



Takeovers Panel

Reasons for Decision - AMP Shopping Centre Trust 02

In the matter of AMP Shopping Centre Trust 02 [2003] ATP 24

Catchwords:

Review of Panel decision – pre-emptive rights – poison pill – change of responsible entity – disclosure of pre-emptive rights – consent to implement pre-emptive rights – constitutional limitations to make orders – taking of property without just compensation – power to order restraint on exercise of contractual rights – exercise of judicial power – orders affecting third party rights – unfair prejudice

*Corporations Act 2001 (Cth), sections 657A, 657D and 659A
Constitution of the Commonwealth of Australia, paragraph 51(xxxi)*

*Antil Ranger v Commissioner for Motor Transaction (1955) 93 CLR 83
Wraff v New South Wales (1953) 88 CLR 353
Mutual Pools and Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155
Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321
Precision Data Holding Pty Ltd v Wills (1992) 173 CLR 167
Re Dingjan and Ors ex parte Wagner and Anor (1995) 183 CLR 323
Harry Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245
Gould v Brown [1998] HCA 6
A-G v Breckler [1999] HCA 28
Sue v Hill [1999] HCA 30
Solomons v District Court of New South Wales [2002] HCA 47
Gjergja v Cooper (1986) 10 ACLR 577
Waldron v MG Securities [1975] VR 508
Australian Securities and Investments Commission v Yandal Gold (1999) 32 ACSR 317
Australian Securities and Investments Commission v Terra Industries (1999) 163 ALR 122
Australian Securities and Investments Commission v Bank Le-Leumi Israel (1996) 134 ALR 101
Tracy v Mandalay Pty Ltd (1953) 88 CLR 215*

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These are our reasons for declining to revoke or vary the orders made by the AMP Centro 01 Panel, directing AMP Life (and other Co-Owners) not to exercise any Pre-Emptive Rights in relation to shopping centres part owned by ART merely because the Responsible Entity of ART is replaced following a takeover under Chapter 6 of the Corporations Act. We did not accept that the Panel was constitutionally prohibited from making the orders, that the Panel did not have the power to affect AMP Life's property rights, or that the orders unfairly prejudiced AMP Life or other Co-Owners.

1. We refer to the application by AMP Life Limited (**AMP Life**) on 15 May 2003 under section 657EA of the Corporations Act (**Act**) for a review of the decision by the Panel on 13 May 2003 in the AMP Centro 01 proceedings to make certain orders following its declaration of unacceptable circumstances. The AMP Centro 01 Panel made a declaration of unacceptable circumstances and an

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order¹ on 13 May 2003 in relation to the affairs of the AMP Shopping Centre Trust (**ART**).

2. The Panel was constituted by Michael Tilley (sitting President), Karen Wood (sitting Deputy President) and Denis Byrne. On 18 May 2003 the Panel decided to conduct proceedings in relation to the application. The Panel issued a brief on 19 May seeking submissions and rebuttals.

Summary

3. The Panel declined to vary or revoke the AMP Centro 01 Panel's decision to make an order under section 657D(2) of the Act.
4. The AMP Centro 01 Panel's order (**A1 Order**) was directed against AMP Life, and any other co-owners (**Co-Owners**) of shopping centres in which ART held interests (**Shopping Centres**). The A1 Order directed the Co-Owners not to exercise pre-emptive rights (**Pre-Emptive Rights**) if the Responsible Entity of ART was changed following, or because of, a successful takeover of ART under Chapter 6 of the Act (**Change of Responsible Entity**). AMP Life (and AMP Henderson Global Investors Limited (**AMPH**) the responsible entity for ART) had contended that the Pre-Emptive Rights entitled the Co-Owners to require ART to sell its interests in the Shopping Centres to them following a Change of Responsible Entity. The AMP Centro 01 Panel expressly stated that its decision did not find or imply that the Pre-Emptive Rights did exist, or would be activated by a Change of Responsible Entity.
5. AMP Life's review application centred on three issues, whether:
 - a) the Panel was constitutionally prevented from making the A1 Order because the order acquired AMP Life's property (the Pre-Emptive Rights) on unjust terms;
 - b) the AMP Centro 01 Panel lacked the power to make the A1 Order if it interfered with a third party's property rights; and
 - c) the A1 Order unfairly prejudiced AMP Life and the other Co-Owners.
6. The Panel considered that AMP Life failed to establish that:
 - a) there was a clear cut limitation under the Constitution of the Commonwealth of Australia (**Constitution**) for the Panel to make the A1 Order (in the absence of a clear cut limitation, the Panel considers that the High Court is the appropriate place for AMP Life to take any constitutional issues for determination); or
 - b) the Panel lacked the power to make the A1 Order where the Panel considered that those orders were necessary and appropriate to protect the interests of ART unitholders; or

¹ A copy of the declaration and order is annexed to these reasons.

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- c) the A1 Order unfairly prejudiced AMP Life or other Co-Owners.

Background

7. The AMP Centro 01 Panel's reasons set out:
 - a) the facts of the agreements (**Co-Owners Agreements**) entered into between ART and the Co-Owners of the Shopping Centres, the nature of the different Shopping centres, the history of the Co-Owners Agreements from their formation in 1997 and through their progression to 2003;
 - b) the details of the takeover bid by CPT Manager Limited (**CPT**) (as responsible entity for Centro Property Trust (**Centro**)) for all of the units in ART;
 - c) the announcement by AMPH on 25 March 2003 (released on 26 March 2003) that a Change of Responsible Entity would be likely to activate the Pre-Emptive Rights;
 - d) Centro's application under section 657C of the Act dated 10 April 2003 for a declaration of unacceptable circumstances;
 - e) Centro's application for a referral of a question of law to the Court under section 659A of the Act;
 - f) the AMP Centro 01 Panel's finding in the AMP Centro 01 proceedings;
 - g) the AMP Centro 01 Panel's decision to make a declaration of unacceptable circumstances;
 - h) the AMP Centro 01 Panel's decision to make the A1 Order; and
 - i) the history of the AMP Centro 01 proceedings, including AMP Life's original decision no to become a party and its later decision to become a party to those proceedings and the AMP Centro 01 Panel's process for dealing with those decisions.

