

**IN THE SUPREME COURT OF VICTORIA
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT**

**IN THE MATTER OF THE WILLMOTT FORESTS 1995 – 1999 PROJECT
ARSN 089 598 612**

**LIST E
S CI 2011 3155**

BETWEEN

**WILLMOTT FORESTS LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) ACN 063 263 650
IN ITS CAPACITY AS A MEMBER OF THE SCHEME**

Plaintiffs

AND OTHERS

AND

**GRIMSEY FINANCIAL SERVICES PTY LTD
ACN 113 911 247**

Defendants

AND OTHERS

PLAINTIFFS' OUTLINE OF SUBMISSIONS

1. By this application, the Plaintiffs seek interlocutory, interim and/or final injunctions:

- (a) prohibiting the holding of the meeting of members of the Willmott Forests 1995-1999 Project (ARSN 089 598 612) (the **Scheme**) pursuant to the notice of meeting issued by Grimsey Financial Services Pty Ltd and Redisland Australia Limited on 20 May 2011 (the **Notice**)¹, to be held on Tuesday, 14 June 2011, and adjourned by resolution until 10:00 am on 23 June 2011 (the **Meeting**);
- (b) alternatively, restraining the defendants from procuring or causing resolution 1 and 2 as set out in the Notice, or any resolutions to substantially the same effect, to be put to the Meeting or to any subsequent meeting of the members of the Scheme.

¹ See below at paragraph 4, Exhibit BW-33 to the Webster Affidavit.

2. The application is made on the grounds that the amendments to the Scheme's constitution (the **Constitution**)² that are proposed in the Notice along with the attached Explanatory Memorandum³ (the **Original Proposal**) and supplemented by the WGG Letter to Growers, dated 9 June 2011 (containing the **Exit Option**⁴, the Original Proposal and the Exit Option referred to herein collectively as the **WGG Proposal**) are beyond the power of amendment by special resolution of the members of the scheme for which s 601GC(1)(a) of the *Corporations Act 2001* (the **Act**) provides. The Plaintiffs submit that the exercise of the power is limited and will not support resolution 1 and 2 as they propose to commit a fraud on minority members of the Scheme by expropriating minority interests. These grounds are addressed in Parts 1 to 3 of these submissions.
3. The application for injunctive relief has its jurisdictional basis in s 1324 of the Act and/or s 37(1) of the *Supreme Court Act 1986*. Matters relevant to the grant of injunctive relief are addressed in Part 4 of these submissions.
4. The Plaintiffs rely upon the Affidavit of Bryan Webster, affirmed 21 June 2011 (the **Webster Affidavit**), in support of this application.

1. THE SCHEME AND WILLMOTT FORESTS

5. The Scheme was established in 1995 to enable members of the Scheme (the **Growers**) to invest in collectively-managed forestry activities.⁵ Since 30 September 1999, it has been registered as a managed investment scheme under Chapter 5C of the Act with Willmott Forests as its responsible entity.
6. The Scheme is conducted on land situated in Victoria and New South Wales, within 150 km of the township of Bombala, NSW, to which Willmott Forests maintains unencumbered⁶ freehold title (the **Land**).
7. The Scheme comprises six "projects", corresponding to six successive prospectuses issued by Willmott Forests,⁷ in response to which investors applied to become Growers in the Scheme.
8. On acceptance of a Grower's application to invest in the Scheme, a Grower was issued "**Hectares**", which are defined under the Constitution as comprising "an

² See Exhibit BW-8 to the Webster Affidavit.

³ See enclosures to Exhibit BW-33 to the Webster Affidavit.

⁴ See Exhibit BW-41 to the Webster Affidavit.

⁵ See Exhibit BW-15 to the Webster Affidavit.

⁶ As such, the Receivers (the 2nd to 4th Plaintiffs) are not appointed in respect of the land on which the Scheme is conducted.

⁷ Two prospectuses were issued in 1995, and one each year from 1996 to 1999.

interest in one hectare of the Land and all improvements to the Land pursuant to a Project Document".⁸ Each Grower becomes party to the "**Project Documents**", which comprise:

- (a) a lease from Willmott Forests of the allocated Hectares (a **Grower lease**);
- (b) a Preparation & Planting Agreement with Willmott Forest Management Limited (Receivers and Managers Appointed) (In Liquidation) (**Willmott Management**); and
- (c) a Maintenance Agreement with Willmott Management.

