Equity Division
Supreme Court
New South Wales

Case Name:	**In the matter of AGL Limited**
Medium Neutral Citation:	[2022] NSWSC 576
Hearing Date(s):	5 and 6 May 2022
Date of Orders:	6 May 2022
Date of Decision:	12 May 2022
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	Order made convening scheme meeting and approving the Demerger Booklet for distribution to shareholders.
Catchwords:	CORPORATIONS – Arrangements and reconstructions – Schemes of arrangement or compromise – Application under s 411 of the *Corporations Act* 2001 (Cth) for orders convening meeting of members to consider and, if thought fit, to agree to proposed scheme of arrangement – whether requirements to order scheme meeting are satisfied.
Legislation Cited:	- *Corporations Act* 2001 (Cth), s 411
Cases Cited:	- *Australian Securities Commissions v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 - *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 - *Re Abacus Funds Management Ltd* (2006) 24 ACLC 211 - *Re Alchemia Ltd* [2012] FCA 927 - *Re APN News & Media Ltd* (2007) 62 ACSR 400 - *Re Ardent Leisure Ltd* [2018] NSWSC 1665 - *Re Australian Leisure and Entertainment Property Management Ltd* [2021] NSWSC 1431 - *Re BINGO Industries Ltd* [2021] NSWSC 798 - *Re BIS Finance Pty Ltd* [2017] NSWSC 1713 - *Re Centrebet International Ltd* [2011] FCA 870 - *Re Centro Retail Ltd* [2011] NSWSC 1320

- *Re Coca-Cola Amatil Ltd* [2021] NSWSC 270
- *Re CSR Limited* (2010) 183 FCR 358; (2010) 265 ALR 703; (2010) 77 ACSR 592; [2010] FCAFC 34
- *Re DUET Finance Ltd* [2017] NSWSC 415
- *Re Ellerston Global Investments Ltd* [2020] NSWSC 879
- *Re ERM Power Ltd* [2019] NSWSC 1502
- *Re ETRADE Australia Ltd* (1999) 30 ACSR 516
- *Re Foster's Group Ltd* [2011] VSC 93
- *Re Foster's Group Ltd (No 2)* [2011] VSC 547
- *Re Foundation Healthcare Ltd* (2002) 42 ACSR 252; [2002] FCA 742
- *Re Investa Listed Funds Management Ltd* [2016] NSWSC 344
- *Re Macquarie Private Capital A Ltd* [2008] NSWSC 323
- *Re Mosaic Oil NL* [2010] FCA 98
- *Re National Australia Bank Limited* [2016] VSC 62
- *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601
- *Re Rhipe Ltd* [2021] NSWSC 1170
- *Re SAI Global Ltd* [2016] FCA 1312
- *Re Spark Infrastructure RE Ltd* [2021] NSWSC 1385
- *Re Staging Connections Group Ltd* [2015] FCA 1012
- *Re Sydney Airport Ltd and the Trust Company (Sydney Airport) Ltd as responsible entity for Sydney Airport Trust 1* [2022] NSWSC 25
- *Re Tabcorp Holdings Ltd* [2022] NSWSC 448
- *Re TPG Telecom Ltd* [2020] NSWSC 772
- *Re Villa World Ltd* [2019] NSWSC 1207
- *Re Walsh & Company Investments Ltd* [2020] NSWSC 1746
- *Re Wesfarmers Ltd; Ex Parte Wesfarmers Ltd* [2018] WASC 308

Texts Cited:

Category: Principal judgment

Parties: AGL Energy Limited (Plaintiff)

Representation: Counsel:
I M Jackman SC/M
J Entwisle (Interested Party)

Solicitors:
Herbert Smith Freehills (Plaintiff)
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File Number(s): 2022/114664

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JUDGMENT

Nature of the application and background

1 By Originating Process filed on 21 April 2022 the Plaintiff, AGL Energy Limited ("AGL") seeks orders under s 411 of the *Corporations Act* 2001 (Cth) ("Act") in respect of the convening of a scheme meeting to consider a proposed demerger, which will involve, in effect, the demerger of AGL into two new entities, AGL Australia Limited ("AGLA") and Accel Energy Limited ("Accel"). Several affidavits have been read by AGL in support of the application; the proposed Demerger Booklet ("Demerger Booklet") has been tendered (Ex JPF1) and a further proposed amendment, of a minor character, has also been identified (Ex PJS-1, tab 4).

