



In the matter of AMP Shopping Centre Trust 01
[2003] ATP 21

Catchwords:

Pre-emptive rights – poison pill – change of responsible entity – nondisclosure of pre-emptive rights – consent to implement pre-emptive rights – uncertainty in the market – uncertainty affecting material contract – disclosure as a remedy – unfair prejudice – referral of question of law to court – orders affecting third party rights – refusal to give undertakings – procedural fairness – review of Panel decisions

Corporations Act 2001 (Cth), sections 602(a), 657A(1), 657D(2), 659A, 657EA, 601NA and 195(4)

THESE ARE THE PANEL'S REASONS FOR ITS DECISION TO MAKE A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES IN RELATION TO THE AFFAIRS OF AMP SHOPPING CENTRE TRUST (ART) AND ORDERS UNDER SECTIONS 657A AND 657D OF THE CORPORATIONS ACT 2001, RESPECTIVELY.

1. These reasons relate to an application by CPT Manager Limited (**CPT**) (as responsible entity for Centro Property Trust (**Centro**)) under section 657C of the Corporations Act 2001 (Cth) (**Act**) dated 10 April 2003 (**Application**). The Application was originally for a referral of a question of law to the Court pursuant to section 659A of the Act, a declaration of unacceptable circumstances pursuant to section 657A of the Act, and a number of final orders pursuant to section 657D of the Act, in relation to CPT's takeover bid for the AMP Shopping Centre Trust (**ART**).
2. The sitting Panel (the **Panel**) for the Application was constituted by Leslie Taylor (sitting President), Jennifer Seabrook (sitting deputy President) and Robyn Ahern.
3. The Panel decided on Friday 11 April, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application.
4. The Panel advised the parties of its decision in this matter on 13 May 2003.

Summary

5. The Panel declared the following circumstances to be unacceptable circumstances in relation to the affairs of ART:
 - (a) if the pre-emptive rights contained in agreements (**Co-Owners' Agreements**) in relation to five shopping centres in which ART owned

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

interests (**Pre-Emptive Rights**¹) would not be activated on a change of the Responsible Entity of ART as a result of a takeover bid under Chapter 6 of the Act (**Change of Responsible Entity**)²:

- (1) the announcement by AMP Henderson Global Investors Limited (**AMPH**) on 25 March 2003 that a Change of Responsible Entity would be likely to activate the Pre-Emptive Rights; or
 - (2) the uncertainty as to whether the Pre-Emptive Rights would be activated on a Change of Responsible Entity; and
- (b) if the Pre-Emptive Rights would be activated on a Change of Responsible Entity, the existence of the Pre-Emptive Rights.
6. The Panel offered the Co-Owners the opportunity to give undertakings in relation to non-exercise of the Pre-Emptive Rights. However, they declined, therefore the Panel decided to make the orders described in paragraphs 88 to 91. (A copy of the Panel's declaration and orders are attached as Annexure C.)
7. The Panel's order does not affect:
- a) the Pre-Emptive Rights as they apply to sale of interests in the shopping centres;
 - b) any Pre-Emptive Rights that have been adequately disclosed to the market and unitholders at the time they were entered into;
 - c) any Pre-Emptive Rights that have been approved by informed unitholders; or
 - d) any Pre-Emptive Rights in other circumstances which do not directly affect a Change of Responsible Entity.

Therefore, the Panel does not consider that its order will have any material adverse effect on the Managed Investment industry.

Background

Prospectus

8. In October 1997 units in ART were offered pursuant to a prospectus dated 12 September 1997 (**Prospectus**). The Prospectus contained summaries of the Co-Owners' Agreements in relation to shopping centres in which ART would

¹ See Annexure A for an extract of summaries of the Pre-Emptive Rights published in the Prospectus, and Annexure B for an extract of relevant terms of the Pre-Emptive Rights in one of the Co-Owners' Agreements. Both extracts relate to Warringah Mall and are similar to those for the other four Shopping Centres.

² For the purposes of this decision, the term "**Change of Responsible Entity**" refers to the change of the Responsible Entity of ART as a result of or following a takeover bid under Chapter 6 of the Act.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

acquire interests. Those summaries included a description of elements of the Pre-Emptive Rights contained in the Co-Owners' Agreements. See Annexure A for the summary of the Pre-Emptive Rights published in the Prospectus, and Annexure B for an extract of the terms of the Pre-Emptive Rights in one of the Co-Owners' Agreements (both in relation to Warringah Mall).

Co-ownership Agreements

9. On 3 November 1997 Co-Owners' Agreements (**1997 Co-Owners' Agreements**) were signed for 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**).
10. On 19 August 1999 the Co-Owners executed deeds of confirmation (**1999 Confirmation Deeds**) in relation to Macquarie Centre (North Ryde, NSW) and Garden City (Booragoon, WA) following from the transfer of ART's assets from Perpetual Trustee Company Ltd (**Perpetual**) (as trustee under the previous prescribed interests regime) to AMPH³ as Responsible Entity under the Managed Investments Act (**MIA**) regime.
11. On 21-25 February 2003 Co-Owners' Agreements (**2003 Co-Owners' Agreements**) were signed for Pacific Fair (Broadbeach, QLD), Garden City (Mt Gravatt, QLD) and Macquarie Centre (North Ryde, NSW) replacing the corresponding 1997 Co-Owners' Agreements.

Prior Disclosure

12. The evidence before the Panel which it proposes to accept, is that:
 - a) the actual Co-Owners' Agreements were available for inspection at the offices of AMPH for the life of the prospectus, commencing in November 1997;
 - b) the actual Co-Owners' Agreements were not available from ASX at any time prior to 28 March 2003, when copies were published on ASX's Companies' Announcements Platform; and
 - c) summaries of the Co-Owners' Agreements were disclosed in the prospectus. However the summaries did not explicitly or unambiguously disclose the contention that AMPH now holds, that a change of trustee under the then current prescribed interests regime would have activated the Pre-Emptive Rights, although the Co-Owners would have been required to act in good faith (in the interests of the ART unitholders and the AMP Life Ltd (**AMP Life**) policy holders) in considering whether or not to consent to the appointment of a particular trustee.

³ Then named AMP Asset Management Pty Ltd.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Confirmation of the Co-Owners' Agreements

13. In August 1999 AMPH and the other Co-Owners executed the 1999 Confirmation Deeds for some of the Co-Owners' Agreements for the shopping centres (maybe all, but AMP Life and AMPH have not yet been able to confirm or deny this). The Confirmation Deeds were executed following the change from Perpetual Trustee Company Ltd (**Perpetual**) as trustee to AMPH as Responsible Entity of ART on the then understanding that the Co-Owners' Agreements may have lapsed on transition to AMPH as Responsible Entity. Unitholders and the market were not told of the 1999 Confirmation Deeds or the 2003 Co-Owners' Agreements, nor of the reason that AMPH considered it desirable to enter into them. Unitholders did not consent to the confirmations or new agreements.

Centro's Bid

14. Between 11 and 18 March 2003, Centro bought 19.9% of the units in ART on market. On 18 March 2003, Centro announced that it proposed to make a bid for all of the units in the trust and replace AMPH as responsible entity of ART when and if its bid succeeded.

AMPH's Announcement - 26 March 2003

15. On 26 March 2003, AMPH announced:

"Centro has indicated that it wishes to acquire at least a majority of the units in ART and to replace the Responsible Entity. Such a change, without the consent of the relevant co-owner, is likely to involve a breach of five co-ownership agreements relating to the property interests of ART (Pacific Fair, Macquarie Centre, Garden City Mt Gravatt, Warringah Mall and Garden City Booragoon). The co-owners referred to above are AMP Life, for policyholders of its statutory funds or AMP Wholesale Shopping Centre Trust No.2 of which AMP Life holds 90%, and ART 10%, of the issued units.

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 that co-owned property to the co-owner at the market value of the property interest."

