

**BETWEEN:**

**KPMG (A FIRM)**

Plaintiff

**AND:**

**COMMONWEALTH OF AUSTRALIA**

First Defendant

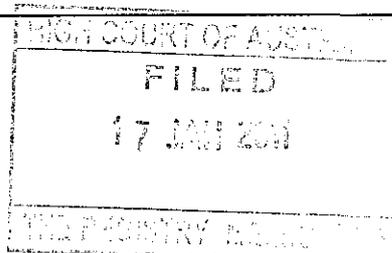
**AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION**

Second Defendant

**Written Submissions of the Defendants**

Filed on behalf of the Defendants by:

Australian Government Solicitor  
50 Blackall Street  
BARTON ACT 2600  
DX 5678 Canberra



Contacts: Nick Wood /  
Ros Kenway

File ref: 10032022  
Telephone: (02) 6253 7595  
Facsimile: (02) 6253 7304

## Part I INTERNET PUBLICATION

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

## Part II STATEMENT OF ISSUES

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2. Pursuant to s 50 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), the Second Defendant (**ASIC**) caused a proceeding (the **Ann Street proceeding**) to be commenced in the Supreme Court of Victoria in the names of eight companies (the **Westpoint companies**) against the Plaintiff (**KPMG**). The Ann Street proceeding was subsequently transferred to the Federal Court of Australia.
3. By its Amended Statement of Claim dated 17 June 2010 [DB 18-22], KPMG seeks a declaration that s 50 of the ASIC Act is invalid in so far as it empowers ASIC to begin and carry on a proceeding in the name of a company. Although the declaration sought by KPMG is framed in general terms, the issues raised (and the relief claimed) should be determined with reference to the facts pleaded in the Amended Statement of Claim and the application of s 50 of the ASIC Act to the Ann Street proceeding.<sup>1</sup>
4. The Defendants have demurred to the whole of the Amended Statement of Claim on the ground that s 50 of the ASIC Act is not invalid as alleged [DB 13].
5. The following questions are potentially raised by the demurrer:
  - 5.1 whether, by authorising ASIC to cause the Ann Street proceeding to be begun and carried on in the name of the Westpoint companies, s 50 of the ASIC Act provides for an acquisition of property within the meaning of s 51(xxxi) of the Constitution;
  - 5.2 whether s 50 of the ASIC Act is properly characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi); and
  - 5.3 whether any such acquisition of property is on just terms within the meaning of s 51(xxxi).

## Part III SECTION 78B NOTICES

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6. KPMG has given notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) [DB 9-11]. The Defendants do not consider that any further notice under s 78B is required.

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<sup>1</sup> Compare, e.g., *Smith v ANL Limited* (2000) 204 CLR 493 at 510-511 [39] (Gaudron and Gummow JJ).

**Part IV MATERIAL FACTS**

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7. On 13 October 2008, pursuant to s 50 of the ASIC Act, ASIC caused the Ann Street proceeding to be begun and carried on in the Supreme Court of Victoria in the names of the Westpoint companies against KPMG.
- 5 8. An agreed summary of the issues raised by the pleadings in the Ann Street proceeding is reproduced at [DB 24-25].
9. The Defendants agree with the statement of material facts set out in paragraphs 5 to 12 of KPMG's submissions.

10 **Part V APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS**

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10. The Defendants accept the statement of applicable constitutional provisions, statutes and regulations set out in paragraphs 66 to 68 of KPMG's submissions, with the addition of s 51(xx) of the Constitution, which provides:

15 *51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:*

...

(xx) *foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;*

20 **Part VI STATEMENT OF ARGUMENT**

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**A. INTRODUCTION**

11. The Defendants submit that, in its application to the Ann Street proceeding, s 50 of the ASIC Act does not infringe the limitation derived from s 51(xxxi) of the Constitution with respect to any property of the Westpoint companies. The
- 25 Defendants submit that s 50 is supported by the legislative power conferred by s 51(xx) of the Constitution.

12. In summary, the Defendants make the following submissions:

12.1 section 50 of the ASIC Act does not provide for any acquisition of property from the Westpoint companies within the meaning of s 51(xxxi), because:

- 30 12.1.1 the general capacity of each of the Westpoint companies to begin and carry on proceedings, and their particular rights in relation to the Ann Street proceeding, have always been subject to the power of ASIC to cause a proceeding to be begun and carried on in the name of the company in the circumstances set out in s 50 of the ASIC Act;

- 35 12.1.2 further, and in any event:

(a) the rights of each of the Westpoint companies to decide to

begin, and generally to control the conduct of, the Ann Street proceeding are incidents of a chose in action held by that company, and that chose in action has not been 'acquired' by ASIC or by any other person;

5 (b) the rights of each of the Westpoint companies to decide to begin, and generally to control the conduct of, the Ann Street proceeding do not in themselves constitute 'property' separate from the chose in action;

10 12.2 further, and in any event, s 50 of the ASIC Act is not a law with respect to the acquisition of property within the meaning of s 51(xxxi); and

12.3 alternatively, the ASIC Act provides just terms for any acquisition of property of the Westpoint companies in relation to the Ann Street proceeding under s 50, because:

15 12.3.1 the Westpoint companies will receive the benefit of any damages awarded by way of judgment or any amount received under a settlement of the proceeding begun and carried on in their names under s 50, being the full value of the chose in action resulting from its enforcement; and

12.3.2 the Westpoint companies will not bear the costs of the proceeding.