2 Mr Joshua Ross, a shareholder in AGL, appeared by leave under r 2.13 of the Supreme Court (Corporations) Rules 1999 (NSW), and pressed for further disclosure of various matters in the Demerger Booklet, without necessarily contending that the scheme meeting should not be convened. I will address Mr Ross' submissions below. Before doing so, it is important to note that the Court has a relatively limited task in order to determine whether to convene a scheme meeting at this first Court hearing. As I note below, the Court will not ordinarily convene a scheme meeting unless the scheme is of such a nature and cast in such terms that, if it received the statutory majority at the meeting, the Court would be likely to approve the scheme at a second Court hearing. Here, on the face of it, what is proposed is a demerger of a corporate entity to form two new companies, and there is nothing that would suggest that, if appropriate disclosure is made to AGL shareholders, and shareholders approve the demerger scheme by the applicable statutory majorities, the Court would not approve the scheme at a second Court hearing. Mr Entwisle, who appeared for Mr Ross, did not contend to the contrary. Mr Ross' submissions instead focussed on the adequacy of disclosure in the Demerger Booklet. That question is significant since approval of the scheme will require

that shareholders have been fairly informed of relevant issues, so as to exercise their votes at the scheme meeting.

3 The second matter I should note, by way of introduction, is that submissions in this matter have addressed issues as to which strongly held views exist in the community, and which are likely well known to members of the public, as to the future of coal-fired generation of power in Australia. It is not necessary for me, and would be entirely inappropriate for me, to entertain any issues as to the merits of the decisions, whether corporate or political, that are involved in that question. Here, as Mr Entwisle largely recognised, what is involved is a question of disclosure of the relevant issues to shareholders, not a question of the substantive correctness of the steps which the government, the community, or AGL should take in respect of any of those matters.

4 Turning now to the background to the proposed demerger, AGL is an integrated essential service provider delivering gas, electricity, and telecommunications services to residential, small and large business and wholesale customers across Australia. Following the proposed demerger, Accel would be Australia's largest electricity generator and AGLA would be a multi-service energy retailer. AGL currently owns the entities which will constitute the AGLA and Accel businesses. On 2 May 2022, AGL and AGLA entered into a Demerger Implementation Deed ("DID"), by which they agreed to implement the scheme subject to satisfaction, or waiver, of various conditions precedent, including approval by the requisite majorities of AGL shareholders and Court approval.

5 In order to implement the demerger, AGLA would demerge from AGL and become a stand-alone listed public company and AGL would be renamed Accel. The proposed transaction contemplates that AGL will undertake a capital reduction ("Capital Reduction") which will reduce AGL's share capital on the scheme implementation date, expected to be 30 June 2022, by $4.74 per AGL share. The proceeds of the Capital Reduction will be applied to the acquisition of 85% of the shares in AGLA by or on behalf of AGL shareholders (other than Ineligible Overseas Shareholders and AGL Australia Selling

Shareholders, as defined) who will receive one AGLA share for every AGL share they hold on the Record Date (as defined). The AGLA shares attributable to Ineligible Overseas Shareholders (as defined) will be transferred to a sale agent to be sold, with proceeds of that sale to be paid to them. Certain Small Shareholders (as defined) who are eligible to receive a transfer of AGLA shares may elect to sell them or purchase additional AGLA shares through a Sale and Top-up Facility (as defined). Following the demerger, AGLA shareholders will hold 85% of the shares in AGLA and Accel will hold the remaining 15% of the shares in AGLA.

6 The AGL board has unanimously expressed the view that the demerger is in the best interests of AGL shareholders and has unanimously recommended that AGL shareholders vote in favour of the resolutions necessary to give effect to the demerger. The reasons for that recommendation and the advantages, disadvantages and risks of the demerger are set out in the chairman's letter in the Demerger Booklet and in section 1 (titled "Advantages, disadvantages, and other relevant considerations") of the Demerger Booklet. I address Mr Ross' criticisms of the adequacy of that disclosure below. Grant Samuel & Associates Ltd also prepared an independent expert's report indicating that, in its opinion, the proposed demerger is in the best interests of AGL shareholders, and also expressed the view that the Capital Reduction associated with the demerger does not materially prejudices AGL's ability to pay its creditors. I also address Mr Ross' criticisms of that report below.

The affidavit evidence read by AGL

7 AGL read several affidavits at the first Court hearing. By his affidavit dated 21 April 2022, Mr Luke Hastings, a solicitor acting for AGL, sets out the background to the proposed demerger. By their affidavits dated 2 May 2022 and 28 April 2022 respectively, Mr Peter Botten and Ms Patricia McKenzie consents to act as chair and alternate chair of the proposed scheme meeting. By two affidavits dated 2 and 3 May 2022, Mr Barry Azzopardi, who is a senior relationship manager with Computershare Investor Services Pty Ltd, addresses the mode of notifying AGL shareholders of the scheme meetings

and providing them with the Demerger Booklet and other relevant scheme materials and as to the proposed conduct of those meetings as hybrid meetings.

