

Premium Income Fund

NSX Release: 31 January 2014



Additional Supplementary Information to be read in conjunction with the Investor Update of 17 December 2013

Investor Update – 17 December 2013

Wellington Capital Limited released an Investor Update on 17 December 2013 which outlined key details about the Fund's activities for the period January to December 2013.

Litigation Update

The Litigation Update component of the Investor Update on page two summarised relevant legal proceedings. The update did not include specific reference to the Clarification released on 11 June 2013.

It is important that the Litigation Update summary be read in conjunction with the Clarification release of 11 June 2013, a complete copy of which is **attached** to this announcement for ease of reference.

Included in the Clarification release of 11 June 2013 was the following statement directing Unitholders to seek independent legal advice:

“Independent Legal Advice

Unitholders in the Premium Income Fund should seek independent legal advice in relation to the effect of the Judgment in *ASIC v Wellington Capital Limited* [2013] FCAFC 52. ”

For further information please contact:

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Premium Income Fund

NSX Release: 11 June 2013



Wellington
PREMIUM INCOME FUND

Clarification – ASIC v Wellington Capital Limited [2013] FCAFC 52 – Full Federal Court Decision

Wellington Capital Limited wishes to expand on its previous announcements in relation to the decision of the Full Court of the Federal Court in the case *ASIC v Wellington Capital Limited [2013] FCAFC 52*.

Judgment of the Full Court of the Federal Court

Attached to this release is a copy of the Judgment of Justices Jacobson, Robertson and Gordon of the Full Court of the Federal Court in *ASIC v Wellington Capital Limited [2013] FCAFC 52*.

The Orders made by the Full Court of the Federal Court are set out below:

‘THE COURT ORDERS THAT:

- 1. The appeal be allowed.*
- 2. The orders made by Jagot J on 17 October 2012 be set aside and orders 3 and 4 below be made in lieu thereof:*

THE COURT DECLARES THAT:

- 3. The in specie transfer of the shares in Asset Resolution Limited (**Shares**) from Wellington Capital Limited (**Wellington**) as Responsible Entity of the Premium Income Fund (**Fund**) to the unit holders of the Fund was beyond the power of Wellington under the constitution of the Fund.*
- 4. By making an in specie transfer of the Shares to the unit holders of the Fund, Wellington did not operate the Fund and perform the functions conferred on it by the Fund’s constitution, and contravened s601FB(1) of the Corporations Act 2001 (Cth). ’*

Independent Legal Advice

Unitholders in the Premium Income Fund should seek independent legal advice in relation to the effect of the Judgment in *ASIC v Wellington Capital Limited [2013] FCAFC 52*.

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FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Wellington Capital Limited

[2013] FCAFC 52

Citation: Australian Securities and Investments Commission v Wellington Capital Limited [2013] FCAFC 52

Appeal from: Australian Securities and Investments Commission v Wellington Capital Limited [2012] FCA 1140

Parties: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v WELLINGTON CAPITAL LIMITED ACN 114 248 458 and PERPETUAL NOMINEES LIMITED ACN 000 733 700**

File number: NSD 1761 of 2012

Judges: **JACOBSON, GORDON AND ROBERTSON JJ**

Date of judgment: 28 May 2013

Catchwords: **CORPORATIONS** – managed investment scheme – role of responsible entity under Ch 5C *Corporations Act 2001* (Cth) – whether *in specie* distribution by responsible entity was beyond power under scheme constitution – where constitution did not contain express power to make distributions *in specie* – where responsible entity was granted all powers “legally possible” for a person or corporation to have – whether power of company to distribute property to members under s 124 *Corporations Act 2001* (Cth) extends to responsible entity

TRUSTS – managed investment scheme as trust relationship – duties and powers of responsible entity as trustee of scheme property – duty to adhere to the trust document – power to distribute trust property to beneficiaries

PRACTICE AND PROCEDURE – relief – where appellant sought only declaratory relief – public utility of declaration disapproving of contravening conduct

Legislation: *Corporations Act 2001* (Cth)
Managed Investments Act 1998 (Cth)