16. If this possibility is correct, the Co-Owners could require Centro, once it was installed as Responsible Entity of ART, to sell to them some or all of ART's interests in these 5 properties, worth nearly \$1 billion and comprising about 63% of the gross assets of ART.
17. Whether the Co-Owners would have this right could not be tested directly until Centro had completed its bid and Centro had been appointed Responsible Entity in place of AMPH.

AMP Life's Position

18. AMP Life, or entities or funds it controls, is essentially the other Co-Owner with ART in the Shopping Centres.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

19. AMP Life consistently suggested that the Panel should not be conducting these proceedings unless to ensure that the competing contentions as to the operation of the Pre-Emptive Rights were adequately disclosed to the market and to order some form of disclosure by Centro as to whether Centro would waive the defeating condition in its offer. AMP Life sought to avoid being bound by any decision of the Court under section 659A of the Act by declining to become a party to the proceedings. AMP Life has also advised the Panel that it reserved the right to appeal, after the close of Centro's bid, any Court decision unfavourable to it if the Panel referred any question of law to the Court under section 659A of the Act.
20. AMP Life also made submissions about the uniqueness of the interests of its policyholders, their interests, and its obligations to them compared to other classes of investors, such as ART unitholders.
21. AMP Life advised the Panel that it was separately represented in the Panel proceedings and had taken steps to ensure its independence from other AMP group related entities, it was represented by a separate team of legal and financial advisers and had continued to consider its position independently of the other AMP entities. AMP Life stated that it was also separately represented at the time of entry into the 1997 Co-Owners' Agreements and the 2003 Co-Owners' Agreements.

AMP Life's position on the Pre-Emptive Rights

22. The Panel sought AMP Life's views and position in relation to whether a Change of Responsible Entity would activate the Pre-Emptive Rights.
23. AMP Life declined to express any concluded view as to whether "if there was a Change of Responsible Entity it [AMP Life] has the right to exercise the Pre-Emptive Rights" and if so, how it intended to exercise that right. Similarly, it declined to disclose any legal advice concerning this issue. AMP Life noted the competing contentions of AMPH and Centro and the right for it to have its contractual rights determined in an appropriate forum.
24. However AMP Life did contend that:
 - a) AMP Life currently had valuable legal rights in the form of the Pre-Emptive Rights (which AMP Life said it held for the benefit of its policyholders) and if the Panel ordered that the Pre-Emptive Rights are not to be exercised, that would remove valuable legal rights from AMP Life;
 - b) under the prescribed interest regime, a change in the trustee would have amounted to a "Dealing" under the Co-Owners Agreements and thus activated the Pre-Emptive Rights; and
 - c) under the MIA regime the role of trustee and manager are fused in the Responsible Entity and it would be barren to attempt to split the analysis.

Takeovers Panel

Reasons for Decision – [AMP Shopping Centre Trust 01]

25. The Panel decided to infer, and to proceed in its decision on the basis, that AMP Life's contentions set out above should be taken to be a contention by AMP Life that the Pre-Emptive Rights exist, are valuable and would, or would likely, be activated by a Change of Responsible Entity. It is not necessary for the Panel to make such a finding for the finding of unacceptable circumstances, however, it is more convenient to set out here what AMP Life's submissions plainly contend rather than maintain that AMP Life had no view on the primary issue in these proceedings.

AMPH's Position on the Pre-Emptive Rights

26. AMPH contended that the Pre-Emptive Rights would be activated by, inter alia, a dealing in respect of any legal or equitable interest in the Shopping Centres. It contends that they would have been triggered by a change in the trustee under the prescribed interests regime and would likely be triggered by a change of Responsible Entity under the Managed Investments Act regime.
27. AMPH agreed that a change of management company under the prescribed interests regime would not have activated the Pre-Emptive Rights.

The Application

28. In its initial application Centro submitted that there was substantial uncertainty in the market regarding whether the Pre-Emptive Rights would be triggered by a Change of Responsible Entity to a person not a member of the Co-Owners Group of AMPH⁴ following a successful takeover bid, and therefore whether the bid will proceed. Centro asserted that this uncertainty constitutes unacceptable circumstances in relation to the affairs of ART.
29. Centro's application requested that the Panel refer the question of law to the Court for a decision under section 659A of the Act. However, in subsequent submissions through the proceedings, Centro proposed that the Panel did not need to refer a question of law in order to deal with the current circumstances regarding ART and Centro's bid. Centro proposed that the Panel should deal with the issue itself, directly, on the issue of whether the Pre-Emptive Rights and the current uncertainty constitute unacceptable circumstances rather than seeking a court decision on the construction of the terms of the Co-Owners' Agreements.
30. In its subsequent submissions, Centro requested the Panel to make a declaration of unacceptable circumstances in relation to:
- a) the existence of the Pre-Emptive Rights,
 - b) the lack of disclosure in respect of the Pre-Emptive Rights,
 - c) the lack of unitholder approval of the Pre-Emptive Rights,

⁴ This expression is defined in Annexure B.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

- d) the tendency of the Pre-Emptive Rights to entrench the Responsible Entity, and
 - e) the adverse effect on an efficient, competitive and informed market that the Pre-Emptive Rights are currently causing.
31. Centro's position was that:
- a) the Panel could appropriately deal with the circumstances without definitively determining whether the Pre-Emptive Rights exist or not;
 - b) if the Pre-Emptive Rights do exist their existence and effect were not clearly disclosed, and their effects constitute unacceptable circumstances; and
 - c) if they do not exist then the uncertainty surrounding their existence constitutes unacceptable circumstances.

Pre-Emptive Rights in Co-Owners' Agreements

32. AMPH and AMP Life⁵ contend that a Change of Responsible Entity of ART would activate the Pre-Emptive Rights contained in the Co-Owners' Agreements.
33. The Panel has received significant arguments from both sides as to whether a Change of Responsible Entity would or may lead to an activation of the Pre-Emptive Rights.
34. For the purposes of this decision, the Panel finds that there is material uncertainty in the market and between parties as to whether AMP Life and AMPH's contention is correct. A definitive answer to the issue is not necessary for the Panel to determine these proceedings. For the purposes of this decision the Panel has assumed that the Co-Owners' Agreements are currently in existence and the Pre-Emptive Rights would be activated by a Change of Responsible Entity. As these are the circumstances where most harm would befall ART unitholders⁶, and the Panel cannot determine in a binding manner, in a reasonable time whether or not the Pre-Emptive Rights would be activated, it is safest for it to make this assumption. If, however, the Pre-Emptive Rights would not be activated, then the Panel's orders would not prejudice any person.

Counsels' Opinions

35. Both AMPH and Centro advised that they had Senior Counsel's views on the interpretation of the Co-Owners' Agreements. Those views were essentially opposed on the question of whether change of the responsible entity of ART

⁵ See paragraphs 22 to 27 above for why the Panel says that AMP Life and AMPH "contend" this position.

⁶ 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.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

would activate the Pre-Emptive Rights if the new responsible entity was not a member of the Co-Owners Group.

36. Both those Senior Counsel's opinions were provided to the Panel in submissions. The Panel considers that the differences in the two Counsels' opinions support its view that there is a genuine dispute as to the effect of a Change of Responsible Entity.

Uncertainty

37. The arguments before the Panel range from the Senior Counsels' opinions as to whether the Pre-Emptive Rights are activated, through arguments about whether the Co-Owners' Agreements terminated at their outset or in 1999 with the transition of ART to the MIA regime. The Panel does not consider that it needs to determine these arguments to make a decision. Although, as it sets out below, even if it did not come to the primary decision that it has, the uncertainty that the different legal arguments engender would be enough for the Panel to consider that the efficient, competitive and informed market for control of ART units has been materially impaired and unacceptable circumstances exist.
38. The Panel does not accept AMPH's submissions that the Panel cannot or should not seek to determine these proceedings until the uncertainty has been resolved by referral to a court. That would cause additional delay, in proceedings which have already extended for a long period, and it may well not give the certainty which AMPH said would be a pre-requisite for a court referral being appropriate. In addition, it is not the case that the Panel needs to have the legal issues determined prior to dealing with these proceedings. Finally, if the Court did give a binding decision that a Change of Responsible Entity would activate the Pre-Emptive Rights, the Panel would still be faced with the same issue as it currently faces i.e. whether that would constitute unacceptable circumstances, only some time later.