Application

8. AMP Life applied for a decision by the Panel that it set aside the order made by the AMP Centro 01 Panel. It requested the Panel to direct that each party bear its own costs in the review proceedings.

Starting Point for AMP Centro 02 Review Panel

9. In its application, AMP Life said that it disagreed with the decision of the AMP Centro 01 Panel to make the declaration of unacceptable circumstances. However, AMP Life's application did not seek review of the AMP Centro 01 Panel's decision in relation to unacceptable circumstances, nor of the findings made by the AMP Centro 01 Panel.

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10. On that basis the following paragraphs set out the findings and decision of the AMP Centro 01 Panel from which the Panel commenced its consideration of these review proceedings.

AMP Life's position on the Pre-Emptive Rights

11. The AMP Centro 01 Panel made its decision on the basis, that AMP Life and AMPH both contended, that the Pre-Emptive Rights would, or would likely, be activated by a Change of Responsible Entity, and that a change of management company under the prescribed interests regime² would not have activated the Pre-Emptive Rights.

Pre-Emptive Rights in Co-Owners' Agreements

12. The AMP Centro 01 Panel assumed, for the purposes of its decision, that the Co-Owners' Agreements are currently in existence and the Pre-Emptive Rights would be activated by a Change of Responsible Entity. It assumed these facts because they are the circumstances where most harm would befall ART unitholders³, and the AMP Centro 01 Panel could not determine in a binding manner, and in a reasonable time, whether or not the Pre-Emptive Rights would be activated. The AMP Centro 01 Panel decided that it was safest for it to make this assumption.

Significance of the Assets

13. The AMP Centro 01 Panel found that the assets to which the Co-Owners' Agreements relate (and therefore the Pre-Emptive Rights) are five super regional shopping centres. They were generally accepted by all of the parties in the AMP Centro 01 proceedings to be effectively irreplaceable and uniquely valuable. As such, they constitute, collectively, the major part of the value and attractiveness of ART. The AMP Centro 01 Panel found that to lose them would materially affect the value and attractiveness of ART units to its unitholders and the market. As such, disclosure of any relevant issues concerning the ongoing or future ownership of the key assets of ART was essential.

Unacceptable circumstances - Uncertainty

14. The AMP Centro 01 Panel found that, in all the circumstances, the current uncertainty for the market and ART unitholders in relation to whether or not a Change of Responsible Entity would activate the Pre-Emptive Rights contained in the Co-Owners' Agreements constitutes unacceptable circumstances in relation to the affairs of ART.

² The prescribed interest regime regulated unit trusts and other collective investments from the commencement of the Companies Act 1981, on 1 July 1982 until the Managed Investments Act of 1998. Managed investment schemes had until 1 July 1999 to transition from the prescribed interests regime to the MIA regime.

³ For example, the ART target's statement says that sale of the assets out of the trust might crystallise a taxable capital gain of \$225 million, and \$1 billion of irreplaceable super regional shopping centres would be removed from the trust and replaced with cash.

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15. The AMP Centro 01 Panel found that such uncertainty will exist regardless of whether a Change of Responsible Entity in such circumstances would or would not activate the Pre-Emptive Rights⁴. On that basis, it was not necessary for the AMP Centro 01 Panel to determine whether or not the Pre-Emptive Rights would be activated by a Change of Responsible Entity prior to deciding whether or not to make a declaration of unacceptable circumstances.

Unacceptable Circumstances - Disclosure

16. The AMP Centro 01 Panel found that the possibility of the Pre-Emptive Rights being activated by a change of trustee under the prescribed interests regime, or by a Change of Responsible Entity under the MIA regime, has not been adequately disclosed to ART unitholders in the context of considering whether unacceptable circumstances exist in relation to the affairs of ART where ART is the subject of a takeover bid by Centro. It found that that lack of disclosure constitutes unacceptable circumstances in relation to the affairs of ART, because the units have been traded, and substantial positions have been acquired, on the understanding that ART was capable (commercially) of being taken over.
17. The AMP Centro 01 Panel found it highly unlikely that prospective purchasers of ART units would reasonably have understood from reading ART's initial public offering prospectus dated 12 September 1997 (**Prospectus**) that a change of trustee under the prescribed interest regime would have activated the Pre-Emptive Rights. The AMP Centro 01 Panel considered that the ART unitholders would likely have understood that an attempt by any of the Co-Owners to *sell* the assets out of the group would have activated the Pre-Emptive Rights. But that is different to the Pre-Emptive Rights being activated merely by a change of trustee with no change in beneficial ownership of the interests in the Shopping Centres (i.e. still beneficially owned by the unitholders of ART).
18. The AMP Centro 01 Panel found that mere availability of the Co-Owners' Agreements for inspection at the offices of AMPH (in its then identity) in 1997 does not constitute acceptable or adequate disclosure in the context of a takeover bid in 2003.
19. The AMP Centro 01 Panel also set out a series of points at which circumstances changed, or AMPH or AMP Life have received advice or information, which might have triggered a decision to make disclosures to the market and to ART unitholders concerning the effect of the Pre-Emptive Rights in relation either to the change of a trustee or a change of the Responsible Entity.

Unacceptable Circumstances - Consent

20. The AMP Centro 01 Panel found that ART unitholders were not told of the effect of the Pre-Emptive Rights in the event of a Change of Responsible Entity under the MIA regime that AMPH contends, before 26 March 2003. It found

⁴ Unless a conclusive determination of the issue could be given. Which, for the reasons set out below, is unlikely.