8 By his affidavit dated 4 May 2022, Mr John Fitzgerald, who is general counsel and company secretary of AGL, outlines the structure of the proposed demerger and the consideration of the scheme by the AGL board, identifies the conditions precedent to the demerger, addresses verification of the factual information related to AGL in the Demerger Booklet, refers to the impact of the scheme on several employee incentive plans maintained by AGL (including incentives held by Mr Hunt, AGL's managing director and chief executive officer) and also addresses proposed communications with AGL: shareholders. AGL also read an affidavit dated 4 May 2022 of Mr Stephen Wilson dealing with the independent expert's report and an affidavit dated 5 May 2022 of Ms Phillipa Stone which addressed AGL's correspondence with the Australian Securities & Investments Commission ("ASIC") and board approval.

Mr Ross' evidence

9 Mr Ross reads his affidavit dated 4 May 2022, which identifies his concerns as to the proposed demerger, involving risks which he perceives to exist to shareholder value in the proposed demerger, and the question of options available to AGL other than the demerger, including the earlier closure of coal-fired power station assets. Mr Ross expresses the view that maintaining AGL's exposure to coal based power generation over the next two decades creates significant risks to shareholder value, and identifies several matters which go to that view. I accept that view is genuinely arguable and is likely held by many in the community, and it is plainly one that can be put by Mr Ross, in a debate which is occurring in the public domain. There was, however, a real tendency in Mr Ross' submissions, as put by Mr Entwisle, to assume that Mr Ross' views were fact, and to test the adequacy of the disclosure made by AGL against the views that Mr Ross holds. There is, of course, a real difference between a genuinely held view of Mr Ross, which

may be shared by many others in the community, and a fact. I must also bear in mind that AGL likely also holds genuinely held views as to the relevant facts, which may be different from Mr Ross' genuinely held views as to those facts. Mr Ross in that affidavit also expressed a concern that the Demerger Booklet may not adequately disclose relevant matters, at a time that he had not seen that booklet, but that concern has not been allayed after he was given access to that booklet. Mr Ross also addressed his dealings with ASIC in respect of that matter, but it is not necessary to address those further.

10 Mr Ross also tendered a report, in draft, of the Australian Energy Market Operator ("AEMO") issued in December 2021 and titled "Draft 2022 Integrated System Plan". That document records, in a graph, a likely decline in the use of brown coal and a decline in the use of black coal over a longer period. That likelihood appears to be common ground, since that same graph appears in the Demerger Booklet, drawing AGL shareholders' attention to that prospect. That draft report also refers to what is referred to as a "step change scenario", again involving a movement away from coal-fired power generation over time, although Mr Ross emphasises that the AEMO at least contemplates, in its draft report, that that movement may occur more quickly than the business case disclosed in the Demerger Booklet, subject to the risk disclosures also made in the booklet.

11 Mr Ross also tendered a newspaper article which he treated as an indication that a large customer of AGL would not renew its contract with AGL from 2029. That customer, and the newspaper article reporting its views, was somewhat more qualified in addressing that matter, since the newspaper article goes no further than to indicate that that customer was "open to replacing" AGL's coal-fired power generation with other supply from 2029 or earlier, without that customer committing itself to take that course.

The Demerger Booklet

12 I now turn to the Demerger Booklet, which is relatively lengthy and involves, on the face of it, a significant degree of disclosure of information in respect of

the risks of investment in energy companies, and particularly energy companies operating coal fired power stations. The chairman's letter records the AGL board's recommendation to vote in favour of the demerger, which it indicates is intended to allow a better understanding of the two companies, and explicitly or implicitly, the prospect of the valuation of AGLA as an energy retailer, in a manner that does not involve any discounting for continued ownership of coal-fired power stations. The Demerger Booklet in turn discloses two unsolicited offers made by a third party to acquire the shares in AGL, but those were not the focus of Mr Ross' submissions. The Demerger Booklet also contains, at page 7, an identification of potential benefits and disadvantages of the demerger, with a cross reference to the identification of those disadvantages in section 1.4 of the Demerger Booklet. I will return to those disadvantages below.