## 20 B. SECTION 50 OF THE ASIC ACT

13. A provision empowering the corporate regulator to begin and carry on a proceeding in the name of a company has long been part of companies legislation in Australia.<sup>2</sup>

13.1 Such a provision was included in the Uniform Companies Acts of 1961-62: see, for example, s 169(7) of the *Companies Act 1961* (Vic).<sup>3</sup>

25 13.2 Under the 1981 co-operative scheme legislation, a similar power was conferred on the National Companies and Securities Commission by s 306(11) of the *Companies Act 1981* (Cth).

30 13.3 Under the legislative regime introduced in 1989, s 50 of the *Australian Securities Commission Act 1989* (Cth) (subsequently renamed as the *Australian Securities and Investments Commission Act 1989* (Cth))<sup>4</sup> (in either form, the '1989 Act') conferred a power on the Australian Securities Commission (as it was then called) in substantially the same terms as the

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<sup>2</sup> See *Australian Securities Commission v Deloitte Touche Tomatsu* (1996) 70 FCR 93 at 119-120; *Carey v Australian Securities Commission* (2008) 169 FCR 311 at 314-316 [13]-[20]; Austin, 'Does the Westpoint litigation signal a revival of the ASIC s 50 class action?' (2008) 22 *Australian Journal of Corporate Law* 8 at 12-15.

<sup>3</sup> The immediate predecessor to this provision was s 144(6) of the *Companies Act 1958* (Vic), which was in turn based on a similar provision that had been introduced in the United Kingdom in s 44(2) and (3) of the *Companies Act 1947* (UK), and which became s 169(4) and (5) of the *Companies Act 1948* (UK). The equivalent provision in the United Kingdom was most recently contained in s 438 of the *Companies Act 1985* (UK), which has since been repealed (see *Companies Act 2006* (UK), s 1176).

<sup>4</sup> See item 4, Schedule 1 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth).

power now conferred by s 50 of the ASIC Act.

14. Section 50 is contained in Part 3 of the ASIC Act, which deals with investigations by ASIC. Powers of investigation are conferred on ASIC by ss 13, 14 and 15 of the ASIC Act, and include a power to conduct investigations into suspected  
5 contraventions of the corporations legislation, or contraventions of other laws that concern the management or affairs of a body corporate or involve fraud or dishonesty and relate to a body corporate. For the purposes of an investigation, ASIC may require a person to appear for examination on oath and to answer questions (s 19).
- 10 15. Where as a result of such an investigation, or from a record of an examination, conducted under Part 3 of the ASIC Act, ASIC forms an opinion that it is in the 'public interest' for the person to 'begin and carry on' a proceeding of one of the kinds described in paragraphs (a) or (b), ASIC may, if the person is a company, cause the proceeding to be begun and carried on in the person's name.<sup>5</sup> If the person is not a  
15 company, ASIC may only do so with the person's written consent. Proceedings of the kind described in paragraph (a) include proceedings for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related. Proceedings of the kind described in paragraph (b) include the recovery of property  
20 of the person.
16. In considering whether it is in the 'public interest' to 'begin and carry on' a proceeding, ASIC has a wide discretion.<sup>6</sup> It is not in every case where it might be in a person's interest to begin and carry on a proceeding that ASIC will consider it to be in the 'public interest' to cause the proceeding to be begun and carried on in the  
25 person's name. But the object of s 50 is to facilitate the bringing of civil proceedings that might not otherwise be begun and carried on by the person who has suffered relevant loss or harm, for example, because of insufficient financial resources or support.<sup>7</sup> The principal purpose for which the proceeding is begun and carried on is in order to recover damages for the relevant loss or harm suffered by the company or  
30 to recover property on behalf of the company.<sup>8</sup>

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<sup>5</sup> See *Australian Securities Commission v Deloitte Touche Tomatsu* (1996) 70 FCR 93 at 120-123; *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 325 (Lockhart J); *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) 54 FCR 562 at 570. See also *O'Sullivan v Farmer* (1989) 168 CLR 210 at 216-217 (Mason CJ, Brennan, Dawson and Gaudron JJ).

<sup>6</sup> See *Australian Securities Commission v Deloitte Touche Tomatsu* (1996) 70 FCR 93 at 108, 123-124.

<sup>7</sup> *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 324 (Lockhart J); *Carey v Australian Securities Commission* (2008) 169 FCR 311 at 317 [26] (Finkelstein J); *Australian Securities Commission v Deloitte Touche Tomatsu* (1996) 70 FCR 93 at 115-118. In relation to a predecessor provision, s 169(7) of the *Companies Act 1961*, see also Wallace and Young, *Australian Company Law and Practice* (1965), p.512: 'What the public interest is in the matter is not clear, for any property recovered by the company would belong to the shareholders subject to the rights of creditors. Probably the situation to which the sub-section is directed is one in which the company is owned by those who have defrauded it and in which a number of members of the public are creditors but none of them has sufficient interest or resources to take the necessary proceedings.'

