) ...will upon lodgement become valid for all purposes under the Act until set aside by a Court.*" (AS [42], [45]). As expanded on below, ASIC's contentions on the

'interim validity' issue may be dismissed for three broadly stated reasons. First, Ground 1 involves a recasting of ASIC's case (which was not one to recover trust property or seek compensation orders under sect 1317H of the Act). Secondly, Ground 1 is based on a misconception of the ratio of the Full Court's reasons. Thirdly, and in any event, ASIC's contentions, if accepted, would produce illogical and unjust results, discordant with the statutory purpose of certainty, and which would threaten to impose significant and new burdens on REs and their officers that would be impossible (not merely difficult) to discharge.

20 *First*, and with reference to ASIC's specific definition of "interim validity" in its Notice of Appeal, ASIC's case sought only declarations of contravention of civil penalty provisions (and associated penalties) against the directors with respect to their acts at certain specific times. The originating process did not seek declaratory relief that the constitution had not been validly amended because the directors did not form the requisite opinion under s601GC(1)(b) and none of the declarations of the trial judge referred to that section or any failure to comply with it. In the context of the specific allegations made against the RE, the Full Court also noted that ASIC's pleaded case did not involve an allegation "that APCHL failed to ensure the amendments to the constitution were properly or validly made in accordance with the Act." (at {2AB 704 FC2 [194]}) or that the directors were liable, on an ancillary basis, with respect to such a primary contravention by APCHL. Further, there was no pleading or finding that if, as a material fact, the directors had in fact failed to form the requisite opinion then the RE or Board was nevertheless "bound to lodge" the amended constitution. Nothing in the Full Court's reasons referred to in AS [42] or elsewhere in FC2 at {2AB 585-586 FC1 [253]-[256]}, {2AB 586-598 [258]-[301]} or {2AB 606 FC1 [324]} suggest those findings were made.

21 *Secondly*, the Full Court did not hold (cf AS [45]) that an invalid amendment is "nevertheless immediately effective and operates for all purposes and for all time." The Full Court did not in fact find or rely on any concept of "interim validity" as phrased in ASIC's notice of appeal "for all purposes under Part 5C.3" of the Act. The relevant findings of the Full Court (for example at {2AB 585 FC1 [253]}) were in the specific context of "the regulatory framework" invoked by ASIC's proceeding. That context was restricted to a consideration of how a scheme's powers and functions are limited by a "scheme constitution" (including as to fees and benefits payable to an RE), such that investors can analyse the scheme constitution with certainty {2AB 585-6 [254]}, and how a failure by the RE or officers of the RE to comply with duties imposed under sect 601FC(1) and 601FD(1) may lead to contravening conduct under sect 601FC(5) and 601FD(3). Relevantly, for the

purposes of determining questions of contraventions of the Act by the RE and the directors, the Full Court restricted itself to determining, "what was the content of the Constitution as a *matter of statutory construction* after the lodgement of the purported amendment of the Constitution?" {2AB 701 FC2 [185]} (emphasis added).

22 The Full Court accepted that the act of lodgement itself did *not* give validity to a document containing amendments once lodged with ASIC, although, for the specific statutory purposes in issue, the acts of the Board and the RE were to be understood as historical or objective facts {2AB 704 FC2 [195]}, {2AB 606 FC1 [324]}. That proposition puts the validity, or effectiveness, of such an amended constitution no higher or lower than to acknowledge that "the document has in fact been lodged" {2AB 704 FC2 [195]}.

23 Further, contrary to what is suggested at AS [46], the Full Court made it clear that its determinations did not impinge on common law and equitable principles relating to the recovery of property paid out by a trustee in excess of power (such as the RE in the present case, see for example {2AB 584 FC1 [245]-[246]}, {2AB 703 FC2 [189]-[190]}).

24 ASIC's reliance on "trust law" is a distraction from a proper focus on the pleaded case and issues before the Full Court. Its case was run down a narrow corridor towards obtaining statutory declarations under sect 1317E and penalties under sect 1317G. The statutory jurisdiction to seek declarations under sect 1317E is exclusive to ASIC (sect 1317J of the Act). It is unaffected, for example, by the threshold requirements otherwise applicable to private actions for declarations in equity and law.[1] That statutory jurisdiction is, however, fenced by an impenetrable and immovable temporal barrier of sect 1317K. The pleaded case did not require consideration of the trust law duties of the RE as trustee, or the private rights of unit holders and of third parties (such as creditors); it was rather concerned with alleged contraventions of specific statutory provisions arising from, as pleaded, specific conduct on specific dates (materially occurring outside of the strict statutory limitation period) in relation to Board meetings with discrete purposes.[2]

25 *Thirdly*, ASIC's contentions, if accepted, would produce illogical and unjust results. As at the time a constitution is modified by an RE under sect 601GC(1)(b), the modification

---

[1] As identified by Gibbs J in *Forster v Jododex Australia* (1972) 127 CLR 421 at 437-8 (in that, whilst ASIC may seek a declaration of contravention in the abstract, a private litigant would need to show a declaration of invalidity serves some other end, material to determining real, not hypothetical, questions with material significance).