Cases cited: *Macaura v Northern Assurance Co Ltd* [1925] AC 619
Mier v FN Management Pty Ltd [2006] 1 Qd R 339

Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth (2010) 243 CLR 319
Re Crusader Limited [1996] 1 Qd R 117
Re Hunter Resources Ltd (1992) 34 FCR 418
Re Investa Properties Ltd (2001) 187 ALR 462
Re McDougall; ASIC v McDougall (2006) 229 ALR 158; [2006] FCA 427
Spangaro v Corporate Investment Australia Funds Management Ltd (2003) 47 ACSR 285; (2003) 21 ACLC 1948; [2003] FCA 1025
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89
Treecorp Aust Ltd (in liq) v Dwyer (2009) 175 FCR 373; [2009] FCA 278

Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report No 65 (1993)
 Ford HAJ and Lee WA, *Principles of the Law of Trusts*, (4th ed, Thomson Lawbook Co., 2010)
 Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006)

Date of hearing:	17 May 2013
Date of last submissions:	17 May 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	90
Counsel for the Appellant:	Mr J C Sheahan SC and Mr J R Clarke
Solicitor for the Appellant:	Australian Securities and Investments Commission
Counsel for the First Respondent:	Mr P Morrison QC and Mr N M Bender
Solicitor for the First Respondent:	McCullough Robertson
Solicitor for the Second Respondent:	Filed a Submitting Notice on 8 February 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 1761 of 2012

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
Appellant

AND: WELLINGTON CAPITAL LIMITED ACN 114 248 458
First Respondent

PERPETUAL NOMINEES LIMITED ACN 000 733 700
Second Respondent

JUDGES: JACOBSON, GORDON AND ROBERTSON JJ

DATE OF ORDER: 28 MAY 2013

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by Jagot J on 17 October 2012 be set aside and orders 3 and 4 below be made in lieu thereof.

THE COURT DECLARES THAT:

3. The *in specie* transfer of the shares in Asset Resolution Limited (**Shares**) from Wellington Capital Limited (**Wellington**) as Responsible Entity of the Premium Income Fund (**Fund**) to the unit holders of the Fund was beyond the power of Wellington under the constitution of the Fund.
4. By making an *in specie* transfer of the Shares to the unit holders of the Fund, Wellington did not operate the Fund and perform the functions conferred on it by the Fund's constitution, and contravened s 601FB(1) of the *Corporations Act 2001* (Cth).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 1761 of 2012

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
Appellant

AND: WELLINGTON CAPITAL LIMITED ACN 114 248 458
First Respondent

PERPETUAL NOMINEES LIMITED ACN 000 733 700
Second Respondent

JUDGES: JACOBSON, GORDON AND ROBERTSON JJ

DATE: 28 MAY 2013

PLACE: SYDNEY

REASONS FOR JUDGMENT

Introduction

1 Wellington Capital Ltd (**Wellington**) is the Responsible Entity of a managed investment scheme now known as the Premium Income Fund (**the Fund**), the units in which are listed on the national stock exchange (**NSX**).

2 Since its inception in 1999, the principal activity of the Fund has been the investment of unit holders' funds in mortgages, equities, debt instruments and cash.

3 On or about 4 September 2012 Wellington sold assets comprising approximately 41% of the assets of the Fund to an unlisted public company called Asset Resolution Limited (**ARL**). The consideration for the sale was not paid in cash. Rather the consideration consisted of the transfer to the Fund of approximately 830 million shares in ARL which comprised the whole of the issued share capital of that company.

4 It is the next step in the transaction which is critical to the issues that arise in the appeal. That step was the distribution *in specie* to each of the unit holders of the Fund of the

shares in ARL. The primary judge described the steps in the transaction at [4]-[6] of her reasons for judgment. It is unnecessary to describe them save to say that the shares in ARL were distributed to unit holders of the Fund in proportion to their unit holdings.

5 ASIC contends that Wellington had no power under the Constitution of the Fund to transfer assets of the Fund, which comprised Scheme Property, to unit holders. It sought declaratory and other relief before the primary judge.