<sup>8</sup> The reference to this purpose was explicit in predecessor provisions such as s 169(7) of the *Companies Act 1961* (Vic).

17. As noted by the Full Court of the Federal Court in *Australian Securities Commission v Deloitte Touche Tohmatsu*,<sup>9</sup> the mischief sought to be addressed by s 50 of the 1989 Act (and by its precursors in Australia and England) is described by the Eggleston Company Law Advisory Committee Report (1969) in the following terms:

5            '[It] should be regarded as the responsibility of government to take civil proceedings in the name of the company in cases where there are seen to be good prospects of recovery, but in which, by reason of the relative poverty of the shareholders or creditors, the inability of the company itself to finance proceedings, or the practical impossibility of organising financial support for the litigation, it is impossible that action will be taken without the support of the government ... [It] would be in accordance with modern views as to the responsibility of the State for enabling under-privileged citizens to enjoy the benefits of the legal system if governments considered themselves as bound to lend them assistance in circumstances of the kind we have described. ...'

15 18. The decision that it is in the public interest to 'begin and carry on' a proceeding is a single decision. That is to say, the expression 'to begin and carry on' is a compound expression that gives rise to a singular power. It is not the case that ASIC must separately decide that each step to be taken in proceedings begun and carried on under s 50 (e.g., a decision as to which counsel to engage, etc.) is in the 'public interest': ASIC's decision at the threshold that it is in the public interest to 'begin and carry on' a proceeding authorises all such steps to be taken in the proceeding.<sup>10</sup>

19. ASIC is not itself a party to a proceeding begun under s 50. Although ASIC must form an opinion that it is in the public interest for the proceedings to be begun and carried on, it does not conduct the proceedings on behalf of the public. Rather, it conducts the proceeding on behalf of and for the benefit of the person in whose name the proceeding is begun and carried on.<sup>11</sup> As Lockhart J observed in *Somerville v Australian Securities Commission (Somerville)*:<sup>12</sup>

25            'The Commission is simply the statutory vehicle to commence and conduct litigation in the public interest. Its interest in the litigation is the furtherance of the public interest by assisting wronged plaintiffs to recover loss or damage or property that has been caused by the wrongful activities of persons whose conduct has been investigated by the Commission pursuant to its investigatory powers.'

20. Accordingly, the potential for any 'divergence' between ASIC's commencement and conduct of proceedings and the interests of the person in whose name the proceedings are begun and carried on is limited.<sup>13</sup>

21. In the case of a proceeding in the name of a natural person, ASIC can only cause the

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<sup>9</sup> (1996) 70 FCR 93 at 115-116.

<sup>10</sup> *Carey v Australian Securities and Investments Commission* (2008) 169 FCR 311 at 315 [14]-[15] (Finkelstein J).

<sup>11</sup> *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 326, 328-329 (Lockhart J).  
<sup>12</sup> (1995) 60 FCR 319 at 329.

<sup>13</sup> Compare KPMG's submissions at paras 14, 26, 28, 56-57, 63 and 65.

proceeding to be begun and carried on with that person's consent. The predecessor provisions to s 50, which only covered proceedings begun and carried on in the name of a corporation, did not contain a consent requirement. The consent requirement was added to s 50 of the 1989 Act in the course of its passage through the Parliament.<sup>14</sup> However, following a recommendation by the Joint Select Committee on Corporations Legislation,<sup>15</sup> the consent requirement was limited to persons other than companies. This accommodates the fact that a company's chose in action might be against persons who are in control of the company and who might otherwise refuse to consent to such proceedings being begun and carried on.<sup>16</sup>

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22. The 'fruits of the litigation' in the form of any damages recovered pursuant to a judgment or settlement of the proceeding will be for the benefit of the person in whose name the proceeding is begun and carried on and in whom the relevant chose in action is vested.<sup>17</sup> On the other hand, the costs of conducting the proceeding form part of the expenses of the investigation which must be paid by ASIC, and are not generally borne by the named plaintiff.<sup>18</sup>

### C. NO 'ACQUISITION OF PROPERTY'

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23. It is accepted that 'property' for the purposes of s 51(xxxi) has a broad meaning,<sup>19</sup> and includes a chose in action (e.g., a right to bring an action for damages for negligence).<sup>20</sup>
24. However, KPMG's submissions do not clearly articulate the nature of the 'property' of the Westpoint companies that is said to have been acquired under s 50 of the ASIC Act. KPMG's submissions seek to identify, as discrete proprietary rights, a right to decide to begin, and a right generally to control the conduct of, the Ann Street proceeding, including (as incidents of the foregoing rights) the rights to make various forensic decisions in the course of conducting those proceedings (e.g., which lawyers

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<sup>14</sup> See *Carey v Australian Securities Commission* (2008) 169 FCR 311 at 315-316 [18] (Finkelstein J).  
<sup>15</sup> Commonwealth Parliament, *Report of the Joint Select Committee on Corporations Legislation* (April 1989), paras 4.45 to 4.51. It may be noted that the Committee proceeded on the basis that the introduction of a consent requirement in s 50 would reduce the powers of ASIC to begin and carry on proceedings in the interests of investors, when compared with the powers of the NCSC under the predecessor provisions: *ibid.* at para 4.45.

