FEDERAL COURT OF AUSTRALIA

Australian Securities and Investment Commission v PE Capital Funds Management Limited (administrators appointed) [2022] FCA 76

File number(s):	QUD 147 of 2021
Judgment of:	**CHEESEMAN J**
Date of judgment:	9 February 2022
Catchwords:	**CORPORATIONS** – Australian Securities and Investment Commission (**ASIC**) seeks declarations against the first defendant in relation to contraventions of ss 601ED(5), 911A(1), 911C and 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) – where the first defendant is an investment manager in the business of procuring funds for the purpose of the acquisition and development of land for the potential future operation of businesses on that land – where the first defendant managed four unregistered and five registered investment schemes – where it is alleged the first defendant managed unregistered investment schemes in contravention of s 601ED(5) – where it is alleged that the first defendant operated a financial services business without an Australian Financial Services License (**AFSL**) – where it is alleged that the first defendant held out that it was relevantly authorised under an AFSL - where it is alleged that the first defendant engaged in misleading and deceptive conduct by representing that it was an authorised representative of an AFSL holder – where it is alleged that the first defendant engaged in misleading and deceptive conduct in relation to the product disclosure statements for certain registered schemes – where the defendants did not take active steps in the proceedings – where administrators appointed to the first defendant – where the second defendant is in liquidation - whether declarations ought to be made – Held: declarations made. **CORPORATIONS –** application by ASIC to wind up the first defendant under s 461(1)(k) of the *Corporations Act 2001* (Cth) and to appoint a registered liquidator under s 472(1) of the Act – where administrators appointed – where the administration is not in funds and does not expect to receive a proposal for a deed of company arrangement – where administrators do not oppose winding orders and appointment of a registered liquidator – where lack of

confidence in the conduct and management of the affairs of the company – where repeated contraventions of the *Corporations Act 2001* (Cth) in the context of the financial services business operated by the first defendant – where public interest in protection of investors in the managed investment schemes operated by the first defendant - whether it is just and equitable to make an order winding up the first defendant – Held: application successful.

CORPORATIONS – application under s 601ND(1) of the *Corporations Act 2001* (Cth) by ASIC to wind up certain registered managed investment schemes operated by the first defendant – where the second defendant, the responsible entity in respect of the registered schemes, is in liquidation – where administrators appointed to the first defendant, the manager of the schemes – where first defendant will be wound up and a liquidator appointed - whether the circumstances warrant an order being made winding up the schemes – Held: application successful.

CORPORATIONS – application by ASIC under s 601EE(2) of the *Corporations Act 2001* (Cth) to wind up managed investment schemes operated in contravention of s 601ED(5) of the Act – where administrators appointed to the first defendant who operated the schemes – where first defendant will be wound up and a liquidator appointed - whether the circumstances warrant an order being made to wind up the schemes – Held: application successful.

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth), s 12BAA, 12BAB, 12DA

Corporations Act 2001 (Cth), ss 19, 20, 319, 440D, 461, 472, 601ED, 601EE, 601ND, 601NF, 911A, 911C, 1012B, 761A, 761E, 761G, 761GA, 763A, 763B, 764A, 766A, 766C, 917A, 1101B, 1012E, 1041H, 1311, 1317E,

Federal Court of Australia Act 1976 (Cth), s 21

Corporations Regulations 2001 (Cth), reg 7.1.18(2)

Federal Court Rules 2011 (Cth), r 1.32

Federal Court (Corporations) Rules 2000 (Cth), rr 1.3, 2.4

Cases cited:

ABN Amro Bank NV v Bathurst Regional Council [2014] FCAFC 65; (2014) 224 FCR 1

Australian Securities and Investments Commission v ABC Fund Managers [2001] VSC 383; (2001) 39 ACSR 443

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (ACN 125 423 574) and Others (No 2) [2013] FCA 234; (2013) 93 ACSR 189

Australian Securities and Investment Commission v Chase

Capital Management Pty Ltd [2001] WASC 27; (2001) 36 ACSR 778

Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2) [2016] FCA 544

Australian Securities and Investments Commission v Cycclone Magnetic Engines Inc [2009] QSC 58; (2009) 71 ACSR 1

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 1644; (2018) 131 ACSR 484

Australian Securities and Investments Commission v Gognos Holdings Ltd [2017] QSC 181; (2017) 123 ACSR 110

Australian Securities and Investment Commission v Infomercial Management Group Pty Ltd [2002] VSC 262

Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd [2005] VSC 50

Australian Securities and Investments Commission v Marco (No 6) [2020] FCA 1781

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd [2014] FCA 1387; (2014) 103 ACSR 453

Australian Securities and Investment Commission v MyWealth Manager Financial Services Pty Ltd (No 3) [2020] FCA 1035

Australian Securities and Investments Commission v Online Investors Advantage Inc [2005] QSC 324; (2004) 194 FLR 449

Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561; [2002] NSWSC 310

Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; (2012) 205 FCR 120

Australian Securities and Investments Commission v TAL Life Limited (No 2) [2021] FCA 193

Australian Securities and Investment Commission v Young [2003] QSC 29; (2003) 173 FLR 441

Chugg v Pacific Dunlop Ltd [1990] HCA 41; (1990) 170 CLR 249*Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247; (2004) 139 FCR 215

Federal Commissioner of Taxation v Murry [1998] HCA 42; (1998) 193 CLR 605

Gognos Holdings Ltd v Australian Securities and Investments Commission [2018] QCA 181; (2018) 129

	ACSR 363 *In the matter of Vault Market Pty Ltd* [2014] NSWSC 1641 *Ibrahim v Pham* [2005] NSWSC 246 *Re FEA Plantations Ltd (Subject to Deed of Company Arrangement) (Receivers Appointed)* [2013] FCA 1331 *Re IPO Wealth Holdings No 2 Pty Ltd* [2020] VSC 733 *Re Rivercity Motorways Management (In Liq) (No 3)* [2016] FCA 1541 *Seven Network Ltd v News Ltd* [2009] FCAFC 160 *Spriggs v Federal Commissioner of Taxation* [2009] HCA 22; (2009) 239 CLR 1
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	209
Date of last submissions	2 November 2021
Date of hearing:	29 October 2021
Counsel for the Plaintiff	Mr Lee Clark and Bruce W Wacker
Solicitor for the Plaintiff	Australian Government Solicitor
Counsel for the Defendants	The Defendants did not appear

ORDERS

QUD 147 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Plaintiff
AND:	**PE CAPITAL FUNDS MANAGEMENT LIMITED (EXTERNAL ADMINISTRATORS APPOINTED)** First Defendant
	ENDEAVOUR SECURITIES (AUSTRALIA) LIMITED (IN LIQUIDATION) Second Defendant

ORDER MADE BY:	**CHEESEMAN J**
DATE OF ORDER:	**9 FEBRUARY 2022**

THE COURT ORDERS THAT:

WINDING UP ORDERS

PE Capital Funds Management Ltd (external administrators appointed)

1. Pursuant to section 461(1)(k) of the *Corporations **Act** 2001* (Cth), the first defendant, PE Capital Funds Management Limited (external administrators appointed), be wound up.

2. Andrew Fielding of BDO Restructuring Pty Ltd (the **Liquidator**) is appointed as liquidator of the first defendant.

3. Pursuant to section 467(1)(c) of the Act, the administration of the first defendant, PE Capital Funds Management Limited (external administrators appointed), ends.

Registered Schemes

4. Pursuant to section 601ND(1)(a) of the Act, the following registered schemes be wound up:

   (a) the PE Capital Master Fund (ARSN 117 940 799) (formerly known as the Skylight Capital Build-Up Fund);

(b) the three so-called "sub-funds" of the PE Capital Master Fund, namely the PE Capital Commercial Property Income Fund, the PE Capital Asia Diversified Income Fund and the PE Capital Asia Wholesale Opportunities Fund; and

(c) the PE Capital Monthly Yield Fund (ARSN 103 557 900) (formerly known as the Film Opportunities Fund);

(together, the **Registered Schemes**).

5. Pursuant to section 601NF(1) of the Act, the Liquidator is responsible for the winding-up of the Registered Schemes.

Unregistered Schemes

6. Pursuant to section 601EE(2) of the Act, the following managed investment schemes be wound up:

(a) the PE Capital Asia Wholesale Opportunities Fund;

(b) the PE Capital Asia Wholesale Diversified Income Fund;

(c) the PE Capital Property Development Opportunities Fund (P Fund) (also referred to as the "P1 Fund"); and

(d) the PE Capital Property Development Opportunities Fund (P3 Fund).

(together, the **Unregistered Schemes**).

7. Pursuant to section 601EE(2) of the Act, the Liquidator is responsible for the winding-up of the Unregistered Schemes.

DECLARATIONS:

8. The plaintiff is to submit short minutes of order to give effect to these reasons by email to the Associate to Justice Cheeseman by 11 February 2022.

9. Leave to apply.

RULE 2.4(2) *FEDERAL COURT (CORPORATIONS) RULES 2000* (CTH)

10. Pursuant to rule 1.3(2) of the *Federal Court (Corporations) Rules 2000* (Cth) and rule 1.32 of the *Federal Court Rules 2011* (Cth) or, alternatively, rule 2.4(1) of the *Federal Court (Corporations) Rules 2000* (Cth), the requirement in rule 2.4(2) of the *Federal Court (Corporations) Rules 2000* (Cth) is dispensed with.

COSTS

11. The first defendant pay the plaintiff's costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

Table of contents

OVERVIEW [1]

INTRODUCTION [2]

PE Capital Funds Management Limited (PECFM) [4]

Endeavour Securities (Australia) Ltd (in liquidation) [7]

PECFM's status as Corporate Authorised Representative (CAR) [9]

Proceedings not defended [10]

Summary conclusion [16]

BACKGROUND [18]

ASIC Investigation [18]

Special Purpose Vehicles [21]

The Managed Investment Schemes [27]

Unregistered Schemes [28]

Principal Unregistered Schemes [30]

Registered Schemes [34]

CONSIDERATION [40]

Standing [40]

Contravention of s 601ED(5) of the Act: operation of an unregistered managed investment scheme required to be registered [41]

Are the Principal Unregistered Schemes managed investment schemes [43]

Were the Principal Unregistered Schemes required to be registered? [52]

Exemptions to registration [63]

When must a PDS be given? [67]

Were the Principal Unregistered Schemes registered? [82]

Operation of the Principal Unregistered Schemes [83]

Conclusion as to contravention of s 601ED(5) of the Act [85]

Contravention of section 911A(1) of the Act [86]

Was PECFM carrying on a financial services business? [89]

Financial services business [90]

Financial product [91]

Dealing in a financial product [94]

Carrying on business [97]

Did PECFM have an AFSL covering the provision of the relevant financial services? [100]

Was PECFM relevantly authorised by an AFSL holder? [101]

Conclusion as to contravention of s 911A(1) of the Act [103]

Contraventions of section 911C(d) of the Act [104]

Holding out [107]

The IM issue representation [111]

The unit arranging representation [117]

No relevant authority [120]

Conclusion as to contravention of s 911C(d) of the Act [121]

Misleading or deceptive conduct [122]

The relevant statutory provisions [123]

Applicable principles [125]

IM issue representations and unit arranging representations [128]

Registered Schemes - Investment Strategy [133]

The diversification and asset class representations [151]

The preferential security representation [165]

Winding up orders [170]

Winding up of PECFM and appointment of liquidator [170]

Winding up of the Registered Schemes [178]

Winding up of the Principal Unregistered Schemes [191]

Declarations [200]

Federal Court (Corporations) Rules 2000, r 2.4 [205]

Costs [209]

CHEESEMAN J:

OVERVIEW

1 These proceedings arise from an investigation by the corporations regulator into, *inter alia*, suspected contraventions of the *Corporations **Act** 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) arising out of the promotion and operation of various managed investment schemes, some registered, some unregistered. The schemes were directed to raising funds for the purpose of acquiring and developing vacant land on the outskirts of Melbourne and Geelong for the potential future operation of various businesses on the land, such as service stations, convenience stores, fast food outlets and childcare centres. The proceedings were not defended, both defendants being under forms of external administration by the time of the hearing. The relief sought by the regulator is directed to obtaining declarations in respect of contraventions of the Act and the ASIC Act and otherwise to obtaining winding up orders, in respect of the first defendant, the manager of the schemes, and nine of the managed investment schemes, five registered and four unregistered.

INTRODUCTION

2 The plaintiff, Australian Securities and Investment Commission (**ASIC**) seeks declarations in respect of contraventions of ss 601ED(5), 911A(1), 911C and 1041H of the Act and, or alternatively, s 12DA of the ASIC Act, by the first defendant, PE Capital Funds Management Limited (external administrators appointed) (**PECFM**) pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).

3 ASIC also seeks the following winding up orders. First, for the winding up of PECFM, under s 461(1)(k) and the appointment of Andrew Fielding of **BDO** Restructuring Pty Ltd, a registered liquidator, under s 472 of the Act. Second, for the winding up of five registered managed investment schemes under s 601ND(1) and for Mr Fielding to be responsible for winding up those schemes. Third, for four unregistered schemes operated in contravention of s 601ED(5) to be wound up under s 601EE(2) of the Act and for Mr Fielding to be responsible for winding up those schemes.