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that the ART unitholders cannot have approved it or consented to it. Changing the effect of the Pre-Emptive Rights to giving Co-Owners rights to remove the key assets of ART on Change of Responsible Entity under the MIA regime, when a change of management company under the prescribed interests regime would not have activated the Pre-Emptive Rights, would be very significant to the control or potential control of ART or the acquisition or proposed acquisition by a person of a substantial interest in ART. The AMP Centro 01 Panel found that implementing the Pre-Emptive Rights (assuming them to be activated by a Change of Responsible Entity), or allowing them to be implemented, without ART unitholder consent, constitutes unacceptable circumstances.

Unacceptable circumstances - Entrenching the Responsible Entity⁵

21. The AMP Centro 01 Panel found that the activation of the Pre-Emptive Rights that AMP Life and AMPH contend would very strongly tend to entrench AMPH as Responsible Entity of ART and would therefore constitute unacceptable circumstances, absent informed unitholder approval.

Effect on the Managed Investment Industry

22. The AMP Centro 01 Panel considered that its decision was unlikely to have any material effect on the managed investments industry. It limited its decision to:
- a) specific circumstances, including without limitation the specific terms and effect of the Pre-Emptive Rights;
 - b) circumstances where neither detailed disclosure to the market was given, nor unitholders' informed consent was obtained, in relation to the specific issue of activation of the Pre-Emptive Rights due to change in trustee under the previous prescribed interests regime, or a change of the Responsible Entity under the current MIA regime;
 - c) provisions which have a tendency to entrench the Responsible Entity of a managed investment scheme and to discourage competition for control of that trust; and
 - d) circumstances where the relevant provisions, and commercial effect, of the Co-Owners' Agreements (if they have the effect that AMPH contends that they did) were not disclosed to unitholders nor the market, despite several critical opportunities for AMPH to do so.

⁵ The Panel uses the term "entrench" to mean significantly impeding, or constituting a significant disincentive to, in commercial and commonsense ways, the exercise by the ART unitholders of their statutory right to replace AMPH as Responsible Entity.

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Discussion

AMP Life's submissions

23. AMP Life submitted that the A1 Order was manifestly incorrect and that the AMP Centro 01 Panel should not have granted it on the basis that:
- a) the A1 Order determined or restricted a third party, namely AMP Life, from exercising (or having the right to seek to exercise) its contractual rights where those rights were established in circumstances unrelated to the takeover bid for ART, and where AMP Life had not been involved in any unacceptable circumstances;
 - b) the AMP Centro 01 Panel did not make any findings as to whether the Pre-Emptive Rights would or would not be activated by a Change in Responsible Entity of ART; and
 - c) the A1 Order raised serious questions regarding the power of the Panel to make such an order (see paragraphs 28, 29 and 31 below).

Unfair to AMP Life

24. AMP Life asserted that the AMP Centro 01 Panel's decision (which was given to parties on 13 May 2003 and which set out in some detail the basis for that decision) acknowledged that, since the issue of the Prospectus in 1997, AMP Life has not engaged in any conduct that could be said to involve unacceptable circumstances by AMP Life.
25. AMP Life noted that it is not a listed entity and as such it is not subject to continuous disclosure obligations or any other obligation to provide information to AMPH as responsible entity of ART, or ART unitholders more generally.
26. AMP Life said that even if it had been a promoter in respect of the 1997 Prospectus (a matter which it did not concede⁶), the real issue was the operation of the Co-Owners' Agreements following the commencement of the MIA regime. AMP Life submitted that the MIA was not a regime introduced or instigated at AMP Life's initiative. Further, AMP Life was not involved in the MIA transition of ART, except in 1999 when it signed certain confirmation deeds (**Deeds of Confirmation**) which AMP Life advised were to confirm the continued operation of the Co-Owners' Agreements. (The Deeds of Confirmation were signed following an understanding in 1999 that the Co-Owners' Agreements may have lapsed on the change from Perpetual Trustee Company Limited as trustee to AMPH as Responsible Entity of ART. During the AMP Centro 01 proceedings both AMPH and AMP Life contended that, in

⁶ AMP Life noted that the ART prospectus at page 240 stated that: "The manager is the issuer of this prospectus and . . . the manager is wholly responsible for its contents." AMP Life noted that it had not consented to be, and was not, named in the prospectus.

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hindsight, that understanding was wrong and the Co-Owners' Agreements had not lapsed in 1999.)

27. AMP Life argued that this was evidence that the A1 Order punished a third party not involved in what the AMP Centro 01 Panel considered to be unacceptable circumstances. AMP Life submitted that such a result is manifestly unfair and inappropriate and that the making of an order with that effect is beyond the power of the Panel.

Beyond power

28. AMP Life submitted that it cannot be within the powers of the Panel, which was established to regulate the conduct of takeover activity in accordance with the Eggleston Principles, to make orders such as the A1 Order.
29. AMP Life submitted that it was beyond the power of the Panel to make the A1 Order because:
- a) it purported to extinguish the rights of AMP Life under the Pre-Emptive Rights on unjust terms in breach of section 51(xxxi) of the Constitution - no compensation is provided to AMP Life or its policyholders; and
 - b) the Panel does not have power to determine the legal rights of AMP Life under the Co-Owners Agreements as that would amount to the exercise of judicial power by a body other than a court. AMP Life argued that the A1 Order achieves that result by an indirect means and there is strong judicial authority that a body such as the Panel cannot do indirectly what it is forbidden to do directly⁷.

Determining AMP Life's rights

30. AMP Life submitted that the Orders effectively determined the rights of AMP Life under the Co-Owners' Agreements by limiting its ability to exercise the Pre-Emptive Rights under those agreements.

Power – affecting third party rights

31. AMP Life submitted that the AMP Centro 01 Panel did not have power, under section 657D of the Act, to make orders which have the effect of extinguishing a third party's contractual rights where the third party and the contractual rights are not involved with the takeover or alleged unacceptable circumstances and where the third party did not engage in any unacceptable conduct. AMP Life submitted that in circumstances where the third party is not a bidder or a target, and the third party has not been involved in the unacceptable circumstances, the Panel cannot make orders extinguishing those rights. AMP Life submitted that the Panel should only make orders that were proportionate,

⁷ *Antil Ranger v Commissioner For Motor Transaction* (1955) 93 CLR 83; *Wraff v New South Wales* (1953) 88 CLR 353.