<sup>16</sup> *Somerville* (1995) 60 FCR 319 at 324-325 (Lockhart J); *Carey v Australian Securities Commission* (2008) 169 FCR 311 at 316 [18] (Finkelstein J); *Deloitte Touche Tomatsu v Australian Securities Commission* (1995) 54 FCR 562 at 580-581, 582 (Lindgren J). However, the power conferred by s 50 of the ASIC Act is not confined by reference to such considerations: see *Australian Securities Commission v Deloitte Touche Tomatsu* (1996) 70 FCR 93 at 127-129.

<sup>17</sup> *Somerville* (1995) 60 FCR 319 at 325, 327 (Lockhart J).

<sup>18</sup> See s 90 of the ASIC Act, s 90 and the definition of 'expenses' in s 5; *Somerville* (1995) 60 FCR 319 at 325 (Lockhart J). Section 91(1) also confers on ASIC power to recover the expenses of an investigation from certain persons who are convicted of an offence in a prosecution or against whom judgment is awarded in a proceeding begun as a result of an investigation.

<sup>19</sup> See, e.g., *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).  
<sup>20</sup> *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [83] (French CJ, Gummow, Crennan JJ). See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 (Mason CJ, Deane and Gaudron JJ), 311-312 (Brennan J), 314 (Dawson J), 319-320 (Toohey J) and 325 (McHugh J); *Smith v ANL Limited* (2000) 204 CLR 493 at 498-499 [3], 500 [7] (Gleeson CJ), 504 [20] (Gaudron, Gummow JJ), 522 [80] (Kirby J), 532 [117] (Hayne J, with whom McHugh J agreed).

to engage, when and in what forum to commence proceedings, what counsel to instruct, what evidence to lead, etc.).<sup>21</sup>

25. The Defendants submit that the operation of s 50 of the ASIC Act has not resulted in the acquisition of any chose in action held by the Westpoint companies in relation to the Ann Street proceeding, nor in the acquisition of any proprietary right or interest in relation to any such choses in action - such as that which KPMG's submissions seek to identify.

***The rights of the Westpoint companies have always been subject to s 50 of the ASIC Act***

26. The dates of incorporation of each of the Westpoint companies are set out in the particulars to paragraph 7 of the Amended Statement of Claim [DB 20]. On the date that each of the Westpoint companies was incorporated, and ever since, both:

26.1 the general capacity of the company to begin and carry on a proceeding to enforce a chose in action; and

26.2 the particular capacity of the company to begin and carry on a proceeding to enforce its chose of action that is the subject of the Ann Street proceeding;

was qualified either by s 50 of the ASIC Act or by s 50 of the 1989 Act (being a provision in substantially the same terms as s 50 of the ASIC Act).

27. Four of the Westpoint companies<sup>22</sup> were incorporated after the commencement of, and in accordance with, the 2001 national scheme. At the time of their incorporation (and ever since):

27.1 s 119 of the *Corporations Act 2001* (Cth) (the **Corporations Act**), by providing that a company on registration comes into existence as a body corporate, impliedly provided that the company comes into existence with the attributes given by the common law to a body corporate (including the capacity to sue and be sued), except so far as the Corporations Act or other legislation modifies or supplements those attributes;<sup>23</sup> and

27.2 while s 124(1) of the Corporations Act provided that a company has the legal capacity and powers of an individual and the powers of a body corporate, s 50 of the ASIC Act modified that particular capacity.

28. The other four Westpoint companies<sup>24</sup> were incorporated under the 1989 legislative regime. At the times of their incorporation (and up until the commencement of the 2001 national scheme):<sup>25</sup>

28.1 s 7 of the *Corporations (Western Australia) Act 1990* (WA) (the '**WA Act**')

<sup>21</sup> See KPMG's submissions at paras 30-31 and 49.

<sup>22</sup> Bayshore Mezzanine Pty Ltd; Ann Street Mezzanine Pty Ltd; Bayview Heritage Mezzanine Pty Ltd; North Sydney Finance Ltd.

<sup>23</sup> See *Ford's Principles of Corporation Law*, para [4.020]ff.

<sup>24</sup> Mount Street Mezzanine Pty Ltd; Market Street Mezzanine No. 2 Pty Ltd; York Street Mezzanine Pty Ltd; Market Street Mezzanine Pty Ltd.

<sup>25</sup> Note s 1378 of the Corporations Act, under which the registration of a company under the co-operative scheme has effect as if it were registration under Pt 2A.2 of the Corporations Act but without creation of any new legal entity.

applied the Corporations Law as then in force in the Australian Capital Territory (ACT) as a law of Western Australia, and ss 119 and 124(1) of that law relevantly made provision in the same terms as ss 119 and 124(1) of the Corporations Act;

- 5 28.2 s 58 of the WA Act applied s 50 of the 1989 Act as then in force in the ACT as a law of Western Australia, and that law made substantially similar provision to s 50 of the ASIC Act.
- 10 29. Accordingly, both at the time that each of the Westpoint companies was incorporated and at the time that the choses in action the subject of the Ann Street proceeding accrued to each Westpoint company, and at all other times, the capacity of each of the Westpoint companies was subject to the power of ASIC to cause a proceeding to be begun and carried on in its name in the circumstances described in s 50 of the ASIC Act.
- 15 30. As a consequence, the exercise of power by ASIC under s 50 of the ASIC Act does not effect an acquisition of any property of the Westpoint companies. Any property held by the Westpoint companies in, or in relation to, the choses in action the subject of the Ann Street proceeding has never been of the nature and amplitude that KPMG's argument requires and assumes.<sup>26</sup> In this respect, the position is analogous to *Telstra Corporation v The Commonwealth (Telstra v Commonwealth)*,<sup>27</sup> where  
20 Telstra's rights in relation to the physical assets comprising the 'PSTN' had always been subject to the statutory rights of its competitors to require access to, and use of, those assets.

