

# FEDERAL COURT OF AUSTRALIA

## Provide Nominees Pty Ltd v Australian Securities and Investments

### Commission [2024] FCAFC 25

Appeal from: *Australian Securities and Investments Commission v Provide Nominees Pty Ltd* [2023] FCA 1137  
*Australian Securities and Investments Commission v Provide Nominees Pty Ltd (No 2)* [2023] FCA 1308

File number: VID 867 of 2023

Judgment of: **LEE, ANDERSON AND MCELWAIN JJ**

Date of judgment: 22 February 2024

Date of publication of reasons: 6 March 2024

Catchwords: **CORPORATIONS** – application made by the Australian Securities and Investments Commission (ASIC) under s 70(3) of the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act) – where failure to comply with notice issued pursuant to s 33(1) of the ASIC Act – where primary judge held ASIC fulfilled pre-condition in s 70(2) requiring ASIC to certify in writing the failure to comply – whether primary judge erred in finding the Court was empowered to conduct inquiry pursuant to s 70(3) – whether s 70(2) requires certification by ASIC of a failure “without reasonable excuse” – meaning of “failure” in s 70(1) – consideration of legislative history – notice of contention upheld – appeal dismissed with costs

Legislation: *Acts Interpretation Act 1901* (Cth) s 18A  
*Australian Securities and Investments Commission Act 2001* (Cth) Pt 3, ss 13, 33, 70, 70(1), 70(2), 70(3)  
*Federal Court of Australia Act 1976* (Cth) s 47  
*Companies Act 1981* (Cth) (repealed) ss 297(1), 297(2)  
*National Companies and Securities Commission Act 1979* (Cth) (repealed) s 39(7)  
*Securities Industry Act 1980* (Cth) (repealed) ss 19(13), 19(14)  
*Companies Act 1961* (Vic) (repealed) s 175(1)  
Explanatory Memorandum, Australian Securities Commission Bill 1988 (Cth), cl 70  
Explanatory Memorandum, Companies Bill 1981 (Cth)

Cases cited: *Attorney-General (Old) v Australian Industrial Relations Commission* [2002] HCA 42; (2002) 213 CLR 485  
*Attorney General v Costain International Ltd* [1983] 2 HKC 110  
*Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2017] VSC 573  
*Australian Securities and Investments Commission (ASIC) v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263; (2020) 148 ACSR 123  
*Australian Securities and Investments Commission v Provide Nominees Pty Ltd* [2023] FCA 1137  
*Australian Securities and Investments Commission v Provide Nominees Pty Ltd (No 2)* [2023] FCA 1308  
*Gertsch v Roberts; Estate of Gertsch* (1993) 35 NSWLR 631  
*Joam v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 13  
*Manson v Ponninghaus* [1911] VLR 239  
*Von Doussa v Owens (No 1)* (1982) 30 SASR 367  
*Wigan v Edwards* (1973) 1 ALR 497

John Levingston, *The Law of Affidavits* (Federation Press, 2013)

Justice Alan Robertson, 'Affidavit Evidence' [2014] *Federal Judicial Scholarship Articles* 3

Division: General Division  
Registry: Victoria  
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Sub-area: Regulator and Consumer Protection  
Number of paragraphs: 48  
Date of hearing: 22 February 2024  
Counsel for the appellant: Mr M D Wyles KC with Mr B K Holmes  
Solicitor for the appellant: Strongman & Couch  
Counsel for the respondent: Mr P W Collinson KC with Mr L Hogan  
Solicitor for the respondent: Australian Government Solicitor

## ORDERS

VID 867 of 2023

**BETWEEN:**           **PROVIDE NOMINEES PTY LTD (ACN 644 657 161)**  
Appellant

**AND:**               **AUSTRALIAN SECURITIES AND INVESTMENTS**  
**COMMISSION**  
Respondent

**ORDER MADE BY:**   **LEE, ANDERSON AND MCELWAIN JJ**

**DATE OF ORDER:**   **22 FEBRUARY 2024**

### **THE COURT ORDERS THAT:**

1.     The appeal be dismissed with costs.
2.     Order 1 not be entered until the publication of the revised reasons of the Full Court.