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and that the A1 Order was disproportionate to the unacceptable circumstances that the AMP Centro 01 Panel found.

Wider effect of the AMP Centro 01 Panel decision

32. AMP Life also submitted that the AMP Centro 01 Panel was mistaken in assessing the effect of the decision and the public policy considerations surrounding the matter. AMP Life submitted that the decision of the AMP Centro 01 Panel would not only affect the managed investments scheme sector but also other sectors in which pre-emptive rights are prevalent and a normal part of commercial practice such as the resources industry.

Prejudice to AMP Life

33. AMP Life also submitted that the A1 Order prejudiced AMP Life and its policyholders as it denied them the opportunity to either exploit or seek to exploit their contractual rights in the event of a Change in Responsible Entity of ART.
34. AMP Life submitted that it was inappropriate for the Panel to look back five years ago to assess whether the circumstances which are before it today are unfair. AMP Life asserted that the Panel should consider what rights AMP Life has now and determine whether their removal would be unfair. AMP Life stated in its various submissions that AMP Life and AMPH have operated independently having regard to, in the case of AMP Life to AMP Life shareholders and policyholders and in the case of AMPH to the interests of the ART unitholders.

Disclosure as a Remedy

35. AMP Life submitted that the proper remedy for any unacceptable circumstances that exist in relation to the affairs of ART (but AMP Life contends that none do) is for the Panel to order that:
- a) AMPH confirm that there has been full disclosure of:
 - i) the Co-Owners' Agreements;
 - ii) the different contentions of AMPH and Centro as to the operation and existence of the Co-Owners' Agreements and Pre-Emptive Rights; and
 - b) CPT disclose, in light of that information, whether it intends to seek to rely upon any relevant bid condition.
36. AMP Life contended that unitholders will then be in a position to determine for themselves what the risk is of the Pre-Emptive Rights existing and being activated by a Change of Responsible Entity. AMP Life asserted to the AMP Centro 01 Panel (and made similar assertions to this Panel) that *"the market is perfectly able to assess the competing views and is no more entitled to a determination on this issue than on any contractual dispute that happens to involve a target as one of*

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the contracting parties (let alone the present situation where the "dispute" is itself hypothetical)." and "If there is full disclosure the market participants can form their own views and respond accordingly."

37. AMP Life asserted that *"The AMP Life proposed order would protect the interest of ART unit holders as they would be confident in the position there is no other material information relevant to their decision whether to accept either the Centro bid or the proposed Westfield bid or to retain or dispose of the units to trade on the ASX."*

Taking of property without just compensation

38. AMP Life argued that because paragraph 51(xxxi) of the Constitution limits the constitutional power of the Commonwealth to make laws under which a person's property may be acquired, except on just terms, the Panel does not have power to make the A1 Order. It correctly asserts that contractual rights may be property for the purposes of paragraph 51(xxxi), and that the principle applies notwithstanding that the subject of the A1 Order, and the Act under which it is made, is corporations.
39. There is a great difference between (on the one hand) regulating the acceptable exercise of proprietary rights and (on the other hand) taking those rights away. The A1 Order does not take away AMP Life's rights, or create corresponding rights in any other person. It merely prevents AMP Life from exercising some of the aspects of those rights in specified circumstances. In *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 Deane & Gaudron JJ at paragraph 15 (pages 189-190) held:

"While there is no set test or formula for determining whether a particular law can or cannot properly be characterized for the purposes of s.51(xxxi) as a law with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws, it is possible to identify in general terms some categories of laws which are unlikely to bear the character of a law with respect to the acquisition of property notwithstanding the fact that an acquisition of property may be an incident of their operation or application. One such category consists of laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest."

40. Accordingly, because of the nature of the proceedings and its relation to them, even if the A1 Order imposes some form of acquisition, it is not an acquisition of property, such as a resumption of land for public works, which must be compensated under the Constitution. Rather, it is an acquisition of property incidental to the adjustment of the competing rights, claims or obligations of persons, which is not required to be compensated.
41. The Panel does not accept that paragraph 51(xxxi) of the Constitution prevents the Panel making the A1 Order.

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Power to make the order

42. The Panel is expressly given power to restrain a person from exercising any voting or other rights attached to securities, direct a person to dispose of securities and vest securities (definition of "remedial order" in section 9 of the Act). The power in section 657D of the Act is wider than that, extending to any other order the Panel thinks appropriate for the purposes of preventing people being affected by unacceptable circumstances or ensuring that a bid proceeds as if unacceptable circumstances had not occurred. There is no reason to read down these wide words, once it is clear Parliament has plainly decided that the Panel may make orders affecting property. This view is supported, albeit by analogy, in *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321.
43. The Panel considers that the A1 Order is the most appropriate order to remedy, in a clear and focussed manner, the prejudice that it considers that the unacceptable circumstances visit upon the ART unitholders.
44. AMP Life contended that the fact that an order under s657D(2) may only be made after the Panel has declared circumstances to be unacceptable under s657A is evidence that the legislature intended that any order made must be linked or directed to the entity who was found by the Panel to have engaged in the unacceptable circumstances. AMP Life contended that as the Panel did not find that AMP Life engaged in unacceptable circumstances it did not have the power to make any orders which affected AMP Life.
45. The Panel rejects this argument entirely for two reasons. The first is that it misses the fact that the CLERP Act reform of the Panel's legislation expressly and deliberately removed any reference to "unacceptable *conduct*" and deliberately directed the Panel to look to the *circumstances* affecting target unitholders or shareholders and to remedy those circumstances by its orders. Looking to the person who caused the unacceptable circumstances may be relevant in assessing the appropriateness of any orders, which the Panel has done, but the fact that a person was not directly involved in causing any unacceptable circumstances is not a bar to the Panel's power as AMP Life contends.
46. The second reason is that the Panel has found that AMP Life did participate in bringing about, or was aware of, the circumstances in existence today. The Panel sets out at paragraphs 58(b) & (c) how and why it considers AMP Life participated in the bringing about, or was aware of, today's circumstances.