[2] ASIC's submission (AS [45]) also fails to grapple with the fact that creditors' and the members' rights (without the limitation of sect 1317K that afflicted ASIC's case) were in any event pursued in reliance on equitable and trust duties and remedies. Those matters were the subject of separate proceedings conducted by the receivers and managers of the RE in the Supreme Court of Victoria, which settled shortly after ASIC had filed its application for special leave. The Full Court had not foreclosed those particular proceedings, nor did it assert a general principle that would have similarly forestalled like proceedings.

can be only one of three things; it is either valid, purportedly valid, or not valid. In AS [62] ASIC refers to a concept of a "true constitution", being a constitution "which exists in law from time to time" -there can be no 'interim validity'- and further contends that the scope of duties on an RE and its officers are to be measured by that "true constitution." The difficulty created, but not answered, by ASIC, is determining precisely when a modified constitution obtains the venerable status of being the "true constitution" (and precision is needed, among other reasons, to locate the act within the temporal jurisdiction determined by sect 1317K). A further question then arises: what is the status of such a modified constitution in the time between modification and the time of any later determination as to whether it is the "true constitution" or apocrypha? What is the effect on evaluating acts performed under the modification (in reliance on them) in that meantime period? The logical result of ASIC's contentions (and in order for ASIC to succeed on appeal) is a paradox, where any modified constitution must be (can only be) treated as invalid (or a nullity, or a void instrument) by default, until such time as the modification can be confirmed to have been validly made. The final sentence of AS [47] confirms ASIC's view in this regard. As set out below, that position is untenable. The better view is that the "constitution", as a matter of statutory construction, is the instrument as lodged with ASIC (but which fact of registration does not, in and of itself, clothe the document with legal effectiveness).

26 The proposition that the amendments ought be treated as having been (albeit purportedly) made as an objective fact, is in accord with authority cited and relied on by the Full Court (*State of New South Wales v Kable* (2013) 252 CLR 118 (***Kable***), at {2AB 584 FC1 [248]}, *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care* (2003) 145 FCR 1 {2AB 584 FC1 [249]}, and *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 {2AB 585 [250]} (***Wellington***)) and which led the Full Court to "proceed on the basis that the resolutions made on 19 July 2006 and 22 August 2006 were made and in existence, and formed a basis for subsequent decision making by the Directors." {2AB 586 FC1 [257]}. It is not contended in these submissions that the amendment purportedly effected by DOV 7 on 19th July 2006 was lawfully made (any retrospectively determined finding to the contrary could not be gainsaid and the Full Court's finding at {2AB 665 FC2 [46]} is not challenged[3]). Nor is it said here that the amendments made in excess of power are somehow made lawful because (as was never in dispute) the Board honestly believed they had acted with 'reasonable consideration'.

[3] Save insofar as 'lawfulness' arises as a result of a positive determination of the notice of contention. However, that is not contended for in, and is not relevant to, the submissions made under this part.

27 The Full Court's reference {2AB 585 FC1 [250]} to Gageler J's comments in *Wellington* (at [60]) is an acknowledgment of the need to distinguish between acts done "in excess of capacity" and acts done in "excess or abuse of powers", as described in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (***Rolled Steel***) at 302-303 (cited in *Wellington* at [60]). That distinction is "crucial" to defining whether an act, such as modification, will be "wholly void" (and truly "ultra vires" as narrowly defined in *Rolled Steel*) or otherwise voidable. In the present case, the distinction can be drawn in relation to the requirement of the RE to "reasonably consider" the effect of the modification. Section 601GC(1)(b) can be construed as containing a requirement, a direction, for how an RE must properly exercise the power of amendment; it is not to be understood as determining whether a power exists at all. In any event, an innocent failure to "reasonably consider" (irrespective of whether that is a requirement for proper exercise of power or whether it is rather an essential prerequisite to capacity) will not diminish the fact of the modification and registration and the significance of those facts.[4] The original invalid act "is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences." (*Kable* at [52]).

28 The Full Court found {2AB 575-6 FC1 [215], [218], 2AB 691 FC2 [146]-[147]} that the legislative scheme created by Part 5.3C of the Act, and the underlying extrinsic material,[5] support a conclusion that s601GC(1), expressed in unqualified terms, 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." Importantly, a modified constitution cannot "take effect" unless it is registered with ASIC and once a modification is made, the RE and its officers *must* lodge the modified constitution (sect 601GC(2)).

29 ASIC's contentions in support of Ground 1 would have the result that amendments should not (indeed, *could* not) be lodged (lodgement otherwise being a clear mandatory requirement of sect 601GC(2)) if the requisite opinion in sect 601GC(1)(b) had not been formed correctly. That is, whilst sect 601GC(2) mandates that amendments must be lodged,

---

[4] An example of a contract made by a statutory company without authority, that is, outside the capacity of the company to do, so is seen in *Crédit Suisse v Allerdale BC* [1997] QB 306 at 350, where Hobhouse LJ held that, "This lack of capacity means that the document and the agreement it contains does not have effect as a legal contract. It exists in fact but not in law."