PE Capital Funds Management Limited (PECFM)

4 PECFM is a subsidiary of PE Capital Ltd (**PEC**) and formed part of the **PEC Group** of companies.

5 ASIC alleges that PECFM has acted in breach of the Act and the ASIC Act by:

(1) operating four unregistered managed investments schemes which were required to be registered under s 601EB in contravention of s 601ED(5) of the Act;

(2) carrying on a financial services business without an Australian financial services licence (**AFSL**) in contravention of s 911A of the Act;

(3) holding out that it had the written authority of One Investment Administration Limited (**OIAL**) and **Endeavour** Securities (Australia) Ltd (in liquidation), both of whom were at the time AFSL holders, to provide certain financial services when it did not, in contravention of s 911C(d) of the Act;

(4) engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, in relation to certain information memoranda it issued in breach of s 1041H of the Act, and/or in breach of s 12DA of the ASIC Act; and

(5) engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, in relation to product disclosure statements for five registered schemes in breach of s 1041H of the Act, and/or in breach of s 12DAof the ASIC Act.

6 The directors of PECFM appointed administrators to PECFM under s 436A of the Act on 21 October 2021.

Endeavour Securities (Australia) Ltd (in liquidation)

7 The second defendant, Endeavour is the responsible entity in respect of the five registered managed investment schemes that ASIC seeks to have wound up. Endeavour is party to an investment management agreement with PECFM executed on 30 October 2017 (the **Endeavour IMA**). At the relevant time, Endeavour held an AFSL.

8 On 15 March 2019, Endeavour was wound up by order of the Court and liquidators appointed to it. Leave to proceed against Endeavour (in liquidation) was granted *nunc pro tunc* on 11 June 2021.

PECFM's status as Corporate Authorised Representative (CAR)

9 PECFM was a corporate authorised representative (**CAR**) of each of OIAL and Endeavour in relation to the provision of certain financial services in respect of specified managed investment schemes only. ASIC contends that PECFM's status as a CAR of OIAL and Endeavour respectively did not relevantly authorise PECFM's conduct which ASIC relies upon to establish contraventions of ss 911A, 911C(d), 1041H of the Act and or s 12DA of the ASIC Act.

Proceedings not defended

10 By the time the proceedings were heard ASIC was the only active party.

11 Endeavour has not filed a defence. The liquidators of Endeavour informed ASIC that Endeavour is without funds and would not take an active part in the proceedings. ASIC does not seek any relief directly as against Endeavour but seeks to wind up five registered schemes of which Endeavour is the responsible entity.

12 PECFM initially engaged a solicitor and entered an appearance but did not file a defence. PECFM's solicitors subsequently filed a notice of ceasing to act citing PECFM's impecuniosity. Before PECFM's solicitors ceased to act, PECFM stated its position in relation to certain aspects of ASIC's claim in a letter dated 20 August 2021, reference to which is made below (the **PECFM Letter**).

13 Subsequently, as noted above, administrators were appointed to PECFM pursuant to s 436A of the Act on 21 October 2021. The administrators have informed ASIC that they are without funds in the administration and have been instructed not to appear in the present proceedings. The administrators do not expect to receive a proposal for a deed of company arrangement and cannot say that the continuance of the administration is likely to bring about a greater or more certain return for creditors than a liquidation. Accordingly, the administrators have provided their written consent pursuant to s 440D(1)(a) of the Act to ASIC proceeding with the present application. The administrators have confirmed that they do not oppose an order for the winding up of PECFM and the appointment of a registered liquidator.

14 The effect of the failure by PECFM and Endeavour to file a defence, in which they deny the allegations of fact made by ASIC in its statement of claim, is that the allegations of fact are taken to be admitted: rule 16.07(2) of the *Federal Court **Rules** 2011* (Cth). A court is not bound to act on such admissions but in the absence of any reason to question the correctness of the facts taken to be admitted, it is appropriate to treat those facts as established against the non-pleading party. Notwithstanding that ASIC is entitled to rely on deemed admissions in respect of the facts alleged in the statement of claim except where there is a reason to question the correctness of those facts, ASIC has also supported the allegations of fact made in the statement of claim by evidence gathered using its investigative powers.

15 PECFM's only stated position in respect of the allegations made against it is in the PECFM Letter in which PECFM purports to identify matters it asserts constitute "issues" with the

statement of claim. To assist the Court, and even though PECFM has not sought to address the "issues" raised in its letter in any formal way, ASIC made submissions as to why the issues raised by PECFM do not disentitle ASIC to the relief it seeks. To the extent it is necessary to do so, I will address these issues below in the relevant context in which they arise.

Summary conclusion

16 For the reasons developed below, I am satisfied that ASIC has established that:

(1) certain managed investment schemes, defined below as the Principal Unregistered Schemes, were not registered under s 601EB of the Act, as required by s 601ED(1) of the Act, and were operated by PECFM in contravention of s 601ED(5) of the Act;

(2) PECFM acted in contravention of s 911A of the Act on and from 1 June 2016 by carrying on a financial services business in respect of which it was required to, but did not, hold an AFSL;

(3) PECFM acted in contravention of s 911C(d) of the Act when it held out that its conduct in:

  (a) issuing certain IMs was within its authority as an authorised representative of an AFSL holder, namely OIAL or Endeavour, when it was not;

  (b) arranging for the issue of units in certain managed investment schemes was within its authority as an authorised representative of OIAL, when it was not;

(4) by reason of the conduct found to be in contravention of s 911C(d) of the Act, PECFM also acted in contravention of s 1041H of the Act and alternatively s 12DA of the ASIC Act by engaging in misleading and deceptive conduct whereby it held itself out as being relevantly authorised by an AFSL holder when it was not; and

(5) PECFM acted in further contravention of s 1041H of the Act and alternatively under s 12DA of the ASIC Act by its conduct in including certain representations in the product disclosure statements for certain registered managed investment schemes which it was responsible for preparing and in respect of which it acted as an investment manager.

17 In the circumstances outlined below and for the reasons which follow I am satisfied it is appropriate to make declarations in respect of the contraventions which are described in detail in the body of these reasons and that there is utility in doing so. I am further satisfied that it is in the public interest to make the winding up orders that ASIC seeks under ss 461(1)(k),

601EE(2) or 601ND(1) of the Act. Further, that Mr Fielding ought be appointed as liquidator of PECFM and as the person responsible for winding up the relevant schemes.

BACKGROUND

ASIC Investigation

18 On 22 May 2020, ASIC commenced an investigation, pursuant to s 13 of the ASIC Act, in relation to suspected contraventions of the Act and the ASIC Act by PECFM and its related companies, including its holding company, PEC (**the ASIC Investigation**). The ASIC Investigation was subsequently expanded on two occasions; first on 11 June 2020 and then relevantly for present purposes on 28 January 2021 to include suspected contraventions ss 601ED(5), 911A, 911C(d) of the Act.

19 During the ASIC Investigation, notices pursuant to s 30 of the ASIC Act were issued to PECFM, PEC, various banks and Australian Financial Complaints Authority (**AFCA**). In addition, ASIC conducted examinations, pursuant to s 19 of the ASIC Act, of various current and former officers and employees of PECFM including each of the members of PECFM's investment committee; Jason Huang (director of PE Capital Asia), Greg Roberts (director of Compliance, PE Capital) and Sam Osborne (director of PE Capital).

20 In support of its application ASIC relies on the affidavits of Simon Ross Phinn, Senior ASIC Investigator in the Financial Services Enforcement team, affirmed 12 May 2021, 2 July 2021 and 30 September 2021; and Anne Elizabeth Gubbins, lawyer, Senior ASIC Specialist, Civil Litigation, affirmed 12 May 2021, 10 June 2021, 21 October 2021 and 27 October 2021. ASIC's evidence includes documents obtained, and transcripts of examinations conducted, during the course of the ASIC investigation.

Special Purpose Vehicles

21 Between 2015 and 2017, companies in the PEC Group identified eight properties for acquisition and development. Each property was acquired and held by a special purpose vehicle (**SPV**). The process by which the SPVs were established and funded followed broadly the same pattern:

(1) land was identified;

(2) a unit trust was established, and a trust deed entered into with a subsidiary of the PEC Group as trustee;

(3) a resolution was passed by the trustee to issue redeemable preference units (**RPUs**) for subscription. These RPUs were usually structured into three classes: Class A, Class B and Class C;

(4) the Trustee issued terms for each of the classes of RPU; and

(5) an unregistered managed investment scheme was created and an information memorandum was issued, with details of the property in question and the proposed development project (the **SPV IMs**).

22 The table below sets out details of eight SPVs.

	SPV	**Property**	**Date of Trust Deed**	**Date SPV IM**
1	PEC Truganina SPV	181 Woods Road, Truganina VIC	16 September 2015	September 2015
2	PEC 1475 Thompsons Road SPV	1475 Thompsons Road, Cranborne North VIC	16 September 2015	21 September 2015
3	PEC Amstel Centre SPV	1016 Cranbourne Frankston Road, Cranbourne VIC	10 November 2015	2 December 2015
4	PEC Centre and Springvale Road SPV	1690 Centre Road, Springvale VIC and 2-10 Springvale Road, Springvale VIC	25 November 2015	25 November 2015
5	PEC Truganina 2 SPV	171 Woods Road, Truganina VIC	17 October 2016	17 October 2016
6	PEC Mt Duneed SPV	623 - 645 Torquay Road, Mt Duneed VIC	17 October 2016	18 October 2016
7	PEC Wollert SPV	155 Craigeburn Road East, Wollert VIC	17 October 2016	19 October 2016
8	PEC Bell Park SPV	48-58 Barton Street, Bell Park VIC	1 May 2017	Not produced notwithstanding ASIC Notice issued.

23 Although each of the eight SPVs initially held land, presently only two of the SPVs still hold land: PEC Truganina SPV and PEC Truganina 2 SPV. The land that is still held by PEC Truganina SPV and PEC Truganina 2 SPV is encumbered by mortgages in favour of Kaplink 011 International Ltd. The remaining six SPVs appear to have sold, or otherwise transferred, the land previously held by them.

24 The documentation put in place in respect of each SPV was in materially the same terms and comprised a trust deed, an SPV IM, terms of issue for RPUs (Classes 1, 2 and 3) and an investment register. It suffices for present purposes to illustrate the arrangements by reference to PEC Truganina 2 SPV.

25 PEC Truganina 2 SPV was established by Unit Trust Deed appointing PE Capital Nominees Pty Limited (**PEC Nominees**), a company within the PEC Group, as trustee and initial unit holder and upon payment of a settlement sum of $10. Contemporaneously with this document, the trustee passed a resolution to issue RPUs for subscription. The resolution set out the term, being 24 months (capable of being extended or reduced at the trustee's discretion), capital structure, types of units to be issued, coupon return rates for each class of RPU and provided that RPUs Class A, B and C would be secured as follows:

> First ranking security for investment pre-development approval (DA). The Trust will reserve the right to grant priority to bank lenders (up to 60% of value).
>
> Second ranking security post-DA and granting of priority to bank lenders.

26 The relevant terms for each class of RPU (save for coupon return) were materially the same. The terms provided that the RPU holder will not be a beneficiary of the fund and that the relationship between the trustee and the RPU holder is one of debtor and creditor. RPU holders possess no right to require the trustee to redeem any RPUs before the redemption date (being 24 months after allotment). Notwithstanding the terms of the resolution, the RPU terms stipulated that the RPU holder did not have any security interest over any assets of the fund to secure payment of any amount or performance of any obligation.

The Managed Investment Schemes

27 PECFM operates various managed investment schemes: some are registered, others are unregistered.

Unregistered Schemes

28 PECFM is the investment or fund manager of each of the following unregistered schemes:

(1) PE Capital P1 Fund;

(2) PE Capital P3 Fund;

(3) PE Capital Property Development Opportunities Fund (P Fund) (**P1 Fund**);

(4) PE Capital Property Development Opportunities Fund (**P3 Fund**);

(5) PE Capital Asia Wholesale Diversified Income Fund (**PEC Asia DIF**); and

(6) PE Capital Asia Wholesale Opportunities Fund (**PEC Asia WOF**).

29 PECFM was appointed manager of the first two funds (PE Capital P1 Fund and PE Capital P3 Fund) pursuant to an investment management agreement dated 22 July 2016 with One Managed Investment Funds Limited ACN 117 400 987.

Principal Unregistered Schemes

30 The remaining four unregistered schemes (P1 Fund, P3Fund, PEC Asia DIF and PEC Asia WOF) are each governed by a Constitution entered into by PECFM as trustee. Together these four funds are referred to as the **Principal Unregistered Schemes**.

31 PECFM issued information memorandums (**IMs**) in respect of each of the Principal Unregistered Schemes. The dates of the relevant IMs and the information included in relation to AFSL holders is set out in the following table:

	Name	**Date(s)**	**AFSL**	**CAR**
1	P1 Fund	1 June 2016	OIAL	PECFM as CAR of OIAL
2	P3 Fund	21 November 2016	OIAL	PECFM as CAR of OIAL
3	PEC Asia DIF	Issued 22 August 2017 Updated 1 November 2017	Endeavour	PECFM as CAR of Endeavour
4	PEC Asia WOF	Issued 1 November 2017	Endeavour	PECFM as CAR of Endeavour

32 Each of the IMs issued in respect of the Principal Unregistered Schemes included statements to the effect that:

(a) the "Fund" is a "wholesale managed investment scheme" or a "wholesale unit trust";

(b) the "Fund" is only open to wholesale clients;

(c) the IM is not (and not required to be) a disclosure document or a PDS for the retail client purposes of the Act.

The later IMs included a statement that the "offer" made under the IM was only available to wholesale clients or sophisticated investors.

33 PECFM transferred all of the moneys invested in the Principal Unregistered Schemes to the SPVs. Investment registers maintained in respect of the Principal Unregistered Schemes and the SPV Unitholder registers support this allegation of fact which is made in the statement of claim and deemed to be admitted by PECFM.

