

## SUPPLEMENTARY OUTLINE OF SUBMISSIONS OF

First and Second Defendants in Proceeding S CI 2011 6604  
(Liparoo & Yungera Rights Proceeding)

First Defendant in Proceeding S CI 2011 6606  
(Solara Rights Proceeding)

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- 1 The First and Second Defendants in the Liparoo & Yungera Rights Proceeding, and the First Defendant in the Solara Rights Proceeding (collectively, the **First and Second Defendants**), filed an outline of submissions dated 28 September 2012 in the Solara and the Liparoo & Yungera Rights Proceedings. They now file a supplementary outline which expands upon their submissions concerning the Court's power to give directions to trustees.<sup>1</sup>
- 2 The First and Second Defendants, as trustees, seek orders approving their entry into the Deeds of Compromise.
- 3 A trustee can seek an order of this nature either pursuant to the Court's inherent equitable jurisdiction<sup>2</sup> or under r. 54.02 of the *Supreme Court Rules*.
- 4 As to a trustee's statutory right to approach a court for advice or approval, the High Court recently stated a number of propositions with respect to New South Wales legislation.<sup>3</sup> Those propositions also apply to an application in this Court under r. 54.02.<sup>4</sup> The relevant propositions are:
  - (a) it is inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words;<sup>5</sup>
  - (b) there are no implied limitations on the Court's power to give advice;<sup>6</sup>

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<sup>1</sup> See the First and Second Defendants' Outline of Submissions filed on 28 September 2012, at [10] – [13] in relation to this point.

<sup>2</sup> *Re Permanent Trustee Australia Limited* (1994) 33 NSWLR 547, 548; and *ExxonMobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* (2010) 29 VR 356, 375 [86].

<sup>3</sup> *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

<sup>4</sup> *Re Centro Retail Australia Limited* [2012] VSC 240, [13].

<sup>5</sup> *Macedonian Church*, 89 [55].

- (c) there are no implied limitations on discretionary factors;<sup>7</sup>
- (d) the procedure is summary in character;<sup>8</sup>
- (e) the procedure is an exception to the Court's ordinary function of deciding disputes between litigants; it affords a facility for giving private advice. It is private advice because its function is to give personal protection to the trustee.<sup>9</sup>

5 As to the Court approving a trustee's entry into a compromise, the relevant principles are:

- (a) the Court's role is to advise whether it is proper for the trustee to exercise its power of compromise. It is not the Court's role to assess the wisdom of the terms of the compromise;<sup>10</sup>
- (b) the Court will consider whether to approve a trustee's entry into a compromise, even though the trustee has already entered into an agreement of compromise;<sup>11</sup>
- (c) in satisfying itself as to a trustee's propriety in entering into a compromise, the Court will consider whether:
  - (i) the trustee's decision to agree to the compromise was within power;
  - (ii) there was any impropriety in the trustee's decision;
  - (iii) the trustee exercised its decision in good faith; and
  - (iv) the trustee gave fair consideration to the relevant issues.<sup>12</sup>

6 Ordinarily, when a party seeks the Court's advice under r. 54.02, a separate proceeding is brought seeking such relief. The use of the word "may" in sub-rules (1) and (2) suggests that it is not necessary that a trustee commence a new proceeding in order to obtain relief under r. 54.02. If, however, the Court is of the view that r. 54.02 requires a separate proceeding to be commenced, the trustees submit that the Court should dispense with compliance under r. 2.04 of the *Supreme Court Rules* because it would be contrary to the principle that questions should be determined in an efficient and economical manner. In any event, it is submitted that there is no impediment to the trustees seeking the Court's approval without commencing a new proceedings when it is open to them to rely upon the Court's inherent jurisdiction.

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<sup>6</sup> *Macedonian Church*, 89 [56].

<sup>7</sup> *Macedonian Church*, 90 [59].

<sup>8</sup> *Macedonian Church*, 90-91 [61] – [63].

<sup>9</sup> *Macedonian Church*, 91 [64].

<sup>10</sup> *McKinnon v Victor Samuels* [2000] VSC 393, [14] – [16]; and *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Limited* (2004) 49 ACSR 1, 13 – 14 [50].

<sup>11</sup> *Re Centro Retail Australia Limited* [2012] VSC 240, [22] – [25].

<sup>12</sup> *ExxonMobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* (2010) 29 VR 356, 375, [87]; *Brown-Sarre v Waddingham* [2012] VSC 116, [24]; and *Re Centro Retail Australia Limited* [2012] VSC 240, [17] – [19].

DATED 2 October 2012

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