Premium Income Fund

NSX Release: 5 November 2014

Wellington Capital Limited v Australian Securities & Investments Commission [2014] HCA 43 – High Court Decision

Wellington Capital Limited as responsible entity of the Premium Income Fund wishes to advise Unitholders and the market of the following matters in relation to the decision of the High Court of Australia today.

In the matter of Wellington Capital Limited and Australian Securities and Investments Commission and Perpetual Nominees Limited, No S275 of 2013, the High Court has dismissed Wellington Capital Limited's appeal, which sought orders setting aside the decision of the Full Federal Court regarding Wellington's in-specie distribution of shares in Asset Resolution Limited which was undertaken on 5 September 2012.

Judgment of the High Court of Australia

Attached to this release is a copy of the Judgment of Chief Justice French and Justices Crennan, Kiefel, Bell and Gageler of the High Court of Australia in *Wellington Capital Limited v Australian Securities & Investments Commission [2014] HCA 43.*

The Order made by the High Court of Australia is that Wellington's appeal be dismissed with costs.

This means that the declarations made by the Full Court of the Federal Court on 28 May 2013 stand. These declarations are set out below for ease of reference:

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 unitholders 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).'*

Asset Resolution Limited shares

Wellington Capital Limited advises Unitholders and the market that the in-specie distribution of shares in Asset Resolution Limited undertaken on 5 September 2012 remain in place. The decision of the High Court handed down today upholds the declarations made by the Full Federal Court on 28 May 2013.

The decision of the High Court does not impugn the validity of the transfer of legal title in the shares in Asset Resolution Limited.

Independent Legal Advice

Unitholders in the Premium Income Fund should seek independent legal advice in relation to the effect of the Judgment in *Wellington Capital Limited v Australian Securities & Investments Commission & Anor* [2014] HCA 43.

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HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND GAGELER JJ

WELLINGTON CAPITAL LIMITED APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ANOR RESPONDENTS

Wellington Capital Limited v Australian Securities and Investments Commission
[2014] HCA 43
5 November 2014
S275/2013

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with N M Bender for the appellant (instructed by McCullough Robertson Lawyers)

J T Gleeson SC, Solicitor-General of the Commonwealth with J A Halley SC and D F C Thomas for the first respondent (instructed by Australian Securities and Investments Commission)

Submitting appearance for the second respondent

CATCHWORDS

Wellington Capital Limited v Australian Securities and Investments Commission

Corporations – Managed investment schemes – Role of responsible entity under Ch 5C of *Corporations Act* 2001 (Cth) – Construction of scheme constitution – Where responsible entity granted all powers "legally possible" for person or corporation to have – Where responsible entity made *in specie* distribution of scheme property to unit holders – Whether distribution beyond responsible entity's powers under scheme constitution.

Trusts – Managed investment schemes – Responsible entity as statutory trustee – Whether general principles of law relating to trusts apply to responsible entity's functions under scheme constitution.

Practice and procedure – Federal Court of Australia – Where Federal Court made declaration that responsible entity had no power under scheme constitution to distribute scheme property to unit holders – Where unit holders not represented in appeal – Whether Federal Court erred in exercising discretion to make declaration.

Words and phrases – "*in specie* distribution", "managed investment scheme", "responsible entity", "return of capital".

Corporations Act 2001 (Cth), ss 9, 124, 231, 601FB(1), 601FC, Ch 5C.
Federal Court of Australia Act 1976 (Cth), ss 21–23.
Trusts Act 1973 (Q), s 33(1)(l).

FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 This appeal concerns the power of the responsible entity of a managed investment scheme to distribute a part of the scheme property *in specie* to scheme members. It requires consideration of the provisions of the *Corporations Act* 2001 (Cth) ("the Corporations Act") governing managed investment schemes and of the scheme constitution.

2 Wellington Capital Ltd ("Wellington") is the responsible entity of a managed investment scheme, now known as the Premium Income Fund ("the Scheme")[1]. The Scheme came into existence under a Deed Poll dated 20 November 1999, which, as amended from time to time, comprised its constitution ("the Scheme Constitution"). Perpetual Nominees Ltd ("Perpetual") is the custodian of the Scheme, appointed by Wellington as its agent to hold "Scheme Property" on its behalf[2]. The members of the Scheme are its unit holders, each of whom has an undivided interest in the "Scheme Fund" and the Scheme Property[3]. Wellington's principal activities have been to invest the Scheme Fund in mortgages, equities, debt instruments and cash.

3 On 4 September 2012, Wellington sold assets of the Scheme to Asset Resolution Ltd ("ARL") in consideration of the issue of 830,532,768 shares in ARL to Perpetual. ARL was a special purpose unlisted public company. The assets thus disposed of had a publicly stated value of $90.75 million and represented about 41% by value of the assets comprising the Scheme Property. On the same day, Wellington instructed Perpetual to transfer the ARL shares held by Perpetual to the unit holders in the Scheme in proportion to the number of units held by each unit holder. That transfer was effected on the following day.

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1 The Scheme was originally constituted as the MFS Capital Insured Income Fund.

2 Scheme Constitution, cl 1.4. Section 601FB(2) of the Corporations Act provides that the responsible entity of a managed investment scheme has power to appoint an agent to do anything that it is authorised to do in connection with the scheme. "Scheme Property" is defined in cl 1 of Sched 1 to the Scheme Constitution to mean all the cash, mortgages and other investments of the Scheme for the time being held by the responsible entity for the unit holders.

3 Scheme Constitution, cl 2.2.1. The "Scheme Fund" is defined in cl 1 of Sched 1 to the Scheme Constitution to mean all of the Scheme Property, subject to the liabilities at that time of the Scheme.