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

# REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

## A INTRODUCTION

1 The appellant, Provide Nominees Pty Ltd (**Provide**), by its supplementary notice of appeal, appeals from orders made by the primary judge on 25 September 2023 (*Australian Securities and Investments Commission v Provide Nominees Pty Ltd* [2023] FCA 1137 (**J**)) and on 30 October 2023 (*Australian Securities and Investments Commission v Provide Nominees Pty Ltd (No 2)* [2023] FCA 1308).

2 Put shortly, despite its prolix notice of appeal, Provide accepted that the central and determinative issue in this appeal is whether the necessary pre-conditions existed to provide the power for the Court to inquire, pursuant to s 70(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), into Provide’s compliance with a requirement to produce books made under Pt 3 of the ASIC Act.

3 This issue was, with respect, sometimes obscured in submissions by the use of the term “jurisdiction”, when the real question is whether the Court had the necessary *power* to grant the relief sought by the respondent (**ASIC**). The Court plainly had jurisdiction in relation to the justiciable controversy that had arisen between the parties, the existence of which was anterior to the commencement of the proceeding seeking relief.

4 In my view, the primary judge did not err when his Honour held (at J [59]) that the Court was empowered to conduct the inquiry sought by ASIC. This conclusion follows from the proper construction of s 70(2) of the ASIC Act as advanced by ASIC in its notice of contention filed on 27 November 2023 (**notice of contention**).

5 It is unnecessary to set out the general background to the proceeding, or how the issue of the existence of power came to be the fulcrum of the contest between the parties. That is addressed comprehensively by the primary judge (at J [10]–[31]) and I do not propose to repeat it here.

6 It is necessary, however, before turning to the notice of contention, to set out s 70 and to give some context as to why the appeal turns upon the proper construction of s 70(2).

7 The balance of these reasons is otherwise set out under the following headings:

B RELEVANT BACKGROUND

C NOTICE OF CONTENTION

D PROVIDE'S CONTENTIONS

E CONSIDERATION

F FINAL OBSERVATIONS

G CONCLUSION AND ORDERS

**B RELEVANT BACKGROUND**

8 Section 70 provides:

**Powers of Court where non-compliance with Part**

- (1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).
- (2) ASIC may by writing certify the failure to the Court.
- (3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

9 As is evident from its terms, s 70 concerns the powers of the Court where a person has failed to comply with a requirement made under Pt 3 of the ASIC Act, which relevantly includes failures to comply with notices to produce specified books.

10 On 2 December 2022, ASIC commenced the proceeding pursuant to s 70(3) seeking relief following the failure of Provide to comply with the notice dated 28 September 2022 given by ASIC under s 33 requiring it to produce certain books (**Notice**).

11 ASIC's application was supported by an affidavit sworn by Mr Shannon James McGuire, an investigator at ASIC, on 2 December 2022 (**First McGuire Affidavit**). In that affidavit, after having reviewed the material produced by Provide in response to the Notice, Mr McGuire deposed that Provide had produced no documents in response to categories 1, 2, 3, 7(d), 12, 13 or 14 of the schedule to the Notice (at J [11]).

12 The last annexure to that affidavit (marked SJM-30) was a certificate, in which Mr McGuire stated:

I, **SHANNON JAMES McGUIRE**, am employed by the Australian Securities & Investments Commission ("ASIC") as an Investigator in the Financial Services

Enforcement Team in Melbourne.

I certify that Provide Nominees Pty Ltd ACN 644 657 161 (**the Company**) failed to produce books in relation to an investigation under section 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**) into suspected contravention of sections 911A, 1041E, 1041F and 1041H of the *Corporations Act 2001* (Cth) and sections 12DA, 12DB and 12DF of the ASIC Act by the Company in connection with the offering of investment opportunities in the period from 26 September 2020 and ongoing, to me by 4:00pm on Tuesday 11 October 2022 at Level 7, 120 Collins Street, Melbourne, Victoria, via email to shannon.mcguire@asic.gov.au, pursuant to a Notice Requiring the Production of Books issued under section 33 of the ASIC Act, dated 28 September 2022, and served by email on Andrew Green of SBA Law at the email address agreen@sbalaw.com by me at 12:31 pm on 28 September 2022.

(Emphasis in original).