Disclosure as a Remedy

39. 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 to ensure that:
- a) AMPH fully disclose to ART unitholders and to the market the terms of the Co-Owners' Agreements;
 - b) AMPH and Centro fully disclose their different contentions as to the operation and existence of the Co-Owners' Agreements and Pre-Emptive Rights; and
 - c) Centro disclose, in light of that information, whether it intends to seek to rely upon any relevant bid condition.
40. 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

Takeovers Panel

Reasons for Decision – [AMP Shopping Centre Trust 01]

activated by a Change of Responsible Entity. AMP Life asserted 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 the contracting parties (let alone the present situation where the "dispute" is itself hypothetical).*"

41. AMP Life, for its part, declined to disclose to the Panel, ART unitholders or the market, whether or not it believes that a Change of Responsible Entity would or may activate the Pre-Emptive Rights and whether or not it would seek to exercise the Pre-Emptive Rights in the event of a Change of Responsible Entity. AMP Life asserted that this is because it can only determine the interests of its policyholders on real rather than hypothetical circumstances.
42. Any resolution of these proceedings based solely on disclosure in the manner proposed by AMP Life in paragraph 39 above, would fail to achieve its purpose if one of the key facts i.e. whether the Co-Owners would exercise any Pre-Emptive Rights, was denied to Centro, ART unitholders and the market. That however, assumes that the resolution proposed by AMP Life (ie disclosure) could remove the other causes of unacceptable circumstances, which it cannot, as explained in paragraph 43 below.
43. Disclosure is an inadequate remedy, and cannot be made an adequate remedy, because of the potential effect on those ART unitholders who would prefer to stay as unitholders of ART. If Centro proceeds with its bid, acquires more than 50% of the units in ART, replaces AMPH as Responsible Entity of ART, and AMP Life or another Co-Owner exercise their Pre-Emptive Rights, the remaining ART unitholders would have their investment changed from a valuable, diversified, shopping centre fund to essentially a cash box, when they had not been informed prior to their investment of this possibility and had not consented to such Pre-Emptive Rights activation being possible. In addition, any ART unitholders who accepted the offer would receive Centro units and the value and composition of Centro's assets would be materially changed, in similar ways to those of ART, if the Pre-Emptive Rights were exercised.

Past Disclosure

44. The Panel considers that there has not been adequate disclosure to ART unitholders or to the market of the operation of the Pre-Emptive Rights in the event of a Change of Responsible Entity as AMPH and AMP Life contend.
45. AMPH initially advised that it was not aware until 24 March 2003, after the Centro bid was announced, of the effect of the Pre-Emptive Rights on a takeover bid for ART. AMPH claimed that it only became aware of this effect when it received Senior Counsel's opinion and that it could not reasonably be expected to have been aware of that information at an earlier date, given the complexity of the legal analysis which is involved. However, AMPH subsequently advised the Panel (after reviewing its earlier files on the issues) of documents held on its files which indicated to the Panel that persons within AMPH had earlier turned their minds to the same, or very similar, issues in

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

relation to a Change of Responsible Entity in ART, as those raised by the Centro bid. The Panel infers that AMP Life had this information given that AMPH is its investment manager.

46. Elements of the Pre-Emptive Rights (i.e. concerning sale of interests in the Shopping Centres) were disclosed in the Prospectus. See Annexure A for an extract from the Material Contracts section of the Prospectus (pages 213 and 214), and Annexure B for an extract of relevant provisions from one of the Co-Owners' Agreements. The extract from the Prospectus and the Co-Owners' Agreement is for the Pre-Emptive Rights in relation to Warringah Mall. The terms are repeated essentially identically in the Prospectus and the other Co-Owners' Agreements for the five relevant Shopping Centres.
47. However, the Prospectus did not clearly disclose AMPH's contention that under the previous prescribed interests regime a mere change of trustee of ART may have activated the Pre-Emptive Rights in the Co-Owners' Agreements i.e. that a transaction other than a voluntary sale might activate the Pre-Emptive Rights. Had that contention been disclosed, it may have been arguable that ART unitholders and the market had been put on notice that a Change of Responsible Entity would activate the Pre-Emptive Rights.
48. The Panel considers it highly unlikely that prospective purchasers of ART units would reasonably have understood from reading the Prospectus that a change of trustee under the prescribed interest regime would have activated the Pre-Emptive Rights. The Panel considers that they 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 by a mere 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).
49. There have been 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. They include:
 - (a) the original Prospectus, where, if AMPH (or its predecessor) intended that a change of trustee would activate the Pre-Emptive Rights, it should have disclosed that in the prospectus;
 - (b) 12 April 1999 when ART offered its unitholders the opportunity to vote on whether unitholders wanted self-custody by AMPH, a related party custodian or an independent custodian when ART moved from the prescribed interests regime to the MIA regime. It would have been appropriate for AMPH to have conducted a thorough review of the effects of the transition, especially in relation to the Pre-Emptive Rights and disclosed to ART unitholders what the various consequences of those

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

alternatives might have been. It may also have been appropriate for AMPH to seek unitholder consent to those specific effects, or to have proposed alternative arrangements to avoid the entrenching effect of the Co-Owners' Agreements under the MIA regime. Whatever AMPH's conclusion about the impact of appointing an external custodian, this analysis would have revealed the issue whether a Change of Responsible Entity would have activated the Pre-Emptive Rights⁷;

- (c) June 1999, when AMPH received advice concerning the transfer of ownership of the ART assets from Perpetual to AMPH⁸. Although this decision did not relate directly to a change of Responsible Entity or to a takeover, it should have caused AMPH and other members of the AMP Group, to consider actively the effect of the transition from the prescribed interests regime to the MIA regime and the move to a self-custodial Responsible Entity. AMPH may have been well advised to disclose to the market and ART unitholders the possible lapse of the Co-Owners' Agreements and its intention to reinstate them;
- (d) 19 August 1999 when two Deeds of Confirmation of Co-Owners' Agreements were executed in relation to Macquarie Shopping Centre and Garden City Booragoon, to remedy the lapse mentioned in paragraph (c) above;
- (e) 17 April 2000 when ART and AMP Life as Co-Owners of Knox City⁹, entered into a deed of variation amending the definition of the Knox City Co-Owner's Group in the Knox City Co-Owners' Agreement to include any replacement trustee of ART and the responsible entity or custodian of any investment management scheme or registered scheme accordingly. This change to the Co-Owners' Agreement meant that a change of Responsible Entity would no longer activate the Pre-Emptive Rights in that agreement. Accordingly on 17 April 2000 AMPH as Responsible Entity of ART and on behalf of AMP Life turned its mind to the relevant issue of Pre-Emptive Rights in a trust for which AMPH was Responsible Entity and a change of Responsible Entity in ART;
- (f) 17 April 2002, in relation to Karrinyup Trust¹⁰, when ART became party to an Implementation Deed to replace PPS Nominees Pty Limited as a unitholder and party. AMP Life submitted that the relevant deed contains

⁷ If an independent custodian trustee were appointed, the transfer of scheme property to a new responsible entity would not need to be perfected by a registrable transfer of the legal title, an event to which clause 9.1 of Annexure B might apply, if it had not already been triggered.

⁸ The evidence appears to suggest strongly that in 1999 AMPH and AMP Life believed that the Co-Owners' Agreements may have terminated. AMP Life advised the Panel that any such belief, if it existed then, was wrong and that the Co-Owners' Agreements have continued operatively from the date entered into through to any subsequent affirmation or superseding agreement.

⁹ Knox City is another property in which ART is a Co-Owner, under a Co-Owners' Agreement.