4 The Australian Securities and Investments Commission ("ASIC") commenced proceedings in the Federal Court of Australia in October 2012 challenging the validity of the transfer. Its application was dismissed by Jagot J, who delivered an ex tempore judgment on 17 October 2012[4]. On 28 May 2013, the Full Court of the Federal Court allowed an appeal from that decision and made declarations that the *in specie* distribution was beyond the power of Wellington under the Scheme Constitution and that, by making the distribution, Wellington had contravened s 601FB(1) of the Corporations Act[5]. Section 601FB(1) required Wellington to operate the Scheme and perform the functions conferred on it by the Scheme Constitution and by the Corporations Act.

5 The appeal to this Court from the decision of the Full Court should be dismissed. The Full Court was correct to hold that the distribution of the ARL shares to Scheme members was beyond power. The Scheme Constitution, properly construed in the light of the relevant provisions of the Corporations Act, confined the return of capital to the winding up process and to cash payments annexed to the periodic distribution of income.

Statutory framework

6 Managed investment schemes are regulated under Ch 5C of the Corporations Act[6]. The term "managed investment scheme" is defined in s 9 of the Corporations Act. The relevant part of the definition is in par (a):

"a scheme that has the following features:

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4 *Australian Securities and Investments Commission v Wellington Capital Ltd* (2012) 91 ACSR 514.

5 *Australian Securities and Investments Commission v Wellington Capital Ltd* (2013) 94 ACSR 293.

6 Chapter 5C was introduced into the Corporations Law, the predecessor of the Corporations Act, by the *Managed Investments Act* 1998 (Cth). It replaced provisions dealing with the regulation of prescribed interests and gave effect to recommendations made by a joint report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee: *Collective Investments: Other People's Money*, Report No 65, (1993). See *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 135–136 [10]–[12] per French CJ, Crennan, Kiefel and Bell JJ; [2012] HCA 54.

(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)"[7].

7 The term "member" is also defined in s 9:

"***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."

The Full Court relied upon that definition in rejecting an argument by Wellington based on s 124 of the Corporations Act. Section 124(1)(d) provides that a company has the power to distribute any of the company's property among the members, in kind or otherwise. Clause 13.1 of the Scheme Constitution conferred upon Wellington "all the powers in respect of the Scheme that is legally possible for a natural person or corporation to have" and was held by the primary judge to pick up that power[8]. That proposition was rejected by the Full Court on the basis that the statutory definition of "member" distinguishes between membership of a company and membership of a managed investment

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7 Paragraph (b) of the definition picks up time-sharing schemes and pars (c)–(n) set out a number of exclusions from the definition, none of which are relevant for present purposes.

8 (2012) 91 ACSR 514 at 527 [58]–[59]. The full text of cl 13.1 of the Scheme Constitution appears in the section of these Reasons outlining that document.

scheme[9]. That conclusion was correct. It accords with the limits of Wellington's powers under cl 13.1, discussed later in these Reasons, to deal with Scheme Property, having regard to the purpose of those powers in facilitating extramural dealings with the Scheme Property.

8 The term "scheme property" is widely defined in s 9 of the Corporations Act. The definition includes property acquired, directly or indirectly, with, or with the proceeds of, contributions of money or money's worth to the scheme, money that forms part of the scheme property under the provisions of the Corporations Act or the *Australian Securities and Investments Commission Act* 2001 (Cth) and money borrowed or raised by the responsible entity for the purposes of the scheme. It was not in dispute that the ARL shares formed part of the Scheme Property prior to their transfer to the unit holders.

9 Part 5C.1 of Ch 5C requires that, subject to irrelevant exceptions, managed investment schemes must be registered with ASIC[10]. Part 5C.2 concerns the "responsible entity" of a registered scheme, a term defined in s 9 as the company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme.

10 Section 601FB(1) sets out in broad terms the functions imposed by the Corporations Act on the responsible entity:

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

The Full Court declared, in the exercise of its general powers to make declarations[11], that Wellington had "contravened" that provision[12]. The term "contravene" is used in the Corporations Act, although not exhaustively, to

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9 (2013) 94 ACSR 293 at 303 [59]–[60].

10 Corporations Act, s 601ED read with s 601EB. By s 601ED(5), a person must not operate in this jurisdiction a managed investment scheme that s 601ED requires to be registered under s 601EB unless the scheme is so registered.

11 *Federal Court of Australia Act* 1976 (Cth), ss 21–23.

12 (2013) 94 ACSR 293 at 306–307 [88]–[90].

designate non-compliance with civil penalty provisions[13]. The court is required to make "a declaration of contravention" if it is satisfied that a person has contravened one of them[14]. Such a declaration, which must specify certain matters[15], is a necessary condition of the imposition of a pecuniary penalty[16]. Initially, ASIC sought a declaration that Wellington had contravened s 601FC(1)(c). Section 601FC(1) sets out specific duties of a responsible entity. A contravention of s 601FC(1)(c) is a contravention of s 601FC(5), which is a civil penalty provision. That claim for relief was later abandoned. Section 601FB(1) is not a civil penalty provision. The declaration that it was contravened by Wellington had no statutory consequences under the Corporations Act. The Full Court justified that declaration as "an appropriate way of marking the court's disapproval of the contravening conduct"[17] and held that the declaration was in the public interest as the Scheme Constitution was in a common form[18].