[5] Support for the self-contained operation of the statutory power is found in paragraph 9.6 of the Explanatory Memorandum. The trial judge identified that this was so, at {1AB 213 LJ [677(b)]}, however diminished its significance, observing *inter alia* that extrinsic materials "*cannot be relied upon to displace the clear meaning of the statutory text*". This was an erroneous analysis. The Directors relied upon the extrinsic materials to uphold, not to displace, the clear meaning of the statutory text.

ASIC's reading of sect 601GC(1) would mean that any invalidly (including by innocent mistake) amended constitution would not be a "constitution" for the limited purposes of statutory construction of sect 601GC(2) and therefore could not be lodged. This would put an RE and its officers in an invidious position: once a constitution has been modified, as here, by the officers honestly believing they had 'reasonably considered' the matters in sect 601GC(1)(b), the RE is obliged to lodge it (not only by sect 601GC(2), but also by operation of sect 601FD(1)(f)(i) -there is no discretion to not lodge).

30 What ASIC's Ground 1 purports is something new and absolute in the strictness of the liability that flows from it: the RE, before even having capacity to consider modifying, and as a pre-requisite to being capable, must first *confirm* the adequacy of its 'reasonable consideration' as an objective fact. This begs the question: who is to confirm the reasonableness of the consideration before the consideration can take place? Leaving aside that in the present case it was never alleged that the RE or Board should have known, on 22nd August or at the Payment Resolutions, that the earlier consideration (out of time, on 19th July 2006) at the time of modification was unreasonable, as a matter of principle, that confirmation, logically, could only come from some independent assessment, separate to the RE and officers' extant duty to ensure compliance with sect 601GC(1)(b). This must be so because ASIC's reading demands the objective certainty of compliance before a document may be "a true constitution." However, in the absence of some independent regulatory body that might confirm the reasonableness of considerations (such as would then permit an RE to have *capacity* to amend) -and there is no such body[6]- it is unclear how any RE, its officers, investors, members or advisors could ever be certain that they were operating under a "true constitution".[7] To those persons, a modification with latent invalidity, similar to an order made without jurisdiction, "bears no brand of invalidity upon its forehead."[8]

---

[6] There is no provision under the Act that would permit an RE or its officers to seek directions from a court (the court's jurisdiction to do so is limited to directing trustees under sect 283HA, or external administrators in limited circumstances under sect 447D and 479, or, arguably regarding the winding up of a managed investment scheme under sect 601EE(2) -see *Australian Securities and Investments Commission v Piggott Wood & Baker (a firm)* [2015] FCA 18 at [34]).

[7] It is relevant to the statutory context also that whilst the Act requires ASIC to keep "registers" of information and records "as it considers necessary" (sect 1274), the Act does not impose on ASIC a duty to ensure that the relevant information stored on the registers is correct. Section 1274(8) of the Act provides a discretionary power to ASIC to refuse to register documents lodged with it, if "*ASIC is of the opinion*" that the document, inter alia, "*contravenes this Act.*" This does not impose a duty on ASIC. At most, it allows ASIC to require compliance (sect 1274(8)(f)-(h)), which can be enforced by court order (sect 1274(11)). Section 1274A of the Act permits searches of the registered maintained by ASIC and sect 1274B provides for a prima facie assumption of the correctness of documents maintained by ASIC on its register, subject to evidence to the contrary.

[8] *Smith v East Elloe Rural District Council* [1956] AC 736 at 769-770.

31 Following the train of ASIC's contentions results in every RE-made modification being deemed to be invalid, until determined otherwise in litigation. That is: an RE's modification of a scheme constitution must be valid in order to found a "true constitution;" a modification can only be valid if the RE has reasonably considered the modification does not adversely affect members' rights; yet there is no mechanism for confirming or determining at modification whether the RE has given any consideration, whether that consideration was reasonable, whether the modification concerned members' rights, or whether those rights would be adversely affected; nor will ASIC allow for a modified constitution to exist between validity and invalidity (as 'purportedly valid') - there is "the true constitution" and nothing else; ASIC does not allow for validity to be assumed until determined otherwise; therefore, in order to be certain that the modification is the "true constitution" it must, like all things claiming to be true, be objectively determined to be such; therefore, until that time, the only logically certain status of the modification is that it is invalid until it is otherwise confirmed or determined to be 'true'.