6 The proceeding was heard as a matter of urgency by the primary judge who delivered an ex tempore judgment and orders dismissing the proceeding.

7 Her Honour was of the view that Wellington had power under two provisions of the Constitution, namely clauses 13.1 and 13.2.5 to effect a distribution *in specie*. We set out clauses 13.1 and 13.2.5 more fully below:-

Natural Person

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

...

Additional Powers

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

...

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

....

8 Neither of those clauses confers power in express terms to make such a distribution but the primary judge was satisfied that as a matter of construction of each of the clauses, the relevant power was conferred on Wellington.

9 Clause 13.1 provides that the Responsible Entity shall have all the powers in respect of the Scheme that are “legally possible” for an actual person or a corporation to have and as though the Responsible Entity was the absolute owner of the Scheme Property.

10 The primary judge found at [58]-[59] that cl 13.1 treated Wellington as a notional corporation and as an absolute owner acting in its personal capacity. She considered that this was sufficient to pick up the power contained in s 124(1)(d) of the *Corporations Act 2001* (Cth) (**the Act**) to:

“distribute any of the company’s property among the members in kind or otherwise.”

11 Clause 13.2.5 confers power on Wellington to, *inter alia*, dispose of or otherwise deal with Scheme Property as if it were the absolute and beneficial owner.

12 The primary judge found at [63] that since unit holders were bound by the terms of the Scheme, and in particular by clauses 13.1 and 13.2.5, they must be taken to have assented to become members of ARL on the *in specie* distribution. Her Honour found that this was sufficient to satisfy the requirements of s 231 of the Act. That section requires the assent of a person to become a member of a corporation.

13 ASIC appeals against the primary judge’s orders. The arguments on the appeal addressed, in more detail than appears to have been debated at first instance, the statutory context against which the terms of the Constitution are to be considered. The statutory context is to be found in Ch 5C of the Act which deals with Managed Investment Schemes.

14 In particular, attention was drawn to the nature of a managed investment scheme and to the terms of s 601FC(2) of the Act which provides that the responsible entity holds scheme property on trust for scheme members.

The relevant provisions of Ch 5C of the Act

15 Part 5C.1 deals with registration of managed investment schemes. It is unnecessary to set out the details of this part, save that reference should be made to the definition of a managed investment scheme.

16 The definition of a managed investment scheme is contained in s 9. The definition is lengthy and specifies a large number of business undertakings or operations which constitute such a scheme. The crucial part of the definition for present purposes is found in para (a) which is as follows:

(a) a scheme that has the following features:

- (i) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

17 Part 5C.2 of the Act deals, in Div 1, with the responsibilities and powers of the responsible entity of a managed investment scheme. The relevant provisions of Div 1 are ss 601FA, 601FB and 601FC.

18 Section 601FA provides that the responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme.

19 Section 601FB(1) provides that the responsible entity of a registered scheme is to operate the scheme and perform the function conferred on it by the scheme's constitution and the Act.

20 Section 601FC(1) specifies the duties of the responsible entity of a registered scheme. The duties include the duty to act honestly, to exercise the required degree of care and diligence, to act in the best interests of the members, to treat the members fairly, to comply with the scheme's compliance plan, to hold scheme property separately and to ensure that scheme property is valued at regular intervals.

21 Section 601FC(2) is an important provision. It states that the responsible entity holds scheme property on trust for scheme members. Scheme property is defined in s 9 of the Act as follows:

scheme property of a registered scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
- (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

22 Division 2 of Part 5C.2 deals with changing the responsible entity. The effect of this Division is, relevantly, that the responsible entity may retire only by calling a meeting of members and may be replaced only by a resolution of the members or by order of the Court.

23 Section 601FL(1) specifies the requirement to call a meeting. It states that if the responsible entity wants to retire it must call a members' meeting to explain its reasons for wanting to retire and to enable the members to vote on a resolution to choose a new responsible entity.