Exercise of judicial power

47. AMP Life has asserted that the Panel would be exercising judicial power in making the A1 Order. The Panel rejects this assertion. There is a long line of authority in High Court decisions that the core exercise of judicial power is to ascertain people's pre-existing rights and obligations and enforce them, and it is not an exercise of judicial power to create new rights and obligations (that is, rights and obligations arising from the making of orders). The High Court held

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in *Precision Data Holding Pty Ltd v Wills* (1992) 173 CLR 167 at paragraphs 20 to 25 (pages 188-192) that the Corporations and Securities Panel as then constituted was not exercising judicial power for this reason.

48. The present matter does not depend on paragraph 657A(2)(b), which is a new concept in the Panel's role, introduced since *Precision Data*. The present matter is squarely of the same nature as the matter before the Precision Data Panel. It is a determination that unacceptable circumstances exist, and what the new rights of the ART unitholders should be (by prohibiting the Co-Owners exercising some aspects of the Pre-Emptive Rights that would impinge upon the ART unitholders' rights), and then creating those rights by way of the A1 Order. *Precision Data* has been cited with approval ever since, by the High Court particularly where it has been concerned about issues in relation to Chapter III of the Constitution.
49. In *Re Dingjan and Ors ex parte Wagner and Anor* (1995) 183 CLR 323, Gaudron J said at paragraph 17 (pages 360-361) (Mason CJ, Deane and Toohey JJ relevantly concurring), citing *Precision Data* for both parts of this proposition:

“if power to bring a new set of rights and obligations into existence is vested in a tribunal which is not a court and policy considerations have a part to play in the tribunal's determination, the power is not judicial. And that is so even if it is necessary for the tribunal to decide disputed facts or form an opinion as to existing rights and obligations as a step in arriving at its ultimate determination.”

Precision Data has been referred to or applied in *Harry Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, *Gould v Brown* [1998] HCA 6, *A-G v Breckler* [1999] HCA 28, *Sue v Hill* [1999] HCA 30, *ASIC v DB Management* [2000] HCA 7 and *Solomons v District Court of New South Wales* [2002] HCA 47.

Disclosure as a Remedy

50. The Panel agrees with the view of the AMP Centro 01 Panel that disclosure is an inadequate remedy, and cannot be made to become an adequate remedy. The potential effect on those ART unitholders who would prefer to stay as unitholders of ART and the ART unitholders who would prefer to accept the cash and scrip offer by Centro cannot be changed simply by disclosure. Similarly, mere disclosure would not remedy the entrenching effect of the Pre-Emptive Rights as AMP Life contends they act.

Unfair Prejudice

51. There appeared to be a mixing of two elements in the submissions to the Panel in relation to the requirement in section 657D(1) of the Act that the Panel not make an order if it was satisfied that the order would unfairly prejudice any

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person⁸. The first is whether an order inflicts prejudice on a party; the second is whether it is unfair to inflict that prejudice on the party.

52. The leading decision in this area is currently the decision of the Full Court of the Victorian Court of Appeal in *Gjergja v Cooper* (1986) 10 ACLR 577, following *Waldron v MG Securities* [1975] VR 508 and oppression cases. *Gjergja v Cooper* was itself followed in *ASIC v Yandal Gold* (1999) 32 ACSR 317, *ASIC v Terra Industries* (1999) 163 ALR 122 and *ASC v Bank Le-Leumi Israel* (1996) 134 ALR 101. In *Yandal Gold* at paragraph 120 - 1 Merkel J noted that in considering whether an order is unfairly prejudicial, it is appropriate to consider
- (a) whether the order is appropriate to give effect to the legislative policy;
 - (b) whether evidence is presented as to the precise nature of the prejudice said to have been suffered; and
 - (c) the degree of culpability of the persons whose interests are affected by the orders.

At paragraphs 122 to 139 his Honour decided that it was appropriate to make a compensatory order, where shareholders had suffered a detriment through misconduct of those against whom the order was made.

53. Further, his Honour went on to say that he did not think that a third party was likely to be unfairly prejudiced because of an order he proposed where the third party had been aware of relevant facts leading up to the relevant contravention of Chapter 6 of the Corporations Act which his Honour was seeking to remedy. In the particular case the third party was a lender to joint bidders. His Honour said at paragraph 145:

"I am not satisfied that Chase or any of the lenders under the Syndicated Secured Term Debt Facility will be unfairly prejudiced. Chase, acting as agent for all of the lenders, was well aware of the Shareholders Agreement and was able to form its own view as to whether it contravened [s 615](#). Additionally, Chase was aware of the facts and circumstances from which it could be inferred that it was likely that the parties had entered into the bid structure agreement. Importantly, no evidence has been adduced from Chase that it was not aware of those circumstances or that it would be unfairly prejudiced by the orders sought by ASIC."

Prejudice vs unfair prejudice

54. Section 657D(1) of the Act expressly requires the Panel not to make an order if it is satisfied that the order would *unfairly* prejudice a person. Mere prejudice to a person is not enough of itself to prevent the Panel making orders to protect

⁸ It is worth noting the onus that the legislature cast in this provision i.e. that the Panel must be satisfied that the order *would* unfairly prejudice any person before it was prohibited from making the order. The Panel is not required to come to any finding that the order *would not* prejudice any person unfairly.

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the interests of ART unitholders. For AMP Life to persuade the Panel that it was appropriate to vary the A1 Order it would have had to have shown that it was *unfair* to restrain AMP Life's ability to exercise the Pre-Emptive Rights.