Registered Schemes

34 In addition to managing the Principal Unregistered Schemes, PECFM was also the manager of a number of registered schemes including:

(1) PE Capital **Master Fund** (formerly known as the Skylight Capital Build-Up Fund);

(2) three funds described as subfunds of the Master Fund, namely:

(i) PE Capital Commercial Property Income Fund (**subfund 1**);

(ii) PE Capital Asia Fund (**subfund 2**);

(iii) PE Capital SIV Fund (**subfund 3**); and

(3) PE Capital Monthly Yield Fund (**PEC MY Fund**);

(together, the **Registered Schemes**)

35 The Master Fund was established in 2006 under the registered name Skylight Capital Build-Up Fund. The name of the Master Fund was changed to its current name in January 2018.

36 Endeavour is the responsible entity for each of the Registered Schemes. PECFM was appointed as investment manager to the Master Fund and the three subfunds under the Endeavour IMA.

37 While PECFM was not formally appointed as the manager of the PEC MY Fund in the Endeavour IMA, ASIC contends that PECFM purported to act as the investment manager for this fund as well. The allegations of fact made in the statement of claim in support of this contention are the subject of deemed admissions and are consistent with the documentary record including the relevant PDS.

38 PECFM issued PDSs in respect of each of the Registered Schemes as follows:

	Name	**Issue Date(s)**
1	Master Fund	19 March 2018
2	Subfund 1	19 March 2018
3	Subfund 2	25 January 2018
4	Subfund 3	25 January 2018
5	PEC MY Fund	10 April 2018

39 Funds raised through the Registered Schemes were transferred to the SPVs in exchange for RPUs. Investment registers maintained by PECFM in respect of the Registered Schemes and unitholder registers maintained in relation to each of the SPVs support this allegation of fact made by ASIC in the statement of claim and deemed to be admitted by PECFM. The PECFM Letter does not raise any issue in this regard.

CONSIDERATION

Standing

40 ASIC commenced the present proceedings on 13 May 2021. ASIC has standing to apply to the Court for the relief the subject of the statement of claim.

Contravention of s 601ED(5) of the Act: operation of an unregistered managed investment scheme required to be registered

41 ASIC contends that the Principal Unregistered Schemes have not been registered under s 601EB of the Act, as required by s 601ED(1) of the Act, and have been operated by PECFM in contravention of s 601ED(5) of the Act. Section 601ED(5) of the Act provides:

> (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

42 I note that while a failure to comply with s 601ED(5) is presently an offence by virtue of s 1311(1) and subject to a civil penalty as a result of combined operation of ss 601ED(8) and 1317E(3)(a) of the Act, the impugned conduct did not occur wholly on or after the commencement day (13 March 2019) and accordingly the civil penalty provisions do not apply: see *Australian Securities and Investments Commission v* ***Marco (No 6)*** [2020] FCA 1781 at [62] - [64] (McKerracher J).

Are the Principal Unregistered Schemes managed investment schemes

43 The first issue is whether the Principal Unregistered Schemes are in fact managed investment schemes.

44 Section 9 of the Act defines 'managed investment scheme' as follows:

> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)…

45 The word 'interest' in this context is also defined in s 9 of the Act:

> interest in a managed investment scheme … means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

46 Members of a scheme will have day-to-day control over the operation of the scheme if the members as a whole participate in the routine, ordinary, everyday business decisions which are made and the members as a whole are bound by the decisions which are made. Conversely, if the members as a whole do not participate in the routine, ordinary, everyday business decisions relating to the management of the scheme, or if the members as a whole are not bound by the decisions which are made, they will not have day-to-day control over the operation of the scheme.

47 In *Marco (No 6)*, McKerracher J observed that (at [65]):

> The definition of 'managed investment scheme' in s 9 of the Corporations Act requires the identification of a '[a] scheme'. In *Australian Softwood Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission)* (1981) 148 CLR 121, Mason J (with whom Gibbs CJ and Stephen J agreed) observed (at 129) by reference to *Clowes v Commissioner of Taxation (Cth)* (1954) 91 CLR 209 (at 225) that 'all that the word "scheme" requires is that there should be "some programme, or plan of action". In *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388; [2002] NSWSC 834, Barrett J discussed the nature of a 'scheme' (at [15]):
>
> > The essence of a "scheme" is a coherent and defined purpose, in the form of a "programme" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan…Profit-making will almost invariably be a feature or objective of the kind of scheme with which the s 9 definition of "managed investment scheme" is concerned, given the definition's references in several places to "benefits". Whatever is incidental and necessary to the pursuit of the profit (or "benefits") will therefore be comprehended by the scheme, including, it seems to me, steps sensible to counter risk of loss (or detriment).

48 I am satisfied that each of the Principal Unregistered Schemes are each a managed investment scheme for the following reasons.

49 First PECFM issued an IM in respect of each Principal Unregistered Scheme in which it was expressly stated that the "Fund" was an "unregistered managed investment scheme" (P1 Fund and P3 Fund) or a "wholesale managed investment scheme" (PEC Asia DIF and PEC Asia WOF).

50 That the IMs were correct in this regard is borne out by the following common features of each of the Principal Unregistered Schemes:

(1) People contribute money as consideration to acquire rights, units, to benefits produced, being targeted returns of a certain amount per annum. The respective "targeted return" for each of the P1 Fund, P3 Fund, PEC Asia DIF and PEC Asia WOF was stated to be as follows: 18% p.a. (calculated and paid every six months); 12% p.a. net fees (calculated and paid every six months); 7%+ p.a. and 12%+ p.a. Investments were made in each of the funds as follows:

(a) thirteen investors invested a total of $3,459,871 in the P1 Fund in return for the issue of units in the P1 Fund;

(b) six investors invested a total of $1,821,093.29 in the P3 Fund and were issued with units in the P3 Fund;

(c) eight investors invested a total of $3,265,000 in the PEC Asia DIF and were issued with units in the PEC Asia DIF; and

(d) seven investors invested a total of $3,750,000 in the PEC Asia WOF and were issued with units in the PEC Asia WOF.

(2) The IM for each of the Principal Unregistered Schemes stipulates that the investment manager is responsible for managing the scheme on behalf of investors. The members did not have individual or collective day to day control of the operation of the schemes. Control of the operation of the schemes in each case is reserved to PECFM.

(3) The IM for each of the Principal Unregistered Schemes included a statement that contributions are to be pooled or used in a common enterprise of investing in mixed use commercial property development projects at various stages of developmental approval to produce financial benefits for the members. PECFM transferred all of the moneys invested in the Principal Registered Schemes to the SPVs in exchange for RPUs.

51 Finally, I note that PECFM is deemed to have admitted that it issued each of the IMs "for the purpose of a managed investment scheme" and that there is no reason to doubt the correctness of that deemed admission.

Were the Principal Unregistered Schemes required to be registered?

52 The issue of whether the Principal Unregistered Schemes were required to be registered was an issue raised in the PECFM Letter and implicitly in the IMs for each of the Principal Unregistered Schemes.

53 Section 601ED of the Act relevantly provides:

601ED When a managed investment scheme must be registered

(1) Subject to subsections (2) and (2A), a managed investment scheme must be registered under section 601EB if:

(a) it has more than 20 members; or

(b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or

(c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination related exceeds 20.

(2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

(2A) A notified foreign passport fund does not have to be registered.

…

(5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

54 Pursuant to s 601ED of the Act, the Principal Unregistered Schemes were required to be registered if they satisfied any of the three conditions identified in s 601ED(1) of the Act. I am satisfied that the Principal Unregistered Schemes satisfy the criteria in s 601ED(1)(b) of the Act and that subject to s 601ED(2) the Principal Unregistered Schemes are required to be registered. The exception to registration contained in s 601ED(2A) which relates to notified foreign passport funds is not presently relevant.

55 First, with respect to s 601ED(1)(b) of the Act, the evidence demonstrates that each of the Principal Unregistered Schemes was promoted by PECFM and at the relevant time PECFM was in the business of promoting managed investment schemes.

56 As to the first element, ASIC has established that the Principal Unregistered Schemes were promoted by PECFM. Relevantly, the act of promoting extends to formulating a scheme, advertising it, soliciting others to participate in it and embarking on implementing the scheme: *Australian Securities and Investment Commission v Young* [2003] QSC 29; (2003) 173 FLR 441 at [53] (Muir J). A person "who sets up the joint venture and markets it to the investors" and persons who "engage in exertion for the purpose of getting up and starting a company (or a scheme), and those who assist them" are captured by the concept of promoting a scheme in s 601ED(1)(b): *Australian Securities and Investment Commission v Infomercial Management*

Group Pty Ltd [2002] VSC 262 at [35] (Byrne J); *Ibrahim v Pham* [2005] NSWSC 246 at [316] (Levine J). In addition to the deemed admissions consequential on PECFM's failure to file a defence, the inference that PECFM promoted each of the Principal Unregistered Schemes is supported by the following evidence.

57 PECFM issued the IMs for the Principal Unregistered Schemes. The express purpose of each IM was to "provide information for prospective investors to decide whether they wish to invest in the Fund" or similar. In consideration for members' investments, PECFM issued units in the Principal Unregistered Schemes to investors. The moneys invested by investors in the Principal Unregistered Schemes were transferred by PECFM in its capacity as the investment manager of each relevant managed investment scheme to the SPVs. The evidence demonstrates that PECFM setup the Principal Unregistered Schemes, solicited investors and embarked on the implementation of the Principal Unregistered Schemes.

58 As to the second element, I am also satisfied that at the time it promoted the Principal Unregistered Schemes, PECFM was in the business of promoting managed investment schemes. With respect to the meaning of the phrase "in the business of", I note that there is no definitive test for determining whether a person is engaged in "business". The majority of the High Court in *Federal Commissioner of Taxation v Murry* [1998] HCA 42; (1998) 193 CLR 605 (Gaudron, McHugh, Gummow and Hayne JJ) observed at 626 [54]:

> … A business is not a thing or things. It is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions.

59 The authorities recognise a number of indicia which may evidence the existence of a "business". In ***Spriggs*** *v Federal Commissioner of Taxation* [2009] HCA 22; (2009) 239 CLR 1, French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ stated at 19 [59]:

> The existence of a business is a matter of fact and degree. It will depend on a number of indicia, which must be considered in combination and as a whole. No one factor is necessarily determinative **[***Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 939 per Hill J]. Relevant factors include, but are not limited to, the existence of a profit-making purpose, the scale of activities, the commercial character of the transactions, and whether the activities are systematic and organised, often described as whether the activities are carried out in a business-like manner **[**See, eg, *Martin v Federal Commissioner of Taxation* (1953) 90 CLR 470 at 473-474 per Webb J, 479, 481 per Williams ACJ, Kitto and Taylor JJ; [1953] HCA 100; *Ferguson v Federal Commissioner of Taxation* (1979) 26 ALR 307 at 311 per Bowen CJ and Franki J; *Federal Commissioner of Taxation v Walker* (1985) 16 ATR 331 at 334-335 per Ryan J; *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 939-943 per Hill J.]

Section 18(a) of the Act enlarges the common law's approach by expanding the definition of a person carrying on a business to include carrying on a business otherwise than for profit.

60 Having regard to the indicia in *Spriggs*, I am satisfied that in 2016 and 2017 at the time the IMs for the Principal Unregistered Schemes were issued PECFM was in the business of promoting managed investment schemes. These schemes were directed to raising funds for the purpose of acquiring and developing land for the potential future operation of various businesses on the land. The eight SPVs which acquired and held the relevant properties were established in 2015 and 2016. Evidence given by officers of PECFM in examinations conducted under the ASIC Act establishes that employees of PECFM actively promoted investment in the managed investment schemes operated by PECFM. PECFM formulated and issued IMs and PDSs in respect of the Principal Unregistered Schemes and the Registered Schemes. These offering documents demonstrate that PECFM was in the relevant business at the relevant times as do the investment registers and SPV unitholders registers. PECFM's promotional activities in respect of managed investment schemes were undertaken for the purpose of profit making and were repeated over a period of years in relation to multiple schemes including but not limited to those the subject of the Endeavour IMA.

61 ASIC is also entitled to rely on PECFM's deemed admission that at the time of issue of each IM in respect of the Principal Unregistered Schemes, it was in the business of promoting managed investment schemes. There is nothing in the evidence which casts doubt on the correctness of this deemed admission. The PECFM Letter is silent on this issue. ASIC's evidence demonstrates that the admission is correct.

62 Accordingly, subject to any applicable exemption under the Act, the evidence adduced by ASIC demonstrates that the Principal Unregistered Schemes were required to be registered under s 601EB. I now turn to consider if the Principal Unregistered Schemes are exempt from the registration requirement by operation of s 601ED(2) of the Act.

Exemptions to registration

63 Section 601ED(2) of the Act provides that a managed investment scheme does not have to be registered if "all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made".

64 A person seeking to rely on an exemption to the registration requirement in s 601ED of the Act has the onus of proof of establishing that the conditions giving rise to the exemption exist: ***Chugg*** *v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249 at 257-9 (Dawson, Toohey and Gaudron JJ with whom Brennan and Deane JJ agreed); *Australian Securities and Investments Commission v Cycclone Magnetic Engines Inc* [2009] QSC 58; (2009) 71 ACSR 1 at [37] and [39]-[40] (Martin J) citing the majority in *Chugg*.

65 In the present case PECFM has not filed a defence and has not sought to lead evidence to discharge its onus of proof in relation to the application of any exemption. Accordingly, I am satisfied that there is no evidence from which I could safely conclude that the Principal Unregistered Schemes were not required to be registered by reason of s 601ED(2) of the Act. I will however consider directly the issues raised in the PECFM Letter and the assertions in the relevant IMs that offers made under the Principal Unregistered Scheme IMs were open only to wholesale clients and or sophisticated investors.