***There is no acquisition of the choses in action***

- 25 31. Further, and in any event, s 50 does not provide for an acquisition of the choses in action held by the Westpoint companies, because:
- 31.1 the choses in action remain intact and vested in the Westpoint companies, despite the operation of s 50; and
- 31.2 neither ASIC nor any other person has obtained any interest in property as a result of the operation of s 50.
- 30 32. The term 'property' can be applied to many different kinds of relationship between a person and subject matter.<sup>28</sup> The expression 'chose in action' can be understood as meaning incorporeal personal property that is enforceable by legal action, but which is incapable of being the subject of actual possession.<sup>29</sup> While some caution needs to be exercised in applying that statement in a context involving s 51(xxxi) of the

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<sup>26</sup> Compare *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 220 [9] and 233 [52] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>27</sup> (2008) 234 CLR 210 at 222 [17], 223 [19], 232-234 [50]-[53].

<sup>28</sup> *Yanner v Eaton* (1999) 201 CLR 351 at 266-267 [19]-[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Telstra v Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

<sup>29</sup> *Torkington v Magee* [1902] 2 KB 427 at 430 (Channell J); see also *Loxton v Moir* (1914) 18 CLR 360 at 379 (Rich J); *National Trustees Executors and Agency Company of Australasia v Commissioner of Taxation* (1954) 91 CLR 540 at 584 (Kitto J).

Constitution,<sup>30</sup> the Defendants submit that neither in substance nor in form have the choses in action held by the Westpoint companies in relation to the Ann Street proceeding been 'acquired' under s 50 of the ASIC Act within the meaning of s 51(xxxi).

- 5 33. Section 50 does not divest a company of its chose in action but, rather, provides for its enforcement on behalf of the company. Any proceeds of that enforcement will be received by the company. Whether a chose in action is regarded as a 'bundle of rights' or as 'a legally endorsed concentration of power',<sup>31</sup> s 50 does not operate so as to deprive a company of such rights or power.
- 10 34. Unlike the legislation considered in *Georgiadis v Australian and Overseas Telecommunications Corporation*<sup>32</sup> (*Georgiadis*) or *Smith v ANL Limited*<sup>33</sup> (*Smith v ANL*), s 50 of the ASIC Act does not extinguish, modify or impair the choses in action of the Westpoint companies in a manner that gives rise to an acquisition of property from those companies within the meaning of s 51(xxxi).
- 15 34.1 The legislation in *Georgiadis* and *Smith v ANL* either extinguished a vested chose in action or diminished a right to enforce a chose in action, thereby relieving the defendant from liability in respect of that chose in action.
- 34.2 In the present case, however, s 50 of the ASIC Act does not remove or diminish the Westpoint companies' rights of action to recover damages, nor does it relieve any person from liability to the company.
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35. There is an important distinction between a law that operates to 'acquire' property and a law that merely regulates the exercise of rights that are incidents of such property.<sup>34</sup> A law of the latter kind does not provide for the acquisition of property.<sup>35</sup> By empowering ASIC to cause a proceeding to be begun and carried on in the name of each of the Westpoint companies, s 50 of the ASIC Act merely regulates the exercise of rights that are incidents of the choses in action which are the subject of the Ann Street proceeding.
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36. For a law to 'acquire' property, rather than merely regulate a right that is an incident of property, some identifiable and measurable benefit or advantage must be derived by another relating to the ownership or use of property.<sup>36</sup> The Commonwealth or some other person must obtain what is properly regarded as an 'interest in property',
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<sup>30</sup> *Smith v ANL Limited* (2000) 204 CLR 493 at 504 [21] (Gaudron and Gummow JJ).

<sup>31</sup> *Telstra v Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

<sup>32</sup> (1994) 179 CLR 297.

<sup>33</sup> (2000) 204 CLR 493.

<sup>34</sup> *Tasmania v Commonwealth* (the *Tasmanian Dam Case*) (1983) 158 CLR 1 at 284 (Deane J); *Smith v ANL* (2000) 204 CLR 493 at 504-506 [22]-[23] (Gaudron and Gummow JJ); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 635 (Gummow J); *Commonwealth v Western Australia* (1999) 196 CLR 392 at 478 [259] (Hayne J); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 413-415 (Stephen J).

<sup>35</sup> *Tasmania v The Commonwealth* (The *Tasmanian Dam Case*) (1983) 158 CLR 1 at 144-146 (Mason J), 181-182 (Murphy J), 246-248 (Brennan J); *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 at 180-183 (Black CJ and Gummow J).