13 The "Frequently Asked Questions", which appear at a relatively early point in the Demerger Booklet, and is in turn drafted in a way that has become customary to allow issues to be readily understood by retail shareholders, draws attention to the risks of an investment in Accel so far as it continues to own coal-fired power stations, a matter on which Mr Ross placed considerable focus. It is there disclosed that Accel will be subject to risks which may adversely affect its future operating or financial performance; it is noted that many of those risks are existing business risks, and others arise as a result of the demerger; and the risk that changes in environmental and climate regulation could result in the accelerated closure of Accel coal-fired assets is specifically identified. A cross-reference is in turn made to section 4.12 of the Demerger Booklet, which Mr Entwisle fairly recognised involved disclosure of those risks, while he submitted that that disclosure should be made earlier in the Demerger Booklet. The difficulty with that submission is, of course, that that disclosure is made earlier in that booklet, in the Frequently Asked Questions contained in an early part of the Demerger Booklet. Assuming that retail shareholders will read the Demerger Booklet, at least to the extent necessary to obtain a general understanding of the proposed transaction, it is likely that they will at least read the Frequently Asked Questions and reach that point of that disclosure. There is also disclosure, in the Frequently Asked

Questions, of the "climate commitments" that Accel has made, which discloses both Accel's aspirations in respect of responsible energy system change and the fact that its proposed closure of coal-fired power stations would take place over a relatively extended time period, through to 2045.

14 A section of the Demerger Booklet in turn addresses "Advantages, Disadvantages and Other Relevant Considerations", and one would again expect that shareholders, including retail shareholders, would treat that title as indicating that significant information is disclosed by that section of the booklet. That section addresses alternatives considered by the AGL board, including maintaining the current business structure, accelerating coal-fired asset closure while maintaining that structure, and other alternatives. AGL there expresses the view that closure of the coal-fired generators is dependent on the readiness of the national electricity market to operate without "critical baseload generation" and it is noted that the AGL board had considered the impact on shareholder value of earlier closure dates, and considered that an announcement of any earlier closure date at this point in time would result in a material deterioration in shareholder value. A shareholder reading that information can have no doubt as to the board's reasoning, although I will return below to Mr Ross' criticism that the Demerger Booklet does not disclose the detailed analysis underlying that conclusion. That section also discloses, at page 35, the timing of the proposed closure of coal-fired power stations.

15 The Demerger Booklet then sets out further information about AGLA and Accel, and the information in respect of Accel again addresses, in section 4, its position in respect of climate issues, including the timetable for closure of coal-fired power stations, and returns to the question of the ability of the energy system to operate without such power stations. A disclosure of risks associated with Accel, at section 4.12, contains what is, on the face of it, a comprehensive disclosure of specific risks, including risks as to carbon footprint, credit rating downgrade, access to capital, its ability to obtain insurance, and authorisations and permits, all of which are considered in the context of the operation of coal-fired power stations. It seems to me that a

shareholder considering taking up shares in Accel as a result of the demerger, even in the unlikely event that he or she was not already aware of the public debate as to coal-fired power stations, would be well aware, from that risk disclosure, that there are risks to a continued investment in Accel in respect of that matter. That risk disclosure also discloses the risk of intervention from government, market operators or regulators, which may accelerate the closure of those coal-fired power stations, and has a specific section dealing with early closure of such power stations.

16 The independent expert report contained in the Demerger Booklet in turn records the genesis of the proposed demerger, including a strategic review of AGL's energy businesses, and expresses the view that the demerger is in the best interests of AGL shareholders and, both in its summary and more detailed reasoning, addresses changes in the energy landscape which are said to drive the alternatives available to AGL. I will return to the criticisms made by Mr Ross of that report below.

Applicable principles

17 I now turn the applicable principles in respect of the convening of a scheme meeting and the approval of a scheme booklet at the first Court hearing. The Court will order that a scheme meeting be convened under s 411 of the *Act* if it is satisfied that the plaintiff is a Pt 5.1 body; the proposed scheme is an arrangement within the meaning of s 411 of the *Act*; the scheme booklet will provide proper disclosure to members; the scheme is bona fide and properly proposed; ASIC has had a reasonable opportunity to examine, and make submissions in respect of, the terms of the scheme and the scheme booklet and has had 14 days' notice of the proposed first Court hearing date; the procedural requirements of the Supreme Court (Corporations) Rules have been met; and there is no apparent reason why the scheme should not, in due course, receive the Court's approval if the necessary majority of votes is achieved: *Re DUET Finance Ltd* [2017] NSWSC 415 at [15] ("*DUET*"); *Re BIS Finance Pty Ltd* [2017] NSWSC 1713 at [20] ("*BIS Finance*"); *Re Villa World Ltd* [2019] NSWSC 1207 at [15] ("*Villa World*").