55. The A1 Order under review is plainly prejudicial to the current interests of the Co-Owners. However, the Panel is clearly not prohibited from making an order that prejudices a person. The only interest of the Panel in considering the prejudice that an order might cause is in assessing whether that degree of prejudice is unfair in all of the circumstances before the Panel.
56. The Panel considered that it could not reasonably quantify any prejudice the A1 Order might cause to the Co-Owners, even before it considered whether or not that prejudice was unfair, because it received no substantive submissions that replacement of AMPH by CPT as responsible entity of ART would prejudice the Co-Owners. Although the Panel received submissions from AMP Life that the A1 Order would prejudice AMP Life, and submissions as to the commercial importance of the identity of its co-owners, neither this Panel nor the AMP Centro 01 Panel received any substantive submissions as to what the nature or magnitude of the prejudice would be. However, because, as set out below, the prejudice of the A1 Order merely reverses a benefit which AMP Life has taken no steps to protect, and one which appears to be an unintended benefit, the fact of not being able to quantify the prejudice is not material to this decision.
57. This is in direct contrast to the clear and direct prejudice which the ART unitholders would be likely to suffer if the Pre-Emptive Rights were exercised, or the possibility of their exercise still remained, including:
 - a) crystallise a taxable capital gain of \$225 million;
 - b) replacement of key assets by cash;
 - c) deterrence of takeovers for ART (with the dual effect of reducing the threat of market discipline on the Responsible Entity, and the lack of a takeover premium); and
 - d) an inability to replace the key assets lost to ART.

Unfair Prejudice to AMP Life

58. The Panel does not consider that the AMP Centro 01 Panel made any error in determining that the A1 Order would not unfairly prejudice any person given:
 - a) any activation of the Pre-Emptive Rights on a Change of Responsible Entity which related to the effect of a successful takeover and change of the management of ART would be a windfall benefit to the Co-Owners, to the detriment of ART unitholders. That benefit :
 - i) appears not to have been known of, or intended by, the Co-Owners in 1997 (although AMP Life, for the Co-Owners, asserts that it knew

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and intended that a change of trustee would activate the Pre-Emptive Rights under the prescribed interests regime);

- ii) does not appear to be a benefit that the Co-Owners and the ART unitholders bargained for in 1997;
- iii) appears to have been an unintended side effect of the MIA; and
- iv) was not clearly disclosed to, or consented to by, the ART unitholders.

To deprive the Co-Owners of this windfall and return it to the ART unitholders would not be unfair;

- b) the degree of knowledge of AMP Life concerning the underlying arrangements and its participation⁹ in:
 - i) the initial prospectus for ART in 1997. The AMP Centro 01 Panel found, and this Panel agrees, that for the purposes of the Panel considering these proceedings, the Prospectus did not adequately disclose the effect of a change of trustee on the Pre-Emptive Rights. In saying this, the Panel considers that the ART 1997 prospectus was, effectively, the float by AMP Life of a portion of its shopping centre assets. On that basis, the Panel does not believe that AMP Life, or alternatively its investment manager (AMPH), was not in a position to have significant influence on the content of the 1997 prospectus;
 - ii) the entry into the Deeds of Confirmation of the Co-Owners Agreements in 1999 (which should have given AMP Life cause to consider how transition to the MIA might have affected the operation of the Co-Owners Agreements and whether disclosure to, or consent by, ART unitholders by AMPH was then needed if AMP Life was going to rely on the changed operation of the Co-Owners Agreements in the future); and
 - iii) the absence of subsequent disclosure or consent for the change in the operation of the Pre-Emptive Rights resulting from the introduction of the MIA regime (despite the various points in time which the AMP Centro 01 Panel considered as being potential prompts for AMP Life or AMPH to consider disclosure to ART unitholders of the changed operation).

⁹ AMP Life has rejected any suggestion that it was, formally, a promoter of the Prospectus in 1997. The Panel considers that its view that AMP Life's participation is relevant is firmly supported by the decision of the High Court in [Tracy v Mandalay Pty Ltd \(1953\) 88 CLR 215 at 242](#). Persons who leave it to others to promote a company or scheme upon the understanding that they also will profit from the operation may be held to be a promoter.

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- c) AMP Life had the opportunity to disclose, or to cause ART to disclose, or to take action to protect the Pre-Emptive Rights, which would have been sensible and prudent behaviour, if AMP Life had seriously considered the Pre-Emptive Rights were worth the amount of prejudice it is now alleging losing them would cause. AMP Life's lack of doing this suggests strongly that it was not aware of the potential for the Pre-Emptive Rights to be activated, or did not consider that the Pre-Emptive Rights would be activated, in the event of a Change of Responsible Entity, or did not value such benefits enough to seek to protect them; and
- d) the fact that revoking the A1 Order would cause the prejudice to fall on the unitholders in ART who have not contributed to it, rather than AMP Life which either contributed to it, or in circumstances where it ought to have been aware of all relevant facts, it failed to take any steps to prevent the prejudice to ART unitholders.¹⁰
59. In making the statements it has above, the Panel does not imply that AMP Life (not being a disclosing entity) had any statutory obligation under the continuous disclosure provisions of the Act, or the ASX Listing Rules, in relation to the ART unitholders. However, if AMP Life wishes to rely on, and exploit, the Pre-Emptive Rights in the way they operate under the MIA regime, the Panel considers that AMP Life had the opportunity to ensure that adequate disclosure was made, well before now, of the way it now contends that they operate, whether by persuading AMPH to do so as Responsible Entity for ART, or by doing so itself. Similarly, if AMP Life now wants to rely on or exploit the Pre-Emptive Rights as it contends they operate under the MIA regime, it would have been prudent to have persuaded ART to seek the approval of ART unitholders at the time of the transition from the MIA regime.