32 AS [45] (and similar submissions made in support of Ground 2) implicitly advances an unsustainable position; namely, to focus not on the context in which amendments are made, or who made them, or why, but to focus instead in the bald fact of, some later determined, defectiveness of the original modification. This would have the result that any acts performed in accordance with a constitution, which is found at some later stage to have been invalidly amended (even if the performance of those acts was undertaken in the honest and reasonable belief that the earlier amendments were valid), will have been in contravention of the Act. In that case the court is required to make a declaration of contravention under sect 1317E, there is no discretion to do otherwise. This imposes absolute liability on RE's and its officers in respect of such later conduct. It would mean, to pose an example, that a board who acts in 2018 in accordance with a constitution amended 12 years earlier in 2006 (and assuming the board in question is constituted by entirely new directors, not involved in, and without knowledge of the circumstances of, the original 2006 decision to amend and without reason to suspect the earlier decision was made without 'reasonable consideration' under sect 601GC(1)(b)), could be liable for breaching sect 601FD(1), if it were determined in 2018 (or, indeed, a further six years after 2018) the earlier amendments were made outside of power. In context where such contraventions expose REs and its officers to punitive consequences under sect 1317E and 1317G of the Act (see *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 [26]-[38]) the imposition of such strict or absolute liability to otherwise blameless persons would in the circumstances be unjust (*He Kaw Teh v R* (1985)

157 CLR 523 at 583 per Brennan J). Further, in the case of an honest director, a declaration of contravention would still remain as the 'exoneration provisions' of sections 1317S and 1318 of the Act do not necessarily apply to expunging a declaration of contravention: *Australian Securities & Investments Commission v Flugge (No. 2)* (2017) 119 ACSR 551 at [53]-[56].

33 ASIC's position is also discordant with the Act, which otherwise allows for certain assumptions to be made by persons dealing with a company, including, for example, that its constitution has been complied with and that a company's officers have properly performed their duties (sections 128 and 129(1) and 129 (4) of the Act). Those statutory assumptions, founded on the 'indoor management rule' (*Royal British Bank v Turquand* (1856) 6 El & Bl 327) are designed to bind a company and stop it from denying liability to third parties on the basis that formalities were not in fact complied with (see *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 (***Northside***) at 154-5 per Mason CJ, 189 per Brennan J, 192 per Dawson J). That is not to suggest that the 19th July 2006 modification was therefore made lawful on lodgement; the statutory assumptions and the 'indoor management rule' do not "create authority where none otherwise exists; it merely entitles an outsider, in the absence of anything putting him upon inquiry, to presume regularity." (*Northside* at 198).

34 Those matters, taken together with the express words of sect 601GC(2) and operation of sect 601GC(1), reveal an evident statutory purpose of certainty, not only to the benefit of scheme members and potential members (investors), but also to provide certainty to the RE and its officers as to what conduct might be considered 'contravening' conduct. That statutory purpose is undermined if a person cannot rely upon the constitution lodged by an RE in accordance with sect 601GC(2) as being the "scheme constitution." If the potential exists for the constitution as lodged, to be later determined not to have ever been the repository of the rights and obligations of members, because (as in this case) a decision by an RE, based on its consideration of the impact on members' rights is found not to have been reasonable, and that determination has retrospective effect, the intended certainty which is an important element of the statutory framework becomes illusory.

35 Contrary to AS [47], sect 1322 of the Act does not provide the "express statutory answer" to the problem arising from ASIC's submissions. First, sect 1322(4) provides the section is reactive, arising in response to complaint or if contraventions are prosecuted; this does not address the certainty dilemma or the problem of imposing absolute liability on REs and their officers in the first instance. Secondly, sect 1322 is limited to correcting irregularities "essentially of a procedural nature" (sect 1322(6)(a)(i), *Cordiant*

Communications (Aust) Pty Ltd v Communications Group Holdings (2005) 194 FCR 322 at [103]). It is not clear if ASIC submits that performing an act (similar to, for example, making the Payment Resolutions), in accordance with a modified constitution is "essentially of a procedural nature", but it would be surprising (given ASIC's other contentions) if ASIC took that position.[9] Finally, sect 1322 is inapposite to the present case, where no director sought to assert that the 19th July 2006 modification was invalid and should be made valid. The directors below relied on the fact of the amendment having been made and registered, not on its lawful effect.

36 The question is whether the legislature should be taken to have intended that an amendment purportedly (although mistakenly) made in accordance with sect 601GC(1)(b) (or indeed, in reliance on any other available source of power) should be regarded as *void ab initio*, thereby rendering in breach of the constitution acts which may reasonably have been thought to have been in conformity with it. Given the statutory purpose of constitutional certainty for investors and others, as identified above, the question should be answered in the negative. The determination of that question is amenable to, but not dependent on, an analysis of the sort undertaken in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***). ASIC's contrary view (AS [50]-[51]) assumes a conclusion (that the RE had no capacity to purport to exercise the power in the first place) and works back, rather than performing the *Project Blue Sky* analysis itself. There was no error in the Full Court's analysis at {2AB 701-703 FC2 [186]-[188]}.