9. The combined effect of the Project Documents is that each Grower:

- (a) owns the leasehold in its respective Hectares, for a term of 25 years (with an option for a further term of 5 years), for the express purpose of pine forestry activities;⁹
- (b) has the benefit of the preparation and planting services (covering the 1st year of the project), and maintenance services (for the 2nd through 25th years) for the trees on its Hectares;¹⁰
- (c) consequently owns—through having the right to harvest and sell—the trees standing on its Hectares (**Trees**) and the timber derived therefrom.

10. The Project Documents make no positive stipulation as to harvesting and marketing of the timber.¹¹ However, the Prospectuses indicated that Growers may elect to have their timber marketed by the responsible entity (then referred to as the "Manager") on their behalf¹², for a fee of 5% of net proceeds.

11. Whatever harvesting/marketing arrangements Growers may make, their anticipated return on investment comprises the net proceeds of their timber after harvesting and marketing expenses. In substance, the Trees are the only asset in the hands of Growers that may potentially be commercially valuable if the Scheme were not to continue.

12. For each project in the Scheme other than the 1999 project (the **pre-1999 projects**), a Grower's required investment in the Scheme (i.e. not including

⁸ Exhibit BW-8, cl 25.1 of the Constitution; see also cll 4.1, 4.5, 4.8.

⁹ See Exhibits BW-9 and BW-10 to the Webster Affidavit.

¹⁰ See Exhibits BW-11 to BW-14 to the Webster Affidavit.

¹¹ Cf Exhibit BW-8, Constitution, cl 13: "The harvesting and sale of Grower's Trees is to be carried out by the Grower unless otherwise agreed with the Manager."

¹² See, for example, page 25 of the prospectus for the 1995 Project (under the heading "How is my timber marketed / sold?" in Exhibit BW-15 to the Webster Affidavit.

harvesting/marketing fee) was comprised wholly of upfront fees payable on entry to the Scheme, comprising separate amounts for rent under the Grower lease, and fees for the preparation and planting services and the maintenance services respectively.¹³

13. In the case of the 1999 project, a Grower's required investment in the Scheme comprises:
 - (a) an upfront fee under the Preparation & Planting Agreement;¹⁴
 - (b) an annual maintenance fee of \$150 per Hectare (fixed for 10 years, then indexed annually for CPI) payable quarterly over the term of 25 years under the Maintenance Agreement;¹⁵ and
 - (c) annual rent of \$100 per Hectare (fixed for 10 years, then indexed annually for CPI) payable quarterly over the term of 25 years under the Grower lease agreement.¹⁶
14. As permitted by s 601FG of the Act and cl 7.1 of the Constitution, Willmott Forests is a Grower in the Scheme, holding approximately 29.9% of Hectares (comprised of owned holdings and assigned interests).¹⁷
15. The Receivers were appointed in respect of the charged assets of Willmott Forests on 6 September 2010. Willmott Forests entered voluntary administration on the same day, and was later placed in liquidation on 22 March 2011.
16. Under the presently operative security arrangements:
 - (a) the Liquidators control Willmott Forests' rights and obligations as responsible entity of the Scheme, including under agreements entered into by Willmott Forests (i) in its capacity as responsible entity of the Scheme, or (ii) with members of the Scheme (but not including debts owed to Willmott Forests by Growers)—by operation of the Deeds of Partial Termination executed on 24 September 2010;
 - (b) the Liquidators control Willmott Forests' freehold title to the land on which the Scheme is conducted—because the land was never subject to the securities under which the Receivers have been appointed; and
 - (c) the Receivers control:

¹³ See, for example, Exhibits BW-9, BW-11 and BW-13 to the Webster Affidavit.

¹⁴ See Exhibit BW-12 to the Webster Affidavit.

¹⁵ See Exhibit BW-14 to the Webster Affidavit.

¹⁶ See Exhibit BW-10 to the Webster Affidavit.

¹⁷ See paragraphs 36 to 37 of the Webster Affidavit.

- (i) Willmott Forests' interests as a Grower in the Scheme; and
- (ii) the rights and interests vested in Willmott Forests and/or Willmott Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) pursuant to the Grower loans, and partial assignments of Growers' interests in the Scheme made in consideration of deferral of the Grower loans.