11 Although the declaration made by the Full Court did not involve any finding of a breach of the duties imposed upon Wellington by s 601FC(1), those duties are relevant. They place constraints upon the exercise of the powers conferred upon the responsible entity to deal with scheme property under a scheme constitution. They include a duty to act honestly[19], a duty of care and

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13 Corporations Act, s 1317E(1) read with the cross-referencing definition of "civil penalty provision" in s 9. The Corporations Act also refers in places to contravention of provisions which are not civil penalty provisions. For example, s 1101B(1) provides that a court may make such orders as it thinks fit on the application of ASIC if it appears to the court that a person has contravened a provision of Ch 7 or any other law relating to dealing in financial products or providing financial services. Such orders would presumably include declarations of such contraventions. However, the Corporations Act does not use the term "contravene" in relation to s 601FB(1).

14 Corporations Act, s 1317E(1).

15 Corporations Act, s 1317E(2).

16 Corporations Act, s 1317G(1)(a).

17 (2013) 94 ACSR 293 at 306 [89] citing *Re McDougall; Australian Securities and Investments Commission v McDougall* (2006) 229 ALR 158 at 170 [55].

18 (2013) 94 ACSR 293 at 306 [88].

19 Corporations Act, s 601FC(1)(a).

diligence[20], and a duty to act in the best interests of the members[21]. The powers conferred by cl 13 of the Scheme Constitution to deal with Scheme Property, while very broad on a literal reading, are to be construed by reference to those duties and other aspects of the statutory scheme. Those powers are also constrained by Pt 5C.7, which applies Ch 2E of the Corporations Act, dealing with related party transactions, to schemes. The purpose of that Part, as set out in s 207 which applies to schemes pursuant to s 601LB, is to protect the interests of the scheme's members as a whole.

12 Of significance in the reasoning of the Full Court was s 601FC(2), which provides that "[t]he responsible entity holds scheme property on trust for scheme members." It underpinned the starting point in the Full Court's reasoning that provisions of the Scheme Constitution conferring wide powers on the responsible entity to deal with Scheme Property must be approached "through the prism of trust law."[22] However, the extent to which general principles of the law relating to trusts apply to a responsible entity's functions under a scheme constitution depends upon the purpose of the statutory trust, other provisions of the Corporations Act and the terms of the scheme constitution.

13 The trust relationship which is imposed by s 601FC(2) expressly attaches to a responsible entity by reason of its office[23]. No occasion arises for imposition of a trust by operation of the general law[24]. The trust imposed does not arise from gratuitous transfer of assets by a settlor to a trustee, to be held on behalf of beneficiaries, who may become transferees. Save for its imposed statutory character, it bears a resemblance to trusts created as incidents of business

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20 Corporations Act, s 601FC(1)(b).

21 Corporations Act, s 601FC(1)(c).

22 (2013) 94 ACSR 293 at 303 [51].

23 *Re Investa Properties Ltd* (2001) 187 ALR 462 at 466 [14] per Barrett J.

24 cf *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 165–168 per Mason CJ, Deane, Toohey and Gaudron JJ; [1993] HCA 1.

transactions, sometimes described as "commercial trusts"[25]. Lord Browne-Wilkinson said of such trusts that[26]:

> "it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind."

The same caution applies in relation to public unit trusts, which may operate under principles of both contract and trust law. To the extent that the relationship between the responsible entity and the members is governed by contract, the content of the powers and duties of the responsible entity will be determined by reference to the contract[27] and its statutory setting. This Court has said of the use of trust concepts in revenue statutes[28]:

> "the degree to which a revenue statute adopts or qualifies or supplants the general understanding of terms with a particular application in property law will be a matter of statutory construction".

What is true for revenue statutes is true for statutes generally and, in particular, for the use of the term "trust" in s 601FC(2).

14 Section 601FC(2) reflects, albeit in truncated form, a recommended draft provision set out in the joint report of the Australian Law Reform Commission

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25 Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce", (1997) 107 *Yale Law Journal* 165 at 167–168.

26 *Target Holdings Ltd v Redferns* [1996] AC 421 at 435 and see Bryan, "Reflections on Some Commercial Applications of the Trust", in Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford*, (2002) 205 at 205–206.

27 Hanrahan, "The Responsible Entity as Trustee", in Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford*, (2002) 227 at 231–232.

28 *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 501 [17]; [2010] HCA 10.

and the Companies and Securities Advisory Committee in 1993[29]. The provision was proposed in part as a protective set-off against the decision not to recommend that the appointment of a custodian of scheme property, separate from the manager, be mandatory. The protection of the trust relationship was to be maintained even in the case in which the responsible entity decided to appoint a custodian[30]:

> "Where an operator engages a custodian to hold the legal title to scheme assets, the operator should hold on trust for the investors the equitable interest arising under that arrangement."

The report proposed that "because of the nature of the activity undertaken, this trust relationship should exist in all collective investment schemes, even those based on contract."[31] The purpose of s 601FC(2) is indicated by that aspect of its ancestry and by its place in the statutory scheme. It creates a layer of fiduciary protection for scheme members in addition to the express duties and protections otherwise created by the Corporations Act and the minimum statutory requirements of a scheme constitution.

15 Part 5C.3 imposes various requirements in relation to the constitutions of registered schemes. Such constitutions must make adequate provision for the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property[32] and also for winding up the scheme[33]. Moreover, the constitution of a registered scheme must be contained in a

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29 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 2 at 146.

30 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [9.14].

31 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [9.14].

32 Corporations Act, s 601GA(1)(b).

33 Corporations Act, s 601GA(1)(d).

document that is legally enforceable as between the members and the responsible entity[34].

16 Part 5C.9 provides for the winding up of a registered scheme. It authorises provisions to be included in a scheme's constitution for the winding up of the scheme at a specified time, in specified circumstances, or on the happening of a specified event[35]. It provides for winding up by an extraordinary resolution at a members' meeting[36]. It also authorises a responsible entity to take steps to wind up a scheme where it considers that its purpose has been accomplished or cannot be accomplished[37]. There is provision for a court-ordered winding up where it is just and equitable to do so[38] or on the application of an unsatisfied judgment creditor[39]. The scheme must be wound up in accordance with its constitution and any court orders[40].