A1 Order Proportionate

60. The Panel considers that the A1 Order is both functional and proportionate. The A1 Order is functional. It does what it is intended to do, in remedying directly, the specific harm likely to be caused to ART unitholders by the unacceptable circumstances found by the AMP Centro 01 Panel. The effects of the A1 Order do not go materially wider than directly required to remedy the relevant unacceptable circumstances.
61. The prejudice which the A1 Order causes to AMP Life and the other Co-Owners is not disproportionate to the prejudice which it will remedy for the ART unitholders. In many ways the prejudice to the Co-Owners is in fact materially lower than the prejudice it remedies. This is because there does appear to be

¹⁰ Remedying the consequences of the unacceptable circumstances on the ART unitholders is clearly within the legislative purpose of section 657D and as such, the effects on the ART unitholders is clearly a factor which the Panel was obliged to take into account when determining whether or not the prejudice caused to the Co-Owners was unfair see the statements by Merkel J in *ASIC v Yandal Gold* (1999) 32 ACSR 317.

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some material doubt¹¹ that the Pre-Emptive Rights would be activated by a Change of Responsible Entity, therefore, any harm to the Co-Owners needs to be discounted by that uncertainty. Similarly, the Co-Owners could not withhold consent to a transfer and exercise the Pre-Emptive Rights merely at their whim. AMP Life is required to exercise the utmost good faith in deciding whether there was a reasonable basis for considering that the incoming Responsible Entity would be an unsuitable person to be a Co-Owner. Therefore the potential prejudice caused by the A1 Order should be discounted by the restrictions faced by the Co-Owners in exercising the power reasonably.

62. However, the prejudice to the ART unitholders which the A1 Order is also intended to remedy is likely to be the loss of the opportunity to participate in a full takeover premium. This is because merely the uncertainty of whether or not the Co-Owners will exercise the Pre-Emptive Rights is likely to deter hostile takeover bids which is in turn, likely to reduce or eliminate any takeover premium available to ART unitholders. The prejudice to ART unitholders would not, however, be the complete loss of a takeover premium in the unit price. Some bidders may be acceptable to the Co-Owners, and some bidders may announce takeover bids which are conditional on the Co-Owners undertaking not to exercise the Pre-Emptive Rights in the event of a Change of Responsible Entity. In this way the ART unitholders may still have some (albeit lowered) prospect of a takeover premium.
63. For these reasons of focus, functionality and proportionality, the Panel is assured in its decision that the A1 Order does not unfairly prejudice the Co-Owners.

Negligible value of the right to veto change of trustee

64. AMPH asserted that the Panel was wrong in finding that the A1 Order did not cause disproportionate prejudice. It said that this was wrong because the AMP Centro 01 Panel expressly found that the application of the Pre-Emptive Rights to a change of trustee “*was likely to be an issue of negligible value under the prescribed interest regime*”. AMPH also said that it was common ground that the Pre-Emptive Rights did not apply to a change of manager under the prescribed interests regime. AMPH asserted that where the application of the Pre-Emptive Rights in these circumstances was not material, there could be no obligation to disclose it. AMPH asserted that the AMP Centro 01 Panel's observation *must be wrong* if the balance of the Panel's reasoning is correct.
65. The Panel does not accept this argument from AMPH. Even if the value of the right effectively to veto a change of trustee, under the prescribed interests regime was likely to be minimal and immaterial *to the Co-Owners*, the effect on *the unitholders* of the Pre-Emptive Rights being activated is clearly very

¹¹ That doubt exists, as evidenced by the competing contentions of AMP Life and AMPH on one hand, and Centro (aln also Westfield) on the other. It will exist until it is conclusively determined in an appropriate court. However, as the Panel has repeatedly concluded, the delay and uncertainty that requiring these issues to be determined in that manner would be unacceptable.

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significant. It is incorrect to suggest that because the value to the Co-Owners was minimal the disclosure in the prospectus was adequate and there was no need to disclose to the unitholders. The issue should have been clearly disclosed because of the material effect it could have on ART unitholders. Even if it was not disclosed in the 1997 prospectus because of inadvertence or because it was considered insignificant in value to the Co-Owners, it should have been disclosed to unitholders at the first opportunity after it came to AMPH's or AMP Life's attention following the introduction of the MIA.

Interests of AMP Life Policyholders

66. AMP Life made submissions about the uniqueness of the interests of its policy holders, their interests, and its obligations to them. The Panel, like the AMP Centro 01 Panel, has taken into consideration throughout these proceedings the obligations AMP Life has to its policy holders. However, the obligations that AMPH has to the unitholders of ART, while not identical (coming under different Acts) are just as persuasive and stringent. The Panel sees no relevant difference between their position and that of the unitholders in ART.

Decision

67. AMP Life failed to make its case to the Panel that:
- a) there was a clear cut limitation under the Constitution for the Panel to make the A1 Order (in the absence of a clear cut limitation, the Panel considers that the High Court is the appropriate place for AMP Life to take any constitutional issues for determination); or
 - b) the Panel lacked the power to make the A1 Order where the Panel considered that those orders were necessary and appropriate to protect the interests of ART unitholders; or
 - c) the A1 Order unfairly prejudiced AMP Life or other Co-Owners.

Orders

68. The Panel has considered whether
- a) orders are needed to remedy the unacceptable circumstances found by the AMP Centro 01 Panel;
 - b) there are any more appropriate orders than those made by the AMP Centro 01 Panel;
 - c) those orders do remedy the effect of those unacceptable circumstances;
 - d) those orders unfairly prejudice any of the Co-Owners; and
 - e) the AMP Centro 01 Panel had, and this Panel has, the power (under the Constitution and under section 657D of the Act) to make those orders.

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69. On the basis of the above considerations, the Panel declines to revoke or vary the order made by the AMP Centro 01 Panel. In doing so, the Panel, like the AMP Centro 01 Panel, is not finding that those Pre-Emptive Rights would be activated if AMPH was replaced as Responsible Entity of ART without the consent of the other Co-Owners of the relevant shopping centres, or that the Co-Owners' Agreements currently exist.
70. In declining to vary the A1 Order, the Panel considers that the A1 Order would not unfairly prejudice any person, given that the interests of the Co-Owners would not be unfairly prejudiced, for the reasons set out in paragraphs 51 to 65 above.
71. The Panel considers that it may properly make its decision in relation to the A1 Order without needing to determine whether or not the Co-Owners' Agreements currently exist, or a Change of Responsible Entity of the ART due to a takeover bid under Chapter 6 of the Act would activate the Pre-Emptive Rights.