¹⁰ Karrinyup is another property in which ART is a Co-Owner, under a Co-Owners' Agreement.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

an exception to the pre-emptive rights in the case of ART (and indeed AMPH as responsible entity of the AMP Diversified Property Trust) where the transferor is a replacement trustee. This would suggest that AMPH turned its mind again to the issue of a change of responsible entity of ART and its effect on co-owners' agreements;

- (g) February 2003 when Co-Owners' Agreements were re-executed for Macquarie Centre, Pacific Fair and Garden City (Mt Gravatt) in essentially the same terms as the 1997 Co-Owners' Agreements despite the regulatory regime having undergone very significant changes from the prescribed interests regime to the MIA regime. It may have been prudent to do a thorough review of the documents to ensure that the agreements still were appropriate under the new regime and whether changes in the regulatory regime made re-execution in the same form appropriate. Disclosure of the re-execution, and publication of the contracts at that time may also have been prudent; and
 - (h) on another 3 occasions (being 24 August 2001, 17 September 2002 and 15 January 2003) AMPH (the Responsible Entity of ART, as well as the investment manager for AMP Life's interests in the ART, and other, shopping centres) received advice that that the replacement of the Responsible Entity ART might activate the Pre-Emptive Rights.
50. ART unitholders and the market were not told of any of these events, or their significance to the Co-Owners' Agreements and Pre-Emptive Rights in relation to ART.
51. AMPH maintains that it advised the market and ART unitholders as soon as it became aware of the potential for the Pre-Emptive Rights to have the effect that it now contends on a Change of Responsible Entity i.e. 24 March 2003. Based on the facts above we believe there were a number of occasions when AMPH should have disclosed the effect of the Pre-Emptive Rights and a Change of Responsible Entity and therefore been able to provide clarity for the ART unitholders and any offeror.

Significance of the Assets

52. The assets to which the Co-Owners' Agreements relate (and therefore the Pre-Emptive Rights) are five super regional shopping centres. They are generally accepted by all of the parties to be effectively irreplaceable and uniquely valuable. As such, they constitute, collectively, the major part of the value and attractiveness of ART. 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.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Market Participants' Knowledge

53. Centro and Westfield Management Limited (**Westfield**) are both experienced property investors. They have each recently spent over \$200 million acquiring units in ART.
54. Centro's evidence to the Panel was that it did not know, after diligent enquiries prior to acquiring its current stakes in ART in March 2003, that the Pre-Emptive Rights in the Co-Owners' Agreements might be activated by a change of trustee under the prescribed interests regime, or by a Change Of Responsible Entity under the MIA regime. Its evidence is that it became aware of the possibility when AMPH made its announcement to ASX on 26 March 2003.
55. Westfield's evidence was that prior to making its substantial acquisitions, it reviewed the Prospectus and did not understand that the Pre-Emptive Rights would be activated upon a Change of Responsible Entity. Westfield proceeded to make its investments in ART on the basis of this review and analysis.
56. Westfield's evidence was that it was advised by representatives of AMPH¹¹ on 24 March *"words to the effect that AMP was in a strong position, because AMP Life had a "right" to buy back ART properties under pre-emptive rights if "Centro obtained control of ART", and that the details of the pre-emptive rights were disclosed in the 1997 ART prospectus."*
57. Westfield's evidence was that after that meeting it again reviewed the Prospectus and did not understand that the Pre-Emptive Rights would be activated upon a Change of Responsible Entity. Westfield proceeded to make further investments in ART on the basis of this review and analysis.
58. The Panel takes this as supportive evidence that the activation of the Pre-Emptive Rights contended by AMPH and AMP Life had not been adequately or effectively disclosed to ART unitholders or the market.

Unacceptable Circumstances - Disclosure

59. The Panel finds 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 for the purposes of the current takeover. 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.
60. 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 for these purposes.

¹¹ AMPH asserts that the persons at the meeting were representatives of AMP Limited.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Unacceptable Circumstances - Consent

61. Given 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, they cannot have approved it or consented to it. The change in 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, was very significant to the control or potential control of ART and the acquisition or proposed acquisition by a person of a substantial interest in ART. Given this background, to exercise or hold out the possibility of exercising the Pre-Emptive Rights without having obtained unitholders' consent would constitute unacceptable circumstances.

Unacceptable circumstances - Uncertainty

62. The Panel considers 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.
63. The Panel considers that such uncertainty will exist regardless of whether a Change of Responsible Entity in such circumstances would or would not activate the Pre-Emptive Rights¹². On that basis, it is not necessary for the 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.
64. If the Pre-Emptive Rights would not be activated, but that fact had not been determined with finality by a court, the existence of the uncertainty (initiated for Centro, rival bidders, the market and ART unitholders by the announcement of AMPH on 26 March 2003):
- a) makes it impossible for unitholders to assess the value of their units; and
 - b) the existence of the uncertainty threatens the prospects of the current takeover bid for ART, or any other takeover offer not supported by the Co-Owners.

Either of these circumstances means that the competitive, efficient and informed market for units in ART has been impaired.

65. The Panel considers that if a Change of Responsible Entity would activate the Pre-Emptive Rights then that information has not been unambiguously disclosed to the market and the unitholders of ART, and the unitholders of ART

¹² Unless a conclusive determination of the issue could be given. Which, for the reasons set out below, is unlikely.

Takeovers Panel

Reasons for Decision – [AMP Shopping Centre Trust 01]

have not approved that aspect of the Pre-Emptive Rights. This non-disclosure and non-approval would impair an efficient, competitive and informed market for units in ART.

Unacceptable circumstances - Entrenching¹³

66. The Panel considers that there is a principle of “non-entrenchment” in the Managed Investment Scheme provisions of the Act and in the purposes of Chapter 6 of the Act and that it should apply that principle in its consideration of this application. Its view that the Act stands for a non-entrenchment principle is supported by the obligations imposed on a responsible entity to prefer the interests of interest holders in a managed investment scheme if the interests of those holders conflict with the responsible entity's interests. Entrenchment would appear to run directly counter to this obligation (unless it had been given informed consent from the unitholders).
67. AMP Life has submitted that section 601NA¹⁴ of the Act is cogent evidence of the fact that Chapter 5C covered the field in terms of provisions designed to protect against any entrenching of the control of a managed investment scheme. The Panel does not accept this contention.
68. It appears clear to the Panel that the introduction of CLERP Act in 2000¹⁵, which brought takeovers of listed managed investment schemes under Chapter 6 of the Act, was intended to expose the responsible entity of listed managed investment schemes to similar scrutiny and discipline by an efficient, competitive and informed market as managers of public companies. To impose the sort of commercial burden on unitholders, as the exercise of the Pre-Emptive Rights would impose on ART unitholders, would frustrate the express purpose of bringing listed managed investment schemes under Chapter 6 of the Act. A possible exception to this legislative policy would be where the unitholders had given their informed consent to such entrenchment.
69. Various extrinsic materials provide evidence that entrenchment was intended to be avoided/prevented/reduced by the MIA and Chapter 6 of the Act. For example:

“...the countervailing consideration is that managers should not be unduly entrenched by the law. To do so would remove competitive pressures from the managed investment industry.”¹⁶

“Not all collective investment schemes are intended to continue indefinitely. The constitution of a scheme may specify events or states of affairs whose occurrence will

¹³ 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.

¹⁴ Section 601NA says that any provision in a managed investment scheme’s constitution that requires the scheme to be wound up on change of responsible entity is void.

¹⁵ Which was introduced after section 601NA.

¹⁶ Corporate Law Economic Reform Program Proposals for Reform: Paper No. 4, “Corporate Control: a better environment for productive investment”, 1997 at 48.

Takeovers Panel

Reasons for Decision – [AMP Shopping Centre Trust 01]

*cause the termination of the scheme (for example, by specifying a particular termination date). However it is not in the interests of investors for a scheme operator to seek to entrench itself through a termination provision. The Review **recommends** that any provision in the constitution that would terminate the scheme if the scheme operator is removed should be ineffective.”¹⁷*

*“The ultimate expression of dissatisfaction by investors in a collective investment scheme is to remove the scheme operator. Currently the trustee or manager of a prescribed interest scheme must cease to act if the holders of the value of 50% or more of the prescribed interests resolve at a meeting that the trustee or manager should be removed. DP 53 proposed that this right be retained. Submissions overwhelmingly supported the Review’s proposal. The Review **recommends** that investors in a collective investment scheme should be able to remove the operator by the approval of the holders of more than 50% of the value of the voting interests in the scheme.”¹⁸*

Other extrinsic materials say that bringing listed managed investment schemes under Chapter 6 of the Act was intended to expose management of listed managed investment schemes to competition and the discipline of being replaced by takeovers.