<sup>36</sup> *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 179-180 [81]-[82] (French CJ, Gummow, and Crennan JJ) and 201-202 [147] (Hayne, Keifel, Bell JJ).

even if it be slight or insubstantial.<sup>37</sup> There must be some correlation (although not necessarily a precise correspondence) between the benefit or advantage obtained, and the property right said to have been acquired. It is not sufficient merely to show that the relevant law is applied to achieve political purposes or in the 'public interest'.<sup>38</sup>

5 The achievement of particular policy or public interest objectives may be attributed to most Commonwealth enactments. If obtaining such a policy objective amounted to obtaining a relevant 'benefit' or 'advantage' for the purposes of s 51(xxxi), the distinction between a law that provides for the 'acquisition' of property and a law that provides for the regulation of persons in relation to property would collapse, and the capacity of the Commonwealth Parliament to exercise its legislative powers so as to regulate fields of activity would be unduly fettered.<sup>39</sup>

10 37. Section 50 of the ASIC Act does not confer on ASIC or any other person such a proprietary right. KPMG asserts that ASIC obtains a 'valuable right' (emphasis added) to conduct the Ann Street proceeding.<sup>40</sup> However, the only 'value' of s 50 of the ASIC Act to ASIC is in its application as a *regulatory* power: it enables ASIC to enforce the Westpoint companies' choses in action in their names and on their behalf.

15 38. It cannot be said that the commencement of a proceeding to enforce a chose in action deprives the company of the 'reality of proprietorship' of the chose in action. Nor is s 50 an indirect means or 'circuitous device' to effect an acquisition of the chose in action by the Commonwealth or any other person.<sup>41</sup> The present case can be distinguished from the legislation considered in *Bank of New South Wales v The Commonwealth*, which sought to establish a scheme for the acquisition by the Commonwealth (or the Commonwealth Bank) of the assets and undertaking of private banks.<sup>42</sup> In contrast, s 50 does not contemplate the acquisition by anyone of the chose in action or other property of the company in whose name a proceeding is begun and carried on.

20 39. Nor is the power conferred on ASIC by s 50 analogous to an assumption of exclusive possession or control of property, as was addressed in *Dalziel*.<sup>43</sup> Mere control of the conduct of a proceeding to enforce a chose in action does not amount to 'use' of the chose in action. The position is no different to that considered in *Femcare v Bright*

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<sup>37</sup> *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 196 [132], 201-202 [147] (Hayne, Keifel, Bell JJ) and 215-216 [190] (Heydon J); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 360-361 [90] (French CJ).

<sup>38</sup> *Chapman v Luminis Pty Ltd (No 4)* (2002) 123 FCR 62 at 270 [734] (von Doussa J), cited in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 180 [84], fn 179 (French CJ, Gummow and Crennan JJ); cf. *Bienke v Minister for Primary Industries and Energy* (1995) 63 FCR 567 at 586-587.

<sup>39</sup> *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 180 (Brennan J) and 189 (Deane and Gaudron JJ).

<sup>40</sup> KPMG's submissions, para 54.

<sup>41</sup> Compare *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

<sup>42</sup> See *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 181 [86] (French CJ, Gummow and Crennan JJ).

<sup>43</sup> *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; see also *Australian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 165-166 (Brennan J), 198-199 (Dawson J) and 245 (McHugh J).

(*Femcare*), where the Full Court of the Federal Court rejected an argument that the legislation authorising a representative proceeding to be brought on behalf of a group under Part IVA of the *Federal Court of Australia Act 1976* (Cth) involved an acquisition of property from the member of the group:<sup>44</sup>

5           'a chose in action, or an obligation, is not something that is capable of "use". It  
may be enforced. Nevertheless, absent any assignment, where enforcement of  
a chose in action or obligation is for the benefit of the owner of the chose in  
action or obligation, it is an unwarranted extension of language to suggest that  
10           a person who is authorised to enforce the chose in action or obligation on  
behalf of another person has the "use" of that obligation. The submission that  
there is an alienation of the interest in a chose in action by the grant of  
authority to enforce that chose in action in litigation in a court on behalf of the  
holder is completely without substance.'

40. KPMG seeks to distinguish the analysis adopted in *Femcare* on the basis of the  
15           'practical impact' of the decisions made by ASIC on the outcome of the proceeding.<sup>45</sup>  
However, the submissions proceed from a premise that ASIC will conduct the  
proceeding in order to promote public interests which are unconnected with the  
interests of the company, and assume that the decisions made by ASIC in the  
conduct of the proceeding will reduce the value of the chose in action to the  
20           company. Neither of those assumptions is justified.

***There is no distinct property in a right generally to control the conduct of the Ann Street proceeding***

41. As indicated above, property may sometimes be usefully conceived of as a 'bundle of  
rights'. For example, in the case of an estate in fee simple, the property can be  
25           conceived of as a bundle of rights in relation to certain land, including rights to use  
and enjoy the land, rights to control the use and enjoyment of the land by others  
(including to permit or forbid such use and enjoyment by others, or permit it on  
conditions), and the right to alienate some or all of those rights.