18 The Court will not ordinarily convene a scheme meeting unless the scheme is of such a nature and cast in such terms that if it received the statutory majority at the scheme meeting, the Court would be likely to approve it on the hearing of a petition which is unopposed: *F T Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72, approved in *Australian Securities Commissions v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 504. In *Re Foundation Healthcare Ltd* (2002) 42 ACSR 252; [2002] FCA 742 at [36] and [44], quoted with apparent approval in *Re CSR Limited* (2010) 183 FCR 358; (2010) 265 ALR 703; (2010) 77 ACSR 592; [2010] FCAFC 34 at [58] ("*CSR*"), French J observed that:

> "It is however important to bear in mind that, by granting leave to convene the meeting, the court does not give its imprimatur to the proposed scheme. If the arrangement is one that seems fit for consideration by the meeting of members or creditors and is a commercial proposition likely to gain the court's approval if passed by the necessary majorities, then leave should be given: *Re ACM Gold Ltd* (1992) 34 FCR 530; 107 ALR 359; 7 ACSR 231; 10 ACLC 573 (O'Loughlin J). The court is not required to give close consideration to the effects of the scheme upon individual members of the classes of members or creditors affected. So to do would be to "introduce burdensome and to a large extent ineffectual consideration at this interlocutory stage": *Re Jax Marine Pty Ltd* [1967] 1 NSWR 145 at 148 (Street J). ...
>
> The court at the stage of ordering a meeting to approve a scheme does not ordinarily go very far into the question of whether the arrangement is one which warrants the approval of the court ... That question is to be answered when the scheme returns to the court for final approval. That is not to exclude the possibility that a scheme may appear on its face so blatantly unfair or otherwise inappropriate that it should be stopped in its tracks before going any further."

19 At the first Court hearing, the Court is concerned not with whether final approval should be given to the scheme, but whether the scheme is adequately explained to those who have a financial interest in it, and whether there is any obvious flaw in the scheme, such that it would be inappropriate even for it to be submitted for consideration: *Re Abacus Funds Management Ltd* (2006) 24 ACLC 211 at [23]; *Villa World* at [18]. The Court is not required to be satisfied that no better scheme could have been proposed, and the question is whether it is reasonable to suppose that sensible business persons might consider the arrangement proposed is of benefit to members:

Re Centrebet International Ltd [2011] FCA 870 at [29]; *Re SAI Global Ltd* [2016] FCA 1312 at [18]; *DUET* at [14]; *BIS Finance* at [22].

Formal requirements for a scheme and uncontentious matters

20 I accept that the formal requirements for a scheme are established. AGL is a Pt 5.1 body as defined in s 9 of the *Act*. Mr Jackman points out that a demerger scheme is an "arrangement" within the meaning of s 411 of the *Act* and the DID provides prima facie evidence that AGL has committed itself to propounding the scheme and that the scheme is bona fide and has been properly proposed: *Re Foster's Group Ltd* [2011] VSC 93 at [10]; *Re Staging Connections Group Ltd* [2015] FCA 1012 at [61]; *Re National Australia Bank Limited* [2016] VSC 62 at [57]-[59]. AGL has applied, in the appropriate way, for orders under s 411(1) of the *Act*; ASIC was notified of the hearing and provided with a draft of the Demerger Booklet and the scheme more than 14 days before the first Court hearing, so that s 411(2)(a) of the *Act* has been satisfied and the Court is not prevented from proceeding with the application; and the matters prescribed by the Supreme Court (Corporations) Rules are satisfied.

Dispatch of meeting materials and conduct of meetings

21 Mr Jackman notes that it is proposed that AGL shareholders who have elected to receive shareholder communications electronically ("Electronic Recipients") will be notified by email of the meetings, and that email will contain instructions and URL links to online locations where they can view and download the Demerger Booklet and associated documents; lodge questions and proxy instructions prior to the meetings; and participate in the meetings online by watching the meeting proceedings, casting votes, and asking questions during the meetings. That approach to notice of the meetings is permitted by cl 96 of AGL's constitution and s 253RA of the *Act* and with the Court's practice of making electronic mail-out orders in relation to notices of scheme meetings: *Re ERM Power Ltd* [2019] NSWSC 1502 at [26]; *Re Ardent Leisure Ltd* [2018] NSWSC 1665 at [27]; *Re TPG Telecom Ltd* [2020] NSWSC 772 at [32]; *Re Coca-Cola Amatil Ltd* [2021] NSWSC 270 at

[26]; *Re BINGO Industries Ltd* [2021] NSWSC 798 at [29]. Mr Jackman points out and I note that Electronic Recipients who are also Small Shareholders (as defined) will receive an additional email which contains information about the Sale and Top-up Facilities (as defined) and allows access to an online portal through which their elections to participate in those facilities can be lodged.

22 A hard copy of the Demerger Booklet and associated documents will be sent to AGL shareholders who have elected to receive communications by post, including the necessary forms for Small Shareholders (as defined) to indicate their election to participate in the Sale and Top-up Facilities. A hardcopy letter will be sent to AGL shareholders who have not elected to receive shareholder communications either electronically or by post, which includes directions and URL links to online locations where that shareholder can access the Demerger Booklet and other documents, again allowing Small Shareholders to indicate their election to participate in the Sale and Top-up Facilities. Mr Jackman submits and I accept that that approach is permitted under s 253RA(2) of the *Act*.