17. Willmott Forests is insolvent and unable to fund the continued operation of the scheme, including procuring Willmott Management (or any other contractor) to undertake the necessary maintenance of the Land and the Trees.¹⁸

18. In proceeding VID 381/2011, issued on 11 May 2011, the Liquidators seek directions that they would be justified:

- (a) in amending the Constitution to give the responsible entity power to extinguish Growers' rights under the Scheme; or
- (b) alternatively, in disclaiming the Project Documents as onerous, to facilitate an informal winding-up of the Scheme.

2. THE WGG PROPOSAL

19. In the Scheme's current form:

- (a) Growers in each of the pre-1999 projects are not required to make any further payments for the remaining term of the Project, save for the costs of harvesting and marketing the timber.¹⁹ There is no provision by which these Growers are liable to forfeiture or expropriation of their interests in the Scheme.
- (b) Growers in the 1999 project are required to pay fees of \$250 per Hectare (indexed for CPI from 2010) annually for the remaining term of the Project.²⁰ There is no provision of the Constitution by which these Growers are liable to forfeiture or expropriation of their interests in the Scheme.

2.A. The Original Proposal

20. The basis of the Original Proposal is to convert the Scheme into a contributory Scheme, under which Growers will be liable for initial restructuring fees and ongoing

¹⁸ See paragraph 57 and Exhibit BW-31 of the Webster Affidavit.

¹⁹ See paragraph 12 above.

²⁰ See paragraph 13 above.

maintenance fees that are summarised as follows in the Explanatory Memorandum (and expressed as being subject to due diligence):

- (a) an initial cost to Growers of \$500 per Hectare (being \$200 reconstruction fee plus \$300 initial management fee), plus supplementary fees in the event that those fees are insufficient; and
- (b) estimated ongoing management fees of \$150 to \$250 per Hectare, plus supplementary fees in the event that those fees are insufficient.²¹

The proposed new clauses 10A and 10B of the Constitution expressly empower the responsible entity to charge the new fees. For Growers in the 1999 project, the ongoing management fees are made payable in addition to their ongoing rental obligations (\$100 per Hectare, indexed to CPI).

- 21. However, the most significant effect of the conversion to a contributory scheme lies in the accompanying powers conferred on the responsible entity to forfeit the interests in the Scheme of those Growers who are unable or unwilling to pay the newly-imposed reconstruction and ongoing maintenance fees.
- 22. It is proposed that defaulting Growers' interests in the Scheme will be forfeited in two stages:
 - (a) At the first stage, for each \$10 per Hectare by which a Grower defaults, its "Grower's Proportional Share" is reduced by 1.5% under the proposed clause 10C.1:

"For each \$10 ... of any invoice for the Initial Management Fee, Reconstruction Fee, Supplementary Initial Management Fee, Management Fee or Supplementary Management Fee in respect of each Hectare in each Phase held by a Grower which that Grower does not pay by the due date (or any extended time permitted by the Responsible Entity), the Grower's Proportional Share will be reduced by 1.5%, and for the purpose of calculating the Grower's Proportional Share in a Phase the total number of Hectares held by all Growers in that Phase will be deemed to be reduced by the total of all the accumulated individual Grower reductions in relation to the Phase under this clause. The Responsible Entity has the discretion to determine any matter in respect of the reduction of a Grower's Proportional Share, including whether the reduction occurs and when the reduction occurs."
 - (b) The reduction of a Grower's Proportional Share correspondingly reduces:

²¹ See pages 6 and 13 of the Explanatory Memorandum included in Exhibit BW-33 to the Webster Affidavit.