42. However, a chose in action that consists of a right to sue for damages (e.g., in  
30           negligence) is not usefully conceived of as a 'bundle' of rights. A right to sue for  
damages is a *unitary* right: the right to damages, enforceable by a court action. Such  
a right to sue may not be assignable at common law (e.g., a claim in tort for damages  
for personal injury). In so far as the right to sue is capable of valuation, that value is  
referable to the remedy sought and the prospects of success in the proceeding.

35           43. There are many forensic decisions that will be made in the course of enforcing the  
right (e.g., which lawyers to engage, whether and in what forum to commence  
proceedings, what to plead, what evidence to lead, etc.). But such decisions do not  
involve an exercise of rights of a proprietary character. That is, there is no property  
in the manner in which a litigant seeks to enforce a right to sue for damages. In so far

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<sup>44</sup> *Femcare v Bright* (2000) 100 FCR 331 at 356-357 [109].

<sup>45</sup> KPMG's submissions at para 55.

as a litigant has 'rights' to make decisions as to the manner in which a proceeding should be conducted, such rights lack the permanence or stability that is characteristic of property.<sup>46</sup> The property is the chose itself: the right to damages, enforceable by a court action. Decisions as to the manner or method of using that property do not have an independent proprietary character.

44. In the present case, the choses in action themselves remain intact. Section 50 does not take away any right to damages, nor any right to a chance of damages, nor any right to sue for damages. Contrary to KPMG's submissions, the forensic decisions made in the course of conduct of a curial proceeding are not proprietary in character. Otherwise, any amendment or alteration of a rule of evidence or procedure which affected the range of forensic decisions available to a litigant would give rise to a potential acquisition of property. This is clearly not the case. The relevant 'property' is the chose in action, and not the 'rights' to make the various forensic decisions in the course of conducting a proceeding for the enforcement of the chose in action.

**D. SECTION 50 OF THE ASIC ACT IS NOT A LAW 'WITH RESPECT TO' THE ACQUISITION OF PROPERTY**

45. Even if, in its application to the Ann Street proceeding, s 50 of the ASIC Act gave rise to an acquisition of property of the Westpoint companies, the provision is not properly characterised as a law 'with respect to' the acquisition of property within the meaning of s 51(xxxi). It is, instead, a law supported by s 51(xx) of the Constitution and, therefore, does not attract the constitutional requirement to provide just terms.

46. There are some laws that provide for an acquisition of property to which s 51(xxxi) does not apply. The rule of construction by which s 51(xxxi) abstracts power with respect to the acquisition of property from the other heads of legislative power only extends to laws which can be characterised as laws 'with respect to' the acquisition of property for a purpose in respect of which the Parliament has power to make laws.<sup>47</sup> Accordingly, a law which cannot properly be characterised as a law with respect to the acquisition of property is not affected by the constitutional requirement of just terms, and is valid if it is supported by another head of legislative power.

47. As Mason J explained in *Mutual Pools & Staff Pty Ltd v Commonwealth (Mutual Pools)*:<sup>48</sup>

'... acquisitions of various kinds, even though they might perhaps fall *prima facie* within the general power, are to be regarded as authorized by the exercise of specific powers otherwise than on the basis of just terms. Of these instances, it may be said that they are all cases in which the transfer or vesting of title to property or the creation of a chose in action was *subservient and incidental to*

<sup>46</sup> Compare *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1247-1248 (Lord Wilberforce).  
<sup>47</sup> See, e.g., *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 171-172 (Mason CJ), 177-178 (Brennan J) and 188-189 (Deane and Gaudron JJ); *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ); see generally *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 246-252 [330]-[344] (McHugh J).

<sup>48</sup> (1994) 179 CLR 155 at 171. See also at Brennan J at 179 and Deane and Gaudron JJ at 189-190.

or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognizable independent character. Indeed, the taxation cases apart, they were all cases in which the relevant statute provided a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship, e.g., the relationship between a bankrupt and the creditors in the bankruptcy, between the Crown and the person who brings in prohibited imports, and between the Crown and an enemy alien with respect to enemy property.'

[emphasis added]

48. In particular, as six members of this Court held in *Nintendo Co Ltd v Centronics Systems Pty Ltd*,<sup>49</sup> a law which is not directed to the acquisition of property as such, but which is concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi).
49. As Gummow J explained in *Airservices Australia v Canadian International Airlines Ltd (Airservices Australia)*,<sup>50</sup> the criterion upon which the principle operates has some affinity with the notion that private property affected by some sort of public interest is properly subject to regulatory control by the state. The principle is to be understood as one which preserves an appropriate balance between the reach of the guarantee afforded by s 51(xxxi) and the need to ensure that Commonwealth legislative power is not unduly fettered.<sup>51</sup> Many laws that are made by the legislature attempt to resolve competing claims with respect to property and its use.<sup>52</sup> It may not be possible to draw bright lines between those laws which should and those which should not be characterised as laws with respect to the acquisition of property.<sup>53</sup> Nevertheless, the principle is well-established,<sup>54</sup> and is readily applied where an area of activity 'needs to be regulated in the common interest'<sup>55</sup> or where the public interest is otherwise served.<sup>56</sup> So understood, the principle does not erode

<sup>49</sup> (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>50</sup> (1999) 202 CLR 133 at 299 [498].

<sup>51</sup> See L Zines, *The High Court and the Constitution* (5<sup>th</sup> ed., 2008) at 582.