17 Another section of the Corporations Act said to interact with the powers conferred on Wellington under the Scheme Constitution was s 231, which sets out sufficient conditions for a person to be a member of a company. One of those conditions is that the person[41]:

> "agree[s] to become a member of the company after its registration and their name is entered on the register of members".

Wellington contended that the unit holders were to be taken as having agreed to the transfer of the ARL shares, and thereby to membership of ARL, by reason of joining the Scheme under a constitution which gave powers to Wellington as responsible entity to effect such a transaction. As appears below, however, the

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34 Corporations Act, s 601GB.

35 Corporations Act, s 601NA.

36 Corporations Act, s 601NB.

37 Corporations Act, s 601NC(1).

38 Corporations Act, s 601ND(1)(a).

39 Corporations Act, s 601ND(1)(b) and (3).

40 Corporations Act, s 601NE(1).

41 Corporations Act, s 231(b).

Scheme Constitution, properly construed, did not authorise the transaction and therefore did not give rise to the imputed agreement.

18 Wellington had its office in Brisbane. Reference was made in ASIC's written submissions to the *Trusts Act* 1973 (Q) ("the Trusts Act") as part of the relevant statutory framework. Section 33(1)(l) of the Trusts Act confers a general power on a trustee to appropriate any part of the trust property towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled. ASIC submitted, correctly, that the power is only enlivened where the relevant beneficiary is entitled to a particular share of the trust property and notice of the intended appropriation has been given to other beneficiaries. Neither condition was satisfied in this case. In any event, the provisions of the Trusts Act in their application to a responsible entity would have to be considered in the light of the provisions of Ch 5C of the Corporations Act. It is unnecessary in this case to further consider how the Trusts Act interacts with the Corporations Act and, indeed, the Scheme Constitution. Wellington did not rely upon the Trusts Act.

The Scheme Constitution

19 The Scheme Constitution which was before the primary judge, the Full Federal Court and this Court, was misleadingly described on its cover sheet as a "Consolidated Constitution". The document attached to the cover sheet was entitled "PREMIUM INCOME FUND SUPPLEMENTARY DEED POLL Made on 5 September 2011". The Court was told that the Supplementary Deed Poll was the document presently held on the ASIC Register as the Scheme Constitution. It was incomplete[42]. However, the case was argued on the common assumption, at first instance and on appeal, that the document contained all that was necessary for the proper construction of its relevant provisions.

20 The Supplementary Deed set out, in a schedule, amendments to the Scheme Constitution. Covering cl 2(a) of the Deed provided that nothing expressly or impliedly contained in it was effective to "confirm, declare or otherwise acknowledge the trust declared under the original constitution, or to impress any new or additional trusts upon property held on trust as at the date of this supplemental deed." Covering cl 2(b) further provided:

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42 The document contained some numbered clauses, the texts of which were not set out, which evidently formed continuing parts of the Scheme Constitution as it stood before its amendment by the Supplementary Deed.

> "Nothing in this supplemental deed should be interpreted as creating any new or further trust and at all times, the Scheme remains a simple trust."

Covering cl 2 was not the subject of any submission by the parties. The trust relationship in issue was that created by s 601FC(2).

21 Under the Scheme Constitution, Wellington, as responsible entity, was empowered to issue units in accordance with the provisions of the Corporations Act and the Scheme Constitution[43]. Members of the Scheme were the registered holders of units in the Scheme[44]. A unit conferred on its holder an undivided interest in the Scheme Fund and Scheme Property as a whole[45]. A unit holder had no interest in any particular part of the Scheme Fund or in any Scheme Property[46].

22 Clause 13.1 of the Scheme Constitution provided expansively that the responsible entity should 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."

Clause 13.2 conferred specific powers on the responsible entity, including the power, by cl 13.2.5, to deal with Scheme Property:

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

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43 Scheme Constitution, cl 3.1.

44 Scheme Constitution, Sched 1, cl 1.

45 Scheme Constitution, cl 2.2.1 — subject to variances between any classes of units that may exist.

46 Scheme Constitution, cl 2.2.2.

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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".

23 The responsible entity was required, by cl 14.3, to manage the Scheme and Scheme Property in accordance with the provisions of the Scheme Constitution "with full and complete powers of management including all powers reasonably necessary or incidental to the performance by the Responsible Entity of its obligations and the observance by the Responsible Entity of all the terms and conditions of this Constitution." The powers and functions of the responsible entity were to be exercised "in the best interest of all Unit Holders and not in the interests of the Responsible Entity if those interests are not the same as those of Unit Holders generally"[47]. Subject to cl 14.7.1, unit holders of the same class were to be treated "equally" and unit holders of different classes were to be treated "fairly"[48]. There was no contention advanced in this Court that those duties had been breached.

24 Clause 16 dealt with the ascertainment of the income of the Scheme and its distribution to Scheme members and included a power to distribute a part of the capital. Clause 16.1 provided:

"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."

Clause 16.2 described the process for calculating periodic entitlements under the Scheme and distributing them to unit holders. That process required the calculation of each unit holder's Distribution Entitlement, the determination of

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47 Scheme Constitution, cl 14.7.1.

48 Scheme Constitution, cl 14.7.2.

each unit holder presently entitled, and the payment of the entitlement to a person entitled to it.

25 Clause 16.3 explained how the Distribution Entitlement was to be calculated:

"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:

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

Where:

UE is the Unit Entitlement

DA is the Distributable Amount

∑U is the total number of Units on issue in the Scheme …"

Clause 16.4 provided for payment of the Distributable Amount to a unit holder by depositing it into an account with a bank or other financial institution nominated by the unit holder and approved by the responsible entity. Alternatively, payment could be made by reinvestment in the Scheme or otherwise as directed by the unit holder.