- (i) the Grower's interest in, and entitlement to receive a proportional share of distributions from, the Revenue Account: proposed new clauses 13A.6 and 13B.3;
 - (ii) the number of votes that a Grower has at any meeting of Growers: proposed substitute clause 15.10;
 - (iii) the Grower's entitlement to be paid a proportion of any sum remaining in the Grower Contributions Account upon the termination of the Scheme: proposed new clause 13A.7; and
 - (iv) the Grower's entitlement to receive a proportion of the net proceeds of realisation, or distribution in kind, on completion of any realisation of Assets relating to any Phase of the Scheme: proposed new clause 17.5.
- (c) Under the proposed new clause 10C.2, the responsible entity may grant a percentage of the Net Proceeds of Sale (up to the aggregate proportion by which Growers' interests in the Scheme have been reduced under clause 10C.1) to any person if, inter alia, the responsible entity is of the view that the Growers would be advantaged by an agreement with that person.
- (d) At the second stage, once a Grower's Proportional Share has been reduced to zero, under the proposed new clause 10C.3, the responsible entity may remove the Grower from the register and may either:
- (i) transfer that Grower's Hectare(s) to any other person either with or without consideration, with any consideration received therefor being deposited into the Grower Contributions Account; or
 - (ii) hold that Grower's Hectare(s) as scheme property, on trust for the other Growers in the Scheme.
23. In addition to the mechanism to forfeit defaulting Growers' interests in the Scheme, the proposed new clause 6.1A(h) purports to vest a plenary power in the responsible entity to assume any interest, which a Grower may have had in relation to any Project Document.

2.B. The Exit Option

24. Following receipt of the Notice, the Plaintiffs raised concerns regarding the Original Proposal, including that the proposed amendments would constitute a fraud on the minority by expropriating minority interests.²²
25. The Original Proposal was subsequently amended to include the Exit Option, which purports to allow those Growers to sell their interests prior to any reduction of proportional interests in what is defined as the "**Hectares Market**". As part of the Exit Option it is proposed and/or alleged that:²³
- (a) Primary has approval to operate a low volume market for 10 managed investment schemes for which it is the responsible entity, limited to 100 transactions with a total value of \$500,000 within a 12 month rolling period;
 - (b) Primary would report on the result of an independent assessment of the plantations to assist parties in forming offers or bids in relation to specific Hectares;
 - (c) following the report, Primary would operate the Hectares Market;
 - (d) if Primary was unable to operate the Hectares Market, it would facilitate sales of Hectares by issuing a Product Disclosure Statement for the benefit of those Growers wishing to sell their Hectares, the costs of such issuance to be borne by the Growers by means of reimbursement.

3. FRAUD ON THE MINORITY

3.A. The Principles in *Gambotto* Limit the Power in s 601GC(1)(a) of the Act

26. Section 601GC(1) provides two alternative ways in which a scheme's constitution may be amended:

"The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:

- (a) **by special resolution of the members of the scheme;** or
- (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights."

(Emphasis added.)

27. Whereas the responsible entity's power of amendment (under para (b)) is conditioned upon the responsible entity (i) reasonably forming an opinion as to the

²² See paragraph 55 and Exhibit BW-35 of the Webster Affidavit.
²³ Exhibit BW-4 to the Webster Affidavit.

effect of the amendment, and (ii) acting in accordance with its general duties as a responsible entity under s 601FC, the power that is vested in the members by special resolution (under para (a)) is plenary.

28. The power of amendment that is vested in the members of the scheme corresponds exactly with the plenary power vested in a company's shareholders to amend its constitution—also by special resolution—under s 136(2) of the Act.
29. The Plaintiffs submit that the restrictions at general law imposed on the (otherwise plenary) statutory power of amendment under s 136(2)—as authoritatively restated in *Gambotto v WCP Limited* (1995) 182 CLR 432—apply equally to the proposed exercise of the s 601GC(1)(a) power to amend the Constitution.
30. In *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444, Barrett J gave a detailed analysis of the two amendment mechanisms for which s 601GC(1) provides.²⁴ In respect of the members' power to amend by special resolution, Barrett J stated:

“[Section] 601GC(1)(a) of the *Corporations Act* is properly to be regarded as a provision that enables members, by a particular form of collective action by way of voting, actually to alter the constitution of a managed investment scheme

The power of modification that s 601GC(1)(a) vests in the members is a plenary power. There is no kind of modification that cannot be made in exercise of the power and by the means it prescribes, although **the power is no doubt subject to the implied limitations that generally attend any power enabling a majority to bind a minority.**²⁵ (Emphasis added.)

31. In other decisions relating to managed investment schemes conducted through a unit trust structure where amendments were sought to be made to the unit trust deed either by way of a scheme of arrangement or under the *Trustee Act*, the applicability of *Gambotto* principles to managed investment schemes has been questioned.²⁶ But in each of case, the question of whether *Gambotto* was capable of application to managed investment schemes *per se* was expressly left open.²⁷
32. In *Re Abacus Funds Management Ltd*, a proposal involving the stapling of securities held under two separate managed investment schemes was considered in two hearings seeking judicial advice. The proposal involved the expropriation of

²⁴ (2009) 228 FLR 444 at 454-56.