- 13 On 6 April 2023, Mr McGuire swore a further affidavit (as corrected by a fourth affidavit sworn on 23 June 2023) in which he deposed that he had personally formed the view on behalf of ASIC that Provide had, without reasonable excuse, failed to comply with the requirements in the Notice (at J [13]).
- 14 On 26 May 2023, a third affidavit was sworn by Mr McGuire (**Third McGuire Affidavit**). In that affidavit, he deposed that he had signed a further certificate (annexure SM-44) on that date pursuant to s 70(2) of the ASIC Act, which provided (at J [18]):

I, **SHANNON JAMES McGUIRE**, am employed by the Australian Securities & Investments Commission (**ASIC**) as an Investigator in the Financial Services Enforcement Team in Melbourne. Pursuant to s 102 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**), ASIC has delegated to me certain functions and powers under Part 3 of the ASIC Act related to the conduct of investigations.

In relation to an investigation under section 13 of the ASIC Act into suspected contravention of sections 911A, 1041E, 1041F and 1041H of the *Corporations Act 2001* (Cth) and sections 12DA, 12DB and 12DF of the ASIC Act, I issued a notice dated 28 September 2022 (NTC2215653) (**Notice**) under section 33 of the ASIC Act to Provide Nominees Pty Ltd ACN 644 657 161 (**the Company**) requiring the production of specified books to me by 4pm on 11 October 2022, at Level 7, 120 Collins Street, Melbourne, Victoria, via email to shannon.mcguire@asic.gov.au.

**I am satisfied and I certify that the Company has, without reasonable excuse, failed to comply with a requirement made under s 33(1) of the ASIC Act**, for the production of specified books pursuant to the Notice, by failing to produce:

- books specified in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 of the Schedule to the Notice at the place and time specified in the Notice; and
- certain books specified by paragraphs 2 and 3 of the Schedule to the Notice; and
- unredacted forms of certain books produced (in redacted form) by the Company in response to the Notice, where the Company had no valid entitlement to apply or maintain redactions on their production.

(Emphasis added).

15 In the light of the above, Provide’s core contention is that s 70(2) requires ASIC to certify what it describes as both “elements” in s 70(1), that is, that ASIC is satisfied: (1) a person has failed to comply with a requirement made under Pt 3 of the ASIC Act; *and* (2) that the failure is without reasonable excuse. Mr Wyles KC for Provide accepted that whether both these pre-conditions existed was the determinative issue on the appeal.

16 More particularly, Provide asserts that the pre-conditions to the exercise of power by the Court were absent because the first certificate issued by ASIC in the First McGuire Affidavit (immediately prior to the commencement of the proceeding) did not certify that the failure was *without reasonable excuse*: it only certified that Provide had failed to produce books pursuant to the Notice (at J [22]). Hence Provide contends that the primary judge erred in failing to conclude that all pre-conditions to the commencement of a s 70 proceeding existed when the proceeding was commenced and that, as a consequence, the Court had no power to grant the relief sought.

## C NOTICE OF CONTENTION

17 The notice of contention is in the following terms:

1. The orders made by the primary judge on 25 September 2023 should be upheld on the alternative or additional ground that s 70(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) does not require certification by the Respondent of a failure ‘without reasonable excuse’ to comply with the relevant requirement made under Pt 3 of that Act (as found at reasons for judgment [47]), and that, accordingly, the certificate issued by Mr McGuire of the Respondent on 2 December 2022 satisfied the requirement of s 70(2) (contra reasons for judgment [52]).

18 The primary judge dealt with this argument (at J [46]–[49]), which, for convenience, is set out below:

46 The expression “the failure” in s 70(1) involves the use of a shorthand reference. In context, it is clear that the shorthand reference is to “the failure” that is referred to in s 70(1). It is less clear, though, whether the shorthand reference is to the failure of the relevant person to comply with the relevant requirement made under Pt 3, or whether it is a reference to the failure to do so without reasonable excuse. There is nothing in the text of s 70(2) which resolves that ambiguity.

47 **Although the question is not free from doubt, I consider that the better view is that the expression “the failure” in s 70(2) is intended to be a reference to the failure of the relevant person to comply with the relevant requirement made under Pt 3 without reasonable excuse.** That construction conforms with the apparent purpose of each limb of s 70.