24 Under s 601FL(2), if the members do not choose a company to be the new responsible entity, or the company they choose does not consent, the current responsible entity may apply to the Court to appoint a temporary responsible entity.

25 Section 601FM deals with the power of the members of a registered scheme to remove the responsible entity. Section 601FM(1) provides that if the members wish to do so, they may call a meeting of members to consider a resolution that the current responsible entity be removed.

26 Part 5C.3 deals with the constitution of a registered scheme. Section 601GA(1) specifies the contents. It provides that the constitution must make adequate provision for, *inter alia*, the powers of the responsible entity in relation to making investments of, or otherwise dealing with scheme property.

27 Part 5C.4 deals with the compliance plan. It specifies in s 601HA the contents of the compliance plan. Section 601HA(1) states that the compliance plan must set out adequate measures for the responsible entity to apply in operating the scheme to ensure compliance with the Act or the scheme's constitution including the arrangements specified in paras (a) to (f) of that sub-section.

28 Those paragraphs include, relevantly, the requirement to ensure that scheme property is clearly identified and held separately, that scheme property is valued regularly and that adequate records of the scheme's operation are kept.

29 The only other part of Ch 5C to which reference need be made is Part 5C.9 which deals with winding up. Relevantly, s 601NA provides that the constitution of a registered scheme may provide for the scheme to be wound up at a specified time or in specified circumstances, but a provision that purports to provide that the scheme is to be wound up if a particular company ceases to be the responsible entity is of no effect.

The Constitution of the Fund

30 The Consolidated Constitution of the Fund was in evidence before the primary judge. It sets out the background to the Deed Poll under which the most recent amendments to the Constitution were adopted. The terms of the Consolidated Constitution are in the Schedule to the Deed Poll.

31 Recital A to the Deed Poll states that the Fund was originally constituted as the MFS Capital Insured Income Fund under a Deed Poll dated 20 November 1999.

32 Clause 2 of the Consolidated Constitution provides that beneficial interests in the Scheme are to be divided into units. It goes on to state that a unit confers on its registered holder an undivided interest in the Scheme Fund and Scheme Property but does not confer any interest in any particular part of the Scheme Fund or in any Scheme Property.

33 Clauses 3 to 12 appear to be in a form commonly found in scheme constitutions. Those clauses deal with applications for units, transfer of units, the register of unit holders, the convening of Scheme meetings including proceedings at such meetings and votes of unit holders.

34 Clause 13 is an important clause. It specifies the powers of the Responsible Entity, that is to say, Wellington. The clause is divided into two parts. The first is headed "Natural Person" and is as follows:

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

The second part of cl 13 is headed "Additional Powers". It provides, relevantly, as follows:

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

13.2.1 acquire or make Authorised Investments;

...

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

...

35 Clause 14 deals with the rights and duties of the Responsible Entity. Clause 14.3 provides that the Responsible Entity will manage the Scheme and the Scheme Property in accordance with the provisions of the Constitution with full and complete powers of management. Clause 14.7 provides that the Responsible Entity will perform its functions and exercise its powers in the best interests of all Unit Holders and will treat Unit Holders of the same class equally.

36 Clause 16 deals with income of the Scheme and distribution of income to Unit Holders. It provides as follows:

Determination of income and reserves

- 16.1 The Responsible Entity is to determine, according to generally accepted accounting principles and practices which apply to trusts:
- 16.1.1 the Income of the Scheme, and in particular, whether any receipts or outgoings of the Responsible Entity are on income account or capital account; and
- 16.1.2 the extent to which the Scheme needs to make reserves or provisions.