²⁵ (2009) 228 FLR 444 at 455, [59]-[60].

²⁶ *Arakella v Paton* (2004) 60 NSWLR 334 at 363-364, [126(1)] (amendment under *Trustee Act* 1925 (NSW), s 81(1)); *Re Australand Holdings Ltd* (2005) 219 ALR 728 at 732, [14]-[15] (amendment by scheme of arrangement).

²⁷ *Arakella v Paton* (2004) 60 NSWLR 334 at 364, [128]; *Re Australand Holdings Ltd* (2005) 219 ALR 728 at 732, [16].

units held by a small number of foreign unit-holders. On the second application (after the proposal had been passed by resolutions of unit holders and company members), Barrett J left open the question of whether *Gambotto* principles apply to expropriations effected through the constitution of a unit trust. His Honour was content to leave the question open specifically because the trustee's applications for judicial advice in that case were a surrogate for the kinds of court hearings in the company law context that the majority had emphasised in *Gambotto*.²⁸

33. In this case, the Scheme is not constituted through a unit trust; nor (save for this application) is there any judicial safeguard against the making of the proposed amendments. Consistent with the historical foundation of the *Gambotto* principles in the general equitable doctrine of fraud on a power,²⁹ the *Gambotto* principles should be applied to the proposed amendments in this case, so as to prevent the (otherwise plenary) s 601GC(1)(a) amendment power being used as the conduit for the purported inclusion in the Constitution of a power to expropriate Growers' interests in the Scheme.

3.B. The Proposed Amendments would effect a Fraud on a Minority of Growers

34. The plain effect of the proposed clause 10C, if validly passed, would be to permit the interests in the Scheme of a minority of Growers who are unable or unwilling to pay the newly-imposed reconstruction and ongoing maintenance fees to be forfeited and applied for the benefit of the remaining Growers in the Scheme. This category of Growers, which are particularly vulnerable to forfeiture, includes Willmott Forests (as a Grower in the Scheme in its personal capacity), as it is insolvent and plainly unable to pay the proposed fees in respect of its Hectares.³⁰
35. Under *Gambotto*, the test for validity of amendments purporting to authorise an actual or effective³¹ expropriation of a member's interests requires that:
- (a) the power to expropriate is sought to be included in the Constitution for a **proper purpose**—namely, to secure the Scheme from significant

²⁸ *Re Abacus Funds Management Ltd* (2006) 56 ACSR 693 at 696, [12], [14]-[15] (Barrett J); *Re Abacus Funds Management Ltd* (2006) 24 ACLC 211 at [19]-[23] (Campbell J; 1st hearing).

²⁹ *Peter's American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 502-503 (Dixon J).

³⁰ See paragraph 57 and Exhibit BW-31 of the Webster Affidavit.

³¹ *Gambotto* (1995) 182 CLR 432 at 444. See also the discussion below commencing at paragraph 37 of these submissions regarding *Bundaberg Sugar Ltd v Isis Central Sugar Mill CO Ltd* [2007] 2 Qd R 214.

detriment or harm, and not merely to secure some commercial advantage;³² and

- (b) the exercise of the power of appropriation will not operate oppressively in relation to minority members—that is, it must be both **procedurally and substantively fair** to the minority members whose interests may be subject to expropriation.³³

36. Further, the onus lies on the parties supporting the expropriatory amendments to establish that the power of amendment would be validly exercised.³⁴

37. The *Gambotto* principles also apply to the case of an amendment to a company's articles that purport to authorise the forfeiture of a defaulting member's shares (as distinct from a compulsory acquisition by the majority, which was the subject of consideration in *Gambotto*).³⁵ For example, in *Bundaberg Sugar Ltd v Isis Central Sugar Mill Co Ltd* [2007] 2 Qd R 214, the company carried on a co-operative sugar processing business. By its articles of association, the company's members were required to be "bona fide suppliers" to the company. The articles were amended to permit the company's board of directors to forfeit a member's shares if it ceased to be a supplier to the company and, upon service of a notice, failed either to dispose of its shares or to remedy its breach of the "bona fide supplier" requirement. Chesterman J held that the provision for forfeiture constituted an expropriation within the scope of the *Gambotto* principles: extinguishment of a member's interest is sufficient, and it is not essential that there be a corresponding acquisition of that interest by another party.³⁶ The plaintiffs did not press the argument that the amendment had been made for a proper purpose; rather, their real complaint was that the provision for forfeiture operated entirely without recompense.³⁷ The articles permitted, but did not require, that the forfeited shares be sold. Chesterman J accordingly declared that the provision for forfeiture was invalid to the extent that it permitted the company to dispose of the forfeited shares except by sale made in an honest and reasonable attempt to obtain market value.³⁸