66 I will consider first whether ASIC has established that a PDS was required to be issued in respect of the Principal Unregistered Schemes. This will entail consideration of the application of the exceptions which apply in respect of wholesale clients (s 761G(7)) and sophisticated investors (s 761GA). I will then consider whether the personal offers PDS exception applies.

When must a PDS be given?

67 A PDS must be given where a financial product is to be issued to a person as a "retail client": s 1012B(3). The meaning of "retail client" and “wholesale client” is defined in s 761G of the Act. The meaning of “sophisticated investors” is the subject of s 761GA of the Act. A financial product is provided to a person as a retail client unless an exemption in s 761G(5), (6), (6A) or (7) or s 761GA applies. Sections 761G(5), (6) and (6A) of the Act are not presently relevant.

68 Section 761G(7)(a) relevantly provides that a financial service or financial product is provided to a person as a retail client unless the relevant price or value equals or exceeds the amount specified in the relevant regulations: At the relevant time, the regulations proscribed the threshold amount in s 761G(7)(a) to be $500,000: *Corporations* ***Regulations*** *2001* (Cth), reg 7.1.18(2).

69 The evidence demonstrates that 29 investments were made in the Principal Unregistered Schemes for amounts less than $500,000 and that multiple investments of less than $500,000 were made in each of the Principal Unregistered Schemes. Section 761G(7)(a) does not render

the investors to whom offers were made and who in turn made investments of less than $500,000 as other than retail clients.

70 Section 761G(7)(c) of the Act differentiates between "wholesale clients" and "retail clients". A person will be a wholesale client where before the provision of the financial product or service, the person gives the provider a certificate by a qualified accountant (defined in s 88B of the Act) that states that the person has net assets of over $2.5 million or a gross income for each of the last two financial years of at least $250,000 a year.

71 Notwithstanding the statements in each of the relevant IMs, there is nothing in the evidence to support an inference that the investors in the Principal Unregistered Schemes were wholesale clients. Indeed, such evidence as is available points in the opposite direction. On 28 July 2020, ASIC issued a notice to PECFM pursuant to s 30 of the ASIC Act, requiring PECFM to produce a copy of all certificates provided by "wholesale clients" pursuant to s 761G(7)(c) of the Act in respect of investments made by wholesale clients in the Principal Unregistered Schemes. On 14 August 2020, PECFM responded to the effect that no certificates had been located but that PECFM "believed that they may have been misplaced in a recent premises move". The PECFM Letter does not seek to raise the wholesale client exception. PECFM has the onus of establishing that s 761G(7)(c) applies. It has not done so. The bare assertion of belief as to the possibility of misplacement in PECFM's response to ASIC's notice does not establish that the wholesale client exception in s 761G(7)(c) is engaged.

72 Section 761GA distinguishes between "sophisticated investors" and "retail clients". Offers made to sophisticated investors do not require a PDS if, *inter alia*, the offer is made by an AFSL holder: s 761GA(a) of the Act. Some of the Principal Unregistered Scheme IMs include statements to the effect that the offers are limited to wholesale clients or sophisticated investors. The offers contained in the Principal Unregistered Scheme IMs were made by PECFM. PECFM was not an AFSL holder. The evidence does not establish that the sophisticated investor exception in s 761GA is engaged.

73 In the circumstances, I am satisfied that ASIC has established that the offers which resulted in investments of less than $500,000 in each of the Principal Unregistered Schemes were made to retail clients and not to wholesale clients or sophisticated investors. It follows that unless the exception in s 601ED(2) applies by reason of a PDS not being required because the offers made were "personal offers" within the meaning of s 1012E(2) of the Act, PECFM was required to

issue a PDS in respect of the offers and consequentially the schemes themselves were required to be registered.

74 In the PECFM Letter, PECFM contends that the exemption to registration in s 601ED(2) applies because all of the offers were "personal offers" under s 1012E(2). PECFM asserts that:

> All offers made to investors in the Principal Unregistered Schemes (as defined in ASIC's Statement of Claim) were personal offers in accordance with s 1012E(5). This is supported by the evidence from the s 19 examination of Mr Zhi Cheng Jason Huang (see Transcript pages 37-38, 71-76 and 97…"

75 ASIC accepts that, for the purposes of s 1012E(8), the issues of financial products where the price for the provision of the financial product equals or exceeds $500,000 are to be disregarded. However, all the investments in the Principal Unregistered Schemes did not equal or exceed $500,000. There were 29 investments of less than $500,000 across the Principal Unregistered Schemes. The availability of the exemption in s 1012E (and, consequently, in s 601ED(2)) rests on whether the offers which resulted in investments of less than $500,000 being "personal offers".

76 Personal offers of financial products do not need a PDS if certain conditions are met: s 1012E(2). Section 1012E(5) provides a personal offer is one that:

(a) may only be accepted by the person to whom it is made; and

(b) is made to a person who is likely to be interested in the offer, having regard to:

  (i) previous contact between the person making the offer and that person; or

  (ii) some professional or other connection between the person making the offer and that person; or

  (iii) statements or actions by that person that indicate that they are interested in offers of that kind.

77 For an offer to be a personal offer it must satisfy the two limbs of s 1012E(5).

78 ASIC contends that the first limb in s 1012E(5)(a) is not engaged. By a notice pursuant to s 30 of the ASIC Act dated 17 February 2020, PECFM was required to produce to ASIC "[a]ll disclosure documents (included but not limited to information memoranda or other offer documents)" for, *inter alia*, the Principal Unregistered Schemes during the period 1 January 2014 to the date of the notice. In response, PECFM produced, *inter alia*, the IMs for the Principal Unregistered Schemes. Those Principal Unregistered Scheme IMs do not provide that

the offers contained in them may only be accepted by the person to whom they are made. To the contrary, the information memoranda are expressed to be in general terms: the stated purpose of each IM was to "provide information for prospective investors to decide whether they wish to invest in the Fund" or similar. The IMs included or were accompanied by a blank application form which on its face is not restricted to being completed by the person to whom it was given. PECFM did not produce, in answer to ASIC's s 30 notice, any offer which was, by its terms, an offer that could only be accepted by the person to whom it is made.

79 As to the second limb of s 1012E(5)(b), I note that the PECFM Letter relies on the s 19 examination of Mr Huang. The evidence of Mr Huang given during his s 19 examination does not establish a connection between PECFM and the investors who made investments in amounts of less than $500,000 of the type required by s 1012E(5)(b). The questions asked of Mr Huang were not directed to establishing that the offers made to his clients were "personal offers" for the purposes of s 1012E(5).

80 Mr Huang gave evidence over two days, being 29 June 2020 and 2 July 2020. The transcript is in evidence. The transcript page numbering is not continuous across each day – it restarts from page 1 on each day. The PECFM Letter relies on particular pages of the Huang examination but does not specify the relevant date. Accordingly, I have reviewed the whole of Mr Huang's evidence and focussed on the page number references given in the PECFM Letter on both days of Mr Huang's evidence. The s 19 examination references cited in the PECFM Letter do not establish that any of the offers made to clients of Mr Huang were "personal offers". Mr Huang did not in terms state that the relevant offers were "personal offers". He did not give evidence that the relevant offers were only being capable of acceptance by the particular offeree. Mr Huang gave limited evidence as to the existence of pre-existing relationships between PECFM through him and some of the investors who made investments of less than $500,000. That evidence falls short of establishing the second limb of s 1012E(5)(b) of the Act. I am not satisfied that the offers made in the Principal Unregistered Schemes were "personal offers" within the meaning of, and for the purpose of, s 1012E. PECFM has not discharged its onus to establish that a PDS was not required and therefore has not discharged its onus to establish that the Principal Unregistered Schemes were not required to be registered. The assertions in the PECFM Letter do not cause me to question the correctness of the deemed admissions of fact relevant to this issue.

81 Based on the above analysis, I am satisfied that ASIC has established that the Principal Unregistered Schemes were required, by s 601ED(1) of the Act, to be registered under s 601EB of the Act.

Were the Principal Unregistered Schemes registered?

82 It is clear that the Principal Unregistered Schemes are not, and have never been, registered under s 601EB of the Act. The IMs include express statements that the schemes are unregistered. It is also implicit in the contention in the PECFM Letter that the Principal Unregistered Schemes were not required to be registered that the Principal Unregistered Schemes were not registered in accordance with the Act. ASIC has led evidence that the Principal Unregistered Schemes are not recorded in the registers it maintains which record such registrations. There is no reason to question the deemed admission by PECFM on this issue.

Operation of the Principal Unregistered Schemes

83 The word "operate" in s 601ED(5) of the Act refers to acts which constitute the management or carrying out of activities of the managed investment scheme as a matter of ordinary parlance: *Australian Securities and Investments Commission v MyWealth Manager Financial Services Pty Ltd (No 3)* [2020] FCA 1035 at [85] citing *Australian Securities and Investments Commission v* ***Pegasus*** *Leveraged Options Group Pty Ltd* [2002] NSWSC 310; (2002) 41 ACSR 561. In *Pegasus*, Davies AJ observed (at [55]) that:

> The word "operate" is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme. The Oxford English Dictionary gives these relevant meanings:
>
> > "5. To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work.
> >
> > 6. To cause or actuate the working of; to work (a machine, etc.). Chiefly *U.S.*
> >
> > 7. To direct the working of; to manage, conduct, work (a railway, business, etc.); to carry out or through, direct to an end (a principle, an undertaking, etc.). orig. *U.S.*"

84 It is plain from the authorities that it is not necessary for an entity's involvement to encompass all of the conduct necessary to the scheme in order for that entity to be taken to operate the scheme for the purpose of s 601ED(5). That being so, the evidence on this application establishes that PECFM was involved in the full gamut of activities relating to the management and conduct of the schemes. PECFM issued the IMs for each of the Principal Unregistered

Schemes, solicited investments from investors and issued units in the Principal Unregistered Schemes. The IMs for the Principal Unregistered Schemes state that PECFM adopted what was described as an active management and investment style whereby it identified property projects in which the schemes invested. PECFM also represented in the IMs that they managed the subscription and complaints processes in respect of the Principal Unregistered Schemes. PECFM is deemed to have admitted that it operated the Principal Unregistered Schemes and the evidence supports that admission. In the circumstances I am satisfied that PECFM operated the Principal Unregistered Schemes within the meaning of s 601ED(5).

Conclusion as to contravention of s 601ED(5) of the Act

85 In the circumstances outlined above, I am satisfied that each of the Principal Unregistered Schemes was a managed investment scheme that was required to be registered but was not registered and was operated by PECFM in contravention of s 601ED(5) of the Act. ASIC is entitled to the declaration which it seeks in respect of the contravention by PECFM of s 601E(5) of the Act.

Contravention of section 911A(1) of the Act

86 ASIC contends that in operating the Principal Unregistered Schemes, PECFM carried on a financial services business without an AFSL in contravention of s 911A(1) of the Act.

87 Section 911A(1) of the Act, which appears in **Ch 7** (Financial services or markets), relevantly provides:

> **911A Need for an Australian financial services licence**
>
> (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

88 Section 911A(2) of the Act lists a number of exemptions from the requirement to hold an AFSL. PECFM has the onus of establishing the availability of any of the exemptions in s 911A(2) of the Act. PECFM has not led any evidence in the proceedings.

Was PECFM carrying on a financial services business?

89 For the reasons which follow I am satisfied that PECFM in operating the Principal Unregistered Schemes carried on a "financial services business".

Financial services business

90 The phrase 'financial services business' is defined by s 761A to mean 'a business of providing financial services'. Section 766A of the Act identifies in turn the circumstances in which a person provides a financial service. Relevantly, a person provides a financial service under s 766A(1)(b) if they 'deal in a financial product'.

Financial product

91 A 'financial product' is a facility through which, or through the acquisition of which, a person makes a financial investment: section 763A(1)(a) of the Act. Pursuant to s 763B(a) of the Act a person makes a financial investment if the investor gives money or money's worth to another person and the other person:

> (i) … uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); …

92 It is also a requirement that 'the investor has no day-to-day control over the use of the contribution to generate the return or benefit': s 763B(b).

93 As noted above, in my consideration of the s 601ED(5) contravention, interests (units) in the Principal Unregistered Schemes were acquired for money or money's worth and the contributions made by investors were pooled for the purpose of generating a financial return in circumstances where investors did not have relevant day to day control over the use of the contributions to generate the return or benefit. Accordingly, interests in the Principal Unregistered Schemes fall within the general definition of financial products in s 763A(1)(a) of the Act. That the interests in the Principal Unregistered Schemes are financial products is also clear having regard to s 764A(1)(ba) of the Act which provides that an interest in an unregistered managed investment scheme is a financial product.

Dealing in a financial product

94 The concept of 'dealing' in a financial product under s 766A(1)(b) is given its meaning by s 766C which relevantly provides that issuing a financial product is conduct which constitutes dealing in a financial product. With respect to the concept of 'issuing' further guidance is given

by s 761E(4) which relevantly provides that the issuer, in relation to a financial product issued to a client is the person responsible for the obligations owed, under the terms of the facility that is the product to the client.

95 PECFM is described as the issuer of the offers made under each of the IMs for the Principal Unregistered Schemes. PECFM was also appointed by the trustee of each of the Principal Unregistered Schemes as the manager, investment manager and or asset manager. PECFM was responsible for preparing and issuing the IMs for each of the Principal Unregistered Schemes. Completed and signed application forms were submitted to PECFM and payments by investors were directed to PECFM. While the Trustee had the sole discretion to accept or reject an application, units issued in respect of successful applications were issued by PECFM and recorded in the investment registers maintained by it for each of the Principal Unregistered Schemes. The ability to update, amend or issue a supplementary IM in respect of the Principal Unregistered Schemes was reserved expressly to PECFM. The IMs for each of the Principal Unregistered Schemes reflect that PECFM, in its capacity as manager, is responsible for the process of subscribing investors, arranging for the issue of units, pooling investments received to acquire RPUs in the SPV trusts and consulting with the Trustee as to whether to make distributions to investors.