23 AGL also proposes to dispatch "reminder to vote" emails and letters to AGL shareholders. I accept that reminders of this kind have been approved in other schemes: *Re Rhipe Ltd* [2021] NSWSC 1170; *Re Australian Leisure and Entertainment Property Management Ltd* [2021] NSWSC 1431; *Re Sydney Airport Ltd and the Trust Company (Sydney Airport) Ltd as responsible entity for Sydney Airport Trust 1* [2022] NSWSC 25 at [42] ("*Sydney Airport*").

24 Mr Jackman also points out that it is proposed that a general meeting and the scheme meeting be held as hybrid meetings, both online and in person (circumstances permitting), and AGL shareholders who participate in the meetings by the online platform will be able to watch the meetings, cast an online vote and ask questions online. The procedures for voting and participation in the Meetings are disclosed in the "Chairman's Letter" and section 13 of the Demerger Booklet, and in the "Frequently Asked Questions" section of the Demerger Booklet. Mr Jackman points out that cl 30.4 of AGL's

constitution and ss 249R-249S of the *Act* permit the conduct of the meetings in that manner.

25 These matters give no reason not to convene the scheme meeting or approve the Demerger Booklet.

Other matters addressed by Mr Jackman

26 Mr Jackman also draws several aspects of the scheme to the Court's attention, in the manner contemplated by Barrett J in *Re Permanent Trustee Co Ltd* (2002) 43 ACSR 601 at 603, which were (with one exception) not contested by Mr Ross.

The Capital Reduction

27 First, Mr Jackman points out that the scheme is conditional upon, amongst other things, the approval of the Capital Reduction Resolution (as defined) at the general meeting. Section 256B(1)(b) of the *Act* provides, inter alia, that a company may only reduce its capital if the reduction "does not materially prejudice the company's ability to pay its creditors". Mr Jackman points out that the independent expert has concluded that the proposed Demerger (necessarily including the capital reduction) will not materially prejudice AGL's ability to pay its creditors. In any event, he submits and I accept that that question is properly deferred to the second Court hearing: *CSR* at [65], [67]. Mr Jackman submits and I accept that the capital reduction is not selective in nature merely because Ineligible Overseas Shareholders will ultimately receive cash for AGL and AGLA shares: *Re ETRADE Australia Ltd* (1999) 30 ACSR 516 at 517; *Re Alchemia Ltd* [2012] FCA 927 at [30]; *Re Tabcorp Holdings Ltd* [2022] NSWSC 448 at [26] ("*Tabcorp*").

AGL performance rights

28 Second, Mr Jackman draws attention to section 9.3.3 of the Demerger Booklet, which indicates that it is not proposed that any payment or other benefit will be made or given to any AGL director, secretary or executive

officer, or any body corporate related to AGL, as compensation for loss of, or as consideration for or in connection with, their retirement from office as director, secretary or executive officer of AGL or a body corporate connected with AGL as a consequence of or in connection with the Demerger.

29 Mr Jackman points out that, as disclosed in section 5.6 of the Demerger Booklet, AGL operates two types of incentive plans for senior executives and management and two general employee share plans, which will be affected by the proposed Demerger. Under a Share Reward Plan ("SRP"), AGL has granted up to $1,000 of ordinary shares in AGL each year to participants on a tax-exempt basis (for most participants). Participants who were granted shares under the SRP will participate in the demerger on the same terms as ordinary shareholders, with disposal restrictions on their shares depending on whether they remain employed by Accel or AGLA. Under a Share Purchase Plan ("SPP"), participants could purchase up to $5,000 of tax-deferred AGL shares each year using their pre-tax salary. Shares purchased under the SPP are generally subject to a four-year disposal restriction period. As a result of the demerger, the AGL board has resolved to lift the disposal restrictions for all participants in the SPP on 29 June 2022, and participants who acquired shares under the SPP will participate in the demerger on the same terms as other ordinary shareholders. A Restricted Equity Plan ("REP") delivers deferred equity under the AGL short-term performance plan. Shares purchased under the REP are generally subject to a two-year disposal restriction period. However, as a result of the demerger, the AGL board has resolved to lift the disposal restrictions for all participants in the REP on 29 June 2022. Participants who acquired shares under the REP will participate in the Demerger on the same terms as ordinary shareholders. A long term incentive plan provides AGL performance rights for senior manages and Mr Jackman outlines the manner in which they will be treated under the scheme. These matters provide no reason not to convene the demerger scheme meeting or approve the Demerger Booklet.