Distribution of Distribution Entitlement

16.2

16.2.1 *Calculating the entitlement*

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

16.2.2 *Determining who has the entitlement*

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

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

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

Calculation of Distribution Entitlement

16.3

16.3.1 *Calculation of Distributable Amount*

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

$$DA = I + C$$

Where:

DA is the amount of Distributable Amount;

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

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

16.3.2 *Calculation of Distributable Entitlement*

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

16.3.3 *Calculation of Unit Entitlement*

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

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

Where:

UE is the Unit Entitlement

DA is the Distributable Amount

ΣU is the total number of Units on issue in the Scheme

Means of Payment

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

Payment to Joint Unit Holders

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

37 Clauses 17-21 deal with a number of matters commonly found in scheme constitutions. These include deductions of tax from amounts payable to the Unit Holder, financial records, investment of funds and liability of the Responsible Entity. One of those clauses, namely cl 19, should be mentioned. It provides in cl 19.1 that the role of the Responsible Entity is to seek and invest the funds of the Scheme in Authorised Investments.

38 Clause 22 attracts the operation of Div 2 of Part 5C.2 of the Act because it provides that the Responsible Entity will comply with its legal obligations in respect of its retirement and replacement.

39 Clause 26 deals with winding up. It provides in cl 26.2 that the scheme will be wound up upon the occurrence of one of the events described as a "Termination Event" and specified in clauses 26.2.1 to 26.2.6.

40 Clause 26.3 provides that as soon as practicable after a Termination Event, the Responsible Entity must realise the Scheme Property and satisfy the liabilities of the Scheme.

41 Clause 26.4 deals with the final distribution to Unit Holders on a winding up. It states that:

Final distribution to Unit Holders

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

42 Reference should be made to the following definitions contained in the Constitution:

"Authorised Investment" includes (subject to the Licence held by the Responsible Entity):

- (a) Mortgage Investments being a loan secured by a registered mortgage over Land;
- (b) deposits at call or for a term with any Bank;
- (c) bills of exchange (including commercial bills) issues, drawn accepted or endorsed by any Bank or negotiable certificates of deposit issued by any Bank;
- (d) subject to any exceptions contained in the Corporations Act or any ASIC Relief (including any ASIC class orders) any managed investment scheme that is a registered managed investment scheme, including a managed investment scheme of which the Responsible Entity is the responsible entity; or
- (e) any investment authorised under section 21 of the *Queensland Trusts Act 1973* which the Responsible Entity considers a prudent investment for the Scheme.

"Distribution Entitlement" means the entitlement to the Distributable Amount determined in accordance with sub-clause 16.3.

"Distribution Period" means each quarter and ends on the last day of the quarter in which the date of determination falls and the last of which will end on the date of termination of the Scheme.

"Distribution Recipient" means the person determined in paragraph 16.2.2 who is entitled to receive its Distribution Entitlements.

"Responsible Entity" means Wellington Investment Management Limited ACN 101 634 146 or any other Person for the time being acting as Responsible Entity of the Scheme ...

"Scheme" means the Premium Income Fund established by this Constitution being a Registered Scheme, including all references to 'Trust' that may be contained in the PDS.

"Scheme Property" means all the Cash, mortgages and other investments of the Scheme (including the Authorised Investments) for the time being held by the Responsible Entity for the Unit Holders.

Other relevant provisions of the Act

43 The definition of "member" in s 9 draws a distinction between a member of a managed investment scheme and a member of a company. The definition is as follows:

member:

- (a) in relation to a managed investment scheme – means a person who holds an interest in the scheme; or
- (e) in relation to a company – a person who is a member under section 231.

44 Section 231, to which reference is made in para (e) of the definition of member, is, relevantly as follows:

A person is a member of a company if they:

- (a) are a member of the company on its registration; or
- (b) agree to become a member of the company after its registration and their name is entered on the register of members; ...

45 Section 124, to which we referred earlier, provides in s 124(1) as follows:

124 Legal capacity and powers of a company

(1) A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:

- (a) issue and cancel shares in the company;
- (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long);
- (c) grant options over unissued shares in the company;
- (d) distribute any of the company's property among the members, in kind or otherwise;
- (e) give security by charging uncalled capital;
- (f) grant a floating charge over the company's property;
- (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction;
- (h) do anything that it is authorised to do by any other law (including a law of a foreign country).

A company limited by guarantee does not have the power to issue shares.