26 It was not in dispute that, as a consequence of the definition of the variable "C" in cl 16.3.1, the responsible entity was accorded a power to determine an amount of capital additional to the income of the Scheme forming part of the Distributable Amount upon the basis of which the Distributable Entitlement of each unit holder was to be calculated. The Full Court held correctly, however, that cl 16 was not the source of a general power to distribute Scheme Property to unit holders[49]. The formula in cl 16.3.3 for distribution of the Unit Entitlements indicated that the payments made under cl 16 were to be in cash[50]. The power under cl 16 to determine an amount of capital to be distributed was parasitic upon the periodic obligation to distribute income. It was embedded in the determination of an "additional amount". It was not indicative of any implied general power to distribute capital at any time and, a fortiori, was not indicative of a power to make a distribution of Scheme Property *in specie*. That conclusion is reinforced by the provision for return of capital in the context of a winding up under cl 26.

27 Clause 26.1 provided that the responsible entity must not resolve to wind up the Scheme unless the responsible entity had complied with the provisions of s 601NC(2) of the Corporations Act. Winding up was mandatory upon the happening of any one of a number of Termination Events set out in cl 26.2. As soon as practicable after a Termination Event, the responsible entity was to realise the Scheme Property and satisfy the liabilities of the Scheme pursuant to cl 26.3. Clause 26.4 dealt with final distribution to unit holders:

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49 (2013) 94 ACSR 293 at 305 [80].

50 (2013) 94 ACSR 293 at 305 [80].

> "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."

Clause 26.7 provided for unclaimed money to be returned to ASIC:

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

That provision reflected the requirements of s 601NG of the Corporations Act.

28 Wellington submitted that cl 26.7 assumed that the responsible entity had the power to make an *in specie* distribution of property other than cash to unit holders. As a textual indicator in support of a general power to distribute property other than cash to unit holders, cl 26.7, confined as it was to the winding up process, did not support the construction of scheme powers generally for which Wellington contended.

The procedural history

29 The shape of the proceedings in the Federal Court changed between their commencement and the final orders of the Full Court. At trial, ASIC sought a declaration that Wellington had acted beyond power in distributing the ARL shares and that the purported transfers to the unit holders were "thereby invalid". It also sought a declaration that Wellington had contravened s 601FB(1) on the basis that, by making an *in specie* distribution of the ARL shares to the unit holders, Wellington did not operate the Scheme and perform the functions conferred on it by the Scheme Constitution and by the Corporations Act. That claim replaced an earlier claim for a declaration of a contravention of a civil penalty provision, s 601FC(5), enlivened by a purported contravention of s 601FC(1)(c). ASIC also sought orders requiring Wellington to take steps to correct the ARL share register and to disclose the judgments and orders of the

Court to the unit holders[51]. In its appeal to the Full Court, ASIC sought a declaration that the transfer was beyond power, dispensing with the element of the declaration previously sought that the transfer was "thereby invalid". It pursued the claim for a declaration of contravention of s 601FB(1) and for a mandatory disclosure order under s 1324B(a).

The decision of the primary judge

30 The application was expedited at first instance. It was heard on 17 October 2012 and Jagot J delivered a comprehensive ex tempore judgment. Her Honour's reasoning involved the following steps:

- The ARL shares distributed *in specie* to unit holders constituted Scheme Property before the distribution[52].

- The general powers conferred on Wellington by cl 13 picked up the powers conferred on corporations by s 124 of the Corporations Act, which included the power to distribute any of the company's property among members, in kind or otherwise[53]. Those powers were not qualified expressly or by necessary implication by the specific provisions of cl 16[54].

- The powers conferred on Wellington by the Scheme Constitution gave rise to a corresponding duty on the unit holders to accept the exercise of those powers in relation to the transfer of the ARL shares[55]. The unit holders must also be taken to have consented, upon the *in specie* distribution, to becoming members of ARL for the purposes of s 231 of the Corporations Act[56].

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51 The amended originating process at trial was annexed to the primary judge's final orders as Annexure B.

52 (2012) 91 ACSR 514 at 518 [7].

53 (2012) 91 ACSR 514 at 527–528 [58]–[59].

54 (2012) 91 ACSR 514 at 527 [54].

55 (2012) 91 ACSR 514 at 528 [60].

56 (2012) 91 ACSR 514 at 528 [63].

- Wellington did not act in contravention of the Scheme Constitution and therefore did not contravene s 601FB(1)[57].

31 The attribution to Wellington of powers with respect to Scheme Property analogous to those conferred on a company by s 124 of the Corporations Act was critical to the primary judge's conclusion that the distribution of the ARL shares was within power. Her Honour's conclusion in that respect relied upon a reading of cl 13.1 of the Scheme Constitution which, having regard to its facultative purpose in relation to extramural dealings with Scheme Property, was overbroad.

The Full Court decision

32 The Full Court's reasoning in allowing the appeal emphasised the trustee capacity in which Wellington held the Scheme Property by reason of s 601FC(2). Their Honours held:

- Clause 13.1 must be approached through the prism of trust law and must be construed as a whole[58].

- Clause 13.1 is a saving provision which enabled Wellington, as a trustee, to deal with the Scheme Property as though it were the absolute owner[59]. Clause 13.1 was not concerned with the powers of Wellington in relation to the unit holders[60].

- Absent the consent of the beneficiaries, it is not open to a trustee simply to transfer the trust property to the beneficiaries[61]. No prior consent to the transfer was obtained from the unit holders[62].