“The Bill extends the takeovers provisions to listed managed investment schemes. As a result of this the managers of these schemes will face the same competitive pressure to perform as company directors and members of these schemes will have the same rights to share in a control premium as shareholders.”¹⁹

“As the current provisions do not apply to managed investment schemes, most listed schemes include in their trust deed takeover provisions based upon those currently in the Corporations Law. The application of the takeover provisions to managed investment schemes will automatically override any inconsistent takeover rules contained in existing trust deeds without the need for further legislative amendment.”²⁰

“One issue that arises from the application of the takeover provisions to managed investment schemes is the appropriate statutory rule for the replacement of the scheme manager. The current statutory rule requires a vote by 50 per cent by value of unit holders to remove the manager (current regulation 7.12.15(10)(g)). In contrast, ASX Listing Rule 13.3 requires a listed scheme’s trust deed to allow removal of the scheme’s manager by an ordinary resolution of unit holders. Unlike the statutory rules, the listing rule approach is consistent with the rule for the removal of company directors.”²¹

The Panel is entitled to, and does, take these documents into account as explaining the legislative policy of Chapters 6 and 5C of the Act.

¹⁷ Australian Law Reform Commission, Companies and Securities Advisory Committee, Report 65, “Collective Investment: Other People’s Money” September 1993 at paragraph 8.4.

¹⁸ Ibid, at paragraph 11.17. Footnotes to extract have been removed.

¹⁹ Parliamentary Joint Committee on Corporations and Securities, “Report on the Corporate Law Economic Reform Program Bill 1998”, May 1999, at paragraph 3.7.

²⁰ Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998, at paragraph 7.53.

²¹ Ibid, at paragraph 7.54.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

70. Any entrenchment of AMPH as Responsible Entity may have been rendered less unacceptable if the effect of the Pre-Emptive Rights on a Change of Responsible Entity had been clearly and unambiguously disclosed to ART unitholders at the appropriate times. However, there is clear evidence that such disclosure has not been made.
71. The Pre-Emptive Rights, if given the operation which AMPH contends for, would entrench the Responsible Entity by imposing an untenable commercial risk on any potential bidder. A bidder would have to commit enough money to purchase control of the trust and would then be exposed to having the primary assets of the trust removed. It would constitute unacceptable circumstances for the management of a trust to deter takeover bids in this way without the consent of its unitholders.
72. The Panel considers that entrenchment offends the principle of an efficient, competitive and informed market.
73. It appears to the Panel 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.

Basis for current Decision

74. The facts of:
 - a) the material uncertainty as to whether the Pre-Emptive Rights would be activated by a Change of Responsible Entity;
 - b) the significance of the commercial consequences to Centro unitholders and remaining ART unitholders if the Pre-Emptive Rights were activated and exercised;
 - c) the lack of any more certain way of resolving the issue outside the Panel;
 - d) AMP Life rejecting being bound by any Court decision under section 659A of the Act; and
 - e) the unacceptable circumstances of the Pre-Emptive Rights if they are activated as AMP Life and AMPH contend they may be,

mean that it is appropriate for the Panel now to make this decision.

75. The Panel considers that even if it was possible to determine the proper effect of the Co-Owners' Agreements with certainty, for the reasons set out in this decision in relation to disclosure, consent and entrenching, unacceptable circumstances would still exist in relation to the affairs of ART.

Reasons - Disclosure and Consent

76. The Panel considers that it would not be against the public interest to make the proposed declarations of unacceptable circumstances. Unitholders and the

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

market were not told of the other issues relating to Pre-Emptive Rights in the Co-Owners' Agreements at any of the opportunities set out in paragraph 49 above, and unitholders did not consent to the relevant operation of the Pre-Emptive Rights.

Reasons - Uncertainty

77. The Panel considers that it would not be against the public interest to make such declarations because it appears from the evidence before the Panel that the uncertainty as to whether or not the Pre-Emptive Rights will be activated by a Change of Responsible Entity prevents an efficient, competitive and informed market in ART units.

Whether Centro was on Notice - and whether that affects the Panel's decision

Centro and Co-Owners' Agreements or Pre-Emptive Rights

78. The Panel considered whether there was a basis for suggesting that Centro had been placed on notice, by its experience as a property manager or by any of AMPH's disclosures, of the potential for the contention that AMPH holds, that a Change of Responsible Entity would activate the Pre-Emptive Rights. The evidence is that it would be unreasonable to have expected Centro to have divined the operation that AMP Life and AMPH now contend for the Pre-Emptive Rights. AMPH advises that it was not aware of this effect of the Pre-Emptive Rights until Centro's bid was announced. Further, Westfield, as an experienced property manager and owner in Australia, came to the same conclusion as Centro in relation to the Pre-Emptive Rights having reviewed all publicly available information on ART and the Pre-Emptive Rights, and despite having AMPH's view on the operation of the Pre-Emptive Rights drawn to its attention.
79. Centro, not having had access to the Co-Owners' Agreements (they not being accessible through ASX and no longer being available for inspection at AMPH's offices) took appropriate precautions by making its offer subject to a defeating condition (in clause 12.10(d) of its bidder's statement), that no other pre-emptive rights existed in relation to ART that had not been disclosed to ASX.

Centro's Pre-Emptive Rights Condition

80. AMP Life submitted that the fact of Centro's defeating condition that relates to the existence of, or right to exercise, various rights relating to ART or its assets, is evidence that Centro was aware of the Pre-Emptive Rights and that Centro should reasonably have understood that the Pre-Emptive Rights have the effect that AMP Life and AMPH contend. AMP Life also submitted that Centro was aware of the Pre-Emptive Rights as Centro ascribed a value to them in its bidder's statement.
81. Centro responded that it did not contend that it was unaware of the Pre-Emptive Rights; only that it was unaware of the contention that the Pre-Emptive Rights could be activated on a Change of Responsible Entity. Centro

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

submitted that it ascribed a value to the Pre-Emptive Rights on the basis they operate as described in the prospectus i.e. they entitle ART to restrain the sale of the relevant shopping centres out of a Co-Owner's Group, and may allow Centro to increase its ownership if any Co-Owners wanted to sell.

82. Centro asserted that the first time it became aware of the Pre-Emptive Rights having the effect contended by AMPH was on 26 March 2003. It submitted it was not aware of the contended effect at the time when it prepared its bidder's statement.
83. The Panel accepted Centro's evidence on this issue and considers that its actions were reasonable in the circumstances.

Effect on the Managed Investment Industry

84. The Panel considers that its decision is unlikely to have any material effect on the managed investments industry. It is limited 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 prescribed interests regime, or now under the MIA regime, change of the Responsible Entity;
 - c) provisions which have a tendency to entrench the Responsible Entity of a trust and to discourage competition for control of that trust;
 - 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; and
 - e) the exercise of the Pre-Emptive Rights in the one situation now relevant in which their effect was not disclosed.
85. The Panel does not accept the assertions that its decision in these circumstances would have industry-wide, chilling effects on change of control provisions in financing agreements (for example entered into between a bank and a property trust). The specific circumstances and terms of the Pre-Emptive Rights can be distinguished from those other provisions. In any event, the Panel considers that such financing pre-emptive rights would likely not be affected, because a bidder bidding for a listed managed investment scheme could, when raising funds to bid for the scheme, raise sufficient cash to pay out the financier with minimal net effect on the bid. Such financing pre-emptive rights are not comparable to the Pre-Emptive Rights within the Co-Owners' Agreements because cash is not effectively irreplaceable, unlike the super regional shopping centres which are the subject of the Co-Owners' Agreements.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

86. AMP Life submitted that any order voiding a provision of the Co-Owners' Agreements, or directing AMP Life and other Co-Owners not to exercise their Pre-Emptive Rights in certain circumstances, would have "seismic" effects on securities and property markets in Australia. The Panel did not accept this. The market has been well aware, for the life of the current Takeovers Panel regime, that the Panel has the power to make a wide range of orders. They include any orders it considers necessary to protect the rights and interests of persons affected by unacceptable circumstances or to ensure that a bid proceeds as if the unacceptable circumstances had not occurred. The Panel has made remedial orders in the past without causing material prejudice to securities or takeovers markets.