³² *Gambotto* (1995) 182 CLR 432 at 445.

³³ *Gambotto* (1995) 182 CLR 432 at 445-6.

³⁴ *Gambotto* (1995) 182 CLR 432 at 447.

³⁵ See also *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, [74] per Hely J (the doctrine of fraud on the power applies to the exercise of a statutory power).

³⁶ [2007] 2 Qd R 214 at [83].

³⁷ [2007] 2 Qd R 214 at [85]-[92].

³⁸ [2007] 2 Qd R 214 at [93]-[94].

38. The proposed mechanism for forfeiture of Growers' interests in the Scheme is likewise expropriatory, and therefore enlivens the *Gambotto* principles as applicable to cases of expropriation.
39. The proposed amendments fail both limbs of the *Gambotto* test relating to amendments permitting expropriation:
- (a) **Proper purpose:** the proposed new clause 10C allows the responsible entity to dispose of the defaulting Growers' forfeited interests—whether in the form of a proportional interest in the Net Proceeds of Sale, or in the form of Hectares—for the benefit of the Growers remaining in the Scheme (to be enjoyed by the remaining Growers according to their respective Growers' Proportionate Shares).³⁹ The forfeiture mechanism thereby operates to aggrandise the majority at the expense of minority Growers' interests in the Scheme. No “significant detriment or harm” in the *Gambotto* sense is avoided: all that the Original Proposal seeks to avoid is the informal winding-up of the Scheme in the manner for which the Liquidators are seeking directions. The Liquidators make that application—and the Receivers intend to support it—the basis that the proposed informal winding-up is apt to produce the most favourable realisation to Growers in the Scheme's present circumstances.⁴⁰ The proposition that any detriment to Growers would be avoided—let alone “significant detriment” in the *Gambotto* sense—is entirely speculative.
 - (b) **Fairness:** the mechanism is also oppressive for the same unarguable reason that was determinative in *Bundaberg Sugar*: the forfeiture of Growers is uncompensated. On no view could it be argued that the mechanism is fair to the forfeited Growers.

3.C. The Exit Option

40. The Exit Option does not overcome the defect in the exercise of the power of amendment under s 601GC(1)(a) set out above in relation to the Original Proposal because it does not provide Growers who are unable (or do not wish) to make the annual contributions contemplated by the WGG Proposal with a mechanism to realise a fair and reasonable price for their Scheme interests. The reasons for this are that:

³⁹ See paragraphs 22(c) and (d) above.

⁴⁰ See Exhibit BW-31 of the Webster Affidavit.

- (a) the very availability of the Exit Option mechanism is uncertain.
 - (b) In any event, Primary's 'Sellers and Buyers Register' for its low volume market discloses a very low level of activity, with only 9 completed transactions with an aggregate value of just \$20,750. Having regard to the recent history and present circumstances of the Scheme, it is reasonable to assume that there will not be strong demand from potential buyers of Scheme interests. Assuming Growers will not be entitled to wait forever for a buyer, and in light of the likely low levels of interest from potential buyers of Scheme interests, the Exit Option might be entirely illusory.
 - (c) The alternative option of facilitating the sale of Scheme interests by product disclosure statement is also uncertain. Further, the costs of producing a Product Disclosure Statement will be met out of the Grower Contributions Account. If the Product Disclosure Statements are to include independent valuation material, the cost of producing a Product Disclosure Statement is likely to exceed the value of the Scheme interests to be marketed.
 - (d) There is every prospect that WFL (and other Growers who wish to sell their Scheme interests) will not attract a bid for their interests (let alone a satisfactory bid) in which case expropriation of their Scheme interests will take place for no consideration.
41. A Grower's ability to offer for sale their interests in a troubled managed investment scheme in an illiquid market is not conducive to attracting a buyer at a fair and reasonable price. The Exit Option is, effectively, a mechanism to facilitate an attempted 'fire sale' of Scheme interests and, in the likely event a sale is not effected (or not effected at a fair and reasonable price) Growers will still find themselves in a position where their Scheme interests are expropriated for little or no consideration.