37 The above propositions do not suggest that once the limitation period has expired, compliance with sect 601GC(1)(b) must be assumed "for all purposes" (cf AS [45]). Nor do they suggest that the fact that an amendment made in excess of power is made out of time under sect 1317K will therefore be determinative of claims made outside of the Act relying on equitable trust principles. Non-compliance with the requirements of 601GC(1)(b) may still be found, as a matter of fact, regardless of whether the non-compliance occurred outside of the limitation period prescribed by sect 1317K. However, the consequences of such an 'out-of-time' failure to comply will depend on what is then sought, and by whom. It could not amount to an actionable declaration of contravention under the Act, as sect 1317K bars the remedy as well as the right to make a claim in respect of any statutory contravention after the effluxion of the specified time and is not amenable to extension: *David Grant & Co v Westpac*

[9] It is unclear how ASIC say the Full Court erred in considering sect 1322; neither FC1 nor FC2 contain express reference to the section. Success on appeal on this ground, would require remitter, as the directors would wish to contend that any such contravention was "procedural" and ought to be excused under sect 1322(4)(c).

Banking Corporation (1995) 184 CLR 265 at 276, *Austructures and Another v Makin and Another* (2014) 103 ACSR 307 at [30], [50]. On the other hand, equitable remedies under "trust law" may continue to stand for prosecution (as they were in this case -see fn 2 above).

38 The Act requires two steps be undertaken in order for an RE to make a validly modified scheme "constitution." First, under sect 6012GC(1), the RE must "reasonably consider" the effect of the modification on members. The second step requires lodgement with ASIC. By Ground 1, ASIC only looks at the first step and ignores the statutory relevance of the second. It cannot be denied that the anterior obligation (to reasonably consider modifications) is significant. Deficiencies in meeting that obligation can and should be prosecuted, but saying so does not mean that, in the meantime, the constitution is something other than what is registered (for the benefit of the members, potential investors, the RE, the officers and their advisors).

39 On that basis, until struck down by the decision of the learned trial judge (and assuming that the judgment is upheld as to that matter), the constitution as lodged with ASIC on 23rd August 2006 (that is, including the amendments effected by DOV 7), was the "constitution" of the scheme within the definition under sect 9 of the Act. It follows that when resolutions were passed, and other steps taken in 2007 and 2008 to pay fees to APCHL, in accordance with the amended constitution, those resolutions and other steps were, for the limited purpose of construing liability for specifically worded contraventions of the Act, authorised by the constitution.

Ground 2: Scope of duties; honesty and extant objective historical facts.

40 Contrary to AS [58], the Full Court did not rely "on honest belief ...to confine the scope of duties at the stage of the [22nd August 2006] Lodgement Resolution and [2007 and 2008] Payment Resolutions". The Full Court found that the relevant "scope of duties" owed by the RE and the officers on the 22nd August 2006 and in passing the later 2007 and 2008 Payment Resolutions was dependent on the purposes of the specific meetings and the circumstances confronting the officers at the time of those meetings {2AB 597 FC1 [298]}. There was nothing wrong with that approach. None of the paragraphs of FC1 or FC2 referred to in AS [57] hold the proposition as broadly framed by ASIC.

41 The submissions of "Error One" in AS [59]-[62] all pertain to the "interim validity" issue raised in Ground 1. The "true constitution" fallacy also founds the submissions later made in respect of several of the "more particular claims", specifically insofar as they rely on denying the objective fact of the lodged constitution (at AS [77]-[80], [81] and [85]). The submissions above deal with that issue, save that, in the context of Ground 2, AS [62] is

particularly flawed. ASIC would measure directors' duties by reference to the "true constitution", being the instrument that the "directors should be striving to uphold" (AS [62]). ASIC does not say how a director could "uphold" a constitution at temporal point A, if it is later found, at temporal point B to have been something other than "the true constitution." It would, as submitted above, be impossible for any director to discharge that duty (and impossible for them to know whether they were satisfactorily discharging that duty) until actual independent confirmation of the constitution's efficacy had been observed and confirmed. ASIC's flaw in the present appeal (as at trial) is to direct attention to the defectiveness of the original act (the 'reasonableness of considerations' at the stage of amendment), without identifying it as the relevant contravention. This identification is crucial to determining whether the particular contravention sits inside, or outside, of the temporal jurisdictional barrier of sect 1317K. If the contravention consisted of insufficiently considering matters as at amendment, then it occurred on 19th July 2006 and was out of time. If the contravention is said to be the later payment (or undertaking of acts) purportedly permitted by the amendment, then that would involve transferring liability from the initial act, out into future time and potentially onto strangers to the original act.

42 "Error Two" (AS [63]-[66]) is founded on the notion that an RE (and its officers) are required to be in constant doubt of earlier determinations (whether they personally engaged in those decisions or not). Whilst AS [63] asserts that it was a finding of "honest belief" that 'eviscerated' ASIC's case, this is not so. The findings of the Full Court at {2AB 593-597 FC1 [288]-[298]}, which are not shown to be erroneous, focussed instead on the trial judge's failure to properly distinguish between the purposes of the 19th July and 22nd August 2006 meetings and on the fact that the matters the trial judge determined the directors had inadequately considered on the 22nd August 2006 all, in fact, related to the considerations on the 19th July 2006 {2AB 597 FC1 [293]}.