Undertakings

87. The Panel offered AMP Life and AMPH the alternative of providing undertakings to the effect of the orders set out below. If AMP Life and AMPH had agreed to give such undertakings, it would not have been necessary for the Panel to make a declaration of unacceptable circumstances or the orders that were made. AMP Life and AMPH were not willing to give the undertakings that were requested.

Orders

88. AMP Life and AMPH declined to give the undertakings that the Panel requested in relation to non-exercise of the Pre-Emptive Rights. Therefore the Panel ordered AMPH (as Responsible Entity of ART and AMP Wholesale Shopping Trust 2 (**AMP Wholesale 2**)), AMP Life and the other parties to the relevant Co-Owners' Agreements, not to exercise, nor purport to exercise, any Pre-Emptive Rights in relation to shopping centres in which ART owns interests, solely because of a Change of Responsible Entity.
89. In ordering this, the Panel did not find 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.
90. In ordering this, the Panel considered that the interests of the Co-Owners would not be unfairly prejudiced, for the reasons set out in paragraphs 92 to 94 below. In essence, any Pre-Emptive Right, if it existed, in such circumstances would be an unintended gain to the Co-Owners Group. It would not have been properly disclosed, it would not have been properly approved by ART unitholders, and it would tend to entrench the Responsible Entity of ART and deter takeover offers for ART, against the intention of Chapter 6 and the Managed Investments regime of the Act.
91. The Panel considers that it may properly make these orders without needing to determine whether or not the Co-Owners' Agreements currently exist, or a change of the Responsible Entity of the ART due to a takeover bid under Chapter 6 of the Act would activate the Pre-Emptive Rights.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Orders - No Unfair Prejudice

92. The Panel considers that it would not unfairly prejudice any person to make the orders it proposes because it appears from the evidence before the Panel that:
- a) the parties to these proceedings agreed that the Pre-Emptive Rights would not have been activated by a change of management company under the prescribed interests regime prior to the commencement of the MIA. Under AMPH and AMP Life's contentions, that would in effect now occur;
 - b) the parties to the Co-Owners' Agreements did not provide any evidence to the Panel that they were aware of the possibility that the Pre-Emptive Rights in the Co-Owners' Agreements might be activated merely by a change of ART's trustee at the time of entering the 1997 Co-Owners' Agreements as evidenced by AMPH's submissions cited above;
 - c) the parties provided the Panel with no evidence of, or any rational commercial basis for, any intention of the Co-Owners that the Pre-Emptive Rights in the Co-Owners' Agreements, when they were entered into, would be activated merely because of a change of trustee of ART under the prescribed interests regime then in force. The Panel infers that this was likely to be an issue of negligible value under the prescribed interests regime;
 - d) by reasonable analogy, had the parties been able to turn their minds to such circumstances, there appears no rational commercial basis for considering that the parties intended the Pre-Emptive Rights to be activated because of a Change of Responsible Entity and the Responsible Entity performing the role previously carried out by the separate trustee. The Panel is supported in this view by the submissions of AMPH that AMPH did not in fact become aware of information as to the likely application of the Pre-Emptive Rights if a party adopted the course now adopted by Centro, until it obtained Senior Counsel's opinion when Centro in fact adopted that course. AMPH also submitted that it could not reasonably be expected to have been aware of that information at an earlier date, given the complexity of the legal analysis which is involved. However, AMPH subsequently advised the Panel (after reviewing its earlier files on the issues) of documents held on its files which indicated to the Panel that persons within AMPH had earlier turned their minds to the same, or very similar, issues in relation to a Change of Responsible Entity in ART, as those raised by the Centro bid. We infer that AMP Life had this information given that AMPH is its investment manager;
 - e) there appears to be no unfair prejudice to any person by ordering that any Pre-Emptive Rights not be exercised in the event of CPT replacing AMPH as Responsible Entity for ART following a takeover bid under Chapter 6 of the Act because:

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

- i. the limited commercial significance of the role of trustee/custodian under the prescribed interests regime (and the similarly limited custodial role under the MIA regime);
 - ii. replacement of the management company under the prescribed interest scheme would not have activated the Pre-Emptive Rights, so no party to the Co-Owners' Agreements would have been able to exercise Pre-Emptive Rights because of a change in the management company, and now by analogy, because of a change in the person who now conducts the management company's role; and
 - iii. the change would have been as a result of a decision of the ART unitholders;
- f) AMP Life submitted that in relation to two of the properties which ART co-owns, ART and the other co-owners consented to the Pre-Emptive Rights not being activated by a Change of Responsible Entity. The examples were in a deed of variation in the case of Knox City in April 2000, and in an implementation deed in April 2002 in relation to the Karrinyup Trust. Neither AMP Life nor AMPH suggest that these deeds harmed the interests of ART unitholders or AMP Life policy holders²²;
- g) the orders affect only a very small portion of the Pre-Emptive Rights compared to the commercial and other value of the aspects of the Pre-Emptive Rights that would be untouched by the Panel's order (i.e. all the parts which were clearly disclosed in the Prospectus);
- h) AMP Life was, in effect, a promoter of the Prospectus, as vendor of assets to the trust. In that capacity it is responsible for the completeness and accuracy of disclosure in the Prospectus²³; and
- i) any activation of the Pre-Emptive Rights on a Change of Responsible Entity would be a windfall benefit to the Co-Owners, to the detriment of ART unitholders, that the Co-Owners neither intended nor knew about, about which the ART unitholders had not been informed and to which they had not consented. To deprive the Co-Owners of the windfall and return it to the ART unitholders would not be unfair.
93. The Panel is further assured in relation to this point because it received no substantive submissions that replacement of AMPH by CPT would prejudice ART, AMP Wholesale 2, AMP Life or the new Co-Owners of the Macquarie and

²² AMP Life has pointed out that the Knox City transaction was part of a wider commercial transaction and that benefits given up in relation to Knox City may have been recouped in relation to other properties.

²³ However, AMP Life had no ongoing disclosure obligations in relation to ART.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Broadbeach shopping centres. The trustees of all of these trusts are either AMPH or wholly-owned subsidiaries of AMP Life, which have been aware for some weeks of these proceedings and what they may entail.

94. To the best of the Panel's knowledge:
- a) all of the Co-Owners in the 5 Shopping Centres are trustees of trusts which are managed by wholly owned entities within the AMP Group. Centro asserted this as a fact in their submissions and invited AMP Life and AMPH to confirm whether there are any other Co-Owners. Neither AMP Life or AMPH advised that there are any non AMP subsidiary Co-Owners;
 - b) AMP Ltd was put on notice on 10 April 2003 of the proceedings and the persons involved in the proceedings;
 - c) none of AMP Ltd, AMPH, AMP Life or Centro has advised the Panel in these proceedings as to any person with an interest in these proceedings, the Panel's proposed decision or proposed orders who hasn't been advised of the proceedings or invited to become a party. AMP Ltd had this issue specifically drawn to its attention by the Panel's Brief of 11 April, the Panel's process letter of 11 April, and the Panel's emails to it of 16 April. Both AMP Life and AMPH received much additional correspondence concerning the issue of who was and was not a party to these proceedings; and
 - d) AMPH has advised that it has considered, and decided it has not been necessary for AMPH to make, submissions to the Panel as responsible entity for at least one of the Co-Owners, AMP Wholesale 2.