The nature of the legislative framework for managed investment schemes

46 The legislative history of Ch 5C was explained by Finkelstein J in *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285; (2003) 21 ACLC 1948; [2003] FCA 1025 at [1].

47 As Finkelstein J there observed, Ch 5C was introduced into the predecessor of the present Act by the *Managed Investments Act 1998* (Cth). It replaced the prescribed interest regime which was a dual party structure that involved a manager and a trustee. The new regime implemented the recommendations of a joint report by the Australian Law Reform Commission and the Companies and Securities Advisory Committee (ALRC Report No 65,

1993). The report recommended, and parliament accepted, that every scheme should be operated by a single entity in which the functions of a trustee and manager were united. That entity ultimately came to be described as the responsible entity.

48 A critical provision of Part 5C.2 is s 601FC(2): see *Treecorp Aust Ltd (in liq) v Dwyer* (2009) 175 FCR 373; [2009] FCA 278 at [37] (Gordon J). The judgment pointed out that the section declares in unequivocal terms that the responsible entity of a registered management investment scheme holds scheme property on trust for scheme members, citing *Re Investa Properties Ltd* (2001) 187 ALR 462 at [12] (Barrett J).

49 The Act does not define a “scheme” but it defines a “managed investment scheme” and “scheme property”. When these definitions are considered it is clear that investors contribute money or money’s worth to a program or plan of action and that those contributions are pooled to produce benefits for the persons who made the contributions. The contributions that are made by members to the scheme are scheme property: *Treecorp* at [38]-[40]; *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339 at 350.

50 Property which has been acquired by the scheme in connection with, or by reason of, contributions made by scheme members, is also scheme property: *Treecorp* at [41], *Mier* at 350.

The cl 13.1 question

51 It follows from what we have said about the legislative framework that the proper construction of cl 13.1 must be approached through the prism of trust law. This must apply to any scheme constitution which specifies the powers of the responsible entity in respect of scheme property.

52 Clause 13.1 must be construed as a whole. It opens with what appears to be a sweeping general statement that the Responsible Entity is to have all the powers in respect of the Scheme that are legally possible for a natural person or a corporation to have. But the balance of the clause recognises the nature of the office of the Responsible Entity as a trustee in stating that the powers that are conferred are as though the Responsible Entity were the absolute owner of the Scheme Property and acting in its personal capacity.

53 Thus, cl 13.1 is no more than a saving provision. It enables the Responsible Entity, as a trustee, to deal with the Scheme Property, as though it were the absolute owner, rather than a trustee, and as though it were acting in its personal capacity, rather than its trust capacity.

54 Moreover, it is clear from the fact that the Responsible Entity is a trustee of Scheme Property that cl 13.1 is not concerned with the powers of the Responsible Entity in relation to Unit Holders. To permit the Responsible Entity to deal with the Scheme Property as an absolute owner in its dealings with the Unit Holders would be contrary to the relationship of trustee and *cestui qui* trust which exists between them.

55 It is a fundamental principle of the law of trusts that a trustee must adhere to the terms of the trust. A beneficiary who is *sui juris* may direct the trustee to transfer trust property to him or her but absent the consent of all beneficiaries it is not open to a trustee simply to transfer the trust property to the beneficiaries: Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) at [1704], [2308].

56 It was conceded by Wellington that it did not obtain the consent of Unit Holders to the transfer *in specie* to them of the ARL shares. Rather, Wellington contended that the primary judge was correct in the view that she reached that the powers of the Responsible Entity as a notional absolute owner picked up the powers contained in s 124 of the Act, and in particular the power in s 124(1)(d).

57 In our view, with respect to the learned primary judge who does not seem to have been addressed on the significance of s 601FC(2), the analysis we have set out above demonstrates that this conclusion is not correct.

58 Indeed, not only is it incorrect when the provisions of cl 13.1 are viewed through the prism of trust law, it is also incorrect as a matter of construction of s 124 of the Act.

59 Section 124(1)(d) of the Act empowers a company to distribute any of the company's property among the members. But the definition of "member" in s 9 distinguishes between membership of a company and membership of a managed investment scheme. It is plain that when s 124(1)(d) speaks of distributions among "the members" it is referring to membership of a company.