43 In its submissions under this 'error', ASIC continues to advance a case never pleaded (of a duty to reconsider) and assert that it was the 22nd August 2006 when the "critical step" was to be taken (AS [64]). That assertion is contrary to the findings of the Full Court at {2AB 561 [181]} who correctly determined the 22nd August 2006 meeting to be of a ministerial nature. That finding is not directly challenged by ASIC, nor could it be in the circumstances. In relation to this 'error', the submissions at AS [65] and [66] are without basis. First, the suggestion that directors should "blindly and mechanically" carry out duties cannot be disputed (as ASIC appears to do). It is only if a director *fails* to carry out duties, or "blindly and mechanically" carries them out with actual or constructive knowledge that to do so is to

further a breach. That was not pleaded, nor was found below, nor is contended by Mr Lewski. The fictional voice quoted in AS [65] is a thing of ASIC's imagination only. Secondly, contrary to AS [66], it is not suggested on behalf of Mr Lewski that if a director's negligence is "gross" or if a director is "obtuse" that fact should "lower the bar set for a director". Rather, a finding of honesty would not likely be made in those circumstances, particularly as the 'honesty' relied on by the Full Court was of an objective standard at {2AB 598 FC1 [299]-[300]}, citing Finkelstein J in *Compaq Computer Australia v Merry and Others* (1998) 157 ALR 1 at 5.

44 The submissions concerning "Error Three" (AS [67]-[68]) highlight no more than in determining a scope of duties, it is necessary to approach the question objectively. That is not disputed. The Full Court did not fail to observe that standard. The contention in AS [68] appears to assume that the Full Court found that "a person acting in a fiduciary or quasi fiduciary position can, by acting in breach of duty on one occasion, confine or limit the scope of their duty in law as a subsequent stage of the same transaction, provided only that they depose to honest belief". That was not found by the Full Court. What is relevant, and as required by the Act, is what an honest person in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed: *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74-75. The whole of the circumstances in the instant case included that, as at the 22nd August 2006 meeting and at all material times afterwards, a decision had already been made (on the 19th July meeting) and the directors had no reason (none was pleaded) to review or doubt their earlier decisions at the time of the 22nd August meeting or the Payment Resolutions.[10]

45 This misconception finds its way into ASIC's assertions of "Error Four" insofar as it confuses what the Full Court did (namely to correctly consider all of the relevant circumstances confronting the directors on the 22nd August 2006 and as at the later Payment Resolutions and to conclude that, objectively, a director in those particular circumstances would not have doubted or revisited the earlier 19th July 2006 decision to modify the constitution and which compelled the Board to effect the payments in 2007 and 2008). The Full Court did not simply "rely on honest belief" of the directors to confine their duties and no paragraph of FC1 or FC2 suggests the Full Court was so loose in its approach.

[10] It was uncontested at trial that the position that confronted the directors as at the time of the Payment Resolutions was that they had been advised by solicitors (including Blake Dawson Waldron separately engaged by several directors) that APCHL had an entitlement under the Constitution to the listing fee, which entitlement had been disclosed to the investing public via the various PDSs and had also been subject to no adverse comment by ASIC, nor the independent compliance committee nor the compliance scheme auditor Pitcher Partners in the course of listing the units of the trust on the Australian Stock Exchange.

46 The submissions in relation to "*The Negligence Claims*" (AS [71]-[74]) and "*improper use*" (AS [81]) again are based on an imposition of strict (which, in the circumstances, is absolute) liability. The above "true constitution" fallacy advanced by ASIC is evident in relation to the contentions of this part. ASIC assumes that a "hypothetical reasonable person" would not hold a belief (on 22nd August 2006 and later) that the earlier (19th July 2006) considerations had been adequate. To so find would be to impose a hitherto unknown duty to reconsider and doubt earlier decisions. It would also impose a notion of continuous breach, which, inconsistently with policy,[11] would render each subsequent moment (after an initial contravention) further successive, repeated and discrete, contraventions of the Act. The jurisdiction under sect 1317K would commence to run from each of those discrete moments, notwithstanding that the foundation for each contravention is the same initial event or conduct.

47 The submissions under "*The conflict claims*" (AS [75]-[80]) are based on a misconception of the case as actually brought by ASIC. There may be no answer in the instant case to a charge of conflicts existing at the time the modification was being considered, but that had occurred earlier, on 19th July 2006 and in a manner that did not put the directors on notice of their own delinquency on later occasions. In any normal case, it would not matter that the directors knew or did not know of their delinquency on the first occasion. That only became a factor in this case because of the operation of the limitation period and ASIC's decision to sue after it had expired. That is, it was essential for the Full Court to consider what duties (including awareness of any conflicts) presented themselves to the Board and when. With specific relevance to the Payment Resolutions, ASIC's approach betrays a failure to adequately distinguish between deficiencies that may have been extant as at the time of modification in July 2006 (out of time under sect 1317K), and deficiencies alleged to have existed at the time of the Payment Resolutions (at which point there were no conflicts, having regard to the purportedly amended constitution then in force and no allegation that the Board were on notice of any prior delinquency). ASIC's approach requires