Issues for other Managed Investment Scheme and Responsible Entities

95. The Panel considers that all listed managed investment schemes and their responsible entities should urgently review their constitutions and other material contracts to assess whether they are parties to contracts with rights similar to the Pre-Emptive Rights in the Co-Owners' Agreements. If they find rights which have similar effects to those that AMP Life and AMPH contend for the ART Pre-Emptive Rights, they will have been put squarely on notice by this decision that the ongoing existence of such pre-emptive rights, in the absence of clear and full disclosure and informed consent by unitholders, risks the Panel declaring the circumstances to be unacceptable circumstances in the event it received an application in relation to those rights.

Request for the Panel to refer a question of law to the Court

96. The Panel considers that the decision and orders above obviate the need to refer the issue to the Court. The Panel considers that resolution by the route outlined above would be materially more timely and efficient, while still being fair and

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

reasonable, than referring the question to court (and potentially being faced with the same issue for determination after receiving the Court's opinion). On that basis, the Panel decided not to refer the requested question of law to the Court.

97. The Panel wishes to note the limited scope of this decision. The Panel refers to the factors listed above in paragraphs 84-86 and notes that the decision is unlikely to apply to other change of control rights in joint venture type arrangements in the absence of other unacceptable circumstances.
98. AMP Life initially decided not become a party to the Panel proceedings so that it should not bound by a Panel decision. AMP Life has since declined to undertake to be bound by any advice to the Panel by a court on a question of law referred to the Court under section 659A of the Act. It also put forward the possibility of it "*advocating and successfully establishing a contrary view to that decided by the Court after the close of the takeover bid.*"
99. Unless AMP Life and the other Co-Owners would be bound by the Court's decision, a decision by a Court of a question of law would have materially reduced certainty and utility for these proceedings.

Review of this Decision

100. This decision may be subject to review by a Review Panel under section 657EA of the Act.
101. A decision by a Review Panel may be subject to judicial review under one or more of:
 - a) The Administrative Decisions (Judicial Review) Act;
 - b) Section 39B of the Judiciary Act; and
 - c) Section 75 of the Constitution.

The Panel considers it unlikely that a court would consider commencing proceedings for review of a Panel decision under any of the above provisions unless a person had exhausted the avenues of specific internal review i.e. section 657EA of the Act. However, the Panel's view is not determinative of this.

102. Accordingly, while this decision may be determinative of the matter if it is not reviewed, it may not be so if a Review Panel or a court comes to a different decision. However, without the Panel making this decision, unitholders will be no further advanced. It is no basis for a Panel not to make a decision which it considers will reduce unacceptable uncertainty for the market and unitholders, merely because there remains the possibility of review of its decision. Indeed, the Panel is firmly convinced that making this decision, and progressing through to any final determination if this decision is reviewed, will bring greatest certainty to ART unitholders more quickly than any other action.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

103. In its announcement of this decision on 13 May 2003 the Panel drew attention to the avenues of review that are open to persons affected by its decision.

Constitutional Issues

104. AMP Life raised issues relating to whether the Panel has the power under the Constitution of the Commonwealth of Australia to make the orders it proposes. The Panel considered it should proceed on the basis that Part 6.10 of the Act is constitutionally valid. If AMP Life wished to challenge the Panel's powers, the Panel advised it that it was free to do so and should do so in the appropriate forum.

Procedural Fairness

105. AMP Life, and to a lesser extent AMPH, alleged deficiencies in the procedural fairness afforded it by the Panel. The Panel rejects any suggestion that it did not afford procedural fairness to all parties. It has consistently looked to provide procedural fairness to all parties before it, within the tight timeframes given it in its legislation. Indeed, the Panel considers that AMP Life had better treatment than its actions warranted, and the Panel went further than strict procedural fairness to AMP Life would have required. AMP Life is free to take its concerns about procedural fairness in these proceedings to any appropriate forum. A description of the circumstances surrounding the alleged procedural fairness is set out below.

Process

106. The Panel contacted all persons whose interests appeared to be affected by the application on 11 April 2003 in a brief, as required by Regulation 20 of the ASIC Regulations. AMP Life received a copy of the brief. It advised the Panel that it did not wish to become a party to the proceedings but sought to make submissions to the Panel. The Panel accepted AMP Life's request and allowed it to make submissions. The Panel advised AMP Life of the consequences under the Panel's rules and the ASIC Regulations of its choice not to become a party to the proceedings: i.e. it would not receive the submissions of the persons who did become parties, nor their rebuttal submissions, nor would it have the opportunity to make rebuttal submissions of its own.
107. The Panel, through the course of proceedings gave AMP Life two further invitations to become a party. AMP Life also refused these two further invitations, even though it acknowledged during the proceedings that its rights might be adversely affected if it did not become a party in circumstances where the Panel might refer the issue before it to a Court or make some order about the Co-Owners' Agreements.
108. On Monday 28 April 2003, the Panel provided parties, and AMP Life, with a draft decision which it then proposed to make, and offered them the opportunity to make submissions, under section 657A(4) of the Act by the end of Tuesday 29 April 2003.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

109. On Wednesday 30 April 2003, AMP Life wrote to the Panel saying that the proceedings had taken a direction it had not foreseen (and which it said it could not have foreseen), that it had been denied access to documents which were relevant to it, and that the Panel had denied it procedural fairness.
110. AMP Life sought the Panel's consent to become a party to the proceedings, to receive copies of all documents provided to the Panel and to the parties in the proceedings, an opportunity to read and consider them and an opportunity to make submissions to the Panel on its draft decision and proposed orders in light of the information in the documents it was seeking.
111. The Panel consented to AMP Life becoming a party to the proceedings and provided the relevant documents to AMP Life. Necessarily, that has meant that the Panel had to defer making its final decision in these proceedings. Initially AMP Life sought that it become a party solely to make comments on the proposed orders, however the Panel considered that such a course merely exposed the process to later delay and review if AMP Life was still dissatisfied with the outcome.
112. The Panel was very mindful of the cost and uncertainty to unitholders in ART and Centro that the added delay, essentially from 1 May to 13 May, would cause. However, the Panel considered that consenting was more likely to give greater certainty to unitholders earlier than the alternatives available to it.

Review

113. The Panel also consented to AMP Life becoming a party because that would allow AMP Life the right to seek review of the Panel's decision at first instance (which it did not have as a person who had chosen not to become a party to the proceedings). The Panel also considered that providing the information to AMP Life, and giving AMP Life an opportunity to make submissions, was most likely to assemble a complete and fully developed decision if any of the parties chose to seek review of the decision to a Review Panel. Again, the Panel considered that this was the shortest way to certainty for unitholders of ART and Centro.

Fairness

114. The Panel is very concerned to ensure that it conducts timely and efficient proceedings, for the benefit of investors, the market and parties, but also that it conducts them fairly and is seen to be fair. On that basis, the Panel considered it may not have appeared to be fair in these circumstances to deny AMP Life the opportunity to make submissions in these proceedings or to seek review of this decision, despite AMP Life's repeated choices to stay out of the process. The Panel notes that this is the first time that a person had refused to become a party and then sought to become one at the very end of proceedings. The Panel's consent in these circumstances should not be seen as any precedent for future proceedings.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

AMP Life Policy Holders

115. AMP Life made much in its submissions about the uniqueness of the interests of its policy holders, their interests, and its obligations to them. The Panel has taken into consideration throughout these proceedings the obligations AMP Life has to its policy holders. It has also taken the interests of AMP Life policy holders into consideration, although it does not accept AMP Life's apparent contention that prejudice to the interests of AMP Life policy holders should be of greater concern than prejudice to the interests of ART unitholders. AMP Life submitted that the prejudice flowing from the Panel's order was more unfair, because part of that prejudice would fall on holders of policies in its statutory fund, whose interests it is bound to protect. However, while it acknowledges the duties AMP Life owes to its policy holders, the obligations that AMPH has to the unitholders of ART, while not identical to those owed by AMP Life (coming under different Acts) are as persuasive and stringent. Neither body of investors has contributed to the unacceptable circumstances regarding the affairs of ART, and neither body of investors has previously been informed about the newly disclosed effects of the Pre-Emptive Rights.
116. The policyholders' rights against third parties can rise no higher than AMP Life's rights against those parties. It is incorrect to suggest that AMP Life should receive more favourable consideration because it is investing on behalf of policyholders, as well as shareholders and rather than ART unitholders. Such an argument mistakes obligations that AMP Life owes to its policyholders for rights it can assert against third parties.