<sup>52</sup> *Airservices Australia* at 299-300 [500].

<sup>53</sup> *Smith v ANL* at 514 [51] (Gaudron and Gummow JJ).

<sup>54</sup> See *Tasmania v Commonwealth (the Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 (Deane J); *Australian Tape Manufacturers' Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Mutual Pools* at 171-2 (Mason CJ), 177-8 (Brennan J) and 189-90 (Deane and Gaudron JJ); *Health Insurance Commission v Peeverill* (1994) 179 CLR 226 at 236-238 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297 at 305-8 (Mason CJ, Deane and Gaudron JJ); *Airservices Australia* at 298-300 [497]-[503] (Gummow J) and 304-5 [517]-[519] (Hayne J); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 361 [91] (French CJ) and 439 [362] (Crennan J). Note also that no party in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 suggested that the principle was wrong: see Heydon J at 226-7 [218].

<sup>55</sup> *Mutual Pools* at 189-90 (Deane and Gaudron JJ); *Airservices Australia* at 299 [497] and 300 [501] (Gummow J).

<sup>56</sup> *Health Insurance Commission v Peeverill* (1994) 179 CLR 226 at 236 (Mason CJ, Deane and Gaudron JJ). See also *Airservices Australia* at 300 [501] (Gummow J).

the guarantee conferred by s 51(xxxi), or render it purely formal.<sup>57</sup>

50. Even if, s 50 of the ASIC Act acquires property of the Westpoint companies in, or in relation to, the choses in action involved in the Ann Street proceeding, it does so by creating a right in ASIC and thereby adjusting the rights of the Westpoint companies so as to bring about the enforcement of those choses in action where it is in the public interest to do so. As explained above, the principal purpose and effect of the creation of that right is to facilitate the recovery of damages or property by a company in connection with matters that have been the subject of an investigation or examination conducted by ASIC where the company is not practically in a position to enforce its own rights (e.g., because of insufficient funds or support).<sup>58</sup> Any acquisition of property of the Westpoint companies is incidental to and consequential upon that principal purpose.<sup>59</sup>
51. The absence of the requirement of consent has the particular purpose of facilitating the recovery of damages or property by a company from or in relation to persons who are in control of the company and could otherwise refuse consent for the proceedings to be begun and carried on.<sup>60</sup>

#### E. JUST TERMS

52. If, contrary to the above submissions, s 50 of the ASIC Act was found to effect an acquisition of property by ASIC from the Westpoint companies, any such acquisition is on just terms, because:

52.1 the Westpoint companies will receive the benefit of any damages awarded by way of judgment or any amount received under a settlement of the proceeding begun and carried on in their names under s 50, being the full value of the chose in action resulting from its enforcement; and

52.2 the Westpoint companies will not bear the costs of the proceeding.

53. Irrespective of precisely what 'property' of the Westpoint companies is said to have been acquired under s 50 of the ASIC Act, the value of that property can amount to no more than the full value of the chose in action resulting from its enforcement. By exercising its power to cause the company to begin and carry on the relevant proceeding, and by meeting the costs of that proceeding, ASIC facilitates the realisation of the value of the company's chose in action. Accordingly, even if s 50 of the ASIC Act has operated so as to acquire any property of the Westpoint companies, the fact that the Westpoint companies are entitled to the fruits of such

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<sup>57</sup> Compare *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 226-7 [218] (Heydon J). Nor does such an approach rest upon the sole characterisation doctrine: see *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 286-8; *Mutual Pools* at 188 (Deane and Gaudron JJ); cf. *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 231 [223] (Heydon J).

<sup>58</sup> See para 16 of these submissions above.

<sup>59</sup> Compare *Abraham-Youri v United States*, 139 F 3d 1462 (1997), where a measure involving the settlement by the United States of certain claims of US nationals against Iran did not amount to a 'taking' of property of the claimants, in circumstances where the settlement was entered into for the benefit of the claimants, and not to harm them or to gain a government benefit at their expense, even though the settlement may also have been intended incidentally to benefit the public.

<sup>60</sup> See para 20 of these submissions above.

litigation, and are not responsible for the costs of such litigation, must represent fair and just compensation to those companies for the acquisition of their property.<sup>61</sup>

54. The suggestion that the fruits of the litigation may be greater if each of the Westpoint companies 'had conducted the proceeding itself' is not encompassed by any  
5 allegations contained in the Amended Statement of Claim, and is based on impermissible speculation.<sup>62</sup> Further, this suggestion may be contradicted if it is the case that the Westpoint companies are practically unable themselves to begin and carry on the relevant proceeding.

**F. CONCLUSION**

10 55. For the reasons set out above, the Court should approve the demurrer.

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15   
per Stephen Gageler .....  
Stephen Gageler SC  
Solicitor-General of the Commonwealth  
20 Telephone: (02) 6141 4145  
Facsimile: (02) 6141 4099

25   
.....  
Chris Horan  
Telephone: (03) 9225 8430  
Facsimile: (03) 9225 8668

30 Counsel for the Defendants

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<sup>61</sup> *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 (Dixon J); *Smith v ANL* (2000) 204 CLR 493 at 512-513 [48] (Gaudron and Gummow JJ)

<sup>62</sup> Compare KPMG's Submissions, para 63.