[11] There has been a deliberate attempt by the Commonwealth legislature to have a consistent approach to limiting the jurisdiction of civil penalty proceedings across similar statutory regimes. In 2009 the parliament enacted the *National Consumer Protection Act*. Part 4.1 of that act contains a regulatory regime for civil penalties similar to Part 9.4B of the *Corporations Act* and sect 167(1) of the *National Consumer Protection Act* contains a temporal jurisdictional limit in similar terms to sect 1317K of the Act. Section 1317K of the Act was referred to in the Explanatory Memorandum for the *National Consumer Credit Protection Bill* 2009 in terms that strongly suggest that the legislature's policy, in relation to time restrictions applicable to similar regulatory regimes in other statutes, was to set an immutable and emphatic time restriction on ASIC's ability to start proceedings for alleged contraventions. The EM stated, "*4.53 ASIC can only seek a declaration and pecuniary penalty order within six years of a person contravening the provision. This is consistent with section 1317K of the Corporations Act, and section 77 of the Trade Practices Act 1974.*" (page 28) (emphasis added).

a series of quantum leaps –taking an idealised state of mind of July 2006, as determined in the 2013 LJ reasons, and implanting those circumstances and states of mind, post hoc and artificially, into the 22nd August and Payment Resolution decision making processes.

Ground 3: sect 208(3) is an element in contravention.

48 This ground concerns whether, on its proper construction, sect 208(3) of the Act (as replaced by s.601LC) is an element of contravention of sect 208 of the Act. If sect 208(3) is an element of contravention, it is uncontroversial that Mr Lewski could not be held liable as an accessory for a contravention of sect 208.

49 The trial judge {1AB 229 LJ [720]-[722]} treated himself as bound to follow the decision in *Waters v Mercedes Holdings Ltd* (2012) 203 FCR 218 (***Waters***) at [38]. However, in so doing, the trial judge failed to recognise that the reference in *Waters* to a "total statement of the prohibition" was a prohibition which speaks only to the payment of financial benefits falling *outside* the scope of sect 208(3). In that circumstance (not apposite here) the onus rests on the party wishing to rely upon the sections exceptions in sections 210-216. *Waters* did not speak to a circumstance where sect 208(3) applies.

50 Properly construing sect 208(3), the structure of sect 208 (as modified under Part 5C.7) is such that sect 208(1) is not engaged at all if the fees are provided for in the "scheme constitution." The language used in sect 208(3) is "*Subsection (1) does not prevent...*". Contrary to the learned trial judge's reasons (at {1AB 229 LJ [723]}), that textual indicator is in favour of treating sect 208(3) as an essential element. The words in sect 208(3) do not purport to create an *exception* to the operation of the liability in sect 208(1). To opposite effect, the consideration of sect 208(3) logically occurs first. This should be contrasted with the language of "*must fall within an exception*" in sect 208(1)(e). If the Parliament had intended sect 208(3) to operate as an exception to liability, it could have used the language of exception as deployed in sect 208(1)(e). Rather, the language chosen by Parliament makes it plain that sect 208(1) does not *prevent, stop or apply* to the payment of all fees to a responsible entity payable under the constitution.

51 Adapting the language in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520, sect 208(3) does not assume the existence of the general or primary grounds from which liability arises under sect 208(1). The language of McHugh J in *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88 at 119, illustrates that the obligation to comply with sect 208(1) is only imposed in circumstances where a fee to a responsible entity is not provided for in the constitution. Satisfaction of sect 208(3) is a gateway *into* establishing liability under sect 208(1), rather than an exit door to escape liability.

52 Further, *Waters* (at [37]) 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 (sect 208(1)(d)). Placing the onus under sect 208(3) upon a defendant would be disharmonious, as it would create the prospect that a plaintiff would bear the onus of establishing a lack of member approval under sect 208(1)(d) and yet, in respect of the same alleged contravention, a defendant would then bear the onus under sect 208(3) of establishing the existence of a constitutional entitlement to a fee which the defendant contends was *approved* by the members. Such confusion cannot have been intended.

53 In addition, the policy underpinnings of sect 208(1)(d) and 208(3) cannot be relevantly distinguished. Thus, contrary to the trial judge's determination {1AB 230 LJ [726]}, policy factors weigh in favour of the appellant's contention. Section 208(1)(d) seeks to ensure that fees already approved by members do not form part of the obligation created by sect 208(1). In other words, the financial benefit prohibition does not apply to benefits approved by the members. Section 208(3) is similar in its type or character. Fees can be payable under the constitution outside the financial benefit regime if they have been introduced with member approval or if there has been consideration that they do not adversely affect members rights (per sect 601GC(1)). By the time a Court is invited to consider sect 208(1), the statutory approval of fees made under sect 601GC has already occurred.

Notice of Contention.