Costs

117. The Panel considered that parties to the proceedings have likely incurred additional costs because of the late time in the proceedings that AMP Life sought to become a party, despite the Panel's repeated invitations for it to become a party. On that basis, the Panel ordered that each party pay their own costs incurred up until 30 April 2003, and that AMP Life pay all parties' costs incurred after that date until the date of the Panel's instrument, in the manner set out in the Panel's Guidance Note on Costs.

Centro's Conditions

118. If it is settled at some point in the future that the Pre-Emptive Rights will not be exercised if Centro replaces AMPH as responsible entity of ART, the Panel expects Centro to waive any conditions of its bid which were triggered by the existence or disclosure of the Co-Owners' Agreements.

Leslie Taylor

Sitting President

AMP Shopping Centre Trust

12 June 2003

Takeovers Panel
Reasons for Decision - [AMP Shopping Centre Trust 01]

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Annexure A

MATERIAL CONTRACTS-AMP SHOPPING CENTRE TRUST

(Extract from the Prospectus for ART, from the Material Contracts section (Section 12) pages 213 and 214)

TERMS OF THE CO-OWNERS AGREEMENT FOR WARRINGAH MALL BROOKVALE, NEW SOUTH WALES

On completion of the contract for sale Warringah and the trustee must enter into a co-owners agreement which sets out the terms and conditions of their co-ownership of the property. Under the agreement:

- a co-ownership committee is established comprising one member (and an alternate) appointed by each co-owner which holds an interest of at least 25% in the property. The co-ownership committee must meet at least four times during each calendar year to consider and make determinations on substantive issues with respect to the management of the property, including all proposals and recommendations made by the asset manager (initially being the trust manager) in connection with the development and management of the property;
- each member of the co-ownership committee is entitled to vote on any resolution considered and a vote is weighted in accordance with that co-owner's proportionate interest in the property;
- a valid resolution requires a 50% majority vote, except in relation to a unanimous matter, those matters being listed in the agreement which includes the business plan, any sale by the co-owners jointly of any part of the property and all matters relating to litigation in connection with the property where any single claim exceeds \$100,000;
- where a dispute arises or the co-ownership committee is unable to achieve a valid resolution the issue may be referred by a co-owner to a special committee established under the agreement. The special committee comprises one representative of each co-owner entitled to be represented on the co-ownership committee. The special committee must consider and make determinations on matters referred to them by the co-ownership committee, the asset manager or co-owners generally. A decision of the special committee must be unanimous and is binding on the parties;
- a co-owner may deal with its interest in the property where the other party is a member of that co-owners group or, in the case of AMP, where the dealing results from the demutualisation of AMP. Otherwise, co-owners have rights of first refusal and a co-owner must notify the other co-owners if it wishes to sell its interest (or part thereof) in the property, specifying the terms and conditions of the sale. During the next two months a co-owner may specify whether it wishes to acquire that interest or a portion thereof. If a co-owner does wish to acquire the interest the selling co-owner must sell the interest to that party and

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

if there are co-owners in total requesting more than 100% of the interest, the interest must be allocated in accordance with the principles set out in the agreement;

- where a co-owner defaults within the meaning of the agreement, the other co-owners may serve notice on the defaulting co-owner whereupon valuers must be appointed to determine the market value of the defaulting party's interest. A co-owner may then acquire the interest of the defaulting party at the market value so determined less costs otherwise incurred on a third party sale and if more than one co-owner wishes to acquire the interest, the interest must be allocated in accordance with the principles set out in the agreement;
- when a co-owner disposes of an interest in the property the remaining co-owners and the incoming co-owner must execute an asset management agreement (the form of which is annexed to the agreement) appointing AMP Investments as the asset and property manager and under which certain fees will be payable.

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

Annexure B

CO-OWNERS' AGREEMENTS -AMP SHOPPING CENTRE TRUST

(Extract from the 1997 Co-Owners' Agreement for Warringah Mall published on ASX on 28 March 2003)

3 November 1997

CO-OWNERS' AGREEMENT

Warringah Mall, New South Wales

Co-owner's Group means:

- (a) that Co-Owner;
- (b) a Related Corporation of that Co-Owner at the relevant time (together with that Co-Owner where the Co-Owner is a trustee);
- (c) the trustee or other person for the time being holding title to the assets of:
 - (i) a unit trust (listed or unlisted) in which that Co-Owner or a Related Corporation of the Co-Owner holds 20% or more of the units in the trust; or
 - (ii) any other trust where that Co-Owner is the beneficiary of 20% of the assets of the trust (whether divided or undivided); and
- (d) the trustee or other person for the time being holding title to the assets of any trust, fund or other entity, the trustee or manager of which is that Co-Owner or a Related Corporation of that Co-Owner.

Dealing means a transfer, sale, disposal, alienation, declaration of trust or other dealing in respect of any legal or equitable interest in the Property (excluding a Mortgage), and includes an agreement to do any of them. "**Deal**" and "**Dealt**" have corresponding meanings.

- (a) a breach of any provision of this deed or the Asset Management Agreement which that Co-Owner has failed to rectify within 10 business days after written notice of the breach has been given to it by any of the other Co-Owners specifying the breach and requesting that the same be remedied within such 10 business day period;
- (b) a Prohibited Disposal where within 10 business days after either receiving written notice of that Prohibited Disposal from any other Co-Owner or itself becoming aware of that Prohibited Disposal the Co-Owner in respect of which the Prohibited Disposal has occurred has been unable:
 - (i) to unwind the transaction causing the Prohibited Disposal; or

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

- (ii) otherwise to put itself into a position whereby a Prohibited Disposal will be taken not to have occurred;
- (c) a default under any Mortgage in relation to the Property; or
- (d) an Insolvency Event.

6. DEALING WITH INTERESTS

6.1 The parties agree that no Dealing with respect to a Co-Owner's interest in the Property may occur except:

- (a) by way of a Permitted Transfer in accordance with clause 8;
- (b) by way of a Dealing where the procedures in clause 9 have been fully complied with first;
- (c) by way of Default Buyout in accordance with clause 10; or
- (d) otherwise with the prior written consent of the other Co-Owners.

9. PRE-EMPTION RIGHTS

9.1 Where a Co-Owner wishes to Deal with the whole or any portion of it's interest in the Property other than by way of Permitted Transfer, it must immediately give notice in writing to the other Co-Owners specifying:

- (a) the Interest to be sold;
- (b) the price at which the Interest is to be sold; and
- (c) the other terms and conditions which are to apply to the sale (including a copy of the proposed contract of sale and any other ancillary agreements or side letters).

9.2 The service on a Co-Owner of a Transfer Notice constitutes an irrevocable offer to that Co-Owner for the sale of the Interest on the Disposition Prices and Terms for a period of two months from the date of receipt of the Transfer Notice.

10. DEFAULT

10.1 If a Default occurs, then at any time within 3 months of the Default occurring or, in the case of a Prohibited Disposal, within 3 months of being given notice of that Disposal in accordance with clause 6.6, any Co-Owner may give notice in writing to the Defaulting Co-Owner:

- (a) stating that it desires to exercise its rights under this clause;
- (b) nominating an independent Valuer; and

Takeovers Panel

Reasons for Decision - [AMP Shopping Centre Trust 01]

- (c) requiring the Defaulting Co-Owner within 15 business days of the giving of that notice to nominate by written notice to the Injured Co-Owner another independent Valuer.

A copy of any notice served under this clause must be given to each other Co-Owner.



**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 01]

- 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 01]

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