

HIGH COURT CLARIFIES UNCERTAINTY SURROUNDING AMENDMENT OF REGISTERED SCHEME CONSTITUTIONS

17 December 2018 | Australia

Legal Briefings - By **Fiona Smedley, James Graham, Yorick Ng and Julian Vertoudakis**

The High Court's decision in [Australian Securities and Investments Commission v Lewski \[2018\] HCA 63](#) has clarified the uncertainty around the meaning of 'rights' where used in section 601GC(1)(b) of the *Corporations Act 2001* (Cth).

That section allows a responsible entity to amend the constitution of a registered managed investment scheme without member approval 'if the responsible entity reasonably considers the change will not adversely affect members' rights'.

The uncertainty prior to this decision hinged on a difference between the 'rights' of members and the value of those 'rights', as well as whether members have a separate right to have the constitution of a registered managed investment scheme administered in accordance with its terms as they stood and which amendments might be adverse to that right.

The High Court in a unanimous judgement said at paragraph 56 that:

The meaning of "members' rights" is to be determined by the statutory context in and purpose for which the words are used. That context and purpose reveals that "right" is used to mean "interest".

The High Court also held at paragraph 54 that an interpretation of members' rights as 'interests' also accords with the prevailing authority set out by the Victorian Court of Appeal in *360 Capital RE Ltd v Watts* (2012) 36 VR 507.

The High Court additionally made the point at paragraph 56 that 'a distinction, extrinsic to the legislation, between the nature of the rights and their value is "beside the point"' in the context of earlier judgements, including the decision of the New South Wales Supreme Court in *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444.

This decision reinforces the need for responsible entities and their directors to reasonably consider the interests of members of the schemes when considering amendments to the registered scheme constitution. As always, directors should form the view that the amendment is in the best interests of members of the scheme.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



FIONA SMEDLEY
PARTNER, SYDNEY

+61 2 9225 5828
Fiona.Smedley@hsf.com



JAMES GRAHAM
CONSULTANT,
SYDNEY

+61 2 9225 5920
James.Graham@hsf.com



YORICK NG
SPECIAL COUNSEL,
SYDNEY

+61 2 9225 5568
Yorick.Ng@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2023

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close