30 Mr Jackman also submits and I accept that holders of incentives and performance rights are not in a separate class by reason only that they hold

such rights: *Re Foster's Group Ltd (No 2)* [2011] VSC 547 at [38]-[43]; *Sydney Airport* at [34].

Accel's retained interest in AGLA

31 Third, as I noted above, following the demerger, Accel will retain a 15% interest in AGLA. Mr Jackman points out that a similar feature existed in the scheme considered in *Re Wesfarmers Ltd; Ex Parte Wesfarmers Ltd* [2018] WASC 308 ("*Wesfarmers*"). In written submissions, Mr Ross suggested this gave rise to a dilution of AGL shareholders, although Mr Entwisle did not address that matter in oral submissions. It is apparent, from the way the written submission is put, that the suggested dilution is not established in economic terms. The demerger has the consequence that the same pool of assets is held in two companies, in which the same shareholders hold the same interests. No shareholder is diluted by the fact of that transaction. I accept that this matter provides no reason not to convene the demerger scheme meeting or approve the Demerger Booklet.

Performance risk

32 Fourth, Mr Jackman notes that a deed poll is to be given by AGLA. He submits and I accept that, as in *Wesfarmers*, any performance risk is sufficiently low where the deed poll is enforceable by scheme participants in the usual way; the scheme of arrangement provides that AGL will enforce the deed poll against AGLA on behalf of and as agent and attorney of the AGL shareholders and that it will procure the registration of AGLA's shares to be transferred and for holding statements to be issued where required; and the terms of the DID contain covenants by AGLA in favour of AGL by which AGLA agrees to take all necessary steps to implement the demerger. I accept this matter also provides no reason not to convene the demerger scheme meeting or approve the Demerger Booklet, for the reasons accepted in *Wesfarmers;* see also *Re Foster's Group Ltd* at [32] and *Tabcorp* at [34].

33 Fifth, Mr Jackman submits and I accept that the appropriate time for the Court to address the question posed by s 411(17) of the *Act* is on an application to approve a scheme at the second Court hearing: *Re Macquarie Private Capital A Ltd* [2008] NSWSC 323 at [25]-[37]. I defer that question to that time.

Mr Ross' submissions as to disclosure

34 I now turn to Mr Ross' submissions as to disclosure. Mr Ross recognises that the demerger contemplates AGL's addressing issues as to climate change and the position in respect of its coal-fired power stations, although he puts the proposition in somewhat stronger terms than the way in which I have summarised it. He submits that the Demerger Booklet has identified alternatives to the demerger, but suggests that there is insufficient disclosure as to the alternative of earlier closure of power stations.

35 I do not accept that criticism. It seems to me that the Demerger Booklet, and the independent expert's report, both address the fact that that option has been considered. They both identify why it is not preferred by the AGL board and the disclosure fairly discloses the AGL board's reasoning. The independent expert's report in turn identifies disadvantages of the earlier closure of the power stations, and the identified disadvantages are not irrational, even if Mr Ross or others may take a different view as to the weight to be given to those disadvantages. It seems to me that it is not reasonable to expect that the Demerger Booklet should address all the steps which may go to the board's assessment of the risks of that approach, or the independent expert's identification of the existence of those risks. The difficulty with doing so would be that that involves predictions, well into the future, in circumstances where there are multiple uncertainties, apparent from the Demerger Booklet, and not contested by Mr Ross, as to government policy and the steps which will be taken in Australia's wider electricity system to address the relevant issues.

36 Mr Ross in turn contends that the demerger will result in two smaller and less diversified entities, which lack the resources to undertake an accelerated decarbonisation program. Here, Mr Ross' criticism rather assumes his view as to the preferred course. In particular, there is no evidentiary support for the proposition that the entities, while smaller and less diversified, would lack the necessary resources, and the extent to which the entities are smaller and less diversified is fully disclosed in the Demerger Booklet. Mr Ross then advances a specific criticism as to the independent expert's disclosure of the early closure option as to coal-fired power stations, but it seems to me that that criticism is not well founded, where the independent expert, as I have noted above, identifies apparent disadvantages of that course, in a manner that is not unreasonable on its face, and need not, in my view, go further to seek to predict the future as to the ability to implement such a proposal, well into the future. That is not to say that that is a matter which cannot be debated in the public domain. To the extent that Mr Ross has formed views as to those matters, it may well be that he will wish to publish those views, and engage in public debate, or debate among AGL's shareholders, as to whether his view is preferable to that which the AGL board and the independent expert have taken. He is free to do so, but it does not follow that his views must be expressed in the Demerger Booklet, or taken as the point of departure for the assessment of the adequacy of disclosure to the Demerger Booklet, rather than addressed in public debate as to the merits of the proposed demerger scheme.