- The incorporation, by indirect reference in cl 13.1, of the powers conferred on a corporation by s 124 did not thereby confer a power to

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57 (2012) 91 ACSR 514 at 528 [62].

58 (2013) 94 ACSR 293 at 303 [51]–[52].

59 (2013) 94 ACSR 293 at 303 [53].

60 (2013) 94 ACSR 293 at 303 [54].

61 (2013) 94 ACSR 293 at 303 [55].

62 (2013) 94 ACSR 293 at 303 [56].

distribute Scheme Property to members of the Scheme without their consent. Nor did cl 13.2.5 confer such powers on Wellington[63].

- In any event, s 124, properly construed, referred to distribution of company property to members of a company and not to members of a managed investment scheme[64].

- The distribution of the ARL shares, which constituted 41% of the Scheme Property, amounted to a partial retirement from office[65] and might also have amounted to a partial winding up[66].

The Full Court approached the construction of the powers conferred on Wellington by the Scheme Constitution on the basis that those powers were constrained by Wellington's statutory capacity as trustee of the Scheme Property. However, as shown earlier in these Reasons, a responsible entity's powers in relation to the disposition of scheme property are determined by the terms of the scheme constitution in light of such enhancements or constraints as are provided by statute and, subject to statute, the general law relating to trusts to the extent that it is applicable.

Whether the distribution of the ARL shares was beyond power

33 Wellington submitted that the legal title to the shares, prior to their transfer, resided in it and the beneficial title in the unit holders. It relied upon cll 13.1 and 13.2.5 as authorising its transfer of the legal title to the unit holders. That submission depended upon its characterisation of cl 13.1 as amounting to a "grant of power in the broadest terms possible". A similar submission was made in respect of cl 13.2.5. Those submissions detached cll 13.1 and 13.2.5 from their context.

34 Constraints upon the power in cl 13 derived, in part, from the statutory duties imposed upon the responsible entity by s 601FC(1) and the fiduciary obligations derived from the statutory trust imposed by s 601FC(2). Controls on related party transactions imposed by Pt 5C.7 also constrained the responsible

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63 (2013) 94 ACSR 293 at 305 [72].

64 (2013) 94 ACSR 293 at 303 [59].

65 (2013) 94 ACSR 293 at 306 [83].

66 (2013) 94 ACSR 293 at 306 [86].

entity's power to deal with the scheme property as though it were its owner. There was no suggestion in this appeal that Wellington breached any of the duties imposed upon it by s 601FC. However, the existence of those duties, and other duties imposed upon the responsible entity, suggests a characterisation of cll 13.1 and 13.2.5 as enabling provisions.

35 A reading of cll 13.1 and 13.2.5, in the context of the Scheme Constitution as a whole, leads to the conclusion that they had nothing to do with the circumstances in which assets or capital forming part of the Scheme Property could be returned to unit holders. They were facultative. They equipped Wellington to deal with the Scheme Property, in accordance with its duties, in the interests of the Scheme members. As ASIC submitted, cl 13.1 allowed third parties to have confidence that things done by the responsible entity with respect to the Scheme Property were within power and authorised by the Scheme Constitution. The conferral upon the responsible entity of power to act "as though" it was the absolute owner of the property facilitated extramural dealings, which might have been by way of sale, purchase of property or investment of Scheme Funds. It did not authorise the responsible entity to undertake intramural dealings involving non-consensual transfers of Scheme Property to unit holders.

36 Internal support for a purposive, and thereby limiting, characterisation of cll 13.1 and 13.2.5 is derived from cll 16 and 26 of the Scheme Constitution. Clause 16 made express provision for the return of capital which the responsible entity had decided should form part of the Distribution Entitlement. It did not contemplate the transfer of assets *in specie*. It provided for payment in cash. It is no answer to submit that the absence of a power to transfer Scheme Property *in specie* to unit holders could leave the responsible entity burdened with illiquid assets which, it was said, could not be distributed to unit holders even in a winding up of the Scheme. That is a contingency which, if it arose, might warrant an appropriate amendment to the Scheme Constitution or even a winding up of the Scheme pursuant to s 601NC(1) on the basis that its purpose could not be accomplished. The only other mechanism for return of Scheme Property by way of capital is upon a winding up, which may be effected pursuant to cl 26 or otherwise under the provisions of Pt 5C.9. The Scheme Constitution, on its proper construction, did not authorise the *in specie* distribution of the ARL shares.

37 The proposition propounded by the Full Court that "absent the consent of all beneficiaries it is not open to a trustee simply to transfer the trust property to

the beneficiaries"[67] was too broad in the context of this case[68]. There has been consideration in some cases of the question whether there is a constraint upon reduction of the capital of a managed investment fund analogous to the principle of the maintenance of capital in relation to corporations. The answer to that question has tended to be in the negative[69]. It is not necessary to explore the matter further as the outcome of the present appeal is to be determined by reference to the Scheme Constitution construed in its statutory setting.

The parties and the relief

38 The defendants to the proceedings commenced by ASIC were Wellington, ARL and Perpetual. The unit holders were not named as parties. However, when the primary judge delivered her ex tempore judgment on 17 October 2012, she made orders appointing two representatives who had been the subject of applications for their appointment on 12 October. Both had agreed to accept appointment. One, Charles Hodges, was appointed to represent persons who purchased ARL shares after 5 September 2012, and persons who were unit holders as at 5 September 2012 and who became shareholders of ARL after 4 September 2012 or who sold ARL shares on or after 5 September 2012. The other, IOOF Investment Management Ltd, was appointed to represent all persons who were unit holders as at 4 September 2012 and who had, since that date, sold units in the Scheme. The representative defendants did not participate in the substantive proceedings.