- 48 As already noted, s 70 empowers the Court to conduct an inquiry into non-compliance with a requirement made under Pt 3 and order compliance. Section 70(1) states a precondition to the application of the section – ASIC must be satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3 (other than Div 8). Section 70(2) states a precondition to the Court conducting an inquiry – ASIC by writing certifies the failure to the Court. The apparent purpose of the second limb in s 70(2) is to certify to the Court the matter about which ASIC must be satisfied – that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3 (other than Div 8). The certification of that matter performs two functions. First, by receiving the certification from ASIC, the Court is informed that ASIC believes that the matters that are the subject of the certification exist. In that way, the Court is able to confirm that the precondition in s 70(1) is fulfilled and the section applies. Second, the certification defines the subject and scope of the inquiry which is then to be conducted by the Court.
- 49 In my view, the contextual matters raised by ASIC do not compel a different conclusion. It can be accepted that a failure to comply with a requirement made under Pt 3 of the ASIC Act, and the reasonableness of any excuse for non-compliance, are discrete issues. In a proceeding under either s 63 or s 70, ASIC bears the burden of proving non-compliance whereas the defendant bears the burden of proving reasonable excuse: see s 63(5) and, in respect of s 70, *ASIC v Maxi EFX* at [81], [129]. However, that factor does not bear upon the proper construction of s 70(2). The certification made by ASIC does not itself constitute evidence of either non-compliance or absence of reasonable excuse. Certification is a procedural step which enlivens the Court’s jurisdiction to conduct the inquiry. As already noted, the function of certification is to inform the Court that ASIC believes the matters stated in s 70(1) to exist and to define the subject and scope of the Court’s inquiry.

(Emphasis added).

## **D PROVIDE’S CONTENTIONS**

19 Provide developed its argument as follows.

20 *First*, it is said s 70 must be read as a whole, and the meaning and operation of expressions within the section must be read consistently with the rest of the section. It follows that the words “ASIC may ... certify the failure” in subsection (2) must be construed in the light of the requirement in subsection (1) that ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement. Read in this way, Provide contends it is difficult to see any legislative purpose in requiring ASIC to be satisfied of no reasonable excuse without requiring that fact to be included in a certificate to be relied upon by the Court: see J (at [48]). As Mr Wyles KC noted during oral argument today, there is no failure to comply for the purposes of s 70(1) if the person who was to attend the examination was run over on his way to the examination: T23.20–21.



21 *Secondly*, in response to ASIC’s reliance upon the legislative history of s 70 and the decision  
of Cox J in *Von Doussa v Owens (No 1)* (1982) 30 SASR 367, Provide contends that the Court  
is not obliged to form any view of its own about the existence of a reasonable excuse before  
making an order, but may make such an order “upon proof of the bare formalities of sub-section  
(13) [which addressed the same matters in ss 70(1) and (2), that is, that the inspector was, in  
fact, satisfied and that he certified accordingly]”: *Von Doussa* (at 389 per Cox J). The absence  
of any express legislative requirement for the Court to be satisfied positively of no reasonable  
excuse, supports the conclusion that ASIC’s certification must include that matter.

## E CONSIDERATION

22 The submissions of Provide cannot be accepted for the following reasons.

23 *First*, and importantly, the word “failure” in s 70(1) is a defined term under the ASIC Act.  
Section 5 of the ASIC Act relevantly provides:

### Interpretation

(1) In this Act, unless the contrary intention appears:

...

*fail* means refuse or fail.

24 As s 18A of the *Acts Interpretation Act 1901* (Cth) makes clear, in any Act where a word or  
phrase is given a particular meaning, other parts of speech and grammatical forms of that word  
or phrase have corresponding meanings. Accordingly, the “failure” under s 70(1) is, and only  
is, the failure to comply with a requirement made under Pt 3 of the ASIC Act. This is what is  
required to be certified by the subsection and nothing more.

25 Consistently with this requirement, the certificate annexed to the First McGuire Affidavit stated  
that Provide had failed to produce books in relation to an investigation under s 13 of the ASIC  
Act (see above (at [12])).