37 Mr Ross addresses a further submission as to a suggested uncertainty as to Accel's future, but that uncertainty appears to reflect the position which he puts as to the risks in respect of coal-fired power generation. It seems to me that those risks, and their potential impact on Accel in the middle term, as well as the steps which Accel seeks to take to mitigate those risks, including the development of alternative energy sources, are fairly addressed in the Demerger Booklet.

38 Nothing in this judgment should be understood as being critical of the substance of any of Mr Ross' concerns, which are plainly fully reasoned and

reflect matters that are of concern to many members of the community. It seems to me, however, that the Demerger Booklet adequately discloses the relevant matters, for the consideration of AGL shareholders. To the extent that Mr Ross takes a different view, he is able to contribute it to a public debate as to these matters.

Proposed investor presentation and information videos

39 AGL also seeks approval of an investor presentation to be made available to AGL shareholders and released on the Australian Stock Exchange ("ASX") and the scripts of three information videos which AGL proposes to publish on its website, release to the ASX announcements platform and share on AGL's social media platforms. Mr Jackman recognises that the authorities, at least since *Re Centro Retail Ltd* [2011] NSWSC 1320 at [11] indicate that Court approval should be sought in respect of any proposed supplementary disclosure to be made concerning a proposed scheme, where the Court is being called upon to approve the explanatory material.

40 The proposed investor presentation invites recipients to read the Demerger Booklet in full before making any voting decision in respect of the proposed demerger and draws attention to specific sections of the Demerger Booklet which contain information relevant to its contents and reflects the information contained, in more detail, in the Demerger Booklet. I accept that the Court should approve the release of the investor presentation.

41 Turning now to the three information videos, the first provides AGL shareholders with information about the demerger, the second deals with Accel and the third with AGLA, and they refer to the scheme materials and the Demerger Booklet. This may be the first occasion on which an application for approval of a video has been pressed, although the issue had arisen in an earlier scheme application in this Court. It seems to me that there is nothing about the fact of a video format which, in itself, prevents the Court giving such approval, in accordance with the criteria that are normally applicable to approving communications with shareholders while a scheme is on foot.

42 I approach this question on the basis that, as the case law has recognised, the Court will wish to be satisfied as to the content of a scheme company's communications with shareholders, while a scheme is on foot. In *Re Investa Listed Funds Management Ltd* [2016] NSWSC 344, to which Mr Jackman drew attention, Brereton J pointed to that principle, and also recognised, pragmatically, that a degree of advocacy is permissible in communications with shareholders so long as it is "fair and honest" advocacy. His Honour noted that a scheme booklet will invariably contain a recommendation, and it is to be expected, in that context, that those putting forward the scheme will favour the transaction to which it relates. In *Re Walsh & Company Investments Ltd* [2020] NSWSC 1746 at [66]-[67], I dealt with the requirement for Court approval of communications with members, where the Court had ordered the convening of a scheme meeting, and noted that, where in that case an unauthorised communication had taken place, the ultimate question was whether that communication had compromised the integrity of the voting process or the adequacy of disclosure in the materials provided to shareholders. I also reviewed the relevant principles in *Tabcorp* at [22], there dealing with a presentation to be given to Tabcorp shareholders and released on the ASX.

43 Mr Entwisle submits, and I accept, that the proposed information videos are not, in terms, a short form or more accessible summary of the information contained in the Demerger Booklet, in the way that some shareholder presentations have been. These information videos are in the nature of interviews with executives who will be involved with AGLA and Accel, who provide some explanation of the business of the two companies, in a manner that is generally favourable to the proposed demerger. It seems to me that, in the context of a potential wider debate as to the proposed demerger, the release of those videos will not adversely impact on the adequacy of disclosure in the Demerger Booklet, or the integrity of a voting process at a scheme meeting, provided that shareholder's attention is drawn to the disclosure of the advantages and disadvantages of the scheme in the Demerger Booklet. I will impose a condition, which AGL has not opposed,

which will have the consequence that there will be a still text banner or message on each of those videos drawing attention to that matter.

Orders

44 For these reasons, I was satisfied that I should convene the scheme meeting, and make the associated orders and I made orders in accordance with the short minutes of order initialled by me and placed in the file.

45 I note for completeness, that Mr Ross has reserved the right, and plainly he and all other shareholders have the right, to oppose approval of the demerger at the second Court hearing. At that point, of course, the Court and all shareholders will be more fully informed, at least as to the view which the majority of shareholders take at the scheme meeting in accordance with the statutory majorities.

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I certify that this and the preceding 20 pages are a true copy of the reasons for judgment herein of his Honour Justice Black

Associate
Date: 12 May 2022