39 Wellington submitted that because of the potential for a conflict of interest between the classes of persons represented by Mr Hodges and the absence of any representation for persons who had sold both units and ARL shares, the proceedings were improperly constituted. On that basis, it was submitted that the Full Court ought not to have granted any relief. This argument was advanced in support of the third ground of appeal, namely that the Full Court erred in

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67 (2013) 94 ACSR 293 at 303 [55] citing *Jacobs' Law of Trusts in Australia*, 7th ed (2006) at [1704], [2308].

68 The paragraphs cited from *Jacobs' Law of Trusts in Australia*, 7th ed (2006) did not support that proposition.

69 *Centro Properties Ltd v PricewaterhouseCoopers* (2011) 86 ACSR 584 at 597–598 [55]–[58] per Barrett J. See also *Mercedes Holdings Pty Ltd v Waters (No 2)* (2010) 186 FCR 450 at 476 [111] per Perram J; *Brisconnections Management Co Ltd v Australian Style Investments Pty Ltd* (2009) 23 VR 253 at 286 [182] per Robson J.

exercising its discretion to grant relief. ASIC submitted that the question whether or not a person ought to have been joined in the proceedings was a matter of judgment and degree. In the end, no orders were made with operative effects upon the rights of the unit holders. Wellington's submissions did not demonstrate any relevant concern arising out of the representation, non-participation and non-joinder of various categories of unit holders that would support an order setting aside the declarations.

40 The Full Court declared, in effect, that Wellington did not have authority to transfer the ARL shares to the unit holders. It was left to each unit holder to determine whether it would take any action in relation to the transfer to it of ARL shares, or whether it would accept that transfer. Potentially difficult questions could arise as between particular unit holders or categories of unit holders and Wellington in this context. Those questions cannot be resolved on this appeal, which is concerned with whether the transfers were within power and whether the declarations made by the Full Court should be set aside. The declarations were a correct statement of the legal position. They were appropriate for the reasons given by the Full Court. This Court should not interfere with them.

Conclusion

41 For the preceding reasons, the appeal should be dismissed with costs.

42 GAGELER J. This appeal turns on two questions: one substantive, one procedural.

43 The substantive question is whether the Full Court of the Federal Court was correct to conclude that Wellington Capital Ltd, the responsible entity of a public unit trust constituted as a managed investment scheme registered under Pt 5C.1 of the *Corporations Act* 2001 (Cth), had no power under the constitution of that scheme to make an *in specie* distribution of scheme property to holders of units in that trust. The procedural question is whether it was open to the Full Court to embody that conclusion in a declaration made under s 21 of the *Federal Court of Australia Act* 1976 (Cth).

44 For reasons which follow, I answer both questions in the affirmative and therefore join in the dismissal of the appeal. In setting out those reasons, I adopt without repetition the statement of facts and procedural history, as well as the abbreviations, in the joint reasons for judgment.

The substantive question

45 The regime for the regulation of managed investment schemes set out in Ch 5C of the Corporations Act has been summarised in two recent decisions of this Court[70]. For present purposes it is sufficient to recall two features of that regime in its application to registered schemes.

46 First, the constitution of a registered scheme: must be contained in a document that is legally enforceable as between the members and the responsible entity[71]; and must make adequate provision for the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property[72]. Second, the responsible entity of a registered scheme, by force of the Corporations Act operating on its status as the responsible entity: holds scheme property on trust for scheme members[73]; is obliged to operate the scheme and to perform the functions conferred on it not only by the Corporations Act itself but also by the constitution[74]; and in exercising its powers and carrying out its duties,

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70 *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 135-137 [10]-[15]; [2012] HCA 54; *MacarthurCook Fund Management Ltd v TFML Ltd* (2014) 88 ALJR 616 at 617-619 [2]-[6]; 308 ALR 202 at 204-205; [2014] HCA 17.

71 Section 601GB.

72 Section 601GA(1)(b).

73 Section 601FC(2).

74 Section 601FB(1).

is obliged (amongst other things) to act in the best interests of members[75], to treat members who hold interests of the same class equally[76], and to ensure that all payments out of scheme property are made in accordance with the constitution and the Corporations Act[77].

47 Subject to the Corporations Act, and to other applicable legislation, the powers of Wellington to deal with Scheme Property as responsible entity are therefore powers to deal with Scheme Property as trustee for unit holders and are to be found in the Scheme Constitution. The substantive question is whether those powers include a power to make an *in specie* distribution of Scheme Property to unit holders. Answering that question requires close attention to the terms of the Scheme Constitution; it is not assisted by "a priori assumptions as to the nature of unit trusts under the general law"[78].

48 Wellington's argument is that the power to make an *in specie* distribution of Scheme Property to unit holders is to be found in either or both cl 13.1 and cl 13.2.5 of the Scheme Constitution. Wellington argues that, on a literal construction, each of those clauses confers power on it as responsible entity to deal with Scheme Property, which encompasses transferring at least part of the Scheme Property to unit holders. That construction is not inconsistent with the trust relationship established by the Corporations Act, Wellington argues, once it is recognised that the responsible entity must always act in the best interests of unit holders and treat unit holders equally. Wellington further argues that its construction is consistent with cl 16 and cl 26 of the Scheme Constitution. Clause 16, it argues, is directed only to obligations as distinct from powers of the responsible entity. Clause 26, it argues, is directed only to termination of the trust.

49 Wellington's argument has the superficial attraction of literalism, but it breaks down on a close textual and contextual analysis of cl 13.1 and cl 13.2.5 of the Scheme Constitution.

50 Clause 13.1 and cl 13.2.5 each explain the scope of the power conferred by hypothesising the responsible entity to be that which it emphatically is not: the absolute owner of Scheme Property. Clause 13.1 refers to the responsible entity having power to deal with Scheme Property "*as though* it were the absolute

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75 Section 601FC(1)(c).