26 In effect, the argument advanced by Provide is that s 70(2) ought to be read in the following  
way:

...

(2) ASIC may by writing certify the failure [and the lack of reasonable excuse for  
the failure] to the Court.

27 Apart from the textual difficulty with this construction, it also sits uncomfortably with the  
reality that certification is a mode of proof, and implicit in Provide’s argument is that it is the

responsibility of ASIC to certify a lack of reasonable excuse in circumstances where the person found to have failed to comply with the relevant requirement under Pt 3 bears the evidentiary burden of demonstrating a reasonable excuse for non-compliance: see *Australian Securities and Investments Commission (ASIC) v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263; (2020) 148 ACSR 123 (at 141 [81] per Wigney J); *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2017] VSC 573 (at [82] per Ginnane J).

28 *Secondly*, the argument confuses the existence of a pre-condition to relief that must exist, with the need to provide a particular mode of proof for establishing the existence of that fact. In any event, as ASIC pointed out, the mere fact of certification necessarily pre-supposed the subjective view of the person making the certification on behalf of ASIC that there was a want of reasonable excuse: see s 70(1).

29 *Thirdly*, the construction advanced by the notice of contention accords with the legislative history of s 70.

30 Section 70 of the ASIC Act was first introduced as s 70 of the *Australian Securities Commission Act 1989* (Cth) and has not relevantly changed since that time. The Explanatory Memorandum to the Australian Securities Commission Bill 1988 identified the section as based upon ss 297(1) and (2) of the *Companies Act 1981* (Cth); ss 19(13) and (14) of the *Securities Industry Act 1980* (Cth); and s 39(7) of the *National Companies and Securities Commission Act 1979* (Cth). The Explanatory Memorandum to the Companies Bill 1981 indicates that in turn, the provision is based upon s 175 of the Companies Acts of the States (as parties to the Interstate Corporate Affairs Agreement). One example is s 175(1) of the *Companies Act 1961* (Vic), which provides:

**175 Officer failing to comply with requirement of this Part**

- (1) Where an officer of a company fails to comply with a requirement of an inspector appointed to investigate affairs of the company, the inspector may, unless the officer proves that he had a lawful excuse for the failure, certify the failure by writing under his hand to the Court.

31 A similar formulation is found in cl 70 of the Explanatory Memorandum to the Australian Securities Commission Bill 1988 which provides:

Cl. 70: Powers of court where non-compliance with Part

189. This clause is based on CA sub-ss. 297(1) and (2), NCSC Act sub-s. 39(7) and SIA sub-ss. 19(13) and (14).

190. Where the ASC is satisfied that a person has unreasonably failed to comply

with a requirement made under this Part (other than Division 7), it may certify to the Court that such a failure has taken place. The Court will then be able to order that person to comply with the requirement or to punish that person as if in contempt of court, or both.

32 As is evident from the precursor provisions to s 70 of the ASIC Act, there is nothing to suggest that it was necessary to certify anything beyond the existence of a “failure” in order to enliven the relevant power.

33 The argument advanced by ASIC in the notice of contention should be accepted. This conclusion is sufficient to demonstrate that there was no error in the primary judge rejecting the argument of Provide as to a want of power.

## **F FINAL OBSERVATIONS**

34 Before concluding, and although unnecessary for the disposition of the appeal, given the submissions made by the parties, it is worth making two final and related observations about an argument relied upon by ASIC.

35 *First*, there is some doubt, in my view, as to whether events occurring *after* the commencement of the proceeding could be relied upon in order to establish the satisfaction of a pre-condition necessary to approach the Court to seek relief. It is, of course, fundamental that in order to succeed (including in respect of a claim for relief founded in statute), a plaintiff must establish a cause of action at the date of the plaint, that is, at the time of the origin of the action. It is for this reason that a moving party cannot, in the absence of statutory authority, amend the proceedings without the consent of the defendant by adding a cause of action which has accrued since the commencement of the action: see *Wigan v Edwards* (1973) 1 ALR 497 (at 515 per Mason J).