54 The above submissions are predicated on an assumption that the question of the validity of the amendments purported to have been made to the scheme constitution on 19th July 2006 is immaterial (or at least that invalidity may be assumed). The Notice of Contention advances an alternative basis for response to ASIC's appeal, namely that the amendments were made within power under sect 601GC(1)(b) of the Act and that the Full Court erred in following *360 Capital* (2012) 91 ACSR 328 (***360 Capital***), insofar as *360 Capital* stands for the proposition that a relevant 'members' right' to be considered in the course of s601GC(1)(b) deliberations includes the right to have the scheme administered in accordance with the constitution. The position as articulated by Barrett J in *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444 (***ING Funds***) and *Re Centro Retail Ltd* (2011) 255 FLR 28 (***Centro Retail***) should be preferred.

55 In *ING Funds Management* (at [98]) Barrett J considered that 'the right to have the scheme administered in accordance with the constitution' could not relevantly be a right to consider in s601GC(1)(b) as,

> "If that is so, any modification of the constitution involves an invasion of that right that is arguably adverse. ... It denies all efficacy to s 601GC(1)(b) and must, for that reason, be rejected. Because the power to modify is concerned with the constitution, the focus is on rights created or secured by the constitution itself."

56 This logic was not directly rejected by Gordon J in *Premium Income Fund Action Group Inc v Wellington Capital Ltd* (2011) 84 ACSR 600 (***Premium Income Fund***) and to the extent *Premium Income Fund* was based on reasoning in conflict with the proposition, Barrett J rejected that departure in reasoning in *Centro Retail* (at [36]).

57 In *360 Capital* the Victorian Court of Appeal, at [40], dismissed Barrett J's reasoning on the basis that:

> "...the right of a member to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership. Without it, all other rights of membership, as well as the continuance, success and security of the scheme, would be at the whim of the responsible entity. Consequently, according to the natural and ordinary use of language, the expression "members' rights" in s 601GC(1)(b) is in our view calculated to embrace a members' right to have a managed investment scheme managed in accordance with its terms."

58 It may be seen from that extract that the Court of Appeal conflated the separate rights of members under an umbrella 'right' not to have the constitution altered. This is in stark contrast to Barrett J's reasoning, in accordance with which, the appropriate course is to identify the separate rights and then determine whether those separate rights might be adversely affected by amendment (see also Gordon J's 'steps' set out in *Premium Income Fund* at [33], which steps are amenable to considering individual rights).

59 To develop an example from the extract from *360 Capital* quoted above, where an RE sought to amend a scheme's constitution to modify the continuance of a scheme, it would seem clear that the members' right to have a scheme continued (insofar as a scheme provided for continuance) would be the relevant right to be considered by any modification that might affect it. That is, if the RE in that example, were to seek to modify a constitution with the effect of discontinuing the scheme, it would be obliged by s601GC(1)(b) to consider whether the members had a right to continuance in the first place and then whether the proposed modification would adversely affect it (in the example, the answer would be yes, so modification would not be permitted – contrary to the conclusion implied by the Court of Appeal in the above extract). The RE in that example should not have to consider, in addition, whether the members' right to have a scheme administered without modification would be affected –because the answer to that would in all cases be yes, and as such s601GC(1)(b) could never have 'efficacy.'

60 Anticipating the sort of critique as explained above, the Court of Appeal in *360 Capital* found (at [41] and [44]) that the "right to have a scheme administered according to the constitution" did not mean that "any change to a scheme's constitution will be adverse to members' rights". The Court of Appeal based this finding on only one example, *Eagle Star Trustees Ltd v Heine Management Ltd* (1990) 3 ACSR 232, as an example of an amendment that was "plainly not adverse to members' rights" (the example being "the abbreviation of the period for redemption of units from 90 days to 60 days"). That example, however, is an example of a *different* right (namely, the members' right of redemption within 90 days) being modified in favour of members. It is not an example of the 'right to have a scheme administered according to the constitution' not being adversely affected. There was no other logical analysis or explanation as to how a 'right to have a scheme administered according to the constitution' (as an individual right) could never be adversely affected by a proposed modification of a constitution.

61 If 'members' rights' include the right to, in effect, not have the constitution modified, then there could be no circumstance where that right would not be at risk (that is, it would be 'adversely affected') by any proposed modification. If this is so, then the considerations required by s601GC(1)(b) could only ever result in the modification being rejected by the RE, or rendering the power in sect 601GC(1)(b) entirely inutile.

62 In any event, and for the reasons advanced above, the Full Court was not wrong in overturning the trial judge's conclusions, irrespective of the finding at {2AB 581 FC1 [235]}.

63 Mr Lewski otherwise adopts the submissions of the First Respondent in appeal M80 / 2018 (**Wooldridge**), made in support of the Notice of Contention in that proceeding.

Part VII: Time estimate

64 The respondent would seek no more than three (3) hours for the presentation of the respondent's oral argument.

1 August 2018

	Bret Walker	Michael Osborne	Justin Tomlinson
T	(02) 8257 2527	(03) 8600 1715	(03) 9225 7914
F	(02) 9221 7974		
E	maggie.dalton@stjames.net.au	osborne@chancery.com.au	jtomlinson@vicbar.com.au

Counsel for the respondent