76 Section 601FC(1)(d).

77 Section 601FC(1)(k).

78 Cf *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 109 [15]; [2005] HCA 53.

owner of the Scheme Property and acting in its personal capacity" (emphasis added). Clause 13.2.5 uses similar language in referring to the responsible entity having power to deal with Scheme Property "*as if* [it] were the absolute and beneficial owner" (emphasis added).

51 That is the language of a legal fiction[79]. Ordinarily, a legal fiction is not construed to have a legal operation beyond that required to achieve the object of its incorporation. That general observation applies as much to the construction of a deed of trust[80], as it does to the construction of a statute[81].

52 The object of the incorporation of the fictional language into cl 13.1 and cl 13.2.5 is plainly to confer powers on the responsible entity to deal with Scheme Property in terms sufficiently broad to ensure that the responsible entity is not confined in the subject-matter of those dealings. Clause 13.1 is the lead provision, spelling out that the responsible entity is to have all of the powers of a natural person. Clause 13.2.5 is a provision which spells out additional specific powers complementary to that general conferral of power. The fictional language in each clause serves to emphasise the amplitude of those powers. That the language is expressly fictional serves equally to acknowledge the legal truth: that the responsible entity is not the beneficial owner of the Scheme Property.

53 The fictional language applies well enough to empower the responsible entity to engage in dealings with Scheme Property with persons other than unit holders. Given that the responsible entity holds the Scheme Property on trust for the unit holders, however, the language would be an extremely awkward way of empowering the responsible entity to engage in dealings with unit holders as unit holders. It makes no sense to refer to a trustee, when distributing trust property to a beneficiary, acting as though the trustee were the absolute owner of property and in a personal capacity, or as if the trustee were the absolute and beneficial owner. The hypothesis defining the scope of the power (that is, absolute and beneficial ownership) would be contradicted by the occasion for its exercise (that is, the existence of the trust relationship itself).

54 There is no warrant for contorting the language of cl 13.1 and cl 13.2.5 to that extent. That is because, within the context of the Scheme Constitution, there is no reason to consider that the objects of the incorporation of that language into cl 13.1 and cl 13.2.5 extend to the conferral of power on the responsible entity to engage in dealings with Scheme Property with unit holders as unit holders. The

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79 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115]; [2000] HCA 62.

80 *Federal Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655 at 662 [13], 673 [61]; [2012] HCA 11.

81 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696; [1909] HCA 67.

powers of the responsible entity to engage in dealings of that nature are the subject-matter of cl 16, during the period of operation of the unit trust, and of cl 26, on its winding up.

55 It is unnecessary for present purposes to address the precise scope of cl 26. It is necessary to address the scope of cl 16 to the extent of observing that cl 16 is directed to the power, as much as to the obligation, of the responsible entity to make distributions of Scheme Property to unit holders. Three features of cl 16 make that plain. The first is the required frequency of distribution; under cl 16.2 the distribution entitlement of unit holders must be calculated and paid quarterly. The second is the required method of calculation of that quarterly distribution entitlement; under cl 16.3 the distribution entitlement is to include any amount of capital that the responsible entity has determined during the applicable quarter is to be distributed. The third is the required means of payment; the mandatory terms of cl 16.4 contemplate only payment into a unit holder's bank account or reinvestment in the Scheme or otherwise as directed by a unit holder. Wellington's argument gives insufficient weight to the second of those features.

56 Construed in the context of cl 16 and cl 26 of the Scheme Constitution, cl 13.1 and cl 13.2.5 have no application to dealings between the responsible entity and unit holders as unit holders. The Full Court was correct to conclude that neither is a source of power for the responsible entity to make an *in specie* distribution to unit holders. It follows that the Full Court was correct to conclude that Wellington made an *in specie* distribution of Scheme Property which Wellington as responsible entity had no power to make under the Scheme Constitution.

The procedural question

57 No issue is taken in the appeal with the jurisdiction of the Full Court to embody its conclusion in the declaration it made under s 21 of the *Federal Court of Australia Act*. No occasion therefore arises to consider whether the same or a similar declaration might have been made under one or more provisions of the Corporations Act[82]. Nor is any issue taken as to the form of the declaration.

58 Wellington's argument is that the Full Court erred in exercising its discretion to make the declaration, which it says "casts a cloud on title" to the transferred property in circumstances where unit holders to whom Scheme Property was transferred *in specie* were not represented in the appeal and were not otherwise given an opportunity to be heard.

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82 Eg s 1101B(1)(a)(i) and s 1317E(1)(f) read with s 601FC(1)(k) and (m) and s 601FC(5).

59 The applicable principle is that a declaration which directly affects a person's rights or liabilities should not be made under s 21 of the *Federal Court of Australia Act* unless that person is joined as a party. The application of that principle involves "matters of degree, and ultimately judgment"[83]. The judgment made in the present case was open to the Full Court.

60 It is important in this respect to recognise that the reference in the declaration which the Full Court made to the *in specie* transfer to unit holders having been "beyond the power" of Wellington under the Scheme Constitution reflects the sense in which the word "power" is used in the Scheme Constitution and in the relevant provisions of the Corporations Act. The reference in the declaration is not to an absence of legal capacity, but to the breach by Wellington of a legal norm which governed the exercise of Wellington's legal capacity as legal owner of the property transferred. To declare that the transfer was beyond the power of Wellington under the Scheme Constitution is not thereby to impugn the validity of the transfer of legal title[84], but merely solemnly to record that Wellington breached that legal norm in making that transfer.

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83 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 524-525.

84 Cf *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 302-303.