4. **THE REQUIREMENTS FOR INJUNCTIVE RELIEF UNDER S 1324 ARE SATISFIED**

42. Section 1324 states the Court's power to grant injunctive relief as follows:
- "(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 - (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or

- (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
- (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
- (f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

...

- (4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1)."

43. In exercising the jurisdiction conferred by s 1324, the Court is not confined by the considerations that would apply if it were exercising its traditional equity jurisdiction, where an interim injunction is sought, the interests of justice will usually require the Court to have regard to the questions whether there is a serious question to be tried and where the balance of convenience lies.⁴¹

44. The passing of a resolution purporting to amend the Constitution in a manner not permitted by s 601GC(1) would be a contravention of the Act. Each of the defendants is proposing to engage in, or is otherwise relevantly concerned in, the apprehended contravention.

4.A. There is a Serious Case to be Tried

45. The matters addressed above in Part 3, and as pleaded in the draft Statement of Claim, amply demonstrate the existence of a serious case to be tried.⁴²

46. Pertinently, once it is established that the proposed resolutions would have the effect of authorising the expropriation of Growers' interests in the Scheme, the onus of proving the validity of the proposed amendment is cast on the sponsors of the resolution.

⁴¹ *ASIC v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605 at [36].

⁴² See Exhibit BW-46 to the Webster Affidavit.

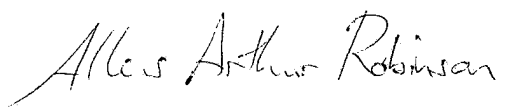
4.B. The Balance of Convenience Favours the Granting of an Injunction

47. The balance of convenience favours enjoining consideration of the resolutions because, if the meeting is allowed to proceed and the resolutions are passed, an inexorable and rapid process will be set in motion which will result in WFL being divested of its role as responsible entity and all of its rights, obligations and liabilities in relation to the scheme. The process, in part, involves the following:
- (a) s 601FM of the Act which requires the outgoing responsible entity to lodge a notice with ASIC asking it to alter its records as soon as practicable and in any event within two business days of the passage of the resolution. If it does not do so, the new responsible entity can lodge the notice. ASIC must comply with the notice when lodged. The change of responsible entity takes effect at that point: s 601FJ of the Act.
 - (b) Thereafter, the old responsible entity must hand over books and provide assistance to the new responsible entity: s 601FR of the Act.
 - (c) Critically, there is an automatic statutory novation of all of the rights, liabilities and obligations of the old responsible entity to the new responsible entity: ss 5601FS, 601FT of the Act.
48. Once done, this process might not be able to be undone. Responsible entities are required to hold Australian Financial Services Licences authorising them to conduct each relevant scheme; a usual condition of Australian Financial Services Licences is that the company must be able to pay its debts as and when they fall due. ASIC is entitled to suspend a company's Australian Financial Services Licence if it is under external administration: s 915B of the Act. It must, at least, be highly unlikely that ASIC would re-register an insolvent entity as responsible entity of a managed investment scheme.
49. Moreover, WFL's interests could be irreparably harmed in the interregnum after the Scheme contracts were novated.
50. On the other hand, there is little disadvantage in postponing the meeting until it can be determined whether resolutions 1 and 2 would be valid. There is no evidence of any prejudice—particularly if the Growers are notified immediately that the meeting will not proceed.

4.C. Undertaking as to Damages

51. The Plaintiffs give the usual undertaking as to damages in respect of the relief sought pursuant to this application. As to the undertaking, the Webster Affidavit states that the Receivers hold proceeds of sale of certain asset sales (in excess of \$1,000,000) as funds in receivership and, on that basis, in the event that the undertaking were to be called upon, the Receivers believe that WFL will be in a position to meet any call out of the proceeds of sale of WFL's charged assets.

Dated: 21 June 2011



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Allens Arthur Robinson
Solicitors for the Plaintiffs

Wendy Harris

Rodrigo Pintos-Lopez