60 It follows in our view that it cannot be correct as a matter of construction of cl 13.1, which is of course concerned with a managed investment scheme, to say that the clause picks up the power to distribute property to members of the scheme.

61 It was suggested in argument that cl 13.1 may permit the Responsible Entity, that is to say Wellington, to distribute Scheme Property to its own corporate members. We doubt whether this is so because that would enable a trustee to part with trust property. However, the issue does not arise in this case and it is unnecessary to deal with it.

62 The short answer to the proposition that cl 13.1 confers the necessary power on Wellington is that the construction put forward by Wellington is fundamentally flawed for the reasons we have set out above.

The cl 13.2.5 question

63 The power conferred on the Responsible Entity under cl 13.2.5 is one of a number of powers which are described in the chapeau, that is to say in cl 13.2, as additional powers to those vested in it by the constitution or the Act.

64 Clause 13.2 states that the powers so conferred are not to be limited by the constitution or the Act. But it does not follow that the clause, or the powers, are to be construed in a way that overrides the terms of the Act. To reiterate what we said above, the clause must be construed in its statutory context. It must therefore be construed in light of the unequivocal way in which the legislature has approached the concept of a managed investment scheme, that is to say, as a program or plan of action in which the responsible entity manages the scheme property in its capacity as a trustee for scheme members.

65 A trustee's powers are derived from the trust instrument or from the governing statutes. "The courts also have power under applicable statutes to confer powers on trustees": HAJ Ford and WA Lee & Ors, *Principles of the Law of Trusts* (4th ed, Thomson Lawbook Co., 2010) at [12.010] and [12.090].

66 As the learned author of ch 12 of that text pointed out at [12.020], a trust is Janus-like, having both a legal and an equitable face as well as a public and a private face. The legal

face is the legal title to the trust assets that is vested in the trustee. This constitutes the public face.

67 The equitable face consists of the duties that the terms of the trust impose on the trustee with respect to the management of the trust assets. The duties owed by the trustee to the beneficiaries are the private face. They may be enforced by the beneficiaries by a proceeding in the equitable jurisdiction of the appropriate court.

68 But as Mr Lee goes on to say at [12.020], persons dealing with a trustee are not concerned with the fact that the property to which the trustee has legal title is subject to equitable duties owed to the beneficiaries.

69 Once that is recognised, it is clear that cl 13.2.5 addresses only the question of the power of the Responsible Entity, *vis-a-vis*, the Unit Holders, to engage in a wide range of dealings with commercial parties in respect of Scheme Property. Those transactions are authorised and within power so that they will not of themselves, in the absence of other matters, constitute a breach of trust.

70 This is also illustrated by reference to cl 13.2.1 which confers power on the Responsible Entity to acquire or make Authorised Investments. That term is defined to include mortgage investments, bank deposits, bills of exchange, units in a registered managed investment scheme and any investment authorised under s 21 of the *Trusts Act 1973* (Qld) which the Responsible Entity considers a prudent investment for the Scheme.

71 The Responsible Entity could therefore purchase shares in a company but the question of whether the investment was properly considered to be a prudent one may arise in a proceeding for breach of trust brought by the Unit Holders.

72 In short therefore, cl 13.2.5 cannot confer power on Wellington to distribute *in specie* any part of the Scheme Property to the Unit Holders. Indeed, the language of cl 13.2.5 is inapt to capture an *in specie* distribution to Unit Holders.

73 An *in specie* distribution is a creature of trust law, although it is also applicable to companies, where a company has power to distribute property *in specie* as a dividend, or in a winding up. In trust law, it involves a distribution by a trustee, at the direction of the

beneficiaries who are *sui juris*, by transferring real or personal property held by the trustee to the beneficiaries in satisfaction, or partial satisfaction, of their interests in the trust.

74 That process involves special and unique features which are not captured by the use of the words “dispose of” or “grant” in cl 13.2.5. Nor is it captured by the general words “or otherwise deal with”, even if those words are not to be read *ejusdem generis* with the words which precede them.