Costs

72. The Panel considered that the review application had been prosecuted efficiently and in a timely manner by all parties concerned. It made no order as to costs in the review proceedings.
73. AMP Life noted that while it considered the decision of the AMP Centro 01 Panel in relation to costs was wrong, it did not seek review of that part of the AMP Centro 01 Panel's decision.

Decision

74. The Panel declines AMP Life's application that it revoke or vary the decision of the AMP Centro 01 Panel to make the A1 Order.
75. The Panel consented to the parties being represented by their comical solicitors. The Panel made no costs order in these proceedings.

Michael Tilley

Sitting President

AMP Centro 02 Proceedings

26 May 2003



**Corporations Act 2001
Sections 657A and 657D
Declaration and Orders**

In the matter of the AMP Shopping Centre Trust

- A. AMP Henderson Global Investors Limited (AMPH) is the responsible entity of the AMP Shopping Centre Trust (ART);
- B. As responsible entity of ART, AMPH is a tenant in common of the shopping centres known as Warringah Mall (Brookvale, NSW), Pacific Fair (Broadbeach, Qld), Macquarie Centre (North Ryde, NSW), Garden City (Mt Gravatt, Qld) and Garden City (Booragoon, WA) (the Shopping Centres);
- C. The other tenants in common of the Shopping Centres (Co-Owners) are listed in the Schedule;
- D. It is now the view of AMPH that it is bound (and a successor responsible entity would be bound) by Co-Owners' Agreements first made on 3 November 1997, and subsequently confirmed and amended by other instruments, with the other Co-Owners in relation to each of the Shopping Centres;
- E. On 18 March 2003, CPT Manager Ltd as responsible entity of the Centro Property Trust announced to Australian Stock Exchange Ltd (ASX) that it proposed to make a takeover bid for units in ART (the Centro bid) and replace AMPH as responsible entity of ART under Part 5C.2 of the Corporations Act 2001;
- F. On 26 March 2003, in response to the Centro bid, AMPH announced to ASX that the replacement of AMPH as responsible entity of ART *"is likely to involve a breach"* of the Co-Owners' Agreements and that *"such a breach may entitle a co-owner to commence a default process and, if the breach is not rectified, may entitle the co-owner to require ART to sell its interests in [the Shopping Centres] to the co-owner at the market value of the property interest"*;
- G. If AMPH is correct in the views it has announced, the rights of co-owners under the Co-Owners' Agreements mentioned in clause F (the Pre-Emptive Rights) would be activated if a takeover bid was made for ART, the bid was successful and the bidder removed AMPH as responsible entity and appointed as responsible entity a company unrelated to AMPH, without the consents of the co-owners;
- H. the exercise of the Pre-Emptive Rights would result in the forced sale from ART of its interests in essentially irreplaceable super-regional shopping centres worth over \$1 billion to ART and comprising over 60% of the assets of the trust;
- I. In view of their amount and nature, these effects are material in relation to ART;

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 02]

- J. AMPH's understanding of the effect of the Co-Owners' Agreements was not publicly disclosed until AMPH made an announcement to Australian Stock Exchange Ltd on 26 March 2003;
- K. By 26 March 2003, units in ART had traded since 1997, substantial holdings had been accumulated in ART and a takeover bid had been announced for ART, without the information announced by AMPH in clauses F and G having been disclosed to the market or ART unitholders;

The Panel finds that:

- L. If AMPH is correct in the view it has announced, the existence of the Pre-Emptive Rights tends to prevent a successful takeover bid being made for ART without the support of the Co-Owners;
- M. If AMPH is correct in the view it has announced, the market in units in AMPH was uninformed in a material respect until 26 March 2003;
- N. If AMPH is correct in the view it has announced, there has been a significant change in the commercial position of unitholders (i.e. the Co-Owners have effectively gained a right of veto over any choice by unitholders to change the Responsible Entity of ART) without their consent;
- O. If AMPH is mistaken in the view it has announced, the market in units in ART is now misinformed in a material respect;
- P. The effect of the Pre-Emptive Rights on the possibility of a takeover bid for ART is inconsistent with an efficient, competitive and informed market in units in ART;
- Q. Whether or not AMPH is correct in the view it has announced, the market in units in ART has been uninformed or misinformed, is at present uninformed and may at present be misinformed regarding that issue;

Pursuant to section 657A of the Corporations Act 2001, the Panel declares that the circumstances referred to in paragraphs L to Q are unacceptable circumstances in relation to the affairs of ART; and

Pursuant to section 657D of the Corporations Act 2001, the Panel orders each of the Co-Owners listed in the Schedule not to seek to, or purport to, exercise any right under any of the Co-Owners' Agreements to acquire an interest in any of the Shopping Centres where that right is enlivened as a direct or indirect result of the replacement of the Responsible Entity of ART (actual or proposed) in connection with a takeover bid under Chapter 6 of the Corporations Act 2001, or by a consequent transfer or registration of title to the Shopping Centres (actual or proposed); and

Pursuant to section 657D of the Corporations Act 2001, the Panel orders AMPH (as Responsible Entity for ART) to announce the effect of these orders to ASX and ART unitholders; and

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 02]

Pursuant to section 657D of the Corporations Act 2001, the Panel orders AMP Life Ltd to pay the costs of the other parties from the date it became a party to this matter until the date of this instrument.

Schedule - the Co-Owners of the Shopping Centres

AMP Life Limited

AMP Henderson Global Investors Limited (as Responsible Entity of the AMP Wholesale Shopping Centre Trust 2)

Warringah Mall Pty Ltd

AMP Pacific Fair Pty Ltd

AMP Macquarie Pty Ltd

Dated 13 May 2003

Signed by Jennifer Seabrook

Sitting Panel Member

AMP Centro Panel Proceedings