96 Having considered this evidence and in light of the deemed admission by PECFM that it issued interests in the Principal Unregistered Schemes, I am satisfied that PECFM relevantly dealt in the financial products comprising interests in the Principal Unregistered Schemes.

Carrying on business

97 The concept of 'carrying on business' is given content by s 761C and Pt 1.2, Div 3 of the Act.

98 In "dealing" in financial products, PECFM provided a "financial service": s 766A(1). The analysis at [95] above demonstrates that the PECFM carried on a business of providing financial services in respect of its activities relating to the Principal Unregistered Schemes. In doing so, PECFM carried on a "financial services business": s 761A. That PECFM operated as part of the broader PEC Group and that PECFM's business activities extended beyond those related to the Principal Unregistered Schemes does not detract from the conclusion that PECFM carried on a financial services business with respect of the Principal Unregistered Schemes: ss 19, 20 of the Act.

99 By s 911A(1) of the Act, PECFM, as a person who carried on a financial services business was required to hold an AFSL unless one of the exemptions in s 911A(2) of the Act applies.

Did PECFM have an AFSL covering the provision of the relevant financial services?

100 It is uncontroversial on the evidence that PECFM does not hold, and has never held, an AFSL. ASIC has conducted searches of the relevant register maintained by it and PECFM did not appear on the register as the holder of an AFSL. A response given by PECFM to an ASIC s 30 notice issued on 27 November 2020 records that PECFM did not hold any AFSL at any time in the period from 1 January 2015 to the date of the notice. The PECFM Letter does not make a positive assertion that PECFM held an AFSL at any point and is silent on ASIC's allegations that it contravened s 911A. There is no reason to doubt the correctness of PECFM's deemed admission that it does not hold and has never held an AFSL.

Was PECFM relevantly authorised by an AFSL holder?

101 One of the exemptions to the requirement to hold an AFSL is where the relevant corporation is authorised as a CAR by an AFSL holder and the authorisation covers the provision of the relevant financial service: s 911A(2)(a) of the Act. The evidence led by ASIC demonstrates that PECFM was authorised as a CAR to provide financial services on behalf of three AFSL holders, namely OIAL, Endeavour and Investors Exchange Limited (**IEL**) but that those authorisations did not cover the establishment or operation of the Principal Unregistered Schemes.

102 The IEL authorisation postdates the issue of the IMs for the Principal Unregistered Schemes. The authorisations from OIAL and Endeavour do not authorise PECFM in respect of its activities in relation to the Principal Unregistered Schemes. I further note that the Endeavour authorisation postdates the issue of the IM for the PEC Asia DIF which is one of the IMs it is said to authorise. I am satisfied that the exemption in s 911A(2)(a) is not engaged. The other exemptions set out in s 911A(2) of the Act are not presently relevant.

Conclusion as to contravention of s 911A(1) of the Act

103 I am satisfied that by its conduct in operating each of the Principal Unregistered Schemes, PECFM carried on a financial services business in respect of which it was required to but did not hold an AFSL. PECFM thereby contravened s 911A(1) of the Act.

Contraventions of section 911C(d) of the Act

104 ASIC contends that PECFM contravened s 911C(d) of the Act by holding out that certain of its conduct (namely, the issuing of certain IMs and interests in the schemes to which those IMs related) was within an authority granted to it by an AFSL holder when it was not.

105 Section 911C of the Act provides:

> **911C Prohibition on holding out**
>
> A person must not hold out:
>
> …
>
> (d) that conduct, or proposed conduct, of the person is within authority (within the meaning of Division 6) in relation to a particular financial services licensee;
>
> if that is not the case.

106 The reference to conduct being within authority in relation to a particular financial services licensee is, relevantly, conduct that is within the scope of an authority given by the holder of an AFSL: s 917A(2) of the Act.

Holding out

107 To "hold out" involves making a representation: *In the matter of Vault Market Pty Ltd* [2014] NSWSC 1641 at [28] (Brereton J). In a recent judgment of this Court, *Australian Securities and Investments Commission v* ***TAL Life Limited (No 2)*** [2021] FCA 193, Allsop CJ in dealing with an application concerning contraventions of s 1041H of the Act made the following remarks regarding the approach to be adopted when assessing as a matter of fact, whether a representation was made (at [110]):

> 110 The documents sent on 17 December 2013 must be examined in their proper context to discern a representation, that is, that the Second Insured was expressly or impliedly told or that TAL made a statement: *Given v Pryor* (1979) 39 FLR 437 at 441 (Franki J), that TAL had the right to delay processing of the claim, and to withhold payment of benefits, until the relevant executed authorities were provided. This is a question of fact to be addressed by considering what was said and done against the background of all the surrounding circumstances: *Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 170; 42 ALR 177 at 202 (Deane and Fitzgerald JJ), cited and approved by the Court in *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12; 202 CLR 45 at 84 [100]. The resolution of the question may be assisted by logical deduction or logical analysis, but it is not limited to, and may not in any particular case involve, such considerations. The question is whether, by the communication in its context, TAL stated to the Second Insured that it had the right to delay processing of the claim, or to withhold payment of benefits, until the executed authorities were provided."

108 The question here is whether against the background of all the surrounding circumstances PECFM held itself out in each of the relevant IMs as being authorised by OIAL or Endeavour as AFSL holders to issue the particular IM and or to issue the relevant units in the trusts to which the IMs related.

109 ASIC contends that PECFM held itself out as being authorised by either OIAL or Endeavour, the relevant AFSL holders, to issue: (1) certain IMs (the **IM issue representation**); and or (2) to arrange the issue of units in the associated trusts described in those IMs (the **unit arranging representation**) when it was not so authorised.

110 ASIC submits that both these representations were made in the IMs for each of the PEC Truganina 2 SPV Trust, PEC Mt Duneed SPV Trust and PEC Wollert SPV Trust. In addition, ASIC contends that the IM issue representation was made in the IMs for the P1 Fund, PEC Asia DIF, PEC Asia WOF and another managed investment scheme known as the PE Capital Asia Fund.

The IM issue representation

111 PECFM issued the IMs for the PE Capital Truganina 2 SPV Trust, PEC Mt Duneed SPV Trust and PEC Wollert SPV Trust. Each of these SPV IMs included the IM issue representation.

112 The IM issue representations in each of the SPV IMs are in materially the same form and may be illustrated by reference to the PEC Truganina 2 SPV IM. The PEC Truganina 2 SPV IM issued by PECFM on 17 October 2016 relevantly provided (on its cover page):

> "This Information Memorandum (IM) for the PE Capital Truganina 2 SPV Trust (Truganina 2 SPV) is issued (sic) PE Capital Funds Management Ltd (ACN 605 157 248) on 17 October 2016.
>
> Corporate Authorised Representative 0012 45743 of One Investment Administration Ltd. (ACN 072 899 060) and AFSL 22506"

113 PECFM issued IMs in respect of the P1 Fund, PEC Asia DIF, PEC Asia WOF and PEC Asia Fund. Each of the IMs included a version of the IM issue representation in materially the same terms. The following example is drawn from the P1 Fund issued on 1 June 2016:

> "This Information Memorandum (IM) for the PE Capital P Fund (The Fund) is issued by PE Capital Funds Management Ltd (ACN 605 157 248) on 1st June 2016. Corporate Authorised Representative 001245743 of One Investment Administration Ltd. (ACN 072 899 060) and AFSL 225064"

114 The IMs for the P1 Fund and the PEC Asia Fund referred to OIAL as the relevant AFSL holder. The IMs for the PEC Asia DIF and the PEC Asia WOF referred to Endeavour as the relevant AFSL holder.

115 I am satisfied that in making the IM issue representations in each of the SPV IMs, PECFM held itself out as being authorised by OIAL as an AFSL holder to issue the SPV IMs. In including its corporate authorised representative number (**CARN**) as a representative of OIAL and citing OIAL's AFSL number immediately after the statement that it is the issuer of the IM, PECFM held itself out as being relevantly authorised to issue the SPV IMs as a representative of OIAL. The inclusion of a statement that PECFM is an authorised representative of OIAL is an irrelevant matter to be included in each of the SPV IMs unless it was the case that the issue of the IM by PECFM was within the authority given by OIAL to PECFM to act as its representative. A statement that is literally true may still be misleading if it conveys a meaning which is false. The two statements which together comprise the IM issue representation when read independently of each other and divorced from the context of the SPV IMs may be literally true. However, when read in context and in combination, the two statements give rise to a representation that PECFM has the authority of OIAL to issue the PEC Truganina 2 SPV IM.

116 The IM issue representations in the remaining four IMs were otherwise in the same form as those in the SPV IMs. It follows that I am satisfied that PECFM held itself out as being authorised as a representative of OIAL as an AFSL holder to issue the IMs for the P1 Fund and the PEC Asia Fund. Likewise with respect to the IMs for the PEC Asia DIF and PEC Asia WOF, PECFM held itself out as being authorised as a representative of Endeavour to issue the IMs.

The unit arranging representation

117 The unit arranging representations are in materially the same form in each of the SPV IMs. The PEC Truganina 2 SPV IM provided:

> "The Trustee is a Corporate Authorised Representative of One Investment Administration Ltd the holder of Australian financial services licence number 220564 and is authorised to arrange the issue of Units in the Trust".

The "Trustee" is defined as PECFM. Read in context and having regard to the fact that PECFM's status as a CAR of OIAL is only relevant if OIAL has authorised PECFM in relation to the scheme constituted by the PEC Truganina 2 SPV IM, I am satisfied that PECFM held

itself out as having the authority of OIAL to arrange the issue of units in the PEC Truganina 2 SPV.

118 The PEC Mt Duneed SPV IM and the PEC Wollert SPV IM, both issued by PECFM on 19 October 2016, included versions of the unit arranging representation to similar effect in respect of PECFM being authorised to issue the relevant IM and to arrange the issue of units in the relevant trust.

119 The IMs for the P1 Fund, PEC Asia DIF, PEC Asia WOF and PEC Asia Fund did not include a statement that PECFM was authorised by an AFSL holder to arrange the issue of units in the funds. ASIC did not seek to establish that such a representation arose by implication.

No relevant authority

120 The authorisations of PECFM by OIAL and Endeavour are in evidence. In each of those documents, the authority conferred on PECFM by the relevant AFSL holder did not authorise PECFM to issue the three SPV IMs and the four other fund IMs. The authority conferred on PECFM by OIAL did not authorise PECFM to arrange the issue of units in the SPV trusts. PECFM has not sought to establish that it is relevantly exempt from holding an AFSL by reason of s 911A(2) of the Act.

Conclusion as to contravention of s 911C(d) of the Act

121 I am satisfied that PECFM contravened s 911C(d) of the Act by holding out that its conduct in issuing the three SPV IMs and the P1 Fund and PEC Asia Fund IMs and arranging the issue of units in the trusts the subject of the three SPV IMs was authorised by OIAL when that was not the case. I am also satisfied that that PECFM contravened s 911C(d) of the Act by holding out that its conduct in issuing the PEC Asia DIF Fund and PEC ASIA WOF Fund IMs was authorised by Endeavour when that was not the case.

Misleading or deceptive conduct

122 ASIC contends that PECFM contravened s 1041H of the Act and or s 12DA of the ASIC Act by its conduct in making: (1) the IM issue representations and unit arranging representations (considered immediately above in the context of s 911C(d) of the Act); and (2) in making representations in the PDSs for the Registered Schemes, or some of them, that the investment strategy of the funds was, *inter alia*, to "diversify and lower portfolio risks", that the fund would invest in particular asset classes, and that "unit holders would receive preferential security over trust assets".

The relevant statutory provisions

123 Section 1041H of the Act relevantly provides:

> **1041H Misleading or deceptive conduct (civil liability only)**
>
> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or likely to mislead or deceive.
>
> (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:
>
> (a) dealing in a financial product;
>
> (b) without limiting paragraph (a):
>
> (i) issuing a financial product;
>
> (ii) publishing a notice in relation to a financial product;
>
> …
>
> (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).
>
> …

124 ASIC also relies on s 12DA of the ASIC Act which prohibits a person from, in trade or commerce, engaging in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. Section 12BAB(1) of the ASIC Act addresses when a person provides a financial service and relevantly includes dealing in a financial product and operating a managed investment scheme. Section 12BAB(7) sets out the meaning of "dealing" which includes issuing a financial product: s 12BAB(7)(b) of the Act. Interests in the relevant trusts were financial products captured by both the general definition in s 12BAA(1)(a) and the specific inclusion of interests in managed investment schemes in s 12BAA(7)(b) of the ASIC Act. PECFM dealt in the financial products comprised of the interests in the Registered Schemes. In doing so, PECFM provided a financial service: s12BAB(1)(b) of the ASIC Act. PECFM also provided a financial service by operating the Registered Schemes: s12BAB(1)(d) of the ASIC Act.

Applicable principles

125 Whether conduct is misleading or deceptive, or likely to be so, is a question of fact to be assessed objectively. Conduct is misleading or deceptive if it has a tendency to lead a person into error. Conduct is likely to mislead or deceive if that is a real or not remote possibility, regardless of whether it is less or more than fifty per cent: *Domain Names Australia Pty Ltd v*

.au Domain Administration Ltd [2004] FCAFC 247; (2004) 139 FCR 215 at 220 [17] (Wilcox, Heerey and Nicholson JJ); and *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; (2018) 131 ACSR 484 at 499 [71] (O'Callaghan J).