Not “legally possible”

75 Mr Morrison QC accepted that even if the distribution were otherwise within the power conferred by cl 13.1, Wellington could not succeed unless the distribution of the ARL shares to the Unit Holders was “legally possible”.

76 It is well established that s 231 of the Act requires that for a person to become a member of a company, he or she must agree to do so. The section does not necessarily contemplate a contract between the member and the company, but there must be assent to membership: *Re Hunter Resources Ltd* (1992) 34 FCR 418 at 425 (Lockhart J).

77 Mr Morrison relied on the decision of Thomas J in *Re Crusader Limited* [1996] 1 Qd R 117 at 129 for the proposition that the necessary assent was to be found in the terms of cll 13.1 and 13.2.5 of the constitution. That was the approach which was adopted by the learned primary judge at [63] of her reasons for judgment.

78 However, since we have come to the view that the clauses upon which Wellington relies do not authorise or empower it to make the distribution, we do not need to consider whether we should follow the decision in *Re Crusader*.

79 It follows from what we have said that the distribution was not within power, because it was contrary to the terms of s 231 of the Act.

Clause 16

80 It is clear that cl 16 does not confer power on the Responsible Entity to distribute Scheme Property to Unit Holders. It provides for the Responsible Entity to make

distributions of income or capital. The formula for determination of the unit entitlement to any such distribution in cl 16.3.3 indicates that the payment is to be made in cash.

81 So too does cl 16.4 which requires the Distributable amount to be "paid" by depositing it into an account or by reinvesting it in the Scheme. The words "or otherwise directed by the Unit Holder" refer to the manner of payment. They do not contemplate a distribution of part of the Scheme Property.

Other considerations

82 It is evident that Ch 5C places considerable importance on the role of the responsible entity. It must be a public company that holds an Australian financial services licence: see s 601FA. Stringent conditions are imposed on the retirement of the responsible entity: see s 601FL.

83 The steps taken by Wellington in the present case amounted to a partial retirement from office other than in accordance with the provisions of the Act. It did so without consent of the Unit Holders by handing over to them a substantial part of the Scheme Property which constituted approximately 41% of the assets of the Fund.

84 The Unit Holders subscribed for units in a pooled investment fund managed by the Responsible Entity. But 41% of the pooled assets which were managed by Wellington were distributed to Unit Holders who now hold shares in an unlisted company. Shares in a company are an entirely different species of property from units in a managed investment scheme: *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 626-627. The management of the company is in the hands of the directors rather than in Wellington and the directors are subject to the constitution of ARL rather than to the terms of the trust comprised in the constitution of the Fund.

85 In our view, the distribution of the shares in ARL to the Unit Holders of the Fund was contrary to the terms of the constitution and was done without power.

86 It may also constitute a partial winding up otherwise than in accordance with cl 26 but we do not need to consider that question.

Relief

87 ASIC does not seek to impugn the transaction by which 41% of the assets of the Fund were transferred to ARL in return for the issue of shares in that company. It had sought to do so in its originating process but did not pursue that claim in its amended pleading. It now seeks purely declaratory relief.

88 The principles upon which the Court will order declaratory relief were usefully summarised by Young J in *Re McDougall; ASIC v McDougall* (2006) 229 ALR 158; [2006] FCA 427 at [54]-[55], see also *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* (2010) 243 CLR 319 at [103]. In our view it is in the public interest for the Court to make a declaration that Wellington has contravened the Act and that its actions were taken without power under the Constitution. That document is in a form commonly used for managed investment schemes and there is utility in making a declaration that the distribution was effected without power under the instrument.

89 Also, the making of the declarations sought by ASIC is an appropriate way of marking the Court's disapproval of the contravening conduct: *McDougall* at [55], citing *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89.

Orders

90 We allow the appeal and make declarations in terms of paras 1 and 2A of the amended originating process.

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Jacobson, Gordon and Robertson.

Associate: *Monica Aguirre*

Dated: 28 May 2013