36 Put another way, as Callinan J observed in *Attorney-General (Qld) v Australian Industrial Relations Commission* [2002] HCA 42; (2002) 213 CLR 485 (at 534 [150]) in a different context, as a general rule, all elements of a cause of action must be complete when the proceedings are commenced: see also *Gertsch v Roberts; Estate of Gertsch* (1993) 35 NSWLR 631 (at 634 per Powell J). Without deciding the point, this reasoning seems to me to apply when the relief sought is statutory and there is a necessity for pre-conditions to seeking relief to exist.

37 Of course, this point is not exactly dripping in merit, and if there was an absence of an initial proper certification prior to commencement, any such argument could have been easily

circumvented at the hearing by ASIC obtaining leave to file another originating application in Court returnable *instanter* (thus instituting another proceeding) and relying on the later 26 May 2023 certificate annexed to the Third McGuire Affidavit.

38 *Secondly*, while it is unnecessary to decide (and although I recognise the ASIC Act specifies no particular form of certificate), I harbour some doubts as to whether an affidavit can be said to constitute a “certificate” for the purposes of s 70(2) (cf at J [53]).

39 This necessitates some explanation.

40 An affidavit bears a particular juridical character distinct from other types of documents. Affidavits arose out of the Courts of Admiralty, Equity, Ecclesiastics and Probate in England as a departure from the rule at common law that evidence was required to be given orally in open court: see John Levingston, *The Law of Affidavits* (Federation Press, 2013) (at 3) (a distinction which is still reflected in modern practice and procedure provisions: see, for example, s 47 of the *Federal Court of Australia Act 1976* (Cth)).

41 One product of this feature of affidavits is that evidence led by affidavit is not adduced by merely filing the affidavit, but only by the step of reading it in open court. As Madden CJ explained in *Manson v Ponninghaus* [1911] VLR 239 (at 241) in a case where a judgment creditor sought to have shares in a company charged with the judgment debt, although the judgment debtor had filed an affidavit setting out certain facts in support of the order sought, he was “entitled to leave his affidavit on the file, and until it is opened it is not part of the proceedings” (see also Justice Alan Robertson, ‘Affidavit Evidence’ [2014] *Federal Judicial Scholarship Articles* 3).

42 Put another way, an affidavit is not by itself a solemn act *certifying* the truth of a fact: it is a document setting out representations by the deponent that the witness will give in the proceeding. Unless and until it is read, an affidavit usually has no broader legal effect (although the serving of it can have legal consequences, such as the waiver of privilege).

43 It seems to me arguable that a certificate bears a different character. As Drummond J explained in *Joam v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 13 (at [14]), what is ordinarily conveyed by the term “certificate” is a document which itself speaks to the truth of some existing fact. Often the fact will be that a person other than the certifier has done something, but it may equally be that the certifier has done something or has come to some

opinion: see *Attorney General v Costain International Ltd* [1983] 2 HKC 110 (at 113 per Huggins VP).

44 A certificate is itself a mode of proof of a fact, which is tendered. The certificate in this case had an existence separate from the First McGuire Affidavit. The affidavit had no purpose other than to identify the evidence-in-chief intended to be given by the deponent at the hearing, including in this case proving the making of the certificate (which could, of course, been proven instead by oral evidence on the *voir dire* if there was an objection to its tender). In the light of the above, I have some misgivings with the notion of a certificate, which has an existence separate from the proceeding, being the same as a representation made in an affidavit which, only when it is read, constitutes part of the evidence-in-chief given by the deponent in the proceeding.

45 It is, however, unnecessary to form any final view about this matter for the disposition of the appeal.

## **G CONCLUSION AND ORDERS**

46 For the foregoing reasons, I consider that the argument advanced by ASIC in the notice of contention should be accepted. It follows that the orders made by the primary judge are correct and the appeal should be dismissed with costs.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: *M. Punch*

Dated: 6 March 2024


## REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

**ANDERSON J:**

47 I agree with the orders proposed by the presiding judge and the reasons given by his Honour for making those orders.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Anderson.

Associate: 

Dated: 6 March 2024

## REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

**MCELWAIN J:**

48 I too agree with the orders proposed by the presiding judge. I also agree with the reasons that his Honour has just stated, save that I prefer to express no view on the “one document” question which was addressed by the primary judge (at J [53]).

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice McElwaine.

Associate: *Eloise Callinan*

Dated: 6 March 2024