126 Section 1041H of the Act and s 12DA of the ASIC Act contain no necessary element of knowledge or dishonesty. Proof of a mental element is not required: *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65; (2014) 224 FCR 1 at 308 [1570] (Jacobson, Gilmour and Gordon JJ) citing Besanko J in *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 120 at 129 [33] and 129 [36] (***ASIC v Stone***).

127 The assessment of whether conduct is misleading or deceptive or capable of being so is a matter of inference drawn from the conduct complained of construed in the light of the evidence of the whole of the circumstances in which it occurred: *Australian Securities and Investments Commission v Online Investors Advantage Inc* [2005] QSC 324; (2004) 194 FLR 449 at 466 [135] (Moynihan J) cited with approval by Besanko J in *ASIC v Stone* at 129 [33]. See also *TAL Life Limited (No 2)* at [110].

IM issue representations and unit arranging representations

128 In the context of considering ASIC's claim in respect of contraventions of s 911C(d) of the Act, I have concluded that by its conduct in making the IM issue representations and the unit arranging representations PECFM held itself out to be authorised by an AFSL holder to issue IMs and or to arrange the issue of units in the relevant trusts when it was not. I am further satisfied that, objectively, the IM issue representations and unit arranging representations were misleading and or deceptive or likely to mislead or deceive prospective investors by inducing a belief that PECFM was relevantly authorised by an AFSL holder when it was not.

129 In the PECFM Letter, PECFM asserts that:

> When looking objectively at the misleading and deceptive conduct claims and reading them in the context of all the matters set out in the relevant PDS's [sic] and Information Memorandums, the conduct set out in the statement of claim is not capable of being misleading and deceptive or likely to mislead and deceive.

130 PECFM does not point to any particular background or contextual statements included in the relevant IMs that displace the inference I have drawn as to the IM issue representations and the unit arranging representations being misleading or deceptive. Further, looking at the IMs as a whole supports the conclusion I have drawn. In addition to the statements complained of, the

relevant SPV IMs refer to OIAL as the "AFS Licensee" in the "Corporate Directory" and state that [OIAL] (AFSL 225064) will manage the Trust in [sic] behalf of unit holders and undertake all compliance and reporting obligations. In the section of the IM headed "The Offer" under the heading "AFS Licence" PECFM is described "as a Corporate Authorised Representative of [OIAL] the holder of [AFSL] number 225064 and is authorised to arrange the issue of units in the Trust". In the section headed "About the manager" it is again stated that PECFM is a Corporate Authorised Representative of [OIAL] and AFSL (225064)…" These details in the IMs are irrelevant unless PECFM's conduct in respect of the IMs is authorised by the relevant AFSL holder under its AFSL. The inclusion of these details would lead a potential investor to think that the information is relevant and that PECFM is relevantly authorised by an AFSL holder.

131 I am satisfied that, objectively assessed, the representations in the relevant SPV IMs, read as a whole (including with the statements on the cover page) and in the context of the purpose of those documents, gives rise to a risk that a potential investor would be led into error in believing that PECFM was authorised by OIAL to issue the IM and to arrange the issue of units in the SPV trust. That risk is real, and not a remote possibility.

132 Similarly, when the IMs for the four funds are considered, the representation that PECFM is authorised to issue the IMs pursuant to an authority granted by either OIAL or Endeavour is reinforced by other references to PECFM's status as an authorised representative of one of those two license holders. I am satisfied that, objectively assessed, the relevant representations in the four fund IMs, read as a whole and in light of their purpose give rise to a risk that a potential investor would be led into error in believing that PECFM was authorised by an AFSL holder to issue those IMs. Again, that risk is real and not a remote possibility.

Registered Schemes - Investment Strategy

133 On 30 October 2017, prior to the issue of the relevant PDSs for the Registered Schemes, PECFM and Endeavour entered into Endeavour IMA. Endeavour was the responsible entity for the Master Fund, which had been established in 2006. By the Endeavour IMA, PECFM was appointed as an asset manager and as an investment manager to the "Fund". "The Fund" is defined as the Master Fund, the subfunds described herein as subfunds 1, 2 and 3 and "such other subfunds that may arise from time to time".

134 Under the Endeavour IMA, PECFM was responsible for managing the Fund's assets and was required in performing its duties and obligations to act in accordance with the agreement and

to comply with the Investment Strategy at all times. The "Investment Strategy" is set out in Schedule 2 to the Endeavour IMA. The Investment Strategy relevantly provides:

> **Schedule 2—Investment strategy**
>
> The PE Capital Master Fund is an IDPS registered managed investment scheme. It allows for the operation of sub trusts under it's ARSN.
>
> The PE Capital Commercial Property Income Fund is a registered managed investment scheme that will pool Investors' money to indirectly invest in a portfolio of Australian mixed use commercial property development projects.
>
> The PE Capital Asia Fund is a registered managed investment scheme that will primarily pool Investors' money to indirectly invest in a portfolio of Australian mixed use commercial property development projects.
>
> The PE Capital SIV Fund is a registered managed investment scheme that will meet the investment needs of foreign Investors who need to meet the various requirements for Significant Investor Visa's (SIV) and Premium Investor Visa's' under various legislation, but including reference to current Austrade and Australian Border regulations.
>
> The Projects will comprise property development projects in a broad range of sectors, some of which are SIV specific, including, but not limited to, the following sectors:
>
> (a) Petrol stations.
>
> (b) Childcare.
>
> (c) Healthcare.
>
> (d) Aged care.
>
> (e) Liquor sales.
>
> (f) Convenience stores.
>
> (g) Fast food.
>
> (h) Retirement & Residential Care.
>
> The Fund's indirect investment in a Project will be made by investing in a Development Trust which will undertake the Project. The PE Capital Group will both manage and co-invest in the Development Trusts. These co-investments by the PE Capital Group will take place through the PE Capital Property Trust (Previously called the PE Capital P2 Fund) subscribing for ordinary units in the relevant Development Trusts. In some instances, joint venture partners will also invest in the Development Trusts.
>
> The Fund will be issued with redeemable preference units (RPUs) in the Development Trusts which will entitle the Fund to payments at a fixed coupon rate of 12% per annum (Plus 2% fees) on the amount the Fund invests in the Development Trusts. The anticipated term of each of the RPUs is 12 months. Projects will be funded by a combination of debt funding in the form of the RPUs that will be issued to the Fund and the PE Capital P1 Fund, equity invested by the PE Capital P2 Fund, joint venture partners (where relevant) and borrowings from financial institutions. As the Fund will have RPUs in the Development Trusts, the Fund will not be a beneficiary of the Development Trusts and the Fund's relationship with the Development Trusts will be

> one of creditor (in the case of the Fund) and debtor (in the case of the Development Trusts).
>
> …
>
> Until Projects are identified, and a new Development Trust is established for investment by the Fund, Members' funds will be held in bank cash deposits.

135 By the terms of the Endeavour IMA, PECFM was responsible for the preparation of the PDSs for the funds the subject of the agreement and for ensuring that applications for interests in the schemes were dealt with in accordance with, *inter alia*, the PDSs. The PDSs for the Registered Schemes were prepared by PECFM and issued by Endeavour in its capacity as the responsible entity for each scheme. PECFM was responsible for the administration of the application process and for management of the investments made in the Registered Schemes.

136 The evidence reflects that the investment strategy disclosed in the Endeavour IMA was broadly the strategy that was in fact undertaken by PECFM in each of the Registered Schemes.

137 ASIC alleges that PECFM also acted as investment manager of the PEC MY Fund. ASIC acknowledges that PECFM was not relevantly appointed to manage this fund under the Endeavour IMA. ASIC contends that PECFM at all times intended to and did follow the same investment strategy for the PEC MY Fund as it did for the Master Fund and the subfunds. It is necessary to consider the PDS for the PEC MY Fund separately because whereas the PDSs for the Master Fund and the subfunds are substantially similar in relevant respects, the PDS for the PEC MY Fund differs in some respects. The PDSs for each of the subfunds referred to the Master Fund noting "this [PDS] contains a summary of significant information in relation to the [Master Fund] as this fund is a subfund of the PE Capital Master Trust".

138 The relevant content of the PDSs for the three subfunds on which ASIC relies is materially the same for present purposes and may be illustrated by reference to the PDS for subfund 1:

(1) appearing under the heading "Significant Features" of the relevant PDS a statement was made in the following, or materially similar, terms:

> "The core investment strategy of the Fund is to engage in lending funds to PE Capital's unique suite of property development project opportunities. The Fund charges a premium coupon rate for this lending which is passed on to unit holders in the form of distributions. The Fund is actively managed and investments are spread across PE Capital's projects, at both pre and post Development Approval (DA) stage. The funds are deployed to finance the deposits used to secure the site plus soft costs, including development management and consultant fees. Funds may also be used to settle land acquisitions where required. Unit holders receive preferential security over trust assets. Each project is held in a separate Special Purpose Vehicle (SPV)

which is a standalone unit trust structure";

(2) appearing under the heading "Investment Strategy" a statement was made in the following, or materially similar, terms:

> "The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns";

(3) under the heading "Asset Classes" a statement was included which said:

> "Cash, Fixed interest and business loans over quality multi-use commercial property 100%."

139 The PDS for the Master Fund was in similar terms save for in two respects. First, the entry under "Asset Classes" was "Cash, Fixed Interest, Commercial Property & Shares 100%". Secondly, that there was no reference to unitholders receiving preferential security in the "Significant Features" section. The Master Fund PDS did include the following statement in respect of subfund 1:

- The main risk of the fund is the security of the underlying properties.
- These are derisked with pooled, first ranking security over all the projects via a GSA (General Security Agreement), which have sectoral and geographical spread, and which are contracted with National &/or Global tenants, and which are in various stages of progression through the development and construction cycle.

140 In the PE Capital MYF PDS, ASIC relies on the following statements:

(1) appearing under the heading "Significant Features":

> "The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns";

(2) appearing under the heading "Asset Classes":

At call and Term deposits with Australian ADI's	5-100%;
Government Securities	0-50%;
Corporate Debt, notes and Securities	0-50%;
Fixed income investments	0-50%;

(NB - The fund will hold these indirectly via the PE Capital Commercial Property income Fund. Currently the fund may redeem its investment in this fund on a monthly basis)

141 A schedule is attached to these Reasons which sets out the relevant parts of the Registered Scheme PDSs on which ASIC relies.

142 PECFM arranged for interests to be issued to investors in the Registered Schemes on the basis of the representations made in each of PDSs for Registered Schemes. As noted earlier in these reasons, ASIC alleges that PECFM transferred all of the moneys invested in the Registered Schemes to the SPVs in exchange for RPUs in the SPV trusts. PECFM is deemed to have admitted this allegation. The investment registers support that pooled funds from each of the Registered Schemes were exchanged for RPUs in the SPV trusts.

143 Before it prepared the PDSs for the Registered Schemes, PECFM, having executed the Endeavour IMA, knew that it was obliged to follow the investment strategy set out in the Endeavour IMA in respect of the Master Fund and the three subfunds. As a consequence ASIC contends that PECFM knew that all investments made in the Registered Schemes would be applied to acquiring RPUs in the SPV trusts.

144 ASIC contends that PECFM made three relevant representations in the Registered Scheme PDSs that were relevantly misleading or deceptive or likely to be so.

145 First, that the investments would be applied in a manner that would "diversify and lower portfolio risks".

146 Secondly, that moneys raised pursuant to the Master Fund and subfund PDSs would be invested in the asset classes nominated in the relevant PDS, namely:

(a) other than for the PE Capital MYF, in “cash, fixed interest, commercial property and shares 100%” (the Master Fund) or "cash, fixed interest and business loans over quality multi-use commercial property" (the three subfunds); and

(b) for the PE Capital MYF, at call and term deposits with Australian ADIs (5 – 100%), government securities (0 – 50%), corporate debt, notes and securities (0 – 50%) and fixed income investments (0 – 50%).

147 Thirdly, that for each of the subfunds "Unit holders would receive preferential security over trust assets". In respect of subfund 1, the Master Fund PDS described the security as a “pooled, first ranking security over all the properties via a GSA (General Security Agreement)”.

148 ASIC contends that despite including these representations in the Registered Scheme PDSs, when it came to arranging for the investment of the pooled funds raised by each Registered Scheme, PECFM did not invest in a manner directed to diversifying and lowering portfolio risks and did not invest in the asset classes nominated in the Registered Scheme PDSs. ASIC

allege that PECFM in fact, followed the investment strategy set out in the Endeavour IMA as it had undertaken to do and applied all of the moneys received from investors in the Registered Schemes to acquire RPUs issued by the SPVs.

149 ASIC further contends that despite making the representation in the subfund PDSs that unit holders received preferential security, PECFM did not obtain from the SPV trustees preferential or first-ranking security in respect of the RPUs issued to the subfunds. It will be recalled that whereas the resolution passed in respect of the issue of RPUs by the SPV trustee referred to the RPUs being secured no such security was put in place (see [25] - [26]). For completeness, I note that although the PEC MY Fund PDS included a statement that "unitholders receive preferential security over the trust assets" ASIC does not contend that this statement was misleading.

150 I will first consider whether the PDSs conveyed each of the representations alleged by ASIC. In doing so, it is necessary to consider the representation in the context of the PDS as a whole and having regard to the purpose of the PDS.

The diversification and asset class representations

151 This representation must be construed in its context. The statement that "[t]he strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns" is given prominence under the heading "Investment Strategy". It is to be read in context of what is elsewhere stated in the PDS including the following extracts:

> **STRATEGY RISK**
>
> The Fund seeks to deliver returns using a distinctive investment approach, which involves investment in a fixed return fund with limited liquidity and exposure to development projects balanced by investment in liquid investments. The nature of the strategy is such that loss could be incurred by virtue of errant asset sector allocation decisions or through errant investment selection.

152 The reference to the investment in a fixed return fund with limited liquidity and exposure to development projects being "balanced by" investment in liquid assets reinforces the representation of diversification and related lowering of portfolio risk. The reference to balance being achieved by investment in liquid assets reinforces the importance of cash being one of the asset classes.

153 However, the relevant PDSs also include the following:

LIQUIDITY RISK

Under abnormal or difficult market conditions some normally liquid assets may become illiquid, restricting our ability to sell them and to make withdrawal payments for Investors without a potentially significant delay. The Fund gains exposure to development projects being undertaken by the PE Capital group of companies by subscribing for redeemable preference units in the special purpose vehicles undertaking those development projects.

and:

DEFAULT OR DELAY RISK

The Fund is exposed to development projects through its holding of redeemable preference units in special purpose vehicles and there are specific risks associated with such investments which may impact the performance of the Fund and cause it to default or delay on the payment of coupons, or the repayment of capital, to the Fund. This in turn may impact the returns payable by the Fund to Investors.

The risk of default or delay can occur as a result of underlying construction or development costs exceeding budgeted costs and the developer being unable to complete the project without obtaining further funds, failure to obtain or delays in obtaining development approvals, the funds kept in reserve by the developer to complete the project being insufficient to meet the cost of completion and a change in market conditions could result in the project's value on completion being worth less than anticipated, or in lower sale rates and prices than expected.

154 The description of the "core investment strategy" included under the heading "Significant Features" is important. It precedes the information included under the heading "Investment Strategy". It expressly states that the "core investment strategy" is to engage in lending to "PE Capital's unique suite of property development project opportunities". It further states that "investments are spread across PE Capital's projects". This part of the PDS suggests that diversification is achieved by spreading investment across multiple PE Capital projects. This is reinforced by earlier description of the fund under the heading "How the fund works":

The Fund is a wholesale managed investment scheme that will pool investors' money to indirectly invest in a portfolio of Australian property development projects in the following sectors:

- Petrol stations
- Childcare
- Healthcare
- Aged, Retirement & Residential care
- Liquor sales
- Convenience stores and
- Fast food.

The Fund's indirect investment in a Project will be made by investing in a Development

Trust that will undertake the Project…

155 Statements of this kind were included in each of the subfund PDSs and in the investment strategy outlined in the Endeavour IMA.

156 I am satisfied that objectively construed in the context of the whole PDS a reasonable investor would have understood that their investments would be pooled and invested in RPUs issued by the SPVs across PE Capital projects. Further, that the means of diversification was by investing in multiple development projects undertaken in separate SPV structures. The reference to asset classes of "Cash, Fixed Interest and business loans over quality multi-use commercial property 100%" would be understood in the context of the debt comprised of the RPUs and the commercial practice of using bank cash deposits in the course of development projects of the kind described in the PDSs.

157 Having regard to the representations read in the context in which they are given and as a whole, I am not satisfied that ASIC has established on an objective reading of the whole of each of the subfund PDSs that the very general statements as to diversification and lowering of risk and asset classes give rise to the representations for which ASIC contend. To the extent that there is a general high level representation to the effect that ASIC contends, I am not satisfied that in whole of the relevant context there was a real risk that potential investors were likely to be misled or deceived.

158 I have reached the same conclusion in respect of the Master Fund but for the following additional reason. The Master Fund PDS describes the Master Fund as a "service" that provides investors with a range of investment options with a minimum initial allocation to each investment option of $20,000. The investment options available under the Master Fund included options to invest in various other PE Capital funds including subfund 1. ASIC has not established that the diversification and asset class representations to the extent that they were made in the Master Fund PDS were misleading and deceptive or likely to be so in the context of each of the underlying investment funds that comprise the investment options within the Master Fund service.

159 Turning to the PDS for the PEC MY Fund, ASIC relies on the following statements:

(a) under the heading "Investment Strategy":

> The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns

(b) Under the heading "Asset Classes":

At call and Term deposits with Australian ADI's	5-100%;
Government Securities	0-50%;
Corporate Debt, notes and Securities	0-50%;
Fixed income investments	0-50%;

(NB - The fund will hold these indirectly via the PE Capital Commercial Property income Fund. Currently the fund may redeem its investment in this fund on a monthly basis)"

160 ASIC contends that these statements were misleading and deceptive or likely to mislead or deceive in circumstances where PECFM intended to and did pursue the same investment strategy as it was obliged to follow under the Endeavour IMA, namely that all moneys raised via the PEC MY Fund would be invested solely into RPUs in the SPV trusts.

161 The PEC My Fund PDS included the following information under the heading "How the Fund works":

> The Fund is a unique vehicle to enable people to invest into a blend of high quality, mixed use, commercial property opportunities in Australia, as well as actively/professionally managed Cash and Fixed Interest opportunities.
>
> **It aims to deliver a 5%+ return to investors after fees**.
>
> The Fund's focus will be on liquid assets, which may include at-call and term deposits with Australian ADIs, Government securities, corporate debt, notes and securities and hybrid securities. The Fund may also invest in other funds that invest in these types of assets. The Fund will maintain a minimum investment of 50% of its assets in liquid assets. In addition, the Fund may invest up to a maximum of 50% of its assets in the PE Capital Commercial Property Income Fund (CPIF - ARSN 117 840 799), which is a fixed income fund that intends to pay monthly coupons to the Fund.
>
> The CPIF has exposure to property development projects being undertaken by the PE Capital group of companies through holding redeemable preference units in the special purpose vehicles undertaking those property development projects.

162 This statement reinforces the significance of the asset class maximum weightings to which ASIC otherwise points. The express statement that the "Fund's focus will be on liquid assets" and that the "Fund will maintain a minimum investment of 50% of its assets in liquid assets" reinforces the representations on which ASIC relies. The PEC MY Fund PDS did not include contextual statements to the effect of those extracted from the subfund PDSs at [154] above.

163 ASIC alleges and PECFM is deemed to have admitted that all moneys invested pursuant to offers made in the PEC MY Fund PDS were transferred to the SPVs in exchange for RPUs. Descending to the level of the specific underlying allegations of fact in the statement of claim,

ASIC alleges that following the issue of the PEC MY Fund PDS, two investors made investments into the PEC MY Fund totalling $225,000. PECFM is deemed to have admitted this allegation. The PECFM investor register records that $225,000 was invested by the PEC MY Fund in the Mt Duneed SPV. That is that the whole of the pooled funds raised in the PEC MY Fund were invested in a single one of the eight SPVs. This contrasts markedly with the way in which funds from the other Registered Funds were allocated across between four and eight of the SPVs. PECFM does not address this specific issue in respect of the application of the funds raised in the PEC MY Fund in the PECFM Letter.

164 I am satisfied that ASIC has established that PECFM's conduct in relation to the PEC MY Fund PDS which included the statements set out above as to the asset classes into which investments would be made, the maximum allocations applicable to the various asset classes, and the focus on the liquidity of the investments, was misleading and deceptive or likely to mislead or deceive, in circumstances where PECFM's strategy as investment manager at the time it issued the PDS on 10 April 2018 was to apply the whole of the moneys raised under the Registered Schemes, including funds in the PEC MY Fund, to acquire RPUs in the SPV trusts. Further that this is what PECFM in fact did. I am satisfied that there was a real risk that potential investors may be misled or deceived. The PEC MY Fund PDS represented that the fund would maintain a minimum investment of 50% of its assets in liquid assets and that in addition, the Fund may invest up to a maximum of 50% of its assets in, in effect, subfund 1. Instead the whole of the funds subscribed to the PEC MYF Fund were invested in the Mt Duneed SPV.

The preferential security representation

165 ASIC alleges that with respect to the PDSs for the three subfunds a representation was made that "unit holders receive preferential security over trust assets". That representation was made in express terms in the section of the PDS headed "Significant Features". There is nothing in the three subfund PDSs which detracts from or qualifies the express representation. The statement in the Master Fund PDS in relation to subfund 1 reinforces the representation contained in the subfund 1 PDS. I say reinforces because the PDS for subfund 1 also makes reference to the Master Fund.

166 The evidence demonstrates that contrary to the representations in respect of each of the subfund PDSs, the interests of the subfunds and the unitholders in the subfunds, did not receive preferential security over trust assets.

167 The operative clause of the general security agreement (**GSA**) which purported to provide a security interest was ineffective in that PEC as the grantor did not hold an interest in the property over which security purported to be given. There is no evidence in the material before me that PEC had any interest in the assets of the SPVs.

168 During their s 19 examinations, Mr Huang, Mr Roberts and Mr Day were each questioned regarding the GSA. That evidence establishes that the GSA is the "GSA" and "preferential security" referred to in the PDSs for the Master Fund and subfund PDSs and that there was not any other instrument which provides security to unitholders over the property held by the SPVs. Mr Huang's evidence was that the security agreement was not registered and the entity purporting to be the grantor of the security interest, PEC, was the "wrong entity" and that the agreement was "worthless". Mr Day also gave evidence that the security agreement was neither registered nor did it provide a first ranking security to investors of the kind represented in the PDSs and IMs issued to investors.

169 The statements as to unitholders receiving "first ranking security" and "preferential security over trust assets" were misleading and deceptive. Unitholders did not have "preferential security" over the trust assets of the SPVs. The representations to the contrary are likely to lead a reasonable potential investor reading the PDSs into believing that their investment would be effectively secured in this way against trust assets when that was not so.

Winding up orders

Winding up of PECFM and appointment of liquidator

170 ASIC applies pursuant to s 461(1)(k) of the Act for an order that PECFM be wound up and pursuant to s 472(1) of the Act that Mr Fielding, a registered liquidator, be appointed. Mr Fielding has consented to the appointment.

171 Section 461(1)(k) provides that the Court may order the winding up of a company if "the Court is of the opinion that it is just and equitable that the company be wound up". Section 472(1) of the Act provides that on an order being made for the winding up of a company, the Court may appoint a registered liquidator to be liquidator of the company.

172 The principles applicable to making a winding up order on the just and equitable ground are well established. Relevantly for present purposes, a company may be wound up on the just and equitable ground where there is "a justifiable lack of confidence in the conduct and management of the affairs of the company" and thus a risk to the public interest that warrants

protection: *Australian Securities and Investments Commission v* ***ABC Fund Managers*** [2001] VSC 383; (2001) 39 ACSR 443 at 469 – 470 [119] (Warren J, as her Honour then was); See also *Re IPO Wealth Holdings No 2 Pty Ltd* [2020] VSC 733 at [64] (Robson J); *Australian Securities and Investments Commission v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 at [96] and [97] (Mandie J); *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (ACN 125 423 574) and Others (No 2)* [2013] FCA 234; (2013) 93 ACSR 189 at [20] (Gordon J) citing Warren J in *ABC Fund Managers* at [115]; *Australian Securities and Investments Commission v CME Capital Australia Pty Ltd (No 2)* [2016] FCA 544 at [14] - [21] (Moshinsky J).

173 I am satisfied that it is appropriate to make an order for PECFM to be wound up for the following reasons.

174 First, the administrators of PECFM have stated that the administration is without funds and that they do not expect to receive a proposal for a deed of company arrangement. Further, that they do not oppose PECFM being wound up under s 461(1)(k) of the Act and a registered liquidator being appointed.

175 Secondly, I am satisfied on the evidence that the Court can have no confidence that PECFM will comply with its legal obligations. In this regard in addition to my conclusion that PECFM has engaged in contraventions of ss 601ED(5), 911A, 911C(d) and 1041H of the Act and s 12DA of the ASIC Act. I note that PECFM does not appear to have lodged with ASIC its annual report for each of the 2018, 2019 and 2020 years as is required by s 319(1) of the Act. In December 2020, PECFM's auditors notified ASIC of PECFM's failure to do so and said that they estimated that the failure would be rectified by 31 March 2021. There is no evidence that PECFM's failure to lodge audited annual reports has been rectified. PECFM has since entered into voluntary administration.

176 In the present case, I have found that PECFM has engaged in contraventions of the Act. There is good reason to believe based on the detailed evidence led by ASIC in respect of PECFM's financial statements and bank balance and including the information provided by the administrators that PECFM is insolvent or is likely to be insolvent. The only issue raised by PECFM in the PECFM Letter in respect of ASIC's contention that PECFM is insolvent is to point to the fact that ASIC has not led expert evidence. The authorities provide that ASIC need only establish that there is "good reason to believe" that PECFM is insolvent, whether or not the formal elements of s 459A of the Act have been satisfied. ASIC does not need to establish

that PECFM is insolvent. It merely points to the above factors as giving rise to a belief that PECFM is insolvent, which circumstances can be taken into account under the just and equitable ground as one of the factors to be considered. Having regard to the nature of PECFM's business, I am satisfied that it is in the public interest to wind up PECFM for the purpose of protecting investors and potential investors. Winding up PECFM will also serve to condemn the past breaches of the Act by PECFM.

177 ASIC has obtained the consent of Mr Fielding to be appointed by the Court as liquidator of PECFM. There has been no objection to his appointment. Accordingly, I will make an order that PECFM be wound up and Mr Fielding be appointed as liquidator.

Winding up of the Registered Schemes

178 ASIC applies pursuant to s 601ND of the Act for an order that the Registered Schemes be wound up. Section 601ND of the Act relevantly provides that on the application of ASIC the Court may, by order, direct the responsible entity of a registered scheme to wind up the scheme if the Court thinks it is just and equitable to make the order.

179 The same principles as apply in respect of s 461(1)(k) of the Act will guide the Court in determining whether to exercise the power to wind up a registered scheme pursuant to s 601ND of the Act on the basis that it is just and equitable to do so.

180 An order under s 601ND(1)(a) ordinarily directs the responsible entity to wind up the scheme (see also s 601NE). However, here, the responsible entity, Endeavour, is in liquidation. It is therefore necessary to appoint another person to take responsibility for ensuring that the Registered Schemes are wound up in accordance with their respective constitutions.

181 I am satisfied that it is just and equitable to wind up the Registered Schemes and for Mr Fielding to be responsible for ensuring that the schemes are wound up in accordance with their respective constitutions. My reasons are as follows.

182 First, the responsible entity of the Registered Schemes, Endeavour, is in liquidation. Secondly, PECFM has operated the Registered Schemes, as investment manager, and will itself be wound up for the reasons outlined above with Mr Fielding as liquidator. Thirdly, there is good reason to believe that the Registered Schemes are insolvent. They are dependent on the SPVs to pay the amount due on redemption of the RPUs. The evidence demonstrates that there is good reason to doubt that the SPVs will meet their payment obligations in respect of the Registered Schemes.

183 PECFM has invested $4,615,664 and $12,295,964 into the SPVs from the Registered Schemes and the Principal Unregistered Schemes respectively. The only material assets of the Registered Schemes and the Principal Unregistered Schemes are the investments in the SPVs by way of RPUs and other amounts owed to them by the SPVs in the nature of interest and management fees. The ability of investors in the Registered Schemes or the Principal Unregistered Schemes to recover any of their investments depends directly on the ability of the SPVs to repay the RPUs or other amounts owed to the schemes.

184 On the material before the Court, it appears that the SPVs are not in a position to do so. The material assets of the SPVs are the land held by them. However all of them, save for two (PEC Truganina SPV and PEC Truganina 2 SPV), have sold, or otherwise transferred, the land previously owned by them and the remaining two SPVs have secured debts, or other liabilities, which appear to exceed the value of the land. ASIC's evidence includes valuations of the properties held by the SPVs and balance sheets for the SPVs. The balance sheets record the investments in the RPUs of each of the SPVs (including the RPUs held by the Registered and Principal Unregistered Schemes in the SPV funds) as equity and not as part of liabilities. This treatment of the RPUs is inconsistent with the terms of the PDSs and the terms of issue of the RPUs which identify these interests as debt, not equity. For this reason, in its evidence ASIC has undertaken the exercise of calculating the net equity in each of the SPVs treating the RPUs as debt. The value of the land, the total liabilities and the net asset / equity position for the two SPVs that still hold land are contained in ASIC's evidence and may be summarised as follows:

SPV	**(A) Land Valuation**	**(B) Total Liabilities**	**(C) RPU investment component of total equity**	**(A)-(B)-(C) Nets assets / equity**
PEC Truganina SPV	$2,850,000	$3,181,651	$2,549,288	-$2,880,939
PEC Truganina 2 SPV	$6,100,000	$7,639,695	$4,332,052	-$5,871,747

185 The SPV schemes otherwise appear to be commercially insolvent in that neither Endeavour nor PECFM have funds to continue the management and administration of the SPV schemes. There is no evidence from which it can be established that there is a reasonable prospect of the SPV schemes being put in funds so that they may continue or of the liabilities referrable to the schemes being met from income or realisable assets of the schemes.

186 The Registered Schemes have not lodged with ASIC their annual reports for each of the 2018, 2019 and 2020 financial years as is required by s 311 of the Act. There is no current financial

statements available by which investors can determine whether they will likely be able to recover their investments.

187 On the evidence before the Court it appears that the SPVs are unable to pay the amounts due to each of the Registered Schemes. In turn it appears that these schemes are unable to pay the amounts due on the units acquired by investors.

188 I am satisfied that an order ought to be made under s 601NF(1) of the Act given that Endeavour, the responsible entity, is in liquidation and may cease to exist before the winding up of the schemes is completed. Endeavour, by reason of its own winding up, is incapable of doing the tasks required to ensure that the schemes be wound up. The appointment of a person other than the responsible entity in these circumstances to ensure that a scheme is wound up in accordance with its constitution is "not unusual": *Re FEA Plantations Ltd (Subject to Deed of Company Arrangement) (Receivers Appointed)* [2013] FCA 1331 at [32] - [33] (Gordon J); See also *Re Rivercity Motorways Management (In Liq) (No 3)* [2016] FCA 1541 at [26] (Greenwood J) and cases cited therein.

189 There is a further reason in support of an order that a person other than Endeavour be appointed to wind up the Registered Schemes. That is because there is a potential for a conflict between the interests of the Registered Schemes and the interests of Endeavour to arise if Endeavour is responsible for winding up the schemes. For example, Endeavour may claim to be owed fees by the Registered Schemes and that it has a right of indemnity from the scheme property to secure such fees. However, the Registered Schemes may assert that Endeavour has acted in breach of its duties as responsible entity of the Registered Schemes and, as a consequence, they have suffered loss or Endeavour is otherwise disqualified from maintaining its indemnity. For these reasons, it is preferable that an independent person be appointed to manage the winding up of the Registered Schemes.

190 Finally, I note that ASIC has obtained the consent of Mr Fielding to be appointed by the Court as the person responsible for winding up the Registered Schemes.

Winding up of the Principal Unregistered Schemes

191 ASIC applies pursuant to s 601EE(2) of the Act for the winding up of the Principal Unregistered Schemes and that Mr Fielding be responsible in respect of winding up these schemes.

192 Section 601EE of the Act relevantly provides that ASIC may apply to the Court to have an unregistered managed investment scheme operated in contravention of s 601ED(5) of the Act wound up. The Court may make any orders it considers appropriate for the winding up of the scheme.

193 As with s 601ND of the Act, it is similarly recognised in the authorities that the exercise of the court's discretion to wind up a scheme under s 601EE of the Act should be guided by the same considerations as are relevant to the discretion to wind up companies on the just and equitable ground pursuant to s 461(1)(k): *Australian Securities and Investment Commission v Chase Capital Management Pty Ltd* [2001] WASC 27; (2001) 36 ACSR 778 at [74] (Owen J); *ABC Fund Managers Ltd* at [152] (Warren J).

194 In addition to the matter identified above in my consideration of the winding up of the Registered Schemes, the following further matters demonstrate that it is just and equitable to wind up the Principal Unregistered Schemes.

195 First, I have found, for the reasons set out above, that PECFM has operated each Unregistered Scheme in contravention of s 601ED(5) of the Act. PECFM has not put before the Court any evidence to the effect that it is taking any steps to protect the interests of the investors in those schemes by, for example, seeking repayment of the RPUs or otherwise gathering in assets for the benefit of those investors.

196 Secondly, the evidence demonstrates that there is good reason to believe that the Principal Unregistered Schemes are commercially insolvent. Like the Registered Schemes, they are dependent on the SPVs to pay the amount due pursuant to the RPUs and other amounts due to the Principal Unregistered Schemes and there is good reason to doubt that the SPVs are in a position to meet their payment obligations to the Principal Unregistered Schemes.

197 Thirdly, PECFM operates the Principal Unregistered Schemes and it will be wound up. It would be imprudent to allow the Principal Unregistered Schemes to continue in circumstances where the entity which managed the schemes from inception is to be wound up.

198 Fourthly, there are public interest considerations which favour winding up the Principal Unregistered Schemes. The provisions of Ch 7 of the Act were introduced by the *Financial Services Reform Act 2001* (Cth). The object of the licensing regime the product of this reform was directed to the adequacy of capitalisation of providers of financial services, exclusion of unqualified and untrained persons from the financial services industry, enforcing compliance

with ethical standards and ensuring fair, orderly and transparent markets for financial products: see objects set out in s 760A. The requirement to issue a product disclosure statement and register a managed investment scheme serves the purpose of protecting investors. ASIC has established breaches of the Act by PECFM as to both the manner of obtaining investments from investors and the continuing operation of the Principal Unregistered Schemes. The power to wind up a scheme that has been operated in contravention of s 601ED(5) of the Act is directed to addressing the precise circumstances which pertain in the present case.

199 Finally, I note that Mr Fielding has consented to being responsible for winding up the Principal Unregistered Schemes.

Declarations

200 ASIC seeks declarations that PECFM contravened ss 601ED(5), 911A(1), 911C and 1041H of the Act or alternatively s 12DA of the ASIC Act.

201 Section 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and s 1101B of the Act confer wide powers on the Court to make declarations that particular persons have engaged in conduct that contravenes the Act. The power granted by s 21 of the FCA Act is limited only by the Court's discretion: *Seven Network Ltd v News Ltd* [2009] FCAFC 160 at [1016]. It extends to making a declaration at the application of a regulator to encourage compliance with an Act that the regulator has the statutory responsibility to administer.

202 It is relevant to consider if the declarations will have utility, whether the proceedings involve a matter of public interest and whether the circumstances require the Court to express its disapproval of the contravening conduct: *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453 at [63].

203 In this case there is a real interest in making the declarations sought to deter contraventions of financial services laws. The contravening conduct warrants the Court's disapproval. The declarations should set out precisely and plainly the contravening aspects of the conduct in order to serve to inform the financial services industry as to the unlawfulness of the conduct.

204 I am satisfied that the declarations ought to be made. I will hear from ASIC on the final form in which the declarations will be made.

Federal Court (Corporations) Rules 2000, r 2.4

205 Rule 2.4 of the *Federal Court (**Corporations**) **Rules** 2000* (Cth) requires that an originating process be supported by an affidavit stating the facts which support the application. Sub-rule (2) provides that an affidavit in support must annex a record of search maintained by ASIC in relation to the company the subject of the application and that such search must be carried out no earlier than 7 days before the originating process is filed.

206 The originating process was filed on 13 May 2021. The searches of the records of ASIC in respect of both PECFM and Endeavour were undertaken on 30 April 2021 (some six days outside of the window provided by r 2.4(2)). ASIC has given evidence that this was because of an inadvertent oversight.

207 ASIC has undertaken fresh current and historical searches of its records in respect of both companies. Those new searches reveal that there were no material changes of those records between 30 April 2021 and 13 May 2021. This demonstrates that there has been no prejudice and serves to cure the original minor defect in the application.

208 I am satisfied that the requirements of rule 2.4(2) should be dispensed with and will make an order accordingly.

Costs

209 There is no reason why ASIC should not have their costs against PECFM in accordance with the order they seek.

I certify that the preceding two hundred and nine (209) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman.

Associate: 

Dated: 9 February 2022

SCHEDULE A

Extracts of the Registered Scheme PDSs

	Impugned representations		
Registered Scheme	**Section titled "Significant Features"**	**Investment Strategy**	**Asset classes**
*PEC **Master Fund***	"The core investment strategy of the Fund is to engage in lending funds to PE Capital's unique suite of property development project opportunities. The Fund charges a premium coupon rate for this lending which is passed on to unit holders in the form of distributions" …	"The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns";	"Cash, Fixed interest, Commercial Property and Shares 100%."
*PE Capital Commercial Property Income Fund (**subfund 1**)*	"The core investment strategy of the Fund is to engage in lending funds to PE Capital's unique suite of property development project opportunities. The Fund charges a premium coupon rate for this lending which is passed on to unit holders in the form of distributions. The Fund is actively managed and investments are spread across PE Capital's projects, at both pre and post Development Approval (DA) stage. The funds are deployed to finance the deposits used to secure the site plus soft costs, including development management and consultant fees. Funds may also be used to settle land acquisitions where required. Unit holders receive preferential security over trust assets. Each project is held in a separate Special Purpose Vehicle (SPV) which is a standalone unit trust structure."	"The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns";	"Cash, Fixed interest and business loans over quality multi-use commercial property 100%."
*PE Capital Asia Fund (**subfund 2**)*	"The core investment strategy of the Fund is to engage in lending funds to PE Capital's unique suite of property development project opportunities. The Fund charges a premium coupon rate for this lending which is passed on to unit holders in the form of distributions. The Fund is actively managed and investments are spread across PE Capital's projects, at both pre and post Development Approval (DA) stage. The funds are deployed to finance the deposits used to secure the site plus soft costs,	"The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns"	"Cash, Fixed interest and business loans over quality multi-use commercial property 100%."

	including development management and consultant fees. Funds may also be used to settle land acquisitions where required. Unit holders receive preferential security over trust assets. Each project is held in a separate Special Purpose Vehicle (SPV) which is a standalone unit trust structure."		
*PE Capital SIV Fund (**subfund 3**)*	"The core investment strategy of the Fund is to engage in lending funds to PE Capital's unique suite of property development project opportunities. The Fund charges a premium coupon rate for this lending which is passed on to unit holders in the form of distributions. The Fund is actively managed and investments are spread across PE Capital's projects, at both pre and post Development Approval (DA) stage. The funds are deployed to finance the deposits used to secure the site plus soft costs, including development management and consultant fees. Funds may also be used to settle land acquisitions where required. Unit holders receive preferential security over trust assets. Each project is held in a separate Special Purpose Vehicle (SPV) which is a standalone unit trust structure."	"The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns"	"Cash, Fixed interest and business loans over quality multi-use commercial property 100%."
*PE Capital Monthly Yield Fund (**PEC MY Fund**)*		"The strategy of the fund is to diversify and lower portfolio risks and to introduce access to previously inaccessible asset classes for optimal investor returns"	"At call and Term deposits with Australian ADI's 5-100%; Government Securities 0-50%; Corporate Debt, notes and Securities 0-50%; Fixed income investments 0-50%; (NB - The fund will hold these indirectly via the PE Capital Commercial Property income Fund. Currently the fund may redeem its investment in this fund on